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Articles

RETHINKING POLICE INTERROGATION: ENCOURAGING RELIABLE CONFESSIONS WHILE RESPECTING SUSPECTS' DIGNITY

Eugene R. Milhizer*

I. INTRODUCTION

The contemporary approach to thinking about the role of the police in encouraging criminal confessions amounts to trench warfare between competing forces. On one side are the champions of individual rights, who distrust the police, presumptively devalue confessions, and seek to erect impediments to obtaining them. On the other are the champions of law and order, who trust the police, prize all confessions, and seek to remove impediments to their reception. The enmity is palpable and the stakes could not be higher; both sides have a crusading spirit that makes claims to the greater good, empirical data, and constitutional support. In recent times, they have ground to a virtual stalemate. Unfortunately, both sides have got it wrong.

This Article proposes a fresh approach to confessions based on traditional values, which promotes reliable confessions while respecting the dignity of those who might confess. It ensures that suspects continue to be fully advised of their rights while also encouraging them to make informed decisions to acknowledge their potential guilt. This approach, which is in full accord with constitutional rights and limitations, would better dignify suspects and serve the common good.

Part II of this Article provides a quick overview of the terrain. It briefly describes how confessions, as a matter of principle and common sense, are beneficial to society and the confessor. It also explains, in an abbreviated manner, the dissonance between this intuitive appreciation for confessions and our disapproving confession jurisprudence. It reviews the assumptions underlying both the traditional voluntariness

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standard and the *Miranda* decision and its progeny, focusing on the Court's conception of free will and dignity, and recognizing how psychological empiricism has exerted a growing influence in the formation of these assumptions.

Part III surveys the psychological treatment of confessions, and the Court's use of it. It begins by tracing the history of psychology and confessions, and examines the psychological model that influenced the *Miranda* Court. It then considers newer psychological models, their problems and limitations, and how they might modify confession jurisprudence in the future. It concludes by critiquing the fundamental assumptions shared by empirical psychology generally, and how this has led confession jurisprudence astray.

Part IV presents a philosophical course correction. It describes how concepts such as truth, justice, the common good, human rights, and dignity all relate to criminal confessions. In doing so, it provides an alternative to empirical psychology and negative rights philosophy that dominates the contemporary discourse about confessions.

Part V recommends ways for translating the principles identified in Part IV into practical police procedures. It begins by identifying the beneficial ends towards which confession jurisprudence ought to be oriented. It then offers specific proposals regarding prohibited and permitted means for obtaining these ends. Included within these proposals is an augmented rights warning protocol, which continues to fully advise suspects of their constitutional rights while additionally encouraging them to cooperate candidly with police for legitimate and virtuous reasons. The constitutionality of the proposed changes is defended, and the manner in which they enhance the suspect's dignity and the common good is explained.

II. AN OVERVIEW OF THE COURT'S APPROACH TO
CONFESSIONS AND FREE WILL

As children we are admonished to mind our manners, brush our teeth, and look both ways before crossing the street. Parental instruction, of course, extends beyond the mundane to the profound, sometimes inculcating basic norms about individual virtue and social responsibility. Among the most important and intuitive of these is that a person should acknowledge his mistakes and misdeeds, take responsibility for them, and try to make things right, even if this includes accepting a just punishment. The objective truth and cultural consensus reflected in this

teaching are so obvious as to be platitudinous.¹ Surely no one guided by a proper moral compass could disagree.

We should expect that the same common-sense values about admitting mistakes and accepting responsibility would be integral to our criminal justice system. These precepts, applied in the law enforcement context, would encourage suspects to make sincere and heartfelt confessions of guilt.² Such confessions are in accord with a traditional

¹ Truth and truth telling hold a special, deeply embedded status in American culture. A small sampling should suffice to make the point. An Internet search of the phrase “truth, justice and the American way” yielded 70,900 hits. See THE OXFORD DICTIONARY OF QUOTATIONS 16 (Elizabeth Knowles ed., 5th ed. 1999) (attributing the quoted phrase to the preamble of the Superman radio show of 1940 onward). We honor presidents who are truthful—for example, Washington and the cherry tree, Parson Weems, *Young George Washington Would Not Tell a Lie*, <http://www.buchanan.org/h-040.html> (last visited Aug. 25, 2006), and Honest Abe Lincoln, Noah Brooks, *Why Lincoln Was Called “Honest Abe,”* http://www.a-christmas-carol.com/stories/why_lincoln_was_called_honest_abe.html (last visited Aug. 25, 2006). We dishonor presidents who do violence to the truth, either by covering up (Nixon), *Watergate: The Scandal That Brought Nixon Down*, <http://www.watergate.info> (last visited Aug. 25, 2006), or falsely denying, dissembling, and parsing (Clinton), *A Chronology: The Key Moments in the Clinton-Lewinsky Saga*, <http://www.cnn.com/ALLPOLITICS/1998/resources/lewinsky/timeline> (last visited Aug. 25, 2006). Guilty secrets burden and stain us, unless and until we “get it off our chest” and “come clean.” Our children’s stories teach the virtue and telling the truth and warn about the dangers of crying wolf. *The Boy Who Cried Wolf*, <http://www.storyarts.org/library/aesops/stories/boy.html> (last visited Aug. 25, 2006). Even our television game shows instruct us “To Tell the Truth,” *To Tell the Truth*, http://www.tvtome.com/tvtome/servlet/ShowMainServlet/showid-4071/To_Tell_the_Truth (last visited Aug. 25, 2006), and warn us of the “consequences” if we do not. *Truth or Consequences*, <http://timstv.showcase.com/torc.html> (last visited Aug. 25, 2006). Above all, we are taught “the truth will set you free” (over 14,000,000 hits for this phrase); *John* 8:32 (and “you will know the truth, and the truth will set you free”).

² “A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the guilty fact charged or of some essential part of it.” 3 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 821, at 308 (James H. Chadbourn ed., 4th rev. ed. 1970) [hereinafter WIGMORE, EVIDENCE]. “The distinction between admissions in criminal cases and confessions by the accused is the distinction in effect between admissions of fact from which the guilt of the accused may be inferred by the jury and the express admission of guilt itself.” WILLIAM P. RICHARDSON, THE LAW OF EVIDENCE § 394, at 268 (3d ed. 1928). For purposes of this Article, the term “confessions” includes “admissions” unless otherwise indicated.

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understanding of right and wrong,³ as reflected in natural law theory⁴ and various theological sources.⁵ As a matter of justice,⁶ such confessions are morally beneficial to wrongdoers and can help reorient offenders who have acted in a disordered fashion.⁷ A sincere confession

³ [One] should accuse himself first and foremost, . . . who happens to behave unjustly at any time; and . . . he should not keep his wrongdoing hidden but bring it out into the open, so that he may pay his due and get well He should be his own chief accuser, . . . and use his oratory for the purpose of getting rid of the worst thing there is, injustice, as the unjust acts are being exposed.

PLATO, GORGIAS 480c-d, in PLATO COMPLETE WORKS 825 (John M. Cooper ed., Donald J. Zeyl trans., 1997) [hereinafter PLATO, GORGIAS].

⁴ The dominant traditional natural law theory is rooted in the moral and metaphysical philosophy of Aristotle, which culminated in the work of St. Thomas Aquinas. See generally LLOYD L. WEINREB, NATURAL LAW AND JUSTICE (1987) (discussing the origins and branches of natural law theory). Natural law theory, as expressed in a realist philosophical approach, is discussed in *infra* Part IV.B, and its application to confession jurisprudence is considered in *infra* Parts IV.C and V.

⁵ The *Catechism of the Catholic Church* instructs that

The confession (or disclosure) of sins, even from a simply human point of view, frees us and facilitates our reconciliation with others. Through such an admission man looks squarely at the sins he is guilty of, takes responsibility for them, and thereby opens himself again to God and to the communion of the Church in order to make a new future possible.

CATECHISM OF THE CATHOLIC CHURCH 365 (United States Catholic Conference, Inc. 1997). Not surprisingly, many of the world's great religious traditions share in the belief that wrongdoers ought to admit their misdeeds with a sincere heart. For example, the Penitential Psalms, which are part of the Jewish and Islamic (as well as Christian) traditions, teach that one should admit his misconduct and seek divine mercy. *Psalms* 51:1-5 (King David admitted to God that he was sinful and implored God's mercy). Similarly, for trials in the Hindu tradition, the guilty party is required to process before a crowd and admit his guilt while the charge against him is read aloud. ARIEL GLUCKLICH, RELIGIOUS JURISPRUDENCE IN THE DHARMASTRA 78 (1988).

⁶ "Justice" is a complicated term having many meanings and connotations. See generally ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 1-11 (1988) (discussing "[r]ival [j]ustices, [and] [c]ompeting [r]ationalities"). *Black's Law Dictionary* defines "justice" as "[t]he fair and proper administration of laws." BLACK'S LAW DICTIONARY 869 (7th ed. 1999). In the context of the natural law, "justice" is understood to mean "giv[ing] each one his due." THOMAS AQUINAS, THE SUMMA THEOLOGIAE pt. II-II, Q. 62, art. 1 (Blackfriars of English Dominican Province trans., 1964) [hereinafter AQUINAS, SUMMA THEOLOGIAE]. "Justice" and its relationship to confession is considered in greater detail in *infra* Part IV.B.2.

⁷ Gad Czudner & Ruth Mueller, *The Role of Guilt and Its Implication in the Treatment of Criminals*, 31 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 71, 73-74 (1987) (discussing how therapists, by challenging offenders' excuses and rationalizations, can trigger feelings of guilt that can be used for rehabilitative purposes). Indeed, many programs will not admit an offender or deem that he has successfully completed treatment unless he acknowledges guilt for the underlying misconduct. See, e.g., *Morstad v. State*, 518 N.W.2d 191, 192 (N.D. 1994) (referring to the decision of a therapist at a sex offender treatment program that the defendant "was not amenable to out-patient sex-offender's treatment at

also can be indicative of a wrongdoer's rehabilitative potential and can serve as an important first step toward his restoration and reintegration into society.⁸

True and heartfelt confessions of guilt can likewise be greatly beneficial to the common good.⁹ They can assist in repairing the disorder and harm caused by an offense, and can sometimes have a profound compensatory effect by helping an offender repay his debt to society.¹⁰ Confessions are also efficient, often saving the state the time, effort, and expense of a lengthy investigation and trial,¹¹ as well as

the center because [he] would not admit sexually assaulting his daughter"); RESTORE: Justice that Heals, Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience, <http://restoreprogram.publichealth.arizona.edu/questions/rp.htm#rp12> (last visited Aug. 25, 2006) ("[O]ffenders do not have to admit guilt to enter RESTORE, but they do have to acknowledge that the act happened and that they were responsible for it.").

⁸ PETER BROOKS, *TROUBLING CONFESSIONS 2* (2000) ("Confession of wrongdoing is considered fundamental to morality because it constitutes a verbal act of self-recognition as wrongdoer and hence provides the basis of rehabilitation."); DEP'T OF THE ARMY PAMPHLET 27-9, *MILITARY JUDGES' BENCHBOOK* ch. 8, § III, para. 8-3-35 (Sept. 2002) [hereinafter *BENCHBOOK*] (in boilerplate sentencing instructions in guilty plea cases, the military judge advises court members (military jurors) that they may consider the accused's guilty plea as constituting "the first step towards rehabilitation").

⁹ In natural law philosophy, "the common good" refers to "the sum total of social conditions which allow people, either as groups or individuals, to reach their fulfillment more fully and more easily." *CATECHISM OF THE CATHOLIC CHURCH*, *supra* note 5, at 365. The common good is discussed in greater detail in *infra* Part IV.B.3.

¹⁰ As one proponent of restorative justice puts it,

As soon as immediate victim, society, and offender safety concerns are satisfied, Restorative Justice views the situation as a teachable moment for the offender—an opportunity to encourage the offender to learn new ways of acting and being in community. These principles suggest that justice is a process for making things as right as possible rather than simply punishing the offender.

Ron Claassen, *Restorative Justice Primary Focus on People Not Procedures*, <http://www.fresno.edu/pacs/docs/rjprinc2.html> (last visited Aug. 25, 2006). In order to make things as right as possible—i.e., "to restore the distributively just balance . . . between the criminal and the law-abiding" that criminal punishment seeks to achieve, JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 263 (1980) [hereinafter *FINNIS, NATURAL LAW*], an offender must acknowledge guilt and work toward mitigating the damage caused by his crime. This, in turn, can help his re-integration into society. Accordingly, confession is integral to reparation, restoration, and re-integration, in the fullest sense of these terms.

¹¹ A formal acknowledgement of guilt, in the fullest sense, is made by a defendant at a criminal trial. If a defendant denies his guilt, then the state must have a contested trial in order to determine and prove the accused's guilt, and if guilty to punish him legitimately. If a defendant admits his guilt and pleads guilty, then the judicial process is simplified, the determination of guilt can be made more certain, and the punishment can be more commensurate and efficient. Compare *Brady v. United States*, 397 U.S. 742, 752 (1970) (discussing some of the practical benefits of guilty plea cases), with Robert E. Scott &

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protecting victims and others from suffering the embarrassment, anxiety, and inconvenience associated with a contested adjudication of guilt.¹² Indeed, confessions have a special, even unique capacity to bring closure and repose to crime victims and their families.¹³

Beyond all of this, truthful confessions are singularly capable of promoting the search for truth,¹⁴ which the Supreme Court has described as a “fundamental goal” of the criminal justice system¹⁵ and the central purpose of a criminal trial.¹⁶ Truthful confessions enhance the reliability

William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1932-34 (1992) (arguing that more innocent persons, especially the poor, would be convicted if guilty pleas were prohibited). Of course, the earlier in the process that a suspect admits guilt, the greater the likelihood that unnecessary investigation can be avoided.

¹² By pleading guilty, an accused waives, *inter alia*, his right to confront his accusers. See U.S. CONST. amend VI; *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). As a consequence, it becomes unnecessary for the victim and other potential witnesses to testify on the merits to help prove the accused’s guilt.

¹³ A powerful example of this is found in the recent litigation involving the infamous O.J. Simpson/Nicole Brown Simpson/Ronald Goldman matter. After O.J. Simpson was acquitted of killing Nicole Simpson and Ronald Goldman in a criminal trial, the latter’s father, Fred Goldman, brought a wrongful death civil action against Mr. Simpson. Before the civil trial commenced, Mr. Goldman’s attorney advised that he would be able to question Mr. Simpson under oath about the murders. He further explained, however, that Mr. Simpson could refuse to testify, in which case the judge would enter a default judgment and the Goldmans “would win.” Mr. Goldman responded that he wanted Mr. Simpson to publicly account for his actions, and, therefore, his attorney should use any legal means possible to prevent the trial from ending without Mr. Simpson testifying. As far as Mr. Goldman was concerned, a public admission of guilt by Mr. Simpson was more important than winning monetary damages. DANIEL PETROCELLI, TRIUMPH OF JUSTICE 32 (1998). A second example involves Brain Brabazon, the stepfather of Baylor University basketball player Brian Dennehy. Upon learning that his son’s former teammate, Carlton Dotson, had pleaded guilty to killing Dennehy, Brabazon said that he was “satisfied that Dotson had confessed but long[ed] to know his motive.” Brabazon continued, “‘There are only two things I want in my life,’ . . . ‘One is the truth of why [Carlton] killed Patrick and the other is life in prison for Carlton.’” Melissa Segura, *Coming Clean*, SPORTS ILLUSTRATED, June 11, 2005, at 19.

¹⁴ See *United States v. Payner*, 447 U.S. 727, 734 (1980) (commenting on the “truth-finding functions of judge and jury”). “Truth,” in a philosophic sense, is addressed in greater detail in *infra* Part IV.A.

¹⁵ *United States v. Havens*, 446 U.S. 620, 626 (1980).

¹⁶ *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *United States v. Nobles*, 422 U.S. 225, 230 (1985). See *Gonzalez v. Sullivan*, 934 F.2d 419, 426 (2d Cir. 1991) (the ascertainment of truth must sometimes yield to the higher value of individual rights); JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT 274 (2000) (discussing the sometimes competing goals of reliably determining the truth and respecting individual liberty and dignity); Joseph D. Grano, *The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice’s Office of Legal Policy*, 22 U. MICH. J.L. REFORM 395, 402-03 (1989) [hereinafter Grano, *Changing World*] (discussing the primacy of truth vis-à-vis other values). Of course, the search for truth is not an absolute, and thus the Court has spoken in terms of

and hence the legitimacy of the criminal justice system, real and perceived, by reassuring the public both that the guilty will be correctly identified and punished, and the innocent will not be falsely convicted.¹⁷ Oftentimes a confession is the most compelling evidence of guilt presented to the fact-finder,¹⁸ and it has long been recognized that a voluntary confession is among the most powerful modes of proving guilt known in the law.¹⁹ In the end, although virtually every reliable

ensuring that the criminal justice system “reliably serves” its truthfinding function. *Rose v. Clark*, 478 U.S. 570, 577-78 (1986). The status of truthfinding as an important but relative goal reflects that it sometimes is at tension with other legitimate goals, such as protecting individual rights from being abridged by unconstitutional police practices. *Spano v. New York*, 360 U.S. 315, 315 (1959) (finding that it must “resolve a [reoccurring] conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement”); Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061, 1064 (1992) [hereinafter Grano, *Ascertaining the Truth*] (arguing the central importance of discovering the truth in the criminal justice system).

¹⁷ See *Nobles*, 422 U.S. at 230 (“The dual aim of our criminal justice system is ‘that guilt shall not escape or innocence suffer.’”) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *United States v. Cronin*, 466 U.S. 648, 655 (1984) (“the ultimate objective [of a criminal trial is] that the guilty be convicted and the innocent go free”) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994) (the purpose of a criminal trial is to “sort[] the innocent from the guilty”).

¹⁸ The importance of confessions in solving crimes and convicting guilty perpetrators is difficult to quantify, and the limited statistical evidence available on the matter is somewhat unclear. See generally JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 24.05[B][4], at 471-73 (3d ed. 1999) (both citing and discussing statistical information and derivative arguments regarding the importance of confessions); 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.1(a), at 436-38 (2d ed. 1999) [hereinafter LAFAVE ET AL., CRIMINAL PROCEDURE]; Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27 (1997) (showing that even coerced confessions resulted in a greater likelihood of a guilty verdict, even when jurors claimed that it had no influence on their verdicts). This statistical uncertainty is attributable to the fact that the magnitude of a confession’s influence upon a fact-finder does not lend itself to easy empirical measurement. Nonetheless, courts and commentators alike have generally understood the singularly compelling impact of confession at trial. *Arizona v. Fulminante*, 499 U.S. 279, 313 (1991) (Kennedy, J., concurring) (confession to a crime makes an “indelible impact” on a jury, and, “[a]part, perhaps, from a videotape of the crime, one would have difficulty finding evidence more damaging to a criminal defendant’s plea of innocence”); BROOKS, *supra* note 8, at 4 (confession is the “queen of proofs”).

¹⁹ A confession is like no other evidence. Indeed, “the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him. . . . [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. 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.”

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confession can be corroborated to some extent by extrinsic evidence,²⁰ in some cases a confession proves indispensable to establishing guilt.²¹ Over time, however, the Supreme Court has increasingly de-emphasized the manifold benefits of truthful and heartfelt confessions, focusing instead on the potential for police misconduct and abuse in the criminal process.

Fulminante, 499 U.S. at 296 (quoting *Bruton v. United States*, 391 U.S. 123, 139-40 (1968) (White, J., dissenting)). *Accord* *Hopt v. Utah*, 110 U.S. 574, 584-85 (1883) (“[A] deliberate, voluntary confession of guilt is among the most effectual proofs in the law, and constitutes the strongest evidence against the party making it that can be given of the facts stated in such confession.”). The special status of a confession has deep historic roots. See JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF* 4 (1970) (explaining that in the absence of two eyewitnesses, the Roman-canon law of proof required the accused’s confession for a conviction; circumstantial evidence, no matter how compelling, was inadequate). Judicial confessions of guilt (such as those associated with guilty pleas and accompanying providence inquiries) can be equally compelling. For example, military judges are required to instruct accused soldiers at courts-martial, before accepting a guilty plea, that “[a] plea of guilty is equivalent to a conviction, and is the strongest form of proof known to the law.” BENCHBOOK, *supra* note 8, at ch. 8, § 111, para. 8-2-1. Moreover, the strength accorded to a guilty plea is partially responsible for appellate courts’ general reluctance to reverse a conviction in a guilty plea case, even where the defendant raises an objection that might have served as a basis for overturning his conviction if he had been found guilty at a contested trial. *E.g.*, *Parker v. North Carolina*, 397 U.S. 790 (1970) (death penalty and coerced confessions issues are foreclosed by defendant’s guilty plea); *McMann v. Richardson*, 397 U.S. 759 (1970) (conviction based on guilty plea not reversed even if a coerced confession was introduced at trial).

²⁰ See generally WIGMORE, *EVIDENCE*, *supra* note 2, § 2071, at 395-97; A.H. Schopler, Annotation, *Corroboration of Extrajudicial Confession or Admission*, 45 A.L.R.2d 1316 (1956) (both discussing corroboration requirements for confessions in different jurisdictions).

²¹ *Ashcraft v. Tennessee*, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting) (police questioning of suspects is “an indispensable instrumentality of justice”). As Justice Frankfurter once observed:

Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offense precisely because they are suspected of implication in it.

Culombe v. Connecticut, 367 U.S. 568, 571 (1961). Professor Inbau elaborated on this same reasoning when he explained that “[m]any criminal cases, even when investigated by the best qualified police departments, are capable of solution only by means of an admission or confession from the guilty individual or upon the basis of information obtained from the questioning of other criminal suspects.” Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L.C. & P.S. 16, 16 (1961) [hereinafter Inbau, *Police Interrogation*] (emphasis omitted).

A. *Assumptions Underlying the Court's Due Process Analysis of Confessions*

The Supreme Court's approach to criminal confessions has changed significantly, even radically, since our founding as a nation. Until the mid-1960s, the Court reviewed the constitutionality of confessions using predominately a due process standard.²² In the earliest cases in this line, the admissibility of a confession hinged on its reliability.²³ Later, the Court fashioned and consulted a complex of inter-related values for determining voluntariness, which included reliability but increasingly emphasized other goals.²⁴ In its most recent decision on the subject, the Court departed from tradition and jettisoned reliability from its "complex of values" construct.²⁵ In all of the due process voluntariness cases, the Court ostensibly sought to respect the free will of each suspect by suppressing confessions that resulted from undue police coercion or compromised the adversarial system.

While the Court's voluntariness inquiry has assumed a conspicuously empirical character,²⁶ its decision-making is also strongly influenced by several pervasive, normative assumptions that both undergird and help shape its "complex of values." Many of these beliefs are similar to those that are fundamental to the post-*Miranda* line of cases, although they are often expressed more definitively and forcefully in the later decisions. These broad assumptions about confessions reflected in the due process cases can be grouped into two general categories—those relating to the suspect, and those concerning public policy and the common good.

²² The Fourteenth Amendment, Section 1, provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without *due process of law*, nor deny any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1 (emphasis added). For a detailed development of the due process standard in criminal confessions, see LAFAYE ET AL., CRIMINAL PROCEDURE, *supra* note 18, § 6.2, at 441-67.

²³ *E.g.*, *Hopt*, 110 U.S. at 584.

²⁴ *E.g.*, *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960) (explaining that involuntariness is a "convenient shorthand" for a "complex of values" relating to the constitutionality of a confession).

²⁵ *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

²⁶ *See, e.g.*, *Townsend v. Sain*, 372 U.S. 293, 308 (1963) (determining whether the confession at issue was "*in fact*" the product of free will); *Culombe*, 367 U.S. at 603 (quoted in *Miller v. Fenton*, 474 U.S. 104, 116 (1985)) (characterizing voluntariness as a "'psychological' fact").

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The first set of basic assumptions – those relating to the suspect – are central to the Court’s reasoning but are often left unstated. Most notable among these is the Court’s failure to express any belief that a truthful confession can ever be in the best interest of a suspect. Quite to the contrary, the Court’s rhetoric consistently implies that all suspects, including guilty suspects, benefit by not confessing. The Court goes even further in the later due process decisions, when it seemingly presumes that guilty suspects are naturally disinclined to confess and will rarely do so absent compelling police pressure.²⁷ These beliefs contrast sharply with the Court’s thinking in early cases like *Hopt v. Utah*,²⁸ which recognized that some guilty suspects are internally motivated to confess, and that police questioning may legitimately act as a catalyst in prompting suspects to act on such impulses.

The second set of assumptions relates to public policy goals and the criminal justice system generally. While the Court at one time acknowledged that reliable confessions are good for society, it has since judged their benefits to be of a lesser significance, and ultimately of no import, in assessing voluntariness. This enabled the Court to free associate in identifying and weighing benefits and costs connected with reliable confessions, which ultimately lead, not surprisingly, to their passive and later active discouragement. Among the ostensibly weighty considerations bearing on voluntariness is the preservation of the adversary system, which, according to the Court, may be compromised by proving a defendant’s guilt using his pretrial confession obtained through inquisitorial methods.²⁹ Another supposed benefit of suppressing confessions is deterring police misconduct, which is premised on the belief that the police are essentially result oriented and

²⁷ See JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 107 (1996) (noting the Court’s inherent distrust of confessions and describing the Court’s normative analysis in Due Process cases as a two-step process: “first, that the interrogation impose[s] undue or impermissible pressure . . . and, second, that such undue pressure [makes] confessing [the accused’s] only reasonable option”).

²⁸ 110 U.S. 574, 585 (1884).

²⁹ See, e.g., *Miller*, 474 U.S. at 116 (Court reiterates that “the admissibility of a confession turns as much on whether the techniques for extracting the statements . . . are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as to whether the defendant’s will was in fact overborne.”); *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (Court instructs that convictions based on coerced confessions must be overturned “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.”).

will use whatever means are necessary and permitted to compel confessions.³⁰

In the end, the Court's pre-*Miranda* cases fashioned and imposed a sterile and cynical conception of voluntariness. While the Court ostensibly concentrates on protecting a suspect's right to choose freely (or freely enough) vis-à-vis official conduct, it pays no attention to the quality of choice made or the values that it implicates. The Court accepts as a given that rational suspects are rightly concerned only with avoiding a determination of guilt and punishment, and concomitantly that self-interested police are more desirous of obtaining plausible confessions than in ensuring that they are voluntarily rendered,³¹ and perhaps even that they are true. It correlatively presumes that rational suspects would not "freely" choose to confess absent aggressive police prompting, or worse.³² Against this backdrop of opposing self-interest, the Court plays the role of a forensic telepathist, excluding evidence whenever it can satisfy itself that the police have *in fact* exerted too much influence in causing *this* suspect to render *this* confession, which is presumptively against his best interest and which he was otherwise disinclined to make. Due process circumscribes the acceptable parameters of the dialectic, and this normatively barren landscape is the backdrop for the *Miranda* line of cases.

B. Assumptions Underlying the Post-Miranda Approach to Confessions

Beginning in the 1960s, the Supreme Court began to chart a course that generally resolved this debate in favor of those who distrust the

³⁰ See, e.g., *Connelly*, 479 U.S. at 166 (citing deterrence of future police misconduct as the reason for suppressing a confession).

³¹ YALE KAMISAR, POLICE INTERROGATIONS 31 (1980) [hereinafter KAMISAR, POLICE INTERROGATIONS].

³² See Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1425 (1985) (explaining that the Supreme Court perceives confessions "darkly as the product of police coercion"); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 125 (1998) (describing the voluntariness analysis as an attempt by the Court to "protect those suspects who were the most vulnerable in police interrogations . . . by . . . empowering them against coercive tactics").

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police³³ and, derivatively, distrust the confessions they obtain.³⁴ The pre-*Miranda*, traditional involuntariness test was widely criticized as too imprecise³⁵ and intolerably uncertain.³⁶ The Court responded in *Miranda*³⁷ by mandating strict compliance with specified procedural

³³ E.g., *Escobedo v. Illinois*, 378 U.S. 478, 498 (1964) (White, J., dissenting) (commenting on the majority's "deep-seated distrust of law enforcement officers" reflected in its reasoning). Similarly, many of the Court's Fourth Amendment decisions finding that a judicial warrant is required for most probable-cause searches can be traced, in large part, to the Court's same negative attitude toward the police. As early as 1948, the Supreme Court held that a search warrant was required to search a hotel room based on probable cause because the interposition of the neutral judicial officer's judgment helped protect against the predictable excesses of the police, who are "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). The warrant-requirement rule was forcefully restated in *Katz v. United States*, 389 U.S. 88 (1967), and "[d]uring the next fifteen years or so, the Court fairly consistently reaffirmed the supremacy of the Warrant Clause." DRESSLER, *supra* note 18, at 190. Evidence seized by the police via warrantless searches was presumptively excluded pursuant to the Exclusionary Rule, which was ultimately characterized by the Court as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect [upon the police]." *United States v. Calandra*, 414 U.S. 338, 348 (1974). The Court's suspicious attitude toward the police was likewise reflected in cases involving pretextual police conduct. See, e.g., *Chimel v. California*, 395 U.S. 752, 767 (1969) (finding an expansion of the scope of search incident to arrest to include the entire premises where a suspect is arrested to be unreasonable, in part because if this were allowed the police could pretextually avoid the warrant requirement "by the simple expedient of arranging to arrest suspects at home rather than elsewhere").

³⁴ See DRESSLER, *supra* note 18, at 492 ("The Warren Court distrusted confessions, was critical of police deception, and inclined to set up an even 'playing field' in the interrogation room."); *supra* note 32.

³⁵ See Joseph D. Grano, *Miranda v. Arizona and the Legal Mind: Formalism's Triumph over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 243 (1986) [hereinafter Grano, *Miranda v. Arizona and the Legal Mind*] (under the traditional involuntariness test, "everything [is] relevant but nothing [is] determinative"); Yale Kamisar, Gates, "Probable Cause," "Good Faith," and Beyond, 69 IOWA L. REV. 551, 570 (1984) (under the traditional involuntariness test, "[a]lmost everything was relevant, but almost nothing was decisive"); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 57 (1974) (describing a typical coercion case as one "in which the court[] provide[s] a lengthy factual description followed by a conclusion . . . without anything to connect the two").

³⁶ See Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979) (Court concludes the traditional involuntariness test resulted in "intolerable uncertainty."); Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869 (1981) [hereinafter Schulhofer, *Confessions*] (the traditional involuntariness test "left the police without needed guidance") (emphasis omitted). Other observers have called the due process test "absolutely useless," Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 430 (1954), and "legal 'double-talk.'" ALBERT R. BEISEL, CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT 48 (1955).

³⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966) (statements obtained during a custodial interrogation cannot be used at trial unless the prosecution demonstrates compliance with procedural safeguards securing the privilege against self-incrimination). Although *Miranda* was foreshadowed by decisions such as *Massiah v. United States*, 377 U.S. 201 (1964)

requirements as a predicate for admitting statements obtained during custodial interrogation.³⁸ In one fell swoop,³⁹ the Court imposed a new methodology for assessing the admissibility of confessions that, although not displacing the pre-*Miranda* due process jurisprudence,⁴⁰ would soon overtake it in importance.⁴¹

Starting with *Miranda*, the Court imposed a series of elaborate and unforgiving protocols for the admission of confessions.⁴² The *Miranda*

(government may not deliberately elicit statements from a person under indictment in the absence of counsel), and especially *Escobedo v. Illinois*, 378 U.S. 478 (1964) (Sixth Amendment is violated when a post-indictment suspect confesses after police deny his request to consult with his counsel), none of these earlier cases established bright-line procedural requirements for constitutional compliance.

³⁸ The dicta in *Miranda* instructs that adequate and sufficient alternatives to the specified rights warnings could be developed. 384 U.S. at 469. A statutory alternative to the *Miranda* warnings was later declared unconstitutional by the Court in *Dickerson v. United States*, 530 U.S. 428 (2000).

³⁹ This is not to discount the importance of *Escobedo*, 378 U.S. 478, and other decisions that presaged *Miranda*. DRESSLER, *supra* note 18, § 24.03, at 458 (“The road to *Miranda* runs through *Escobedo*.”). See *Massiah*, 377 U.S. 201 (holding that the Sixth Amendment right to counsel attaches when a defendant is indicted, and therefore the Sixth Amendment is violated when government agents, in the absence of defense counsel, deliberately elicit incriminating information from a person against whom adversarial judicial criminal proceedings have commenced).

⁴⁰ The Court observed that even after *Miranda*, “We have never abandoned [the] due process jurisprudence, and thus continue to exclude confessions that were obtained involuntarily.” *Dickerson*, 530 U.S. at 434.

⁴¹ See FRED P. GRAHAM, *THE SELF INFLICTED WOUND* 157 (1970) (calling *Miranda* “the high-water mark of the due process revolution, the ultimate expression of judicial philosophy and technique that had characterized the Warren Court on crime”). For statistical illustrations of the impact of *Miranda* on criminal practice, see Richard A. Leo, *The Impact of Miranda Revisited*, in RICHARD A. LEO & GEORGE C. THOMAS III, *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* 210-15 tbls.1-6 (1998) (demonstrating the effect of *Miranda* on confessions in various aspects of criminal proceedings).

⁴² *Miranda* imposed the well-known rights-advisement requirements for custodial interrogation. 384 U.S. at 444. In order for a confession to be admissible consistent with Fifth Amendment protections, *Miranda* instructs that the suspect must be first advised of his right to remain silent, the consequences of foregoing this right, the right to consult with a lawyer and have the lawyer present during interrogation, and the right to an appointed lawyer if he (the suspect) is indigent. The four so-called *Miranda* rights are set out in 384 U.S. at 444, 471-74, 479. A confession is admissible only if the prosecutor can satisfy the “heavy burden” of showing that the suspect waived these so-called *Miranda* rights “voluntarily, knowingly and intelligently.” *Id.* at 444; see *Johnson v. Zerbst*, 304 U.S. 458 (1938). A confession obtained without such a showing must be excluded, even if it is not “involuntary in traditional terms.” See *Miranda*, 384 U.S. at 457 (the Court, after examining the facts of the four cases under collective consideration and concluding that it “might not find the defendants’ statements to have been involuntary in traditional terms,” ultimately concluded that they must be excluded because they were taken in violation of the Fifth Amendment); see also *Dickerson*, 530 U.S. at 444 (“The disadvantage of the *Miranda* rule is

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line of cases⁴³ did more than simply mandate procedures that might result in fewer confessions;⁴⁴ they reflected antipathy, or at least skepticism, toward the use of confessions themselves.⁴⁵ This enmity extended beyond the pragmatic to the normative and was based on the Court's belief that it was uncivilized, unenlightened, and even unfair to solve crimes through the use of confessions, which were presumably obtained only by using the "less refined methods" that typify police interrogations.⁴⁶ The Court has even asserted that the criminal justice

that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result.").

⁴³ Later cases applying *Miranda* imposed additional embellishments that were designed to ensure that the values protected by *Miranda* were safeguarded in other circumstances. *E.g.*, *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (once a suspect has been given *Miranda* warnings and requests counsel, the "interrogation must cease, and officials may not reinitiate interrogation without counsel present"); *Arizona v. Roberson*, 486 U.S. 675 (1988) (the *Minnick* rule applies even when different officers seek to interrogate a suspect about separate crimes). Justice Scalia, with typical panache, has castigated some of these requirements as follows:

Today's extension of the *Edwards* [*v. Arizona*, 451 U.S. 477 (1981)] prohibition is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement. This newest tower, according to the Court, is needed to avoid "inconsisten[cy] with [the] purpose" of *Edwards*' prophylactic rule, which was needed to protect *Miranda*'s prophylactic right to have counsel present, which was needed to protect the right against *compelled self-incrimination* found (at last!) in the Constitution.

Minnick, 498 U.S. at 166 (Scalia, J., dissenting) (citations omitted).

⁴⁴ *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) ("the thrust of the new [*Miranda*] rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all"). Although the studies vary, most conclude that *Miranda* did in fact reduce the number of confessions obtained by police. *See, e.g.*, Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 417, 438 (1966) (results from several large cities show about a 16% drop in the rate of confessions after *Miranda*, and about a 4% drop in the conviction rate for serious offenses); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 871 (1996) (55-60% pre-*Miranda* rate of confessions in Salt Lake City dropped to a 33% rate after *Miranda*); Richard H. Seeburger & R. Stanton Wettick, Jr., *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967) (54.4% pre-*Miranda* confession rate dropped to 37.5% immediately after *Miranda*, and even lower later in time). The methodologies used in such studies, however, have been criticized on a variety of empirical grounds. *See generally* Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996); George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933 (1996).

⁴⁵ *Miranda*, 384 U.S. at 538 (White, J., dissenting) ("[T]he not so subtle overtone of the [*Miranda*] opinion [is]—that it is inherently wrong for the police to gather evidence from the accused himself.").

⁴⁶ The quoted words are taken from an article written by Professor Inbau; the complete sentence reads as follows: "In dealing with criminal offenders, and consequently also with

system would “suffer morally” from a broad reliance on confessions to prove guilt.⁴⁷

The rationale of *Miranda* is based on the following three-part syllogism:

- (1) The Fifth Amendment Privilege applies to police questioning, and compulsion within the meaning of the privilege can include informal pressure to speak.
- (2) Informal compulsion actually⁴⁸ (or at least presumptively)⁴⁹ exists in any and every form of custodial interrogation.
- (3) Specified warnings are necessary to dispel the compelling pressure of custodial interrogation and thereby preserve the suspect’s capacity to exercise free will in dealing with the police.

Several other interrelated and foundational assumptions permeate *Miranda* and its progeny.⁵⁰ For the most part, these are more explicit and fully developed counterparts of the assumptions that undergird the pre-*Miranda* jurisprudence.

criminal suspects who may actually be innocent, the interrogator must of necessity employ less refined methods than are considered appropriate for the transaction of ordinary, everyday affairs by and between law-abiding citizens.” Inbau, *Police Interrogation*, *supra* note 21, at 19 (emphasis omitted).

⁴⁷ *Escobedo v. Illinois*, 378 U.S. 478, 489 (1964) (emphasis omitted) (favorably quoting 8 WIGMORE, EVIDENCE, *supra* note 2, at 312).

⁴⁸ The *Miranda* Court observed that persons “subjected to the techniques of persuasion described above [i.e., custodial interrogation] cannot be otherwise than under compulsion to speak.” 384 U.S. at 461. This was the prevalent interpretation of *Miranda* at the time. Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 735 (1987); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 447 (1987) [hereinafter Schulhofer, *Reconsidering Miranda*] (in the absence of the *Miranda* warnings, custodial interrogation necessarily results in unconstitutional compulsion).

⁴⁹ Elsewhere the *Miranda* Court observed that even when a suspect’s statement may not be involuntary in traditional, pre-*Miranda* terms, “[t]he potentiality for compulsion is forcefully apparent,” 384 U.S. at 457 (emphasis added), and that this potentiality is sufficient to justify suppression. See *United States v. Patane*, 542 U.S. 630, 639 (2004) (“[T]he *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution’s case in chief.”).

⁵⁰ It is an over-simplification to suggest that the line of post-*Miranda* cases reflect a judicial philosophy that is identical or even consistent in all respects. Certainly, the Warren Court’s jurisprudential approach is in some ways distinguishable from that of the Burger and Rehnquist Courts. See *infra* notes 77-78. Nevertheless, several pervasive assumptions operate across all the post-*Miranda* cases, albeit with varying degrees of emphasis.

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First, the Court assumes that it is in the best interests of guilty suspects not to confess. Although this seems obvious from the general tenor of the opinion, the Court never says this in so many words. Rather, it treats the assumption as being so well understood that it needs no citation of authority or explicit exposition. The Court is probably correct about this insofar as the assumption conforms to the conventional wisdom of the legal community, i.e., that a guilty suspect (or any suspect for that matter) should not speak with police, let alone confess, without first consulting with an attorney. Further, the assumption is implicit in the Court's holding. As a matter of common sense, suspects are not generally advised of their prerogative to do something that is detrimental to their interests.⁵¹ If advised at all, they are made aware of their right to *avoid doing* something that is presumptively harmful. Accordingly, it would make little sense to mint a complicated mandatory rights warning advisement protocol unless a confession was judged to be detrimental to a suspect's interests.⁵²

Second, the Court assumes that confessions are not especially beneficial to the common good, and that they may even be detrimental to society. The Court contends that *Miranda's* critics have overstated the importance of confessions in solving crime.⁵³ Other potential benefits to society—such as repairing the harm caused by the crime, helping an offender repay his debt, avoiding the toll of a trial on victims and witnesses, bringing closure to victims, and so forth—are constitutionally irrelevant.⁵⁴ Even if confessions are needed to secure convictions in some cases, *Miranda* signals the Court's preference for Fifth Amendment

⁵¹ For example, no court has ever required an advisement to a suspect that he has a right to confess, or to lead police to incriminating evidence, or to advise the prosecutor of adverse character witnesses and prior bad acts.

⁵² In other words, it is assumed that, at least from the suspect's perspective, the greatest possible benefit is to avoid a conviction (even if it is merited) and any associated punishment (even if it is just). Thus, a suspect would prefer avoiding an adverse judicial determination to any intangible benefits that might be gained by confessing, such as clearing his conscience, accepting responsibility, making things right, and gaining whatever merits a just punishment might afford. To the extent that these latter considerations have any value, they are seen as matters of individual preference that are not cognizable under the Fifth Amendment. See *Oregon v. Elstad*, 470 U.S. 298, 305 (1985) (commenting that Fifth Amendment is not concerned with "moral and psychological pressures to confess emanating from sources other than official coercion").

⁵³ *Miranda*, 384 U.S. at 479, 481. To be fair, the Court has sometimes backed off somewhat from the assertion in recent post-*Miranda* decisions. E.g., *Moran v. Burbine*, 475 U.S. 412, 426 (1986) ("Admissions of guilt . . . are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.").

⁵⁴ *Supra* note 52.

values over law enforcement interests.⁵⁵ But the Court's rhetoric goes beyond merely characterizing the law enforcement benefits of confessions as being of a lesser magnitude that should be balanced away to achieve greater rewards; the Court is worried that confessions can be detrimental to the social fabric, and that we would all "suffer morally" from an undue reliance on confessions to prove guilt.⁵⁶

Third, the Court assumes that the police will seek confessions at virtually all costs and use whatever techniques they can to obtain them, constrained only by the limitations explicitly imposed by the courts or from other external sources.⁵⁷ The Court's reasoning begins with the premise that police no longer torture or use brute force primarily because of court decisions that disallowed this.⁵⁸ Further, it supposes that police adapted to pre-*Miranda* limitations by resorting to psychological coercion and manipulation, which is far more difficult for courts to superintend on a case-by-case basis.⁵⁹ The reasoning continues that bright-line rules for custodial interrogations must be established, therefore, to counterbalance the more sophisticated but nonetheless coercive techniques now used by police.⁶⁰

Fourth, the Court assumes that the *Miranda* protections are necessary for the adversary system, as this is embodied in the Fifth Amendment right against compelled self-incrimination.⁶¹ The Court views the adversary system as requiring a fair balance between the state and the defendant in the prosecution of crime, and it believes that this equilibrium is maintained by reducing the use of confessions at trial,⁶² at

⁵⁵ See Weisselberg, *supra* note 32, at 121.

⁵⁶ Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964) (favorably quoting 8 WIGMORE, EVIDENCE, *supra* note 2, at 312).

⁵⁷ This reasoning is the basis for the Court's contemporary justification of the exclusionary rule, i.e., unconstitutionally obtained confessions are excluded in order to deter future police misconduct in obtaining confessions. Harris v. New York, 401 U.S. 222, 225 (1971) (exclusionary rule applied to the *Miranda* line of cases); Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (exclusionary rule applied to due process voluntariness cases).

⁵⁸ See DRESSLER, *supra* note 18, at 456 (attributing the disuse of torture and use of psychological ploys to "public opposition to violent police practices and a judicial crackdown").

⁵⁹ *Miranda v. Arizona*, 384 U.S. 436, 448 (1966) (citing "gap in our knowledge" of what typically goes on during police interrogations as a justification for bright-line warning requirements).

⁶⁰ *Id.*

⁶¹ See *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964) (explaining that the Fifth Amendment privilege embodies "our preference for an accusatorial rather than an inquisitorial system of criminal justice").

⁶² See Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 320 (1991) [hereinafter Schulhofer, *Some Kind Words*].

least those obtained by state agents.⁶³ In the absence of a confession, the government would, as it should, have to convince the fact-finder of a defendant's guilt using its own resources and independently obtained evidence. Also, when a defendant manages to avoid confessing, he is less fettered when participating in an adversary trial, i.e., he can more effectively plead not guilty, present a conflicting version of events, and exercise his right to testify. *Miranda*, in other words, helps ensure that the state investigates crime properly and undertakes its appropriate burden in our adversary system, thereby affording the defendant a fighting chance for an acquittal. As the Court once explained, the Fifth Amendment privilege promotes a "sense of fair play which dictates 'a fair state-individual balance by requiring the government . . . in its contest with the individual to shoulder the entire load . . .'"⁶⁴ As one *Miranda* dissenter put it, the "not so subtle overtone of the opinion [is] . . . that it is inherently wrong for the police to gather evidence from the accused himself."⁶⁵

Fifth, the Court assumes that a typical police interrogation damages the suspect as a person and is disrespectful of his human dignity.⁶⁶ In *Miranda*, the Court pronounced "the constitutional foundation underlying the [Fifth Amendment] privilege is the respect a government—state or federal—must accord to the *dignity and integrity* of its citizens."⁶⁷ Using soaring rhetoric, the *Miranda* Court later declared that the atmosphere within an interrogation room "carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most

⁶³ Just as in the pre-*Miranda* jurisprudence, see *Colorado v. Connelly*, 479 U.S. 157, 170 (1986), the post-*Miranda* approach does not address the "moral and psychological pressures to confess emanating from sources other than official coercion." *Oregon v. Elstad*, 470 U.S. 298, 305 (1985).

⁶⁴ *Murphy*, 378 U.S. at 55 (quoting 8 WIGMORE, EVIDENCE, *supra* note 2, § 2251).

⁶⁵ *Miranda*, 384 U.S. at 538 (White, J., dissenting). The Court's position in this regard has become somewhat tempered over time, as it today is more critical of the "sporting view of justice" and thus less likely to view defendants as underdogs in need of a helping hand.

⁶⁶ The human-dignity justification for *Miranda* blends with the Court's adversarial-system justification. As the Court put it, *Miranda's* conception of the adversarial system is founded on the belief that "to respect the inviolability of the human personality, . . . the government seeking to punish an individual [must] produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Id.* at 460 (majority opinion).

⁶⁷ *Id.* (emphasis added).

cherished principles—that the individual may not be compelled to incriminate himself.”⁶⁸

The above-quoted language is telling, for it expresses the outer limits of the Court’s conception of a custodial suspect’s dignity, *viz.* a suspect is dignified by reinforcing his capacity to resist confessing. Whether a guilty suspect ultimately confesses, remains silent, or even lies to police, conversely, has no bearing on his dignity as a person. Moreover, the Court concludes that a suspect’s risk of suffering an indignity can be sufficiently minimized by a mechanical compliance with the *Miranda* protocols, even when the conduct of the police is “objectionable as a matter of ethics”⁶⁹ and involves the “deliberate misleading of an officer of the court.”⁷⁰ *Miranda*, in other words, tolerates the inevitability of reprehensible police behavior, and it is satisfied that a suspect’s dignity will be sufficiently protected by requiring procedures that can enable most suspects to resist confessing most of the time.

The Court, consistent with all of the above assumptions, seeks substantially the same end as it had in its pre-*Miranda* cases—to establish and enforce an empirical baseline for assessing and protecting a suspect’s “free enough will” vis-à-vis police coercion.⁷¹ The post-*Miranda* means for achieving this end, however, are radically different than the Court’s traditional methodology. Where pre-*Miranda* cases use a totality of the circumstances test for assessing voluntariness, the post-*Miranda* approach fashions and applies bright line criteria. And, where the pre-*Miranda* cases consult a “complex of values” designed to inform

⁶⁸ *Id.* at 457-58. Elsewhere the Court writes that “the very fact of custodial interrogation exacts a heavy toll on individual liberty.” *Id.* at 455. Years later, the Court re-iterated that *Miranda* protects a “privilege [that] embodies ‘principles of humanity and civil liberty.’” *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (internal quotations omitted).

⁶⁹ *Moran v. Burbine*, 475 U.S. 421, 423-24 (1986). In *Burbine*, the suspect’s sister arranged for an attorney to call the police station and inform a detective that she would act as the suspect’s lawyer if the police intended to interrogate him. The detective assured the lawyer that the suspect would not be interviewed that night. Less than an hour later, the police conducted the first in a series of interviews of the suspect. Prior to each session, the suspect was informed of his *Miranda* rights and signed written waivers. He was never advised, however, that his sister had retained counsel for him, or that the counsel had called the police. The Court held that the police had followed acceptable *Miranda* procedures and established that the suspect properly waived his rights.

⁷⁰ *Id.* at 424.

⁷¹ The Court has never said that compliance with *Miranda* guarantees free will. *See, e.g., Brown v. Illinois*, 422 U.S. 590, 604 (1975) (explaining that although *Miranda* compliance establishes an absence of Fifth Amendment compulsion, it does not necessarily show an adequate exercise of free will so as to attenuate the connection between an illegal arrest and a subsequent confession).

an essentially factual assessment of free will, the post-*Miranda* approach explicitly relies upon psychological theory and data in constructing its bright lines and then applying them to particular cases.⁷² *Miranda*, therefore, did not introduce the idea of empirically ascertaining the freedom of a suspect's will as the Court had already moved in this direction in the pre-*Miranda* cases.⁷³ But in *Miranda* the Court sought to achieve better jurisprudence through science, by using psychology to enhance its empirical assessment of free will, and even to provide normative content. A more detailed discussion of the psychological theory and models used by the Court in *Miranda*, and its implications for the future, is undertaken in the next Part.

One final observation should be emphasized before proceeding: *Miranda* and its progeny are undeniably hostile to confessions. As Justice Harlan put it, "the thrust of the new rules [announced in *Miranda* is] . . . ultimately to discourage any confession at all."⁷⁴ To be fair, this is the only position that the Court could take and still be faithful to its underlying assumptions. If confessions are truly contrary to a suspect's best interest, if they are generally obtained using objectionable methods, if they are harmful to society, and if they undermine the adversary system, then they ought to be discouraged. Even the *Miranda* warnings themselves, taken verbatim from the opinion, betray the Court's antipathy towards confessions. In the *Miranda* Court's own words, "The warning of the right to remain silent must be accompanied by the explanation that anything said *can and will* be used against the individual in court."⁷⁵ Of course, the emphasized words are clearly wrong. A

⁷² E.g., *Miranda*, 384 U.S. at 448-55.

⁷³ See *supra* Part II.A.

⁷⁴ *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting). This anti-confession sentiment is reflected in later cases, as well as some that closely predate *Miranda*. E.g., *Michigan v. Tucker*, 417 U.S. 437, 448 n.23 (1974) (quoting *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964)) ("a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses' than a system relying on independent investigation").

⁷⁵ *Miranda*, 384 U.S. at 469 (emphasis added). This language has been adopted verbatim in most rights advisement protocols. In fact, Harold Berliner, who is credited with being the first to mass produce and market the *Miranda* rights warning cards to police departments around the country, recognized that the "can and will" language in the warning was incorrect.

The warning has been praised for its simplicity and clarity, but Berliner, who served as district attorney of Nevada County from 1957 to 1973, admitted in a recent interview that one phrase was superfluous, possibly even inaccurate. "Anything you say *can and will* be used against you in a court of law." Why *can and will*? Berliner

defendant's inculpatory statements may be used against him at trial, but this is not inevitable.⁷⁶ More importantly, exculpatory statements, especially those that are convincing, are far more likely to be used at trial for the defendant's benefit. Indeed, an exculpatory statement provided to investigators may obviate the need for a trial altogether. The only plausible explanation for the Court's hyperbolic advice is that it wanted the *Miranda* warnings to discourage suspects from confessing to police.

Beginning in the 1970s, the Court tacked somewhat toward the law and order camp,⁷⁷ rendering opinions that occasionally expressed a more

paused for a long while, looking slightly stunned at the notion his words needed polishing.

"It is not an exact statement of the truth of the situation. I would take 'and will' out," he said, shrugging. Berliner conceded that not *everything* will be used in court. In fact, most of it won't. But something about the rhythm of the sentence worked, and it has been repeated so often that it always seemed untouchable.

Blair Anthony Robertson, *No One Wants To Hear His Words: How Ex-DA Wrote Miranda Warning*, OUR TOWN, www.sacbee.com/static/archive/ourtown/history/miranda.html (last visited Aug. 25, 2006) (emphasis in original).

⁷⁶ For example, they may be subject to evidentiary exclusion, e.g., FED. R. EVID. 601 ("General Rule of Competency" of witnesses) (cited in *Colorado v. Connelly*, 479 U.S. 157, 167 (1986) (explaining 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 . . . and not by the Due Process Clause of the Fourteenth Amendment")), or constitutional objections, e.g., *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (suppressing a suspect's confession, in spite of the fact that he was read his *Miranda* warnings, because his confession was the fruit of a Fourth Amendment violation).

⁷⁷ See Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 352 (2004) ("A working majority of the Burger Court undertook a three-pronged offensive in support of the police."); see also *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) ("subsequent cases [to *Miranda*] have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming [*Miranda's*] core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief"). With the departure of Chief Justice Warren and other justices having a similar philosophy from the Court, "almost all Court watchers expected the . . . Burger Court to treat *Miranda* unkindly. They did not have to wait very long." Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 13 (1995) [hereinafter Kamisar, *Warren Court*]. As Bernard Schwartz put it, although the essentials of the Warren Court's jurisprudential edifice, including *Miranda*, was preserved, these cases "were modified, even narrowed and blunted in some ways" by the Burger Court. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 329 (1993). See generally LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* (1983) (contrasting the Court's approach to confessions before and after the *Miranda* decision). The Rehnquist Court that followed tilted "toward the right," as notably reflected in its criminal law decisions. SCHWARTZ, *supra*, at 372. See generally DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992) (discussing the Court's transition toward judicial conservatism).

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favorable attitude towards police⁷⁸ and acknowledged the practical utility of confessions.⁷⁹ This resulted in some retrenchment of *Miranda*'s procedural regime for police interrogations.⁸⁰ The Court, however, persisted in the same basic, normative understandings that undergirded both the *Miranda* line of cases and the earlier due process decisions—namely, that confessions are presumptively contrary to the self-interest of the confessor, and remaining silent is, at worst, the moral equivalent of truthfully confessing guilt.

⁷⁸ For example, in *New York v. Quarles*, the Court recognized an exception to *Miranda* based, in part, on its belief that the police act for a variety of laudable motives, including “their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.” 467 U.S. 649, 656 (1984). See *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 (2001) (explaining that the requested relief is not necessary, in part, because of the “good sense . . . of most . . . law-enforcement officials”); *Murray v. United States*, 487 U.S. 533 (1988) (majority rejects the dissent’s contention that police would routinely engage in illegal searches, consistent with broad independent source exception to the exclusionary rule, because obtaining a warrant can be inconvenient and time-consuming). Such reasoning represents a softening of the Court’s attitude toward the police, as compared to some of the Warren Court’s rhetoric. See *supra* note 32. This is not to suggest, however, that the Burger and Rehnquist Courts presumed the police always behaved benevolently. E.g., *Whren v. United States*, 517 U.S. 806, 810 (1996) (discussing pretextual police conduct); *Berkemer v. McCarty*, 468 U.S. 420, 433 (1983) (while the Court grants that generally “police behave responsibly and do not deliberately exert pressures upon . . . suspect[s] to confess” in misdemeanor traffic offense cases, the “same might be said of [the police with respect to] custodial interrogations of persons arrested for felonies”).

⁷⁹ E.g., *Davis v. United States*, 512 U.S. 452, 461 (1994) (acknowledging “the need for effective law enforcement” in a confession case); *Connelly*, 479 U.S. at 166 (acknowledging the “substantial cost” associated with suppressing a confession); *Oregon v. Elstad*, 470 U.S. 298, 312 (1985) (Court acknowledges the “high cost to legitimate law enforcement activity” associated with suppressing confessions); *Quarles*, 467 U.S. at 658 n.7 (exclusion of a confession because the police failed to comply with *Miranda* would, in some cases, “penaliz[e] officers for asking the very questions which are the most crucial to their efforts to protect themselves and the public”); *Michigan v. Mosley*, 423 U.S. 96, 102 (1975) (Court does not want to “transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.”).

⁸⁰ E.g., *Quarles*, 467 U.S. 649 (Court recognizes a “public safety” exception to the requirement that *Miranda* warnings be given before a suspect’s answers may be admitted into evidence.); *Michigan v. Tucker*, 417 U.S. 433 (1974) (*Miranda* protections are only prophylactic in character, and thus the fruits of a statement taken in violation of *Miranda* need not be excluded from trial.); *Harris v. New York*, 401 U.S. 222 (1971) (statements taken in violation of *Miranda* can be used to impeach the defendant’s trial testimony). Cf. *Arizona v. Fulminante*, 499 U.S. 279 (1991) (the wrongful admission of a coerced confession is subject to the harmless error analysis).

C. *The Solution: A "Principled" Approach*

Through all of these jurisprudential iterations and evolution, the Court has far too often "put aside childish [notions]"⁸¹ about the many obvious and intrinsic benefits of confessions cataloged above, fixating on *means* (how the police attempt to obtain a confession) to the exclusion of *ends* (whether a truthful and heartfelt confession is obtained). In so doing, the Court has acted as if those who favor encouraging confessions were naive at best and disingenuous at worst, and all of the wide-ranging advantages to be derived from confessions were less important than other competing values and considerations. But the Court's jurisprudence is even more troubling than this, as it often expresses disapproval rather than mere indifference towards confessions. Rather than starting with the premise that confessions are basically good things that ought to be encouraged and maximized, the Court typically begins with the presumption that confessions ought to be discouraged because they are probably either coerced,⁸² obtained through misleading advice or deceit,⁸³ or foolishly made,⁸⁴ and that their importance for law-

⁸¹ "When I was a child, I used to talk as a child, think as a child, reason as a child; when I became a man, I put aside childish things." 1 *Corinthians* 13:11. Perhaps *childlike*—rather than *childish*—is a better characterization of the favorable attitude towards confessions described earlier and advocated in this Article.

⁸² Early due process cases, such as *Brown v. Mississippi*, 297 U.S. 278 (1936), were concerned with extreme and outrageous police practices that were obviously coercive. The more recent *Miranda* cases proceed from the understanding that "compulsion inheres in custodial interrogation to such an extent that any confession, in any case of custodial interrogation, is compelled." Herman, *supra* note 48, at 735. In other words, the Court presumes that custodial interrogation, without the protection of the *Miranda* safeguards, will necessarily result in unconstitutional compulsion. Schulhofer, *Reconsidering Miranda*, *supra* note 48, at 447.

⁸³ Early due process cases, such as *Spano v. New York*, 360 U.S. 315 (1959), involved police deception (fledgling police officer falsely creates sympathy by the suspect for the officer, which the police exploit). See also *Moran v. Burbine*, 475 U.S. 412 (1986) (police questioning did not violate the *Miranda* requirements even though the police did not inform the suspect that his sister had retained an attorney for him and mislead the attorney who called wanting to speak with the suspect). The modern techniques employed by the police to obtain confessions have been described as having "many of the essential hallmarks of a confidence game." Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 *LAW & SOC'Y REV.* 259, 260-61 (1996) (footnote omitted) [hereinafter Leo, *Miranda's Revenge*]. See also Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation*, 18 *CRIME, L. & SOC. CHANGE* 35 (1992) (quoting William Hart, *The Subtle Art of Persuasion*, *POLICE MAGAZINE*, Jan. 1981, at 15-16 (today "interrogation is not a matter of forcing suspects to confess but of 'conning' them").

⁸⁴ E.g., *Dickerson v. United States*, 530 U.S. 428, 450 (2000) (Scalia, J., dissenting) (commenting that the *Miranda* majority was offended by the act of confession, as many who confess do so in a "fit of stupidity"); *Minnick v. Mississippi*, 498 U.S. 146, 166-67 (1990) (Scalia, J., dissenting) ("even if I were to concede that an honest confession is a foolish mistake, I would welcome rather than reject it").

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enforcement purposes has been grossly exaggerated and sometimes even intentionally overstated.⁸⁵ Put another way, the Court presupposes that guilty persons are naturally disinclined to confess, and it rejects the idea that confessions are intrinsically beneficial to a suspect's dignity or the common good.

The reasons for this "deep-seated distrust"⁸⁶ and "palpable hostility"⁸⁷ toward confessions are varied and complex. Some of it no doubt rests on a correct understanding of imperfect human nature. In the words of Justice Jackson, "It probably is the normal instinct to deny and conceal any shameful or guilty act[.]"⁸⁸ and from this it has been argued that any admission of culpability ought to be viewed with a certain degree of wariness.⁸⁹ No less an authority than Professor Inbau has observed that "Criminal offenders, except, of course, those caught in the commission of their crimes, ordinarily will not admit their guilt unless questioned under conditions of privacy, and for a period of several hours."⁹⁰

But the suspicion and hostility toward confessions that is often reflected in the Court's holdings and dicta are far more strident and insidious than Justice Jackson's words or even Professor Inbau's observations would logically suggest. To be sure, much of this animus can be traced to a historical record that is replete with examples of indefensible and sometimes outrageous practices for extracting

⁸⁵ For example, the *Miranda* Court's belief that the law-enforcement proponents had overstated the importance of confessions is specifically mentioned as a basis for the Court's holding in that case. *Miranda v. Arizona*, 384 U.S. 436, 479, 481 (1966) (although "not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances," the Court is not persuaded by the "recurr[ing] argument . . . that society's need for interrogation outweighs the privilege [to remain silent]").

⁸⁶ *Miranda*, 384 U.S. at 537 (White, J., dissenting).

⁸⁷ *Dickerson*, 530 U.S. at 450 (Scalia, J., dissenting).

⁸⁸ *Ashcraft v. Tennessee*, 322 U.S. 143, 160 (1944) (Jackson, J., dissenting). A judicial recognition of this human inclination to deny guilt was an important premise of the erstwhile exculpatory no doctrine, which held that a person cannot be charged with making a false statement for falsely denying guilt in response to an investigator's question. See *King v. Erickson*, 89 F.3d 1575, 1579 (5th Cir. 1996), *overruled by* *LaChance v. Erickson*, 522 U.S. 262 (1998).

⁸⁹ Of course, a contrary conclusion can be argued from this premise—assuming people tend to deny and conceal actual wrongdoing, then an admission of guilt is likely to be true because it would be counter-intuitive for a person to falsely confess. See *Hopt v. Utah*, 110 U.S. 574, 585 (1883) ("[O]ne who is innocent will not imperil his safety or prejudice his interests by an untrue [confession].").

⁹⁰ Inbau, *Police Interrogation*, *supra* note 21, at 17 (emphasis omitted).

confessions,⁹¹ and a belief by some that police will continue to employ such tactics if left to their own devices.⁹² Other observers dispute disparaging generalizations about police questioning, contending that police misconduct occurs only in “extraordinary cases, having no relation to the ordinary day-to-day operations of a police department.”⁹³ Quantifying the pervasiveness and magnitude of police abuse has remained elusive, however, largely because interrogations are typically conducted in private, which “results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.”⁹⁴

A principled approach to confessions would involve more than simply rejecting *Miranda* and its progeny and returning to good old pre-*Miranda* days, as these days were not so good. The earliest Supreme Court decisions were concerned with the reliability of confessions to the exclusion of other values,⁹⁵ and thus they did not properly account for the dignity of those confessing or the integrity of the criminal justice system. In later due process confession cases, the Court concentrated on preserving each suspect’s ability to exercise a sufficiently free will in choosing whether to confess without seeking, as it should have, to promote confessions that were truthful and heartfelt.⁹⁶ A principled and

⁹¹ *E.g.*, *Brown v. Mississippi*, 297 U.S. 278 (1936) (defendants whipped until they agreed to confess to such statements as the police dictated). *See also Miranda*, 384 U.S. at 446 n.6 (collecting cases involving especially egregious police conduct in obtaining confessions).

⁹² DRESSLER, *supra* note 18, at 430 (“if the police are left to their own devices to obtain confessions from persons they suspect are guilty, there is an enhanced risk that they will turn to inquisitorial techniques that . . . create an undue risk of false confessions [as well as] violate ‘the law’s ethical or moral responsibility[ies]’ toward suspects) (internal quotations omitted). This concern about future police misconduct in obtaining confessions is the predicate for the Court’s deterrent justification for pre-*Miranda* and post-*Miranda* exclusionary rules. *E.g.*, *Harris v. New York*, 401 U.S. 222 (1971) (exclusion of confessions based on *Miranda* violations justified to deter future police misconduct); *Ashcraft*, 322 U.S. 143 (pre-*Miranda* exclusion of confessions justified to deter future police misconduct).

⁹³ *Developments in the Law – Confessions*, 79 HARV. L. REV. 938, 940 (1966) [hereinafter *Developments*]. As one dissenting justice in *Miranda* put it, “the examples of police brutality mentioned by the Court [in the majority opinion] are rare exceptions to the thousands of cases that appear every year in the law reports.” 384 U.S. at 499-500 (Clark, J., dissenting).

⁹⁴ *Miranda*, 384 U.S. at 448; *Ashcraft*, 322 U.S. at 149-50 (“As to what happened in the fifth-floor jail room during this thirty-six hour secret examination the testimony follows the usual pattern and is in hopeless conflict.”). In *Miranda*, the Court explicitly referenced this “gap in our knowledge” as a justification for its relying on police manuals and texts as a basis for surmising what typically goes on during police interrogations. 384 U.S. at 448.

⁹⁵ *E.g.*, *Hopt v. Utah*, 110 U.S. 578, 584 (1884).

⁹⁶ *E.g.*, *Rogers v. Richmond*, 365 U.S. 534, 543-44 (1961) (admissibility of defendant’s confession was “answered by reference to a legal standard which took into account . . . [its] probable truth or falsity . . . [which] is not a permissible standard under the Due Process Clause of the Fourteenth Amendment”).

effective criminal justice system should do both: it ought to ensure that confessions are the product of a confessor's free will, as that concept is correctly understood and prudently applied, while simultaneously encouraging suspects to exercise their will by choosing to be candid with police and honestly admit any wrongdoing. These twin aspirations of preserving free choice and encouraging the right choice are complimentary, and one need not inevitably be sacrificed or shortchanged at the expense of the other.⁹⁷

The goals of choosing freely and choosing well can be promoted within the existing framework of *Miranda* and its progeny, but not without some important modifications. *Miranda*'s ostensible objective of ensuring that a suspect makes an informed choice regarding whether to confess is completely compatible with a correct understanding of the preeminence of a suspect's free will, and thus should be preserved. But the *Miranda* warnings ought to be expanded and improved, so that a suspect makes a better-informed and more meaningful decision about the benefits of confessing when deciding whether to speak with police. In other words, the present *Miranda* warnings should be augmented so that they do more than simply advise a suspect he has the right to choose whether to speak with police and warn him about the possibilities of self-incrimination; they also ought to explain to a suspect *why* he should speak candidly with police even if this would be self-incriminating. Before considering any of the proposed changes to the present approach to criminal confessions, however, it is necessary to understand the empirical (and especially, the psychological) studies that have fueled the misguided assumptions described here and that have created a system so in need of reform.

III. THE PSYCHOLOGY OF VOLITION: CONFESSION JURISPRUDENCE AND PSYCHOLOGICAL EMPIRICISM

The Court's normative assumptions about confessions (discussed in the previous Part) have remained largely unchanged over the last several decades because they have generally rested on similar jurisprudential values and decision-making sources. For over a century, the Court has increasingly viewed constitutional issues through the prism of legal

⁹⁷ See generally JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1996) (arguing each action must have its own justification, and if the law is to protect freedoms then it is permissible and even necessary to make judgments about the quality of actions).

realism and empiricism,⁹⁸ which assume that the judicial decisions should be based on all the facts and data pertaining to a particular case rather than upon legal rules expressing abstract notions of truth, justice, the common good, and human dignity.⁹⁹ This empirical approach to judicial decision-making attained preeminence through the influence of legal realists such as Chief Justice Oliver Wendell Holmes, who once famously observed “the man of the future is the man of statistics and the master of economics.”¹⁰⁰ Holmes and others like him believed that man and his laws are merely material in nature, which contrasted sharply with the traditional understanding of man as a moral creature having responsibilities towards God and his fellow man.¹⁰¹

As the courts have become increasingly receptive to using empirical sources in all forms, traditional understandings of free will and voluntariness have been gradually replaced by expansive reliance on ostensibly deductive explanations for the same concepts.¹⁰² This

⁹⁸ Ian McLean expresses the ascendance of this jurisprudential approach as follows:

The dominant American legal paradigm is in broad outlines secular and positivist. It speaks and acts as though “moral values derive their source from human experience[:] Ethics is autonomous and situational, needing no theological or ideological sanction.” Moral principles enforced by law are simply chosen by the community from an infinite range of possibilities through the application of supposedly scientific standards to selected data.

Ian A.T. McLean, *Criminal Law and Natural Law*, in COMMON TRUTHS: NEW PERSPECTIVES ON NATURAL LAW 259, 280 (Edward B. McLean, ed., 2000) (internal quotations and citations omitted) (emphasis omitted). See generally Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115, 122 (2003). “Where the Supreme Court has viewed legislative hypotheses, predictions, theories, and claimed causal relationships as novel or implausible, it has applied a heightened empiricism, one which demands evidence of a real harm or evil and seeks to quantify the legislative predicate.” *Id.*

⁹⁹ JOHN HENRY SCHEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 3 (1995).

¹⁰⁰ Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897).

¹⁰¹ See generally Francis Cardinal George, *Law and Culture*, 1 AVE MARIA L. REV. 1 (2003).

¹⁰² As Professor Blumenthal has noted:

The use of social science—of psychology in particular—to inform legal theory and practice is fast becoming the latest craze in the pages of legal academia. Books and symposia have recently been devoted to the interplay between psychology and law and between emotions and the law, and to the application of other psychological and social scientific research to legal questions. An increasing number of such articles are appearing in the legal literature; prestigious law journals, for instance, are showing an increased willingness to publish empirical work by both lawyers and psychologists.

Jeremy A. Blumenthal, *Law and Social Science in the Twenty-First Century*, 12 S. CAL. INTERDIS. L.J. 1, 1 (2002). See also Timothy Zick, *Constitutional Empiricism: Quasi-Neutral*

conflation of law and science has been particularly pronounced with regard to confession jurisprudence and the use of psychology.¹⁰³ As a consequence, any thorough consideration of the Court's approach to police interrogations would be incomplete without at least a brief review of the psychological theories¹⁰⁴ that have influenced past judicial

Principles and Constitutional Truth, 82 N.C. L. REV. 115 (2003) (discussing the adoption of empirical data by courts in the realm of constitutional law).

¹⁰³ See *Missouri v. Seibert*, 542 U.S. 600, 602 (2004) (discussing the "psychological skill" of police investigators); *Burger v. Kemp*, 483 U.S. 776, 811 (1987) (Blackmun, J., dissenting) (examining the "psychological problems" of the defendant, as provided by a psychologist's testimony at trial); *Miranda v. Arizona*, 384 U.S. 436, 452-53 (1966) (providing examples of psychological interrogation ploys such as the "Mutt and Jeff" method); *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960) (declaring a confession involuntary when the "evidence indisputably establish[ed] the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed"); *Spano v. New York*, 360 U.S. 315, 322 (1959) (taking into account defendant's "emotional instability"); *Fikes v. Alabama*, 352 U.S. 191, 196 (1957) (reasoning that the inadmissibility of the defendant's confession was due to, among other factors, the fact that he was "certainly of low mentality, if not mentally ill"). For a more complete discussion of the relationship of confession law and psychology, see Stephen J. Thurman et al., *Miranda in Comparative Law*, 45 ST. LOUIS U. L.J. 581 (2001).

¹⁰⁴ This undertaking begs a preliminary question: is psychology a science? Few would dispute that portions of psychology, and especially psychoanalysis, is not a "hard" science like chemistry or physics. Indeed, some aspects of psychology may not even be a proper science at all, for when one says that a person confesses either because of appropriate guilt, shame, or conscience, or "inappropriately" because of psychic service to come compulsion neurosis, see OTTO FENICKEL, *THE PSYCHOANALYTIC THEORY OF NEUROSIS* 268-74 (1945), this judgment seems to be much more in the nature of a metaphysical expression than an empirical fact. Science is epistemological and metaphysics is ontological. With the advent of psychology and psychoanalysis, the contradiction of "scientific metaphysics" was introduced.

The contradiction can be briefly illustrated. In the Freudian system, "conscience" is incorporated into the theory of psychic mansions: the id, ego, and superego. The superego is the parental and social censor, the "repressed" and redirected conscience now configured to the "yes" and "no" of the culture. Dr. Otto Fenickel, a disciple of Freud, contends that in the neurotic "[a] portion of the ego has become an 'inner mother,' threatening a possible withdrawal of affection" via internalized parental prohibitions. *Id.* at 102. Neurosis results either from losing or improperly resolving the Oedipus complex and the maturation of the superego. For those who inadequately negotiate this, certain levels of anxiety change into guilt feelings and then the ego behave toward the superego as it once behaved toward a threatening parent whose affection and forgiveness is needed. *Id.* at 102-03. In Fenickel's construct, "[p]olicemen or bogeymen represent these 'externalized pre-superegos.'" *Id.* at 103. Manifestly, the Freudian paradigm, like various later psychological theories, is a vast metaphysical system. It is not verifiable by the reductive, controlling, and predictive praxology of science. Neither, I would contend, is it universally valid—nor is it as deep, rich, wise, and true—as is a metaphysics grounded in ontology and Christian anthropology.

Despite the problematic status of psychoanalysis and other similar components of psychology as a true science, the Court, like the culture more broadly, has accepted it as such without differentiation. While Part IV will not directly contest the characterization of psychology as a science—in fact, it accepts that certain aspects of the vast field of

decisions pertaining to criminal confessions, and those that are likely to hold sway in the future.¹⁰⁵

In order to better comprehend and critique the Court's so-called scientific approach to confessions, it is necessary first to have an understanding of the development of modern psychology and the Court's growing reliance upon it. Accordingly, this Part begins by presenting a brief history of psychology as a distinct area of study and its early usage by the courts, culminating with *Miranda's* explicit reliance on the Reid Model. It next recounts how recent interactive approaches have been developed within the psychology community in response to scientific criticisms of the Reid Model, and how these newer models have started to influence the courts. It finally considers the implications of judicial reliance on the interactive models, both in light of the scientific debate as to their reliability and in view of their flawed assumptions. Part III concludes that the substantial disagreement within the psychological community (and even among the various interactive hypotheses themselves), as well as the incomplete and professedly amoral nature of contemporary psychology generally, counsel that courts¹⁰⁶ and other decision-makers should be wary in relying upon these empirical sources when establishing general standards for the admissibility of confessions. A consideration of the broader philosophical and jurisprudential implications of the assumptions underlying the psychological methods is undertaken next in Part IV.

psychology are scientific—it will expose some of the many problems associated with adopting an empirical approach to confession jurisprudence that accepts at face value the scientific character of psychology.

¹⁰⁵ Some have urged the relevance of other social sciences, besides psychology, in fashioning confession jurisprudence. *E.g.*, Kamisar, *Warren Court*, *supra* note 77, at 18 (applying sociolinguistic research to the holding in *Davis v. United States*, 512 U.S. 452 (1994), finding that the *Edwards* rule does not apply unless the suspect unambiguously asserts his right to counsel). The relevance of other social sciences to confession jurisprudence is beyond the scope of this Article.

¹⁰⁶ The argument here involves more than a simple recognition of the unsuitability of courts to gather and use empirical data. *See* *GM v. Tracy*, 519 U.S. 278, 308 (1997) (the courts are “institutionally unsuited to gather the facts upon which economic predictions can be made”). In general, Congress has a greater institutional capacity to obtain and act on the basis of facts than do courts: for example, Congress has constant contact with constituents while courts are more isolated; and, Congress has resources to study problems and issues, and it can do so proactively, while courts are dependent on litigants. Part III instead addresses the special problems associated with the judicial use of psychological empiricism.

A. *The Psychology*¹⁰⁷ of Miranda: *The Rise and Fall of the Reid Model*

The birth of modern psychology is often attributed to the works of Sigmund Freud, who hypothesized that individual personalities are largely derived from the irrational impulses of the subconscious.¹⁰⁸ As the scientific community came to reject Freud's approach,¹⁰⁹ many of those who criticized Freud for engaging in overly simplistic assessments of scientific phenomenon and the interrelationship between man and the environment developed so-called "social-psychological" models,¹¹⁰ which tried to "bridge the gap between the broad environmentalism of sociology and the narrow individualism of psychological or biological theories."¹¹¹ This approach found expression in various "social-process" theories for explaining behavior, so named because they focus on both

¹⁰⁷ The many usages of the term "psychology" can be confusing. Unless otherwise indicated in this Article, "psychological" and "psychology" are used in their colloquial sense. The exception arises below in the discussion of the "purely psychological" theories of confession. Here, "psychological" carries its technical definition, which is motivated by a study of the way individuals perceive their own actions, and is so distinguished from the "social-psychological" models. See *infra* Part III.B (discussing social-psychological models).

¹⁰⁸ Though Freud's writings gave the role of the subconscious new emphasis in the scientific realm, accounts of the internal struggle between a person's subconscious mind and his rationality can be found in much earlier works, such as Sophocles's plays and the writings of medieval thinkers such as Augustine. SARAH TRUELOVE ET AL., PATTERNS IN WESTERN CIVILIZATION 216 (3d ed. 2003). The courts have consulted and applied Freudian psychoanalytic theories in only a few scattered cases. See *Miller v. United States*, 320 F.2d 767, 772 (D.C. Cir. 1963) (focusing on the role of guilt in Freudian analysis as applied in criminal cases); *United States v. Torniero*, 570 F. Supp. 721, 725 (D. Conn. 1983) (examining the psychological tendencies of a compulsive gambler).

¹⁰⁹ Though Freud's work brought about a shift in psychological thought, psychologists and others within the scientific community have roundly criticized Freud's theories. For a general discussion of these criticisms, see C. BADCOCK, ESSENTIAL FREUD (1988); A. BERNSTEIN & G. WARNER, AN INTRODUCTION TO CONTEMPORARY PSYCHOANALYSIS (1981); E. KURZWEIL, THE FREUDIAN ESTABLISHMENTS (1989); O. A. OLSEN & S. KOPPE, THE PSYCHOANALYSIS OF FREUD (1988); J. REPPEN, BEYOND FREUD (1984). Yet while the scientific community has grown largely skeptical of Freud's approach, most psychologists nonetheless continued to presume that human behavior is at least partly motivated by the workings of the subconscious. See, e.g., GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS 123-24 (2003).

¹¹⁰ Social-psychological models attempt to explain a person's behavior through balancing the individual perceptions emphasized by the "purely psychological" theories and the broad impact of a person's social environment. LAWRENCE S. WRIGHTSMAN ET AL., PSYCHOLOGY AND THE LEGAL SYSTEM 104 (4th ed. Brooks/Cole Publ'g Co. 1998). While social-psychological models all stress the importance of understanding the interaction of the individual perception with the individual's social environment, the models vary greatly depending on which of these two factors—individual assessment or environment—is emphasized.

¹¹¹ *Id.*

the internal and external processes that can cause a person to engage in criminal conduct.¹¹²

In *Miranda*, the Supreme Court was profoundly influenced by social-process thinking, and, in particular, the psychological tactics of the Reid Technique,¹¹³ when it considered the admissibility of confessions with regard to the psychological coerciveness of police interrogation strategies.¹¹⁴ By the 1960s when *Miranda* was decided, the Reid Model, developed by Brian C. Jayne¹¹⁵ to help explain the Reid Technique for police questioning, had become the preeminent social-process approach to confessions. It describes interrogation as “the psychological undoing of deception.”¹¹⁶ According to the Model, criminal deception is a conditioned avoidance mechanism, i.e., it is a means for “avoiding the . . . consequences of being truthful.”¹¹⁷ Successful, undetected lying encourages future lying.¹¹⁸ Conversely, successful socialization teaches that lying is “wrong” and causes liars to experience anxiety.¹¹⁹

Because apprehensiveness can lead to confessions,¹²⁰ the Reid Technique concentrates on methods by which police can increase a suspect’s anxiety and then take advantage of his discomfort during an interrogation.¹²¹ Although most psychologists agree that the Reid

¹¹² *Id.* at 118 (emphasis omitted). The models of these processes can then be further divided into those based on control theories, which is to say those assuming that “people will behave antisocially unless they are trained not to by others,” and those based on learning theories that concentrate on criminal behavior as a learned trait. *Id.*

¹¹³ The Reid Technique is a nine-step interrogation method first published by John Reid and Fred Inbau in the early 1960s. For a fuller explanation of the Reid Technique, see FRED E. INBAU & JOHN E. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* (1962).

¹¹⁴ *Miranda v. Arizona*, 384 U.S. 436, 456-58 (1966).

¹¹⁵ Jayne was a colleague of Reid and Inbau. He differentiates between the Reid Technique (the official method taught for police interrogation) and the Reid Model (Jayne’s psychological analysis of why suspects confess as a result of the Technique). For a general discussion of Jayne’s principles and method in developing the Reid Model, see Brian C. Jayne, *The Psychological Principles of Criminal Interrogation: An Appendix*, in FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 327-47 (3d ed. 1986).

¹¹⁶ GUDJONSSON, *supra* note 109, at 118. Though Gudjonsson’s work centers primarily on the Cognitive Behavioral Method, a later psychological theory concerning confessions, he provides a good historical overview of the Reid Model and its influences on confessions law, both within the United States and abroad.

¹¹⁷ *Id.*

¹¹⁸ See Jayne, *supra* note 115, at 328.

¹¹⁹ *Id.*

¹²⁰ GUDJONSSON, *supra* note 109, at 118.

¹²¹ FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* xii (4th ed. 2001). An introduction to a more recent account by Reid and Inbau explained: “We are opposed . . . to the use of force, threats of force, or promises of leniency. We do approve, however, of psychological tactics and techniques that may involve trickery and deceit; they are not

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Technique “represents a potentially very powerful way of breaking down resistance during interrogation,”¹²² many also object to its heavy reliance on “trickery and deceit” and use of “considerable psychological manipulation and pressure.”¹²³ These critics contend that the Technique’s purpose is to override the will of the suspect through the imposition of the interrogator’s will.¹²⁴

Referring principally to the Reid Technique, the *Miranda* Court condemned psychologically manipulative police questioning,¹²⁵ finding it to be inherently coercive and ultimately unconstitutional, at least without a preceding rights warning and waiver.¹²⁶ Although the Court has, on occasion, been self-critical of its reliance in *Miranda* on the Reid Model and Technique,¹²⁷ it has never since doubted that psychological

only helpful but frequently indispensable in order to secure incriminating information from the guilty or to obtain investigative leads from otherwise uncooperative witnesses or informants.” *Id.*

¹²² GUDJONSSON, *supra* note 109, at 120.

¹²³ *Id.* at 10. In particular, the Reid Model postulates that suspects confess “when the perceived consequences of a confession are more desirable than the anxiety generated by the deception.” *Id.* at 118. The Reid Technique seeks to exploit this reaction by “[b]reaking down denials and resistance[,] [thereby] [i]ncreasing the suspect’s desire to confess.” *Id.* at 11. A suspect is broken primarily through an evaluation and exploitation of his *expectancy*, *persuasion*, and *belief*. Jayne, *supra* note 115, at 333. Consistent with the theory, police officers are taught to obtain confessions by manipulating a suspect’s expectancy (or what he identifies as desirable) through persuasion, or by changing a suspect’s “beliefs in the structure of internal messages that tend to support or refute an expectancy.” *Id.* The Reid Model describes two types of perceived consequences that affect a suspect’s expectancy: *real* consequences, which may involve fines or incarceration, and *personal* consequences, relating to damaged self-esteem or integrity. GUDJONSSON, *supra* note 109, at 118. Jayne’s work suggests that the suspect’s perception of these two types of consequences require two forms of persuasion. See Jayne, *supra* note 115. To alter the perceived *real* consequences, a police officer must exploit a suspect’s defense mechanisms by emphasizing the sentencing reductions that a confession might yield as compared to a conviction without confession. *Id.* at 332-35. Expected *personal* consequences, on the other hand, are best altered through sympathy and compassion in order to reduce the guilt and shame associated with confessing. *Id.*

¹²⁴ Cf. GUDJONSSON, *supra* note 109, at 120. “[T]he success . . . depends on the extent to which the interrogator is successful in identifying psychological vulnerabilities, exploiting them to alter the suspect’s belief system and perceptions of the consequences of making self-incriminating admissions and persuading him to accept the interrogator’s version of the ‘truth.’” *Id.*

¹²⁵ *Miranda v. Arizona*, 384 U.S. 436, 456 (1966).

¹²⁶ *Id.* at 457-58.

¹²⁷ See, e.g., *New York v. Quarles*, 467 U.S. 649, 654 (1984) (“The Fifth Amendment itself does not prohibit all incriminating admissions; [a]bsent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.” The *Miranda* Court, however, presumed that interrogation in certain custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda*

theory and data ought to play a central role in determining the voluntariness of a confession.¹²⁸

From the perspective of the psychological community, a principle objection to the Reid Model and similar approaches¹²⁹ is that they are reactive, i.e., they place too much emphasis on practical experience and police manuals as opposed to tested scientific hypotheses.¹³⁰ Psychologists in the main ultimately rejected the Reid Model because it fixated on police interrogation techniques to the exclusion of other

rights and freely decides to forgo those rights.”) (quoting *United States v. Washington*, 431 U.S. 181, 187 (1977)) (citations omitted).

¹²⁸ Since the *Miranda* decision, many Supreme Court decisions have cited to the *Miranda* court’s use of the Reid Model as influencing the Court’s reasoning in that decision. See *Missouri v. Seibert*, 542 U.S. 600, 602 (2004); *Stansbury v. California*, 511 U.S. 318, 323 (1994); *Colorado v. Spring*, 479 U.S. 564, 580 (1987); *Moran v. Burbine*, 475 U.S. 412, 459 n.45 (1986); *Oregon v. Elstad*, 470 U.S. 298, 328 (1985); *James v. Arizona*, 469 U.S. 990, 996 (1984); *Rhode Island v. Innis*, 446 U.S. 291, 306 (1980). For a discussion of this trend from the perspective of an advocate of *Miranda*’s reliance on the Reid Model, see Weisselberg, *supra* note 32.

¹²⁹ One variant, which has gained considerable influence in the United Kingdom, is the Decision-Making Model. It is related to social choice theory and was developed by Hilgendorf and Irving in the early 1980s. Hilgendorf and Irving’s model postulates that although a suspect may discount the objective, legal ramifications of the confession, he is likely to be influenced by more subjective factors, such as those “related to self and social approval and disapproval.” GUDJONSSON, *supra* note 109, at 121. The Model was conceived after reviewing the Royal Commission on Criminal Procedure’s report regarding the criminal interrogation process in the United Kingdom. The Decision-Making Model contends that when a criminal suspect is interrogated, he becomes entangled in a complex decision-making process, causing him to weigh a number of values and possibilities for action. *Id.* at 120-21. Among the most important of these are “whether to speak or remain silent, whether to make self-incriminating admissions or not, whether to tell the truth or not, whether to tell the whole truth or only part of the truth, and how to answer the questions asked by the police interrogator.” *Id.* at 120. Despite their differences, the Decision-Making Model and Reid Model both emphasize the role of the police officer vis-à-vis the suspect, and they both hold as an underlying assumption that a suspect would not confess absent the influence of the interrogating officer.

¹³⁰ Many within the psychological community, as well as the public outside the psychological context, also object on ethical bases to Reid’s use of deceit:

Another problem relates to ethical and professional issues. Many of the tactics and techniques recommended [by the Reid Model and Technique] encourage the police officer to employ trickery, deceit and dishonesty. Although such measures are commonly allowed in American courts, they raise very serious questions about the ethical nature of this form of interrogation. Public awareness of this kind of police behaviour must inevitably undermine the public’s respect for the professionalism of police officers. Deception and trickery will also cause resentment among suspects and are likely to increase the likelihood that the confession will be disputed at trial.

Id. at 37.

external and internal factors that might lead suspects to confess.¹³¹ Ironically, it is this same psychologically discredited emphasis on police practices that resonated so powerfully with the Warren Court in *Miranda* and continues to echo throughout later confessions cases.¹³² Since the *Miranda* decision, the Court has trended away somewhat from disapproving police aggressiveness to accepting some level of police pressure as a component of effective crime control.¹³³ Roughly during this same period, the psychology of confessions has moved from earlier police-centric approaches to models that incorporate a much wider array of considerations and influences.¹³⁴ These more expansive psychological models are reviewed next in Part III.B.

¹³¹ *Id.* at 25-27.

¹³² See, e.g., *Colorado v. Connelly*, 479 U.S. 157 (1986) (emphasizing that a confession will not be ruled involuntary absent a finding of police coercion). Many psychologists have criticized the Court's decision in *Connelly* as placing too great an emphasis on police activity, while at the same time de-emphasizing the importance of the suspect's own psychological state. One writer opined that, after *Connelly*, "Concerns for reliability and preservation of 'free will' fell by the wayside as, in the interests of administrative ease and consistency, courts were removed from the business of looking into a defendant's mind in order to determine the voluntariness of his or her confession." P.T. Hourihan, *Earl Washington's Confession: Mental Retardation and the Law of Confessions*, 81 VA. L. REV. 1471, 1503 (1995).

¹³³ See generally Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 189-97 (1983) (contrasting the Warren Court's application of *Miranda* with that of the Burger Court). This trend of carving exceptions from the Warren Court's decisions to facilitate criminal investigation was not limited to the Court's treatment of confessions. More broadly, the Burger Court also

refused to apply the [F]ourth [A]mendment's warrant requirement to a broad range of police investigatory practices, weakened the strength of the warrant's particularity requirement, enhanced the power of the police to stop and frisk, diluted the prosecutor's duty to disclose exculpatory evidence, discouraged the use of civil suits to remedy alleged police and prosecutorial misconduct, and curtailed the privilege against self-incrimination.

Id. at 193 (citations omitted).

¹³⁴ Though there appears to be little evidence to indicate a corresponding relationship between these two trends, both the jurisprudential and psychological understandings of confessions have broadened over the past four decades. Courts, however, have been generally hesitant to expand the law of confessions to consider the admissibility of an admission made in the absence of police coercion. *But see* *United States v. Zerbo*, No. 98 CR. 1344(SAS), 1999 WL 804129, at *1 (S.D.N.Y. Oct. 8, 1999) (concluding that police interrogation of a 53-year-old man who was mentally disabled was "unconstitutionally coercive in light of his disabilities"). Modern psychology, on the other hand, is more willing to view police behavior as merely one of a number of factors that contribute to a suspect's decision to confess. See *infra* Part III.B.

B. *Post-Miranda Psychology and Beyond: Interactive Models and the Courts*

The newer, more comprehensive¹³⁵ psychological approaches are embodied in the so-called “social-psychological” or “interactive” models, which have predictably begun to influence judicial decision-making with respect to criminal confessions.¹³⁶ Social-psychological models attempt generally to explain a person’s behavior by balancing individual perceptions emphasized by the “purely psychological” theories, of which psychoanalysis is one example, with the broad impact of a person’s social environment.¹³⁷

All social-psychological models stress the importance of understanding the interaction between an individual’s perception and his social environment. They vary greatly, however, depending on which of these two factors—individual assessment or environment—is emphasized. Rather than presuming the criticality of one factor, the

¹³⁵ “Comprehensive” in this sense refers only to the attempt by interactive models to incorporate a wider variety of personal and environmental factors in order to better understand confessions. The models are somewhat akin to “totality of the circumstances” made by courts applying the due process voluntariness standard. See *supra* Part II.A. The comprehensive approach has often been criticized within the psychological community, however, because of difficulty in controlling the vast number of psychological variables and differing opinions regarding the relative levels of importance to be ascribed to each. For example, this difficulty in controlling variables in the study of confessions is particularly evident with respect to the studies concerning the impact of the accused’s age on his decision whether to confess. See, e.g., D. W. Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 J. CRIM. L. & CRIMINOLOGY 103, 107 (1974) (hypothesizing that suspects who are more mature are better able to resist police interrogation). One psychological study found that juveniles in Colorado were more than twice as likely to confess as those over 25 years of age. L. S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENVER L.J. 1, 19 (1970). A later study concluded a suspect’s age has a demonstrable but less significant impact on the rate of confessions. C. PHILLIPS & D. BROWN, *ENTRY INTO THE CRIMINAL JUSTICE SYSTEM: A SURVEY OF POLICE ARRESTS AND THEIR OUTCOMES* (1998) (62% admission rate for juveniles, 54% for adults). Still other studies determined that age is not a significant factor with respect to confessions. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 291 (1996) (no significant difference in confession frequencies among different age groups); Neubauer, *supra* (finding no statistically significant relationship between confessions rates of those ages 16-20 and over 21). Indeed, some researchers treat age itself differently, as if it encompasses a combination of factors rather as a discrete variable. See GUDJONSSON, *supra* note 109, at 142 (describing “temperamental differences related to age” as a combination of related factors such as “neuroticism, impulsiveness and venturesomeness”).

¹³⁶ See *infra* note 165, listing cases in which the Court considered psychological matters addressed by the interactive models and showed a greater willingness to consider this when determining the voluntariness and admissibility of a suspect’s confession.

¹³⁷ See WRIGHTSMAN ET AL., *supra* note 110, at 104.

newer interactive¹³⁸ (or integrative) models apply a deductive approach in which all of the variables that might lead a suspect to confess are studied, and from this examination the factors that prove to be the most influential are deduced.¹³⁹

All interactive models thus begin by acknowledging that confessions are the product of “a particular relationship between the suspect, the environment and significant others within that environment.”¹⁴⁰ They each also describe confessions as a bridge between antecedent factors and the consequences of confessing. Antecedent factors occur prior to the investigation and may strongly influence a suspect to confess.¹⁴¹ The consequences of confessing can be manifested immediately thereafter or much later in time.¹⁴² While interactive models may disagree about the pertinence and relative weight of particular antecedent factors and

¹³⁸ The term “interactive” is not one that is uniformly employed throughout the field of psychology. The approach referenced here is alternatively referred to as interactive process models, *see* GUDJONSSON, *supra* note 109, at 124, or integrated models, *see* WRIGHTSMAN ET AL., *supra* note 110, at 124. For purposes of this Article, the term “interactive models” incorporates all such approaches.

¹³⁹ *Cf.* WRIGHTSMAN ET AL., *supra* note 110, at 125 (explaining the study of the individual and societal characteristics that predominates modern psychology). As one psychologist has explained:

No single variable causes all crime, just as no one agent causes all fever or upset stomachs. However, several causal factors are associated reliably with criminality. Any one of these factors will sometimes be a sufficient explanation for criminal behavior; more often, however, they act in concert to produce criminality. . . . Our model emphasizes the etiological principles that we believe are among the best supported findings in criminological research.

Id.

¹⁴⁰ GUDJONSSON, *supra* note 109, at 124.

¹⁴¹ *Id.* at 125.

¹⁴² *Id.*

consequences, they all acknowledge the importance of biological,¹⁴³ environmental,¹⁴⁴ and psychological¹⁴⁵ considerations generally.¹⁴⁶

The distinctive attribute of the interactive models—i.e., that which sets them apart from earlier psychological theories (such as the Reid Model)¹⁴⁷—is that the relevant factors pertaining to a suspect are not viewed in isolation or a contextual vacuum. Rather, each factor is considered to be mutually dependent on all of the others, albeit to varying degrees.¹⁴⁸ This interrelation of factors with regard to confessions is illustrated by the manner in which modern social-psychologists view guilt, shame, and relief.¹⁴⁹

¹⁴³ Relevant biological factors include a suspect's genetic composition and neurotransmission, his testosterone level and strength, and his physiological status during the interrogation. See WRIGHTSMAN ET AL., *supra* note 110, at 126 fig.5-1; James W. Pennebaker et al., *The Psychophysiology of Confession: Linking Inhibitory and Psychosomatic Processes*, 52 J. PERSONALITY & PSYCHOL. 781-93 (1987). Physiological responses might include the suspect's increased heart rate and blood pressure, perspiration, and respiratory difficulties. *Id.* Although these physical manifestations tend to return to fairly normal levels immediately following a confession, the building tension and uncertainty experienced by a suspect over time will often cause these elevated physiological processes to reoccur. *Id.*

¹⁴⁴ Environmental factors, in contrast, involve any of the "external influences" that may cause a suspect to confess, ranging from isolation from family and friends to the many dynamics relating to the interrogation itself, including the specific techniques used by the police. See GUDJONSSON, *supra* note 109, at 126.

¹⁴⁵ The psychological considerations contemplated by interactive models are particularly wide ranging. They include a suspect's general predispositions, such as IQ and empathetic or psychopathic tendencies, as well as his emotional and cognitive status at the time of the interrogation. See WRIGHTSMAN ET AL., *supra* note 110, at 126 fig.5-1. Other factors concern a suspect's subjective sensibilities and reactions at the time of the confession or afterward, whereas the cognitive elements focus more on a suspect's mental perceptions and thought process during this period. *Id.*

¹⁴⁶ Another example of an interactive model, the Cognitive Behavioral Model ("CBM"), is discussed in detail in GUDJONSSON, *supra* note 109, at 124-28. The CBM divides relevant considerations into five categories: social, emotional, cognitive, situational, and physiological factors. The CBM approach is similar to that set out in WRIGHTSMAN ET AL., *supra* note 110, at 124-28, with further delineation of the psychological (involving the emotional and cognitive factors) and environmental (which encompasses the social and situational considerations) groupings.

¹⁴⁷ In the broadest sense, the Reid Model uses social-psychological methods to reconcile the individual motivations of the suspect with the external pressures exerted by police interrogators. See WRIGHTSMAN ET AL., *supra* note 110, at 104. Yet, as was noted earlier, the Reid Model concentrates on the interrogator's role in altering a suspect's decision-making process to the virtual exclusion of other influences.

¹⁴⁸ See WRIGHTSMAN ET AL., *supra* note 110, at 125-26.

¹⁴⁹ Numerous definitions of guilt, shame, and relief can be found within psychology, which sometimes focus on seemingly minor disagreements as to the cause and connotation.

According to the interactive models, guilt arises when a past action is inconsistent with a suspect's conscience.¹⁵⁰ Shame results from the public exposure of the suspect by an accusation and through interrogation.¹⁵¹ These two emotions, although inter-related, can prompt radically different behavior. Guilt may lead a suspect to reparative and rehabilitative action. Shame, on the other hand, often strengthens a suspect's sense of denial and increases his desire to hide from the public spotlight.¹⁵² Guilt and shame might also be accompanied by biological responses, such as heightened heart rate, blood pressure, or levels of perspiration.¹⁵³

Interactive theory acknowledges that a confession can have superficial, short-term benefits for confessors. Guilt may prompt a suspect to confess,¹⁵⁴ which can lead to an immediate sense of relief because some of the uncertainty felt by a suspect stemming from his misconduct has thereby been resolved.¹⁵⁵ A suspect may even believe that by confessing, he is satisfying some unspecified need to discuss his actions openly with someone else, including police.¹⁵⁶ In contrast, interactive theory holds that the long-term emotional effects of a confession are detrimental to confessors, and they are generally marked by humiliation, disgrace, and shame.¹⁵⁷ As time passes, confessors may experience these feelings because of public condemnation and their need to inform loved ones about their wrongdoing and try to explain it.¹⁵⁸

A suspect may also experience cognitive relief, similar to the emotional relief discussed above, as an immediate consequence of

This general discussion undertaken here is intended only to provide broad observations as to those understandings that have achieved some consensus within the field.

¹⁵⁰ J.P. Tangney, *Assessing Individual Differences in Proneness to Shame and Guilt: Development of Self-Conscious Affect and Attribution Inventory*, 59 J. PERSONALITY & SOC. PSYCHOL. 102, 102 (1990). The use of "conscience" here does not refer to the understanding of moral conscience discussed later in Part IV of this Article. Rather, it is the motivating psychological element "associated with some real or imagined past transgression that is inconsistent with the person's internalized values and standards." GUDJONSSON, *supra* note 109, at 126.

¹⁵¹ *Id.*

¹⁵² Tangney, *supra* note 150, at 102-05.

¹⁵³ See Pennebaker, *supra* note 143, at 782-83.

¹⁵⁴ Tangney, *supra* note 150, at 103.

¹⁵⁵ Jonathan L. Freedman et al., *Compliance Without Pressure: The Effect of Guilt*, 7 J. PERSONALITY & SOC. PSYCHOL. 117, 117-24 (1967).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ GUDJONSSON, *supra* note 109, at 126-27.

confessing.¹⁵⁹ This consolation may be disturbed, however, by a suspect's unresolved confusion regarding the underlying facts of the case and the legal impact of his confession at a criminal trial.¹⁶⁰ Over time, these uncertainties and doubts will often dominate a suspect's long-term perceptions.¹⁶¹ A suspect may even seek to retract his confession or explain it away in an attempt to mitigate these powerful feelings.¹⁶²

In summary, all of the interactive models hypothesize that certain discrete factors contribute to the rendering of a confession, and that these factors exert varying relative influence in the process. In accordance with the scientific method,¹⁶³ specific hypotheses regarding these factors and their influence are tested in order to verify or refute them, based largely on empirical data gathered by researchers. The data used for these purposes, however, is often inconclusive as a matter of science and especially problematic when applied outside of a strict psychological context. A particularly confounding and pervasive difficulty involves the practical inability to identify all of the variables at play and then accurately calibrate their relative weight. Scientists typically address these imponderables by using statistical correlations, which can render the reliability and utility of data-based conclusions even more dubious.

Despite these scientific limitations, however, these models often provide ostensibly convincing explanations for confessions,¹⁶⁴ which, not surprisingly, have begun to influence courts.¹⁶⁵ The increasing judicial

¹⁵⁹ *Id.* at 127.

¹⁶⁰ *See id.* at 125 tbl.5.1.

¹⁶¹ *Id.* at 127.

¹⁶² *Id.*

¹⁶³ [T]he steps of a scientific method are: 1) observing the empirical facts; 2) analyzing the accumulated data into general categories; 3) forming a tentative hypothesis that will explain the observed data; and 4) using the hypothesis to predict new events and observing whether these predictions come true. Such a method uses three different forms of logical reasoning: induction in generalizing the data; abduction in forming an hypothesis to explain the data; and deduction in using the hypothesis to predict future occurrences.

Catherine Pierce Wells, *Holmes on Legal Method: The Predictive Theory of Law as an Instance of Scientific Method*, 18 S. ILL. U. L.J. 329, 338 (1994).

¹⁶⁴ As the discussion that follows will illustrate, interactive methodologies are themselves criticized by many within the psychological community (given the nature of psychology as a scientific pursuit), as well as by those who believe in the criticality of free will and its relationship to human dignity.

¹⁶⁵ The Court has continued outwardly to maintain that psychological persuasion alone cannot invalidate an otherwise licit admission. *See Yarborough v. Alvarado*, 541 U.S. 652, 669 (2004). *See also Oregon v. Elstad*, 470 U.S. 298 (1985). The Supreme Court, while

receptivity toward interactive psychological theories and supporting data calls for a more detailed consideration of the scientific methods of psychological inquiry and the inherent limitations of these methods when translated to a jurisprudential context.

C. *Limitations in Translating Interactive Psychology to Confessions Jurisprudence*

As a matter of historical fact, social-psychological research pertaining to the causal factors for criminal confessions is comparatively scarce.¹⁶⁶ The limited research that does exist can be categorized into three groups based on the methodology employed: (1) studies that focus on the factors associated with confessions (or refusal to confess); (2) studies that analyze the confessions through professional observation and video and audio recordings of interrogations; and (3) studies that are based on interviews with and self-reporting by suspects who have confessed.¹⁶⁷ Clearly, an extensive discussion of this research would be

generally disapproving of the use of psychological manipulation, emphasized that it “has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver.” *Id.* at 312. Dicta in numerous recent decisions of the Supreme Court, however, indicate an increasing reliance on the psychological considerations contemplated by the interactive models, as well as a greater willingness to consider these factors when determining the voluntariness and admissibility of a suspect’s confession. *See, e.g., Yarborough*, 541 U.S. at 667-68 (“[T]he voluntariness of a statement is often said to depend on whether ‘the defendant’s will was overborne,’ a question that logically can depend on ‘the characteristics of the accused.’ The characteristics of the accused can include the suspect’s age, education, and intelligence, as well as a suspect’s prior experience with law enforcement.”) (internal citations omitted); *Medina v. California*, 505 U.S. 437, 446 (1992) (holding that a defendant has the burden to establish his own incompetence, but considering the psychological testimony of numerous experts regarding defendant’s alleged schizophrenia); *Mitchell v. Kemp*, 483 U.S. 1026, 1027 (1987) (Marshall, J., dissenting) (criticizing defendant’s counsel for making “no inquiries into his client’s academic, medical, or psychological history”); *Rock v. Arkansas*, 483 U.S. 44, 62 (1987) (holding the exclusion of professional hypnotically-induced psychological testimony to violate a defendant’s right to testify on his own behalf). This expanded scope of judicial review relating to empirical psychology—and interactive psychological models in particular—has grown to encompass such considerations as a suspect’s age, (*see, e.g., Yarborough*, 541 U.S. at 660); intelligence (*see, e.g., Burger v. Kemp*, 483 U.S. 776, 792 (1987) (considering a suspect’s Intellectual Quotient as a factor in his decision-making ability)); and “current mental state” (*see, e.g., Colorado v. Connelly*, 479 U.S. 157, 159 (1986) (considering the psychology of the accused but declining to find a Due Process violation in the absence of police coercion)). Courts have become increasingly willing to consider such factors, even in the absence of any demonstrable psychological abuse by police.

¹⁶⁶ GUDJONSSON, *supra* note 109, at 151. This portion of the Article by no means purports to consider all of the findings derived from this research, which would be far beyond the scope of this Article.

¹⁶⁷ *See id.* at 130-57 (describing each of these techniques in greater detail).

ancillary to the aims of this Article and inevitably unfair to the science and its proponents. For these reasons, only the first and third categories are discussed here,¹⁶⁸ and then only briefly, focusing principally upon the particular methodology used and the problems associated with its application both within and beyond the confines of science.

The first category—the factor-based analysis—focuses on characteristics of the suspect (for instance, the suspect’s age, gender, or previous criminal activity), characteristics of the offense (the nature of the criminal charges), and characteristics of the interrogation itself (such as the duration or location of the interrogation, and whether the suspect was read his *Miranda* warnings).¹⁶⁹ The imponderable number and variety of factors that might be associated with a confession, as well as the body of research necessary to demonstrate the predictability of

¹⁶⁸ For practical reasons, the second research method for studying the psychology of confessions described above—observation of the interrogation itself through either direct presence or by later observing the confession through video or other media—is not discussed at length in this Article. Though recording confessions allows psychologists systematically to evaluate the police interrogation as well as the characteristics of the suspect at the time of the interrogation, some critics have nonetheless questioned the utility of such methods. See generally J. Baldwin, *Police Interviewing Techniques: Establishing Truth or Proof?*, 33 BRITISH J. OF CRIMINOLOGY 325 (1993). In particular, they contend that videotaping may place too great a reliance on non-verbal signs rather than the content of the interview. See G.D. Lassister & A.A. Irving, *Videotaped Confessions: The Impact of Camera Point of View of Judgments of Coercion*, 16 J. APPLIED SOC. PSYCHOL. 268-76 (1986) (demonstrating the dangers associated with showing videotaped confessions in jury trials). These same problems can arise with respect to the psychological study of juries, where subtle variations, such as in the placement of the camera or the angle of recording, can be a source of manipulation or coercion. *Id.* Recording confessions have proven effective in the United Kingdom, where, since 1991, the law has required that suspects of indictable offenses have their interviews tape-recorded. See ROYAL COMMISSION ON CRIMINAL JUSTICE REPORT 26 (1993). The same cannot be said of the American experience, where generally a suspect’s first interrogation (and also any subsequent interrogations) is not recorded, and it is often impractical to have professional researchers routinely present during questioning. Even as the use of videotaping has become more commonplace with regard to police questioning in serious cases, American police departments remain reluctant to require the taping of interrogations for a variety of reasons. See William A. Geller, *Police Videotaping of Suspect Interrogations and Confessions: Preliminary Examination of Issues and Practices*, REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 54 tbl.1 (Police Executive Research Forum 1992). Professor Inbau has written that

while the videotaping of selected confessions may certainly be beneficial to the prosecution, the practice opens the door for wider sweeping court rulings or standards that could eventually require the videotaping of the entire interrogation along with its subsequent confession for each and every suspect interrogated. In the final analysis, would this be good for the criminal justice system?

INBAU ET AL., *supra* note 121, at 395-96.

¹⁶⁹ GUDJONSSON, *supra* note 109, at 141, 146, 148.

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certain individual factors, precludes an extensive examination of any particular trends or theories in this Article.¹⁷⁰ For present purposes, it is important to simply note that factor-based studies are generally conducted via the observation and compilation of external data.¹⁷¹ Accordingly, a researcher might consult the records of all people who either confessed or refused to confess within some arbitrarily defined group, and then compare this information to the reported data concerning the individuals' ages, genders, past criminal records, or other selected variables.

The inherent difficulties of this approach, even just within a scientific context, are readily apparent. Because factor-based analysis is limited to a suspect's objective traits that can be objectively measured, its scope is necessarily circumscribed to the external factors that may influence confessions without regard to a suspect's actual emotional or cognitive state of mind at the time of the interrogation.¹⁷² Such superficial observations can provide little insight regarding the impact of internal factors, or about how these intangibles may have interacted with external variables, in causing a suspect to confess. The problems associated with this methodology are exacerbated when it is used beyond the strict bounds of psychology inquiry, such as in the realm of jurisprudence, where the internal motivations of a suspect can be just as important as his external actions.¹⁷³

¹⁷⁰ For those interested in reviewing the empirical data produced from these studies, the leading work on confessions psychology within the United States is Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221 (1997). See also Lawrence E. Hinkle, Jr., *The Physiological State of the Interrogation Subject as It Affects Brain Function*, in THE MANIPULATION OF HUMAN BEHAVIOR 19 (1961); Saul M. Kassin & Christina T. Fong, "I'm Innocent!" *Effects of Training on Judgments of Truth and Deception in the Interrogation Room*, 23 LAW & HUM. BEHAV. 499 (1999); Leo, *Miranda's Revenge*, *supra* note 83; Richard A. Leo & Richard J. Ofshe, *The Truth About False Confessions and Advocacy Scholarship*, 37 CRIM. L. BULL. 293 (2001).

¹⁷¹ See generally GUDJONSSON, *supra* note 109, at 140-41 (explaining the methodology used in factor-based analysis).

¹⁷² See *id.* at 140 (describing factor-based analysis as being limited to study of the objective "background characteristics of the suspect," "characteristics of the offence," or "contextual characteristics" of the interrogation such as access to a lawyer and the strength of evidence against the suspect).

¹⁷³ Our criminal justice system places great emphasis on the internal motivations of suspects. Almost all offenses require that *mens rea* (a guilty state of mind) be proven beyond a reasonable doubt in order to support a criminal conviction. See MODEL PENAL CODE § 2.02 cmt. 1, at 229 (1985) (stating that "unless some element of mental culpability is proved with respect to each material element of the offense, no valid criminal conviction may be obtained"). The only exception to this broad rule is the "narrow class of strict liability offenses," which is concerned only with the *actus reus* (the wrongful act or

The basic differences between the scientific method and jurisprudential development reveal other intractable problems inherent in using the former to accomplish the latter. Science advances through the relentless cycle of hypothesizing, testing, and validating or refuting, which in turn leads to a revised hypothesis and another cycle.¹⁷⁴ This process, which is integral to the very fabric of scientific exploration, is fundamentally inapposite to the development of sound jurisprudence, which depends on predictability, certainty, and repose,¹⁷⁵ and properly rests on immutable truths and invariable norms.¹⁷⁶ Whereas one scientist might reasonably hypothesize that age, for example, is the determinant factor in a suspect's decision to confess,¹⁷⁷ another may later reject this premise and test to ascertain whether external characteristics predominate, such as the length of the interrogation¹⁷⁸ or the size and color of the interrogation room.¹⁷⁹ Basic conceptions of truth and justice, on the other hand, are not transient and volatile conclusions that are susceptible to scientific calibration and validation. Indeed, they need not be empirically verified and cannot be empirically refuted in a scientific sense. Any attempt to scientifically determine or quantify what is

omission) itself. *Id.* The suspect's state of mind is important not only in defining the crime itself but also in establishing affirmative defenses such as duress or insanity, which "can arise from a number of sources, both internal and external to the actor . . ." Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought To Be*, 78 ST. JOHN'S L. REV. 725, 817 (2004) [hereinafter Milhizer, *Justification and Excuse*] (excuse defenses "focus on the actor and not on the act," and in particular on the actor's state of mind). The mental components of excuse defenses include "involuntary actions, actions related to cognitive deficiencies, and actions relating to volitional deficiencies." *Id.* at 816. Further, a defendant's criminal state of mind may aggravate or mitigate his criminality and punishment, even when it does not change the crime of which he is guilty. *See, e.g.*, 18 U.S.C. Appx. § 5(K)2.1 (2000) (in determining whether an upward departure from a sentence is warranted, "[t]he sentencing judge must give consideration to matters that would normally distinguish among levels of homicide, such as the defendant's *state of mind* and the degree of planning or preparation") (emphasis added). *See also* United States v. Singleton, 49 F.3d 129 (5th Cir. 1995) (finding that an upward departure from usual sentence was appropriate for defendant's murder conviction, given the defendant's culpable state of mind when he committed the offense).

¹⁷⁴ *See supra* note 163.

¹⁷⁵ Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 650 (1999).

¹⁷⁶ *See infra* Part IV.B.

¹⁷⁷ *See, e.g.*, Leiken, *supra* note 135 (finding that suspects under the age of 25 were more than twice as likely to confess as suspects over 25).

¹⁷⁸ *See* S. Moston et al., *The Incidence, Antecedents and Consequences of the Use of the Right to Silence During Police Questioning*, 32 BRITISH J. OF CRIMINOLOGY 23, 24 (1992) (finding a number of contextual factors to be more determinative of a suspect's decision to confess than age, including the time spent in custody and the number of police interviews).

¹⁷⁹ *See generally* INBAU ET AL., *supra* note 121, at 57-64 (describing the physical features of the interrogation room that will best facilitate confessions).

normatively true runs the risk of misusing data and misapplying theory, and could corrupt any jurisprudence derived from it.¹⁸⁰

The problems inherent in predicating jurisprudence on science are magnified with respect to the third category of studies described above—those based on self-reporting methods. These studies attempt to explain the influences that lead to confessions based on the subjective views of suspects rather than through the observation of external manifestations. The data can be collected through face-to-face interviews with confessors or, as is more frequently the case, through surveys distributed to these individuals.¹⁸¹

¹⁸⁰ The oral argument before the Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973), provides a stark example of a judge seemingly requiring physical proof of a metaphysical principle when fashioning jurisprudence.

Counsel: We say there is life from the moment of impregnation.

Justice Marshall: And do you have any scientific data to support that?

. . . I want you to give me a medical, recognizable medical writing of any kind that says that at the time of conception that the fetus is a person.

MAY IT PLEASE THE COURT 348, 352 (Peter Irons & Stephanie Guitton eds., 1993) (cited in McLean, *supra* note 98, at 280). The problem is not so much with seeking scientific support for some truth, but rather it is with requiring scientific validation in order for something to be considered truthful and thus a legitimate foundation for jurisprudence.

¹⁸¹ Proponents of interactive models distribute surveys that typically focus on three general factors that are thought to facilitate confessions:

1. *External pressure* to confess, which is associated with persuasive police interrogation techniques, police behaviour and fear of confinement.
2. *Internal pressure* to confess, where suspects experience a great deal of guilt about the crime they committed and consequently need to relieve themselves of the guilt of confessing.
3. *Perception of proof*, where suspects believe that there is no point in denying the offence because the police will eventually prove they did it.

GUDJONSSON, *supra* note 109, at 152 (emphasis and enumeration in original). Though the elements of the models previously described do not coincide directly with this list, some of the elemental considerations lend themselves to particular facilitating factors. For example, the environmental elements of the model—those dealing with factors as “external influences”—are primarily a source of external pressure, though they may eventually manifest themselves in other ways as well (for example, leading to an increase of internal guilt or shaping the suspect’s perception of the evidence he faces). Psychological elements encompass the other two categories: emotional elements can be seen to generally shape the suspect’s internal motivations to confess, and cognitive elements fall largely into the perceptive considerations. *Id.* at 153. Some studies have demonstrated that a fourth *inhibitory* factor, namely fear of the possible consequences associated with the charged activity, can also play an important role in a suspect’s decision whether to confess; however, these influences have most often been rolled into the consideration of external pressures. *Id.*

While this approach allows for a more individualized inquiry into reasons why a particular suspect confessed, it raises a variety of additional problems related to its accuracy and usefulness. Bluntly put, the objective reliability of self-reporting studies, unlike factor-based inquiries, is contingent upon the quality of the information provided to researchers by the putative confessors themselves.¹⁸² From a psychological perspective alone, the reliability of such data is highly doubtful. First, the self-reporting methodology necessarily presupposes that a confessor actually can be self-aware about what truly motivated him to confess. This premise is fundamentally inconsistent with the underlying psychological theory, at least insofar as it seeks to prove that a person can be subconsciously influenced to confess by factors of which he is not consciously aware.¹⁸³ Second, a particular confessor may, for a variety of reasons, be incapable of accurately remembering what really happened in the interrogation room, and, more importantly from the perspective of the study, why he confessed.¹⁸⁴ The self-reporting methodology assumes that these persons will not confabulate or, if they do, that this can be correctly identified. Third, even if a confessor is able

¹⁸² See Josine Junger-Tas & Ineke Haen Marshall, *The Self-Report Methodology in Crime Research*, 25 CRIME & JUST. 291, 321-48 (1999) (describing the problems with ascertaining the validity and reliability of self-report studies). Professors Junger-Tas and Marshall explain that

People must be willing to admit to the act and they must be able to answer truthfully (i.e., they must remember, and they must remember correctly). People may be more willing to admit to nonserious acts, even those committed with high frequency . . . but there may be questionable validity with regard to details and accurate timing of events, most probably because such events are easily forgotten. However, serious- and low-frequency offenses have more salience and thus may lead to more accurate reporting; yet, because of their more serious nature, respondents may be more inclined to deny their involvement in such offenses.

Id. at 322-23.

¹⁸³ See WRIGHTSMAN, *supra* note 110, at 100-01 (emphasizing that psychologists study criminal behavior in order to discover its causes, of which the actual actors are unaware).

¹⁸⁴ Professors Junger-Tas and Marshall have emphasized these problems with reliability and memory recall in self-reporting studies:

A major problem in most self-report studies is that they are retrospective. Our memory is essentially unreliable. Even assuming a willingness to answer questions, the issue of ability accurately to answer questions about the past remains. Our memory is not a passive registration machine; remembering events is more a reconstructive than a reproductive process. Some events are completely forgotten, missing parts are filled in, "new" facts—that may be invented—are added. In addition, there are problems of memory storage, forgetting, deleting, and recalling.

Junger-Tas & Marshall, *supra* note 182, at 338-39 (citations omitted).

to recall circumstances and motivations leading to a confession, he may have a motive to lie or mislead researchers.¹⁸⁵ Again, the methodology presupposes that intentionally false responses can be identified and discounted.

Another empirical problem with the studies generally involves how to identify and measure the relative influence of all the potentially relevant factors. A confessor, for example, may be asked to evaluate whether a certain factor—such as police behavior during an interrogation—played an “important role” in causing him to confess. Inherent in his response are several intermediate subjective assessments, such as what does it mean to be an *important* factor, which necessarily involves some determination generally of what it means to say that something is *important*.¹⁸⁶ Other definitional and assessment issues abound, e.g., what constitutes “police behavior,” what were the parameters of the “interrogation,” and what comprises the “confession.” While this inability to account for all variables might be surmountable for researchers within the strict parameters of the science of psychology—especially when their object is to isolate a single variable—the ramifications can be mind-boggling for those who attempt to interpret and apply the data to the universe of potentially relevant variables outside of its theoretical context.¹⁸⁷

Psychologists have sought to address and minimize the empirical vagaries and vicissitudes arising in all categories of research by drawing statistical correlations between different interactive factors to discern trends, rather than basing conclusions on demonstrable, case-specific causal relationships.¹⁸⁸ Researchers using this approach immediately

¹⁸⁵ See *id.* at 328 (describing evaluations of self-report studies that call into question respondents’ truthfulness).

¹⁸⁶ *Id.* at 352 (“Important issues in the construction of the questionnaire are the selection of items, item overlap, question wording, clarity of questions, and the use of open-end questions or response categories. Of the many sources of response error . . . , the[se] task variables are most amenable to researcher manipulation and control.”).

¹⁸⁷ See Blumenthal, *supra* note 102, at 23-34 (discussing the numerous difficulties legal scholars and psychologists face when attempting to translate psychological studies into judicial decisions and legal research).

¹⁸⁸ See generally Thomas K. Park, *Understanding Children: Reflections on Criminality and Demographic Structure: A Multi-National Examination of the Links Between Youth and National Crime Statistics*, 45 ARIZ. L. REV. 595, 597 (2003) (examining the effects of society’s growing dependence on psychology and sociology’s development of statistical trends to predict individual behavior, particularly in juveniles). See also Jesse G. Kalin, *Determinism*, <http://mb-soft.com/believe/text/determin.htm> (last visited Aug. 25, 2006) (“[B.F. Skinner’s] stimulus - response account also uses modern statistical and probabilistic analyses of causation.”).

confront the truism that “Correlation is not causation, and causality cannot be convincingly inferred from correlation unless the process that binds the relationship is understood.”¹⁸⁹ Although statistical correlation can be scientifically useful despite its many limitations, its aptness as a jurisprudential resource can be especially problematic.¹⁹⁰ Even where statistical evidence seems empirically apt, its use may be morally objectionable.¹⁹¹ Finally, even when judicial usage of statistical correlation seems apt and moral, it is particularly susceptible to being misapplied by judges and policy-makers who are not specially trained in the uses and limitations of statistics and correlative data.¹⁹²

In summary, the methodologies that typify contemporary science demonstrate the limitations and danger of converting psychological theory into jurisprudential tenets. Such an approach, besides being a departure from our venerable Western legal tradition, is incompatible with the belief that the law pertaining to confessions necessarily implicates moral judgments about the common good and individual dignity. In properly oriented confession jurisprudence, values should not be replaced by data and normative discernment by statistical correlation. Human confession, as with all aspects of human life, should

¹⁸⁹ Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 437 (2005).

¹⁹⁰ See generally Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465, 496 (1984) (discussing why the law of probable cause should insist on case-specific facts and discount statistical evidence); see also Mark A. Small, *Legal Psychology and Therapeutic Jurisprudence*, 37 ST. LOUIS U. L.J. 675, 690-92 (1993) (finding most psychological studies are “descriptive” in nature and thus do not translate to a prescriptive legal system).

¹⁹¹ See STEVEN PINKER, *HOW THE MIND WORKS* 313 (1997) (Pinker argues that racial profiling is a repugnant practice “not because it is irrational (in the sense of statistically inaccurate) but because it flouts the moral principle that it is wrong to judge an *individual* using the statistics of a racial or ethnic *group*. The argument against bigotry . . . [is] a rule of ethics, that tells us when to turn our statistical categorizers off.”).

¹⁹² See Jonathan J. Koehler & Daniel N. Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 246, 266 (1990) (arguing in favor of “intuitive” decision making strategies as opposed to statistical probability logic as a basis for decision making by statistically untrained people). As described earlier in Part III, the study of psychology, like other sciences, involves the identification and verification of trends relating to psychological behavior through the repeated testing of hypotheses. When data and hypotheses generated by this process are removed from its scientific context and imported into jurisprudence, a danger exists that untrained courts will “discover” and overstate a causal relationship when the evidence establishes only a correlation. Broadly speaking, “[a]rguments about causes are often caustic. In particular, arguments that devolve into dichotomous choices are rarely fruitful because behavior has multiple causes. When the analysis also fails to recognize basic principles relevant to studying and understanding behavior, the problem is even deeper and more insidious.” Jones & Goldsmith, *supra* note 189, at 454.

dignify and not objectify the human person, and should ensure that the incommensurable worth of each individual is expressed with reference to common good. Modern psychology, by its very nature, ought to confine itself to its proper parameters, which are not nearly as expansive as the Court's post-*Miranda* jurisprudence would allow.¹⁹³ In order to place the science of psychology in the proper context, one must come to understand the assumptions underlying the modern psychological theories concerning confessions as compared with the philosophical relevance of confession to the human person. These are discussed in the next Part of this Article.

IV. THE PHILOSOPHICAL RELEVANCE OF CONFESSION TO THE COMMON GOOD AND THE HUMAN PERSON

Part III examined the relationship between criminal confessions and psychological empiricism. This Part seeks to compare the fundamental assumptions underlying the psychological treatment of confessions to traditional philosophical understandings of confession, rooted in notions of truth, justice, human dignity, and the common good. Psychology and

¹⁹³ My criticism of the Court's use of psychological empiricism in fashioning confession jurisprudence should not be construed as a categorical objection to the judicial use of scientific or statistical data generally. For example, in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), the Court concluded that the a uniform practice of ordering motorists out of their vehicles as a matter of course whenever they had been stopped for a traffic violation was reasonable under the Fourth Amendment, in large part because it was justified by statistical evidence showing "that a significant percentage of murders of police officers occur[] when the officers are making traffic stops." *Id.* at 110 (citing *United States v. Robinson*, 414 U.S. 218, 234 n.5 (1973)). The Court's holding was influenced by one study finding that approximately thirty percent of police shootings took place when a police officer approached a suspect seated in an automobile. *Id.* Assuming such evidence is relevant and appropriate for the Court's consideration consistent with the observations made earlier in note 102, there is no reason to suppose that the Court would be practically incapable of using the cited research to help it address the issue. *See also* *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004) (citing the number of gas tanks that were disassembled and reassembled at the border without causing damage or an accident, the Court held that such a procedure does not significantly intrude upon a vehicle owner's property interest); *Michigan Dep't of State v. Sitz*, 496 U.S. 444 (1990) (in ruling on the constitutionality of suspicionless sobriety roadblocks, the Court considered evidence about the percentage of drivers passing through the checkpoint who were arrested for alcohol impairment); *United States v. Limares*, 269 F.3d 794, 798 (7th Cir. 2001) (probable cause established where record revealed the drug sniffing dog had been correct sixty-two percent of the time). For the many reasons discussed in this part, psychological empiricism is qualitatively different from the type of statistical evidence involved in cases like *Mimms*, *Flores-Montano*, *Sitz*, and *Limares*, and these differences render psychological empiricism much less accessible and apt for use by courts.

philosophy, it should initially be noted, have long been intertwined.¹⁹⁴ The twin disciplines often share the same subject of investigation: the human intellect.¹⁹⁵ Throughout history, philosophers have gladly taken up the garments of psychologists¹⁹⁶—Augustine,¹⁹⁷ Aquinas,¹⁹⁸ Descartes,¹⁹⁹ and Kant²⁰⁰ are some of the more familiar—though many of

¹⁹⁴ The well-known and influential philosopher Aristotle is sometimes referred to as the “Father of Psychology.” “Aristotle [384-322 BC] is often regarded as the father of psychology, and his book, *De Anima* (On the Soul), the first book on psychology.” Human Intelligence, *Aristotle*, <http://www.indiana.edu/~intell/aristotle.shtml> (last visited Aug. 25, 2006). There are other claimants for the title, most notably Sigmund Freud. TRUELOVE, *supra* note 108, at 216.

¹⁹⁵ Psychology’s approach to studying the human intellect is as “[a] branch of science dealing with behavior, acts, or mental processes, as well as the mind, self, or person who behaves or acts or who has the mental processes.” THE DICTIONARY OF PSYCHOLOGY 65 (Raymond J. Corsini ed., Brunner/Mazel 1999). Philosophy most directly examines the human intellect in the branch of study known as epistemology (the study of human knowing). *See generally* VINCENT G. POTTER, READINGS IN EPISTEMOLOGY: FROM AQUINAS, BACON, GALILEO, DESCARTES, LOCKE, BERKELEY, HUME, KANT (1993) (containing a variety of short selections from some of the founders and proponents of different epistemological schools); LOUIS MARIE REGIS, EPISTEMOLOGY (Imelda Choquette Byrne trans., 1959) [hereinafter REGIS, EPISTEMOLOGY] (primarily intended as an introduction to Thomistic Epistemology, but also traces the development of modern epistemology, particularly Kant and Descartes).

¹⁹⁶ This is a natural consequence of the classical approach to philosophy, which contrasts sharply with the modern preference to reduce the search for knowledge into disconnected studies. The classical philosopher made much less distinction between subjects of study inasmuch as they were all connected to the “love of wisdom,” from which he derived the title of his profession.

¹⁹⁷ Augustine [354-430] famously provides insight to his notion of psychology (use of this term subject to the limits in the text above) in his *Confessions*, which traces his journey to Catholicism. A practical translation is AUGUSTINE, CONFESIONS (John E. Rotelle ed., Maria Boulding trans., 1997).

¹⁹⁸ Thomas Aquinas’ [1225?-1274] principle work is his massive volume, *The Summa Theologiae*, which gives a comprehensive treatment of his theory of the human intellect. A sufficient Latin text with English translation is AQUINAS, SUMMA THEOLOGIAE, *supra* note 6. Aquinas’ broad range of subjects covers both intellect and human ability to know. *See generally* REGIS, EPISTEMOLOGY, *supra* note 195; LOUIS MARIE REGIS, ST. THOMAS AND EPISTEMOLOGY (1946).

¹⁹⁹ Descartes is sometimes referred to as the father of modern philosophy—and rationalism. JACQUE MARITAIN, AN INTRODUCTION TO PHILOSOPHY 137 (E.I. Watkin trans., 1962) [hereinafter MARITAIN, INTRODUCTION]. Descartes’ *Discourse on Method and Meditations on First Philosophy* took him far afield from the investigative methods of classical and medieval philosophy. He began his attempt to refute skeptics by doubting all things, in the end affirming only his own existence. He then sought to work back to a position of knowledge by virtue of that one undeniable—to his mind—truth. REGIS, EPISTEMOLOGY, *supra* note 195, at 40-47 (emphasis omitted) (discussing the “Psychological Structure of the Cartesian Problem”). This was his famous “*Cogito ergo sum*”—I think, therefore, I am. *Id.* at 41.

²⁰⁰ Immanuel Kant (1724-1804) wrote on the nature of human knowledge. His identification of the *noumena* (things in themselves) and *phenomena* (appearances) is a

them would hardly recognize psychology and philosophy as distinct fields of study.²⁰¹ Psychologists have similarly shown little compunction about donning the robes of philosophers when it suited their purposes.²⁰² Although this interrelationship of philosophy and psychology has sometimes been contentious, the two disciplines are by no means naturally hostile to each other as evidenced by their many shared adherents.²⁰³

Nevertheless, some variants of either discipline inevitably clash given their contrasting conclusions about certain issues.²⁰⁴ Beyond this, as either discipline strays into the realm more properly governed by the other,²⁰⁵ the possibility of conflict only increases. It should thus come as no surprise that the area of confessions has become a point of diversion. The purpose here is to identify and understand the abstract values that ought to guide a principled approach to confessions from a distinctly philosophic vantage and to use these values to critique the assumptions

fundamental distinction of his work. "According to Kant, it is vital always to distinguish between the distinct realms of phenomena and noumena." REGIS, *EPISTEMOLOGY*, *supra* note 195, at 47-59 (emphasis in original). Kant is also considered to be one of the archetypical deontologists. IMMANUEL KANT, *FUNDAMENTAL PRINCIPLES OF THE METAPHYSIC OF ETHICS* (Thomas Kingsmill Abbott trans., 1962). Several of his more popular works include *Critique of Pure Reason*, *Critique of Practical Reason*, and *Critique of Judgment*.

²⁰¹ Jacques Maritain ascribes the word "philosophy" ("love of wisdom" in Greek) to Pythagoras. MARITAIN, *INTRODUCTION*, *supra* note 199, at xiii (citing Cicero). According to Maritain, philosophy in this sense is nothing more than "wisdom itself so far as it is accessible to human nature. . . . It is the wisdom of man as man, which he acquires by the labor of his intellect, and it is for that very reason that his wisdom . . ." *Id.*

²⁰² This refers to some of the modern variants of the discipline such as Evolutionary Psychology, which at times tends toward denying free will, ROBERT F. SCHOPP, *AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY* (1991), or reducing human knowledge and belief to a sum of inchoate experiences. Center for Evolutionary Psychology, <http://www.psych.ucsb.edu/research/cep> (last visited Aug. 25, 2006).

²⁰³ Consider, as proof of this, the number of societies that combine interest in the two disciplines: The Society of Philosophy and Psychology; Association for the Advancement of Philosophy and Psychiatry; American Psychological Association, Division 24 (Theoretical & Philosophical Psychology); and British Psychological Society, History and Philosophy of Psychology Section.

²⁰⁴ Compare ARISTOTLE, *NICOMACHEAN ETHICS* 1106b36, in *THE BASIC WORKS OF ARISTOTLE* 959 (Richard McKeon trans., 1941) [hereinafter *ARISTOTLE, NICOMACHEAN ETHICS*] (expressing the traditional view of classical philosophy which focuses, *inter alia*, on the development of the individual via virtue and choice; "[v]irtue, then, is a state of character concerned with choice"), with B. F. SKINNER, *BEYOND FREEDOM AND DIGNITY* 343 (1972) (a proponent of behavioral determinism, which reduces all internal psychological states to publicly observable behavior prompted by a stimulus-response reaction).

²⁰⁵ This premise assumes without argument the modern breakdown of disciplines into discrete studies, each having its own independent focus. See *supra* note 195.

underlying modern psychology's treatment of confessions. In order to understand this divergence, it is first necessary to discuss the fundamental assumptions regarding confessions inherent in modern-day psychology.

A. Interactive Psychology and Human Will: Some Fundamental Assumptions

As discussed in Part III, social-psychological models generally, and interactive models in particular, hypothesize about the motivations for human behavior. The particular theories can vary greatly, with one sometimes bearing little resemblance to the next. For purposes of this Article, distinguishing between distinct hypotheses and models is of far less importance than understanding the fundamental assumptions that typify them all. Accordingly, Part IV.A focuses on a four-part logical progression that dominates contemporary psychological inquiry and a realist philosophical critique of this understanding of the human will. The progression proceeds as follows:

- (1) Human thought and action can be understood and explained through scientific inquiry and testing alone.
- (2) Science and its methodology are amoral (and properly so) in nature and make no moral judgments concerning man's behavior.
- (3) People are not motivated by "moral" values in the traditional sense but rather act to maximize their tangible self-interest.
- (4) Because criminal confessions are against a person's tangible self-interest, they can only be obtained through coercive techniques.

It is only by appreciating these ubiquitous assumptions (1-3, above), and the conclusion that they support (4, above), that one can begin to understand the full philosophical import of tethering confession jurisprudence to empirical psychology.

Sigmund Freud once stated, "an illusion it would be to suppose that what science cannot give us we can get elsewhere."²⁰⁶ This strident belief that scientific inquiry could provide sufficient empirical answers to previously metaphysical questions undergirds the first premise

²⁰⁶ SIGMUND FREUD, *THE FUTURE OF AN ILLUSION* 56 (James Strachey trans. & ed., Norton & Co. 1961).

underlying modern psychological inquiry: *human thought and action can be understood and explained through scientific inquiry and testing alone.*

This assumption about the sufficiency of empirical research discounts the hermeneutical component in the sciences of man.²⁰⁷ More than this, it engenders and reinforces a reductionist view of the human psyche, and derivatively of the human person.²⁰⁸ In applying this approach to the realm of psychology, “medical thinking magnified its measuring sticks and severely narrowed their objects so that life processes were studied on an ever decreasing scale, increasingly removed from their condition within the harmony of an organic whole.”²⁰⁹ One thinker explained:

Science, in order to study man, takes him in himself, as an individual and not as a person, isolating him from his environment; it is able to analyse his physical and psychical relationships with his environment, but it cannot have any knowledge of his spiritual relationship, his personal communion with his fellows.²¹⁰

Focused and deductive methodology can be quite efficacious in a pristine laboratory where discrete variables might be isolated and controlled. In contrast, the study of the human psyche—and the psychology of confessions in particular—cannot be situated in such an environment,²¹¹ at least not without sterilizing all the ostensibly extraneous normative influences that are not susceptible to scientific quantification. As a consequence, psychology has neither the capacity nor the inclination to place the biological and experiential factors pertaining to confessions in the broader normative context.²¹²

²⁰⁷ See CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES 15-57 (1995).

²⁰⁸ If nothing else, the use of numerical terms and statistical analysis can lead to “the dehumanization of the legal process.” Kevin M. Clermont, *Procedure’s Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1147 (1987).

²⁰⁹ JOSEPH MAUCERI, THE GREAT BREAK: A SHORT HISTORY OF THE SEPARATION OF MEDICAL SCIENCE FROM RELIGION 104 (1986) [hereinafter MAUCERI, THE GREAT BREAK].

²¹⁰ PAUL TOURNIER, THE MEANING OF PERSONS 129 (1957).

²¹¹ WRIGHTSMAN ET AL., *supra* note 110, at 8 (distinguishing psychology from other biological study).

²¹² A corollary of this amoral reductionism is that psychological study of confessions is performed without regard to the greater implications of confession in society. For example, very few (if any) psychological studies have been performed to investigate the effect of criminal confessions on crime victims. *Id.* at 207. Furthermore, because psychology focuses on individual subjects, psychological research about confessions does not address *at all* the

The difficulty inherent in isolating variables, coupled with the imperative that scientific hypotheses be “provable” or “disprovable,” has produced a staggering body of research and data whose purpose is to investigate some discrete psychological detail of the human mind by validating or contradicting earlier psychological assumptions and studies.²¹³ Even assuming that this process can lead to a better scientific understanding of the human psyche, it does not follow that courts or lawmakers would be well served by relying upon any particular psychological theory or theories in formulating confession doctrine or procedures.

The preceding point is proved by history. Recall that the Reid Model, which greatly influenced the *Miranda* decision,²¹⁴ has since become widely disfavored within the psychological community.²¹⁵ *Miranda* nonetheless remains a viable legal precedent, with its reasoning and references to the Reid Model favorably quoted and systemically applied.²¹⁶ There is every reason to believe that today’s pet psychological theories will suffer the same ignoble fate as the Reid Model. Given psychology’s fluid and indeterminate character, it is a weak foundation indeed for a legal system that relies on precedent and should rest on immutable principles.²¹⁷

In performing their scientific examination of the human psyche, most proponents of social-psychological theory would readily acknowledge that they are unconcerned with what is *good* for the suspect in terms of abstract and external absolutes; some even reject the idea that such absolutes exist at all. Rather, researchers define what is *good* for the suspect in the narrow terms of what the suspect perceives to be in his own best interests, as a matter of demonstrable and quantifiable fact. Any other considerations are dismissed as a matter of subjective theology and personal morality, and accordingly are judged to be scientifically irrelevant.²¹⁸ Thus, the second operating premise: *science*

implications that a particular understanding of confessions might have on society at large or the criminal justice system.

²¹³ See *supra* note 135.

²¹⁴ See *supra* notes 113-21 and accompanying text.

²¹⁵ See *supra* notes 129-34 and accompanying text.

²¹⁶ See *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”).

²¹⁷ See generally *infra* Part IV.B.

²¹⁸ “By any psychological theory the will as an agency by which man chooses good and avoids evil remains almost exclusively a religious concept today.” JOSEPH MAUCERI, *THERAPY OR THEOLOGY?* 29 (1995).

and its methodology are amoral (and properly so) in nature and make no moral judgments concerning man's behavior.

Prominent scientists have described the contemporary expatriation of morality from science as follows:

Whether at conferences or in conversation, each of us [in a scientific field] has regularly encountered concerns that what is "natural" or "biological" will come to be thought "good[]" The tendency to link facts with meanings is not new; people have sought normative implications in natural phenomena for centuries. Nonetheless, our preferences in the normative world of meaning cannot create scientific facts, and the bare existence of facts cannot alone support any normative conclusions whatsoever. To put this more bluntly, description is not prescription, and explanation is not justification.²¹⁹

The reductionist and amoral lens of contemporary psychology renders a distorted view of free will and self-determination, and thus again derivatively of the human person. Contemporary psychology essentially treats "[a]ny emotional transaction [as] a psychological deal . . . not a matter of freedom or moral choice. The transaction is rooted in conflict and repression and the uncertainty of our motives; no moral choice here, only utilitarian preferences . . ." ²²⁰ With respect to the notion of free will, the contrast between modern psychology and the classical philosophic thinking that proceeded could not be more starkly drawn. For example, the classical philosopher Aristotle, in addressing the development of the individual through the exercise of free will, writes "[v]irtue, then, is a state of character concerned with choice."²²¹ Quite to the contrary, modern psychology, as epitomized by the determinism of B.F. Skinner,²²² "reduces all internal psychological states

²¹⁹ Jones & Goldsmith, *supra* note 189, at 484-85.

²²⁰ MAUCERI, *THE GREAT BREAK*, *supra* note 209, at 105.

²²¹ ARISTOTLE, *NICOMACHEAN ETHICS* 1106b36, *supra* note 204, at 959. The philosophical relevance of confession to the human person in general, and the importance of self-determination (free will) in particular, is discussed in greater detail in *infra* Part IV.B.

²²² See generally SKINNER, *supra* note 204. The determinism of Skinner is perhaps the most extreme example of science's rejection of a traditional understanding of free will. Although some schools of modern psychology differ from Skinner as a matter of degree, few are different as a matter of kind. For a general description of Determinism and the assumptions upon which it rests, see Robert Young, *The Implications of Determinism*, in *A COMPANION TO ETHICS* 536 (Peter Singer ed., 1991). Skinner was by no means the first to

to publicly observable behavior” resulting from a “stimulus - response account.”²²³

Human volition, in other words, loses its moral component and is viewed simply as a conditioned response to stimulation, or at most as a matter of gratification moved by tangible self-interest. This latter understanding of human behavior finds explicit expression in the social-psychological study of confessions,²²⁴ and this supports the third assumption that is integral to social-psychological studies involving confession: *people are not motivated by “moral” values in the traditional sense but rather act to maximize their tangible self-interest.* As a noted psychologist once commented, “[i]t is easy to understand that suspects would generally be resistant to confessing, considering the adverse consequences of doing so.”²²⁵

The irrelevance of moral absolutes and value judgments to social-psychological theory is plainly illustrated by the latter’s conception of guilt.²²⁶ While social-psychological theory acknowledges a relationship between guilt and conscience, its understanding of conscience as such discounts any transcendent determination of right and wrong. Conscience is instead viewed as something that is “learned,” in the sense that it is acquired and internalized exclusively from one’s environment. As the discussion below illustrates, the belief that the moral aspects of guilt can be divorced from environmental circumstances is fundamentally misguided.²²⁷ But this is precisely what social learning

proffer a deterministic ideology in scientific study and observation. See SIMON DE LAPLACE, 5 THEORIE ANALYTIQUE DE PROHIBITS: INTRODUCTION VII (Oeuvres 1812-1820) (explaining mechanical determinism); GOTTFRIED LEIBNIZ, MONADOLBY (Robert Latta ed. & trans., 1925) (1898), <http://eserver.org/philosophy/leibniz-monadology.txt> (last visited Aug. 25, 2006) (discussing predetermination in the context of “Monadic” theory); JAMES V. MCGLYNN, S.J. & JULES S. TONER, S.J., MODERN ETHICAL THEORIES 125 (1962) (describing the influence of determinism on Freud). It is Skinner’s theory of Behaviorism, however, that is often used as the prototypical example of modern determinism’s interaction with psychology.

²²³ Kalin, *supra* note 188.

²²⁴ Specifically, it is a variant on rational or social choice theory. For a general description of these assumptions in the context of the social sciences, see PAUL E. JOHNSON, SOCIAL CHOICE: THEORY AND RESEARCH (1998).

²²⁵ GUDJONSSON, *supra* note 109. This assumption—that a person will not choose to confess because it is against his interest to do so—corresponds to the apparent hostility to confessions that was demonstrated by the Warren Court. See *supra* notes 33-38 and accompanying text.

²²⁶ See *supra* Part III.B.

²²⁷ See *infra* notes 322-24 and accompanying text.

theory holds, i.e., that one's behavior is determined by what one observes to be acceptable in one's surrounding environment.²²⁸

The conclusion that follows from the previously recited assumptions is predictable, pervasive, and perverse: *because criminal confessions are against a person's tangible self-interest, they can only be obtained through coercive techniques.* The immediate syllogism supporting this conclusion is widely accepted among researchers: (1) a criminal suspect seeks to maximize his tangible self-interest;²²⁹ (2) a criminal confession is adverse to a suspect's tangible best interests;²³⁰ and, therefore, (3) "it is impractical to expect any but very few confessions to result from a guilty conscience unprovoked by an interrogation."²³¹ The corollary, which is especially pertinent to confession jurisprudence, is that "[m]ost people who are exposed to coercive procedures will talk."²³²

The just-recited conclusion and corollary, while ostensibly corroborated by some research,²³³ has not been convincingly or universally verified. Quite the opposite, recent studies reflect that about one-fifth of the guilty suspects who confess would have chosen to do so even in the absence of any police interrogation.²³⁴ Social psychologists

²²⁸ GUDJONNISON, *supra* note 109, at 124. This argument regarding social learning theory is not unique to modern psychology; rather, it was addressed by St. Thomas Aquinas in his *Summa Theologicae*. There, Aquinas rebutted the objection that a choice is not freely made if it is "moved by another" — that is, if it is motivated by external or environmental factors. AQUINAS, *SUMMA THEOLOGIAE*, *supra* note 6, at pt. I, Q. 83, art. 1. To this objection, Aquinas explains that "[f]ree-will is the cause of its own movement, because by his free-will man moves himself to act. But it does not of necessity belong to liberty that what is free should be the first cause of itself . . ." *Id.* In other words, one cannot say that the mere existence of environmental influences and motivations, such as those prompting a guilty suspect to confess, excludes the possibility that the confession was freely given or that the motivation to confess came from other sources, such as a suspect's natural inclination to be remorseful and accept responsibility.

²²⁹ *Supra* notes 222-23, and accompanying text.

²³⁰ GUDJONNISON, *supra* note 109, at 39 (confessions have "obvious negative consequences" and are inherently contrary to a person's best interests). In a rare demonstration of judicial candor, the Court acknowledged in one post-*Miranda* case that "[i]t is difficult to tell with certainty what motivates a suspect to speak." *Oregon v. Elstad*, 470 U.S. 298, 314 (1985). Such expressions of candor are the exception, not the rule.

²³¹ INBAU ET AL., *supra* note 121, at xiv.

²³² L.E. Hinkle, *The Physiological State of the Interrogation Suspect as It Affects Brain Function*, in *THE MANIPULATION OF HUMAN BEHAVIOUR* 44 (A.D. Biderman & H. Zimmer eds., 1961).

²³³ See, e.g., *id.*; G.H. Gudjonsson & H. Petursson, *Custodial Interrogation: Why Do Suspects Confess and How Does It Relate to Their Crime, Attitude, and Personality?*, 12 *PERSONALITY & INDIVIDUAL DIFFERENCES* 295 (1991).

²³⁴ See, e.g., G.H. Gudjonsson & I. Bownes, *The Reasons Why Suspects Confess During Custodial Interrogation: Data from Northern Ireland*, 32 *MEDICINE, SCI. & L.* 204 (1992); J.F. Sigurdsson & G.H. Gudjonsson, *Alcohol and Drug Intoxication During Police Interrogation and*

cope with this dissonance by politely discounting such findings as “interesting”²³⁵ or “counter-intuitive.”²³⁶ Their attachment to modern science, and all that it promises and holds, will allow for nothing else. Yet it is this failure of modern psychological methods to account for a person’s seemingly natural inclination to confess that makes the scientific hypotheses so inappropriate for application by the courts and so open to philosophical criticism. The basis for this criticism is discussed next.

B. Philosophical Values and the Natural Inclination Towards Confession

The assumptions underlying modern psychology’s assessment of confessions, as described above, are fundamentally opposed to the traditional philosophical view that genuine, heart-felt confessions are not only possible, but should be fostered by the community. Philosophically speaking, confession (as an act) is a nexus of sorts where humanity’s desire for truth, impulse for justice, and need for both to achieve the common good all intersect. A proper confession balances these first two goals against the imperative of human rights and dignity, allowing the power of human choice to promote the common good. Thus, in order to provide a meaningful critique of the psychological treatment of confessions and the court’s reliance on that psychology, one must first become oriented to the overarching values implicated by confessions—truth, justice, human dignity, and the common good—and the particular way that these values interact in the confessions context.

Before engaging in an exploration of these philosophical concepts,²³⁷ it is important that a primarily realist²³⁸ position is adopted here, to the exclusion of other philosophical schools.²³⁹ Central to the realist position

the Reasons Why Suspects Confess to the Police, 89 ADDICTION 985 (1994). It is telling that such a high percentage of self-motivated confessors is identified in studies that are premised on the belief that these people do not exist.

²³⁵ GUDJONSSON, *supra* note 109, at 153.

²³⁶ *Id.* at 152.

²³⁷ It must be acknowledged that any comprehensive discussion of philosophy is vastly unsuitable to the task at hand and far beyond the scope of this Article. Anything even approaching this magnitude of endeavor is better suited to an encyclopedic set of volumes. The *History of Philosophy* series by Frederick Copleston and *The Encyclopedia of Philosophy*, published by the MacMillan Company, stand out as two of the best.

²³⁸ Realist here is used to denote one who believes human thought can correspond accurately to reality. See generally HENRY VEATCH, REALISM AND NOMINALISM REVISITED (1970).

²³⁹ For example, nominalism takes a view that absolutes do not exist in nature, but only in the human mind. *Id.* at 43-45. Other theories, such as the idealism of Descartes, propose

is the claim that truth exists and can be known.²⁴⁰ Further, realism presumes that nature has an order and goods knowable to us, i.e., there exists a type of natural law²⁴¹ that governs human actions.²⁴² These same basic principles are indispensable to a properly ordered criminal justice system. The first (that truth exists) is indispensable because the “preeminent” goal of any such a system is to uncover truth;²⁴³ indeed,

that ideas are what we know, as opposed to ideas being that by which we know the world. CHARLES RICE, FIFTY QUESTIONS ON THE NATURAL LAW 128 (1999).

²⁴⁰ “The philosophy of Aristotle and St. Thomas is in fact what a modern philosopher has termed *the natural philosophy of the human mind*, for it develops and brings to perfection what is most deeply and genuinely natural in our intellect alike in its elementary apprehensions and its native tendency towards truth.” MARITAIN, INTRODUCTION, *supra* note 199, at 74.

²⁴¹ As Gilson describes natural law:

Man, as a rational creature, has the strict duty of knowing what eternal law exacts of him and of conforming to it. This might be an insoluble problem, were this law not in some way written in his very substance, so that he has only to observe himself attentively in order to discover it there. In us, as in every thing, the inclination which draws us toward certain ends is the unmistakable mark of what eternal law demands of us. Since it is eternal law that makes us what we are, we have only to yield to the legitimate inclinations of our nature in order to obey it. Eternal law, thus shared by each one of us, and which we find written in our own nature, is called *natural law*.

ETIENNE GILSON, THE CHRISTIAN PHILOSOPHY OF ST. THOMAS AQUINAS 266 (1956) [hereinafter GILSON, CHRISTIAN PHILOSOPHY].

²⁴² Yves Simon discusses the natural law and various thinkers such as Aristotle, Plato, Aquinas, and Maritain, (thinkers listed in order of appearance in his work) in his work on it. YVES R. SIMON, THE TRADITION OF NATURAL LAW 7, 27-30, 32-34, 122-25, 186-87 n.16. (1965). “The immediate context of Thomist epistemology is thus a *philosophy of nature*. Every nature is a complex but unified reality, at the same time that it is predestined or predetermined to an end.” REGIS, EPISTEMOLOGY, *supra* note 195, at 143. C. S. Lewis, the great apologist of Christianity in the 20th century, offered a succinct and simplistic definition: “Human beings, all over the earth, have this curious idea that they ought to behave in a certain way, and can’t really get rid of it.” C.S. LEWIS, MERE CHRISTIANITY 21 (1943). For contemporary elaboration on the natural law, see ST. THOMAS AQUINAS AND THE NATURAL LAW TRADITION: CONTEMPORARY PERSPECTIVES (John Goyette et al., eds., 2004).

²⁴³ David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. CRIM. L. & CRIMINOLOGY 469, 494 (1992) (“The criminal justice system, like most institutions, has many objectives. Nevertheless, one goal emerges as preeminent: finding the truth.”). The Supreme Court has also recognized this. “There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.” James v. Illinois, 493 U.S. 307, 311 (1990) (internal quotations omitted). “The essence of the brief *amicus* of the American Bar Association reviewing practices long accepted by ethical lawyers is that under no circumstance may a lawyer either advocate or passively tolerate a client’s giving false testimony. This, of course, is consistent with *the governance of trial conduct in what we have long called ‘a search for truth.’*” Nix v. Whiteside, 475 U.S. 157, 170-71 (1986) (emphasis added).

the word “verdict” means to assert the truth.²⁴⁴ The second (that truth is knowable) is indispensable because uncovering truth is a realistic but not an absolute goal, insofar as it is limited to methods that are proper within the natural order of rights and dignities accorded to human persons.²⁴⁵ Thus, the criminal justice system engages in a relenting “search for truth,”²⁴⁶ which sometimes properly yields to truth-defeating principles such as the right to remain silent (discussed in depth in other Parts of this Article),²⁴⁷ the attorney-client privilege,²⁴⁸ and the marital-communication privilege,²⁴⁹ to name a few. These preliminary observations about truth and the criminal justice system set the stage for a more detailed consideration of the first of our philosophical topics: truth itself.

1. Truth

The basic questions about truth—such as what is it and whether it exists in an unadulterated form—have alternatively plagued and spurred philosophy. Like two biting gadflies, they have driven everything from the Socratic dialogue²⁵⁰ to phenomenological

²⁴⁴ MORTIMER ADLER, *SIX GREAT IDEAS* 36 (1981) [hereinafter ADLER, *SIX GREAT IDEAS*].

²⁴⁵ Paul L. Seave, *And Nothing But the Truth: A Review of Judge Rothwax’s “Guilty: The Collapse of Criminal Justice,”* 28 PAC. L.J. 533, 534 (1997) (“The criminal justice system, Judge Rothwax explains, should reflect ‘equal measures of truth and fairness.’”); Kara Lundy, Note, *Juror Questioning of Witnesses: Questioning the United States Criminal Justice System*, 85 MINN. L. REV. 2007, 2012 (2001). “Therefore, although determining truth is the ultimate goal of the United States criminal justice system, certain violations of a defendant’s dignity or autonomy can lead to some evidence of truth being kept from the fact-finder.” *Id.* “Against this strong governmental interest, we must weigh the nature and extent of the intrusion upon the individual’s Fourth Amendment rights when the police briefly detain luggage for limited investigative purposes.” *United States v. Place*, 462 U.S. 696, 705 (1983). “‘There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.’ But various constitutional rules limit the means by which government may conduct this search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation’s history.” *James*, 493 U.S. at 311 (citations omitted).

²⁴⁶ *Nix*, 475 U.S. at 171.

²⁴⁷ See *infra* Part V.

²⁴⁸ See generally David B. Leland, *Attorney-Client Privilege*, 68 GEO. WASH. L. REV. 598 (2000).

²⁴⁹ Pamela A. Haun, *The Marital Privilege in the Twenty-First Century*, 32 U. MEM. L. REV. 137 (2001).

²⁵⁰ A type of philosophical investigation utilized by Plato in a series of works that have come to be known, quite appropriately, as Dialogues. It involves using a conversation between individuals, who usually hold varying and conflicting views, as both a literary and analytical method to reach and teach philosophical conclusions. The accessibility of such a method to the reader is remarkable, especially vis-à-vis the existing works of Plato’s student, the treatise-minded Aristotle. This is not to say that Aristotle did not write dialogues; he was praised by no less a rhetorician than Cicero. Aristotle, <http://en.wiki>

bracketing²⁵¹ to any number of other methodologies and approaches.²⁵² The purpose here is not to resolve or even catalogue all of these disputes; it is beyond the scope of the Article, and the intent and capacity of the author. Pause is appropriate, however, to consider *truth* as such, so as to draw some useful deductions about it, which can later be applied to criminal confessions.

“All men by nature desire to know.”²⁵³ Thus did Aristotle begin Book I of his *Metaphysics*. The thirst for knowledge, of course, is not quenched by falsehood but is satiated by truth.²⁵⁴ Augustine observed that he had “known many who wished to deceive, but none who wished to be deceived.”²⁵⁵ Truth is an innate desire of humanity;²⁵⁶ it is our

pedia.org/wiki/Aristotle (last visited Aug. 25, 2006). Regrettably, Aristotle’s dialogues have been lost over time. *Id.*

²⁵¹ Edmund Husserl (1859-1938) noted that phenomenological reflection does not presuppose that anything exists, but rather it amounts to a “bracketing of existence,” i.e., setting aside the question of the real existence of the contemplated object. European Graduate School, *Edmund Husserl*, <http://www.egs.edu/resources/husserl.html> (last visited Aug. 25, 2006).

²⁵² An old favorite is Oliver Wendell Holmes: “[T]ruth [is] the majority vote of that nation that can lick all others.” Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 40 (1918).

²⁵³ ARISTOTLE, METAPHYSICS 980a1, in THE BASIC WORKS OF ARISTOTLE 689 (Richard McKeon trans., 1941).

²⁵⁴ Louis Regis provides a fascinating discussion of the connection between the desire for truth and the foundation of Greek Philosophy:

Sir Arthur Eddington clearly reveals the universal law governing the existence of every problem. In the mind there must be two storytellers, who must each tell different stories about the same fact or the same universe. As long as there is but one narrator there is no problem. Neither is there a real problem when there are several storytellers whose stories agree. Only when there is a coexistence in the mind of two storytellers giving divergent accounts does a problem develop. . . . We may begin our . . . inquiry at the very cradle of Western thought, with the Greeks. We see that as long as there exists in the Greek mind only the theogonic and cosmogonic universe described by Homer and Hesiod there is no problem. . . . But as soon as keen-minded thinkers start to reflect, as soon as they try to explain the three outstanding facts in this universe of immediate perception—namely, motion, the multiplicity that motion implies, and order among the different phenomena—as soon as they attempt to give a cosmological explanation of reality and try to bring into it the first law of the mind, its need for unity, then a universe other than that of the cosmogonies springs up in the human consciousness.

REGIS, EPISTEMOLOGY, *supra* note 195, at 8-9.

²⁵⁵ AUGUSTINE, CONFESSIONS, *supra* note 197, at bk. XI.

²⁵⁶ Consider the opening words of *Fides et Ratio*:

In both East and West, we may trace a journey which has led humanity down the centuries to meet and engage truth more and more deeply.

taking hold of and knowing the world in which we live.²⁵⁷ Yet, despite (or perhaps because of) the desire for truth and its description by some as the “ultimate good of the human mind,”²⁵⁸ conclusions about it are far from uniform.

The basic characteristic of truth given by Aristotle and accepted by Aquinas—and Augustine²⁵⁹—is “[t]hat which affirms the existence of what is, and denies the existence of what is not.”²⁶⁰ This imparts the transcendent relationship of truth to being.²⁶¹ Furthermore, truth assumes the characteristic of determinacy as a consequence of its relationship to being. To say that truth is determinate simply acknowledges the principle of non-contradiction.²⁶² The principle holds

It is a journey which has unfolded—as it must—within the horizon of personal self-consciousness: the more human beings know reality and the world, the more they know themselves in their uniqueness, with the question of the meaning of things and of their very existence becoming ever more pressing. This is why all that is the object of our knowledge becomes a part of our life. The admonition *Know yourself* was carved on the temple portal at Delphi, as testimony to a basic truth to be adopted as a minimal norm by those who seek to set themselves apart from the rest of creation as “human beings”, that is as those who “know themselves”.

Pope John Paul II, *Fides et Ratio* (Sept. 14, 1998), http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_15101998_fides-et-ratio_en.html (last visited Aug. 25, 2006).

²⁵⁷ The recipients of Aristotle’s philosophical and intellectual beneficence often go further and connect truth to beauty and good in a “sovereign” fashion, even to the point of “regulat[ing]” our thinking on them. ADLER, *SIX GREAT IDEAS*, *supra* note 244, at 135. For a more strictly Thomistic view of the relationship of truth and beauty, see the writings of Jacques Maritain, particularly an acknowledged classic of his early scholarship *Art and Scholasticism*. JACQUE MARITAIN & J.F. SCANLON, *ART AND SCHOLASTICISM WITH OTHER ESSAYS* (1943).

²⁵⁸ ADLER, *SIX GREAT IDEAS*, *supra* note 244, at 63.

²⁵⁹ Augustine offered the following definition: “*Verum est id quod est*” (truth is what is). Andrzej Maryniarczyk, *Veritas Sequitur Esse*, Catholic University of Lublin (1999), <http://www.vaxxine.com/hyoomik/lublin/veritas.html> (last visited Aug. 25, 2006). See AQUINAS, *SUMMA THEOLOGIAE*, *supra* note 6, at Q. 17, art. 1 (where Aquinas discusses Augustine’s definition.); see also AQUINAS, *QUESTIONES DISPUTATAE DE VERITATE* vol. I, Q. 1, art. 1 (Robert W. Mulligan, S.J. trans., 1952), [hereinafter *AQUINAS, DE VERITATE*] (answering the first difficulty, Aquinas writes that if the meaning of Augustine’s statement is “‘The true is that which is—it is had when the existence of what is, is affirmed[]’ . . . then Augustine’s definition agrees with that of the Philosopher [Aristotle] mentioned above”).

²⁶⁰ AQUINAS, *DE VERITATE*, *supra* note 259, at vol. I, Q. 1, art. 1.

²⁶¹ Although not differing in reality, the words “true” and “being” express different things. As Aquinas writes: “The reason why it is not tautological [or meaningless repetition] to call a being true is that something is expressed by the word *true* that is not expressed by the word *being*, and not that the two differ in reality.” *Id.* (answer to first contrary) (emphasis in original).

²⁶² Sometimes referred to as the principle of contradiction. RICE, *supra* note 239, at 137.

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that a “thing cannot both be or not be at the same time under the same aspect,”²⁶³ or, put another way, “that the same thing cannot be affirmed and denied at the same time.”²⁶⁴

In light of the foregoing, several conclusions about truth can be deduced. First, a desire for truth is a result of human beings’ natural desire for knowledge. Second, truth is a relationship of conformity between the human intellect and the object of that intellect: reality. Third, the relationship of truth and reality necessitates that truth is determinate, such that the same thing cannot be affirmed and denied at the same time.

The opposite of truth, of course, is falsity²⁶⁵ or, as a voluntary act, lying. Falsity is a lack of conformity between one’s thoughts and reality, while lying is a lack of conformity between what one does or says and what one believes.²⁶⁶ The relationship and meaning of *truth* and *falsity* is obvious and intuitively understood; as Mortimer Adler once observed, they “are common notions, commonly used.”²⁶⁷ Because of this, the act of

²⁶³ Etienne Gilson, *Medieval Realism*, http://www.ellopos.net/theology/eckhart_gilson.html (last visited Aug. 25, 2006).

²⁶⁴ *Id.*

²⁶⁵ Falsity in its various forms has often been condemned, often forcefully. Augustine wrote “Truth is that which setteth free from all error, and Falsehood that which entangleth in all error, one never errs more safely, methinks, than when one errs by too much loving the truth, and too much rejecting of falsehood.” AUGUSTINE, DE MENDACIO bk. 1, para. 1, <http://www.ccel.org/fathers2/NPNF1-03/npnf1-03-35.htm> (last visited Aug. 25, 2006). Aquinas likewise instructed that “[i]t is evident that lying is directly and formally opposed to the virtue of truth.” AQUINAS, SUMMA THEOLOGIAE, *supra* note 6, at Q. 110, art. 1. Falsity, therefore, is contrary to the basic inclination for knowledge and separates the mind from its object—the reality that is—for the sake of what is not. Thus, the basic definition of a lie is not, it should be noted, connected to any intention of harm—at least not as commonly defined. Rather, what defines a lie is the lack of correspondence between what one is saying and what one believes to be true. “[W]hether the false statement turns out to be injurious or beneficial, it remains a false statement because what its words say do not correspond to what the person who has made the statement actually thinks.” ADLER, SIX GREAT IDEAS, *supra* note 244, at 32. Thus, as Adler also notes, there is the concept of the so-called “white lie.” *Id.*

²⁶⁶ Acts include signs. Aquinas agrees with Augustine on this point: “And so when it is said that ‘a lie is a false signification by words,’ the term ‘words’ denotes every kind of sign. Wherefore if a person intended to signify something false by means of signs, he would not be excused from lying.” AQUINAS, SUMMA THEOLOGIAE, *supra* note 6, at Q. 110, art. 1. William James summed up the distinction nicely: “Truth, as any dictionary will tell you, is a property of certain of our ideas. It means their ‘agreement,’ as falsity means their disagreement, with ‘reality.’” William James, *Pragmatism*, <http://www.emory.edu/EDUCATION/mfp/truth.html> (last visited Aug. 25, 2006).

²⁶⁷ MORTIMER ADLER, ARISTOTLE FOR EVERYBODY 139 (1985) [hereinafter ADLER, ARISTOTLE FOR EVERYBODY]. Adler continues that “everyone knows how to tell a lie.” *Id.*

lying is particularly offensive to human nature and the interrelationships of human beings. Lying is nothing less than the intentional obstruction by another of each person's natural inclination to know.²⁶⁸ Truth, or correspondence between thought and reality, is thus needed both to satisfy our innate desire for knowledge and to enable us to make accurate judgments about reality.²⁶⁹ It is thus most fitting that an ardor for truth rests at the heart of any system of justice.²⁷⁰

2. Justice

The common definition of justice as external action²⁷¹ is as "a habit whereby a man renders to each one his due."²⁷² Justice, according to this view,²⁷³ is concerned both with the internal quality of an act and with its external consequences, i.e., the good of another.²⁷⁴ As justice is a habit,

This knowledge, Adler asserts, requires a basic understanding of the difference between truth and falsity. *Id.*

²⁶⁸ As Adler makes the distinction between speaking falsity and lying:

There is a clear difference between the judgment that what a man says is false and the judgment that he is telling a lie. His statement may be false without his necessarily being a liar. Try as he will to speak truthfully by saying precisely what he thinks, he may be mistaken in what he says through error or ignorance.

The person we ask for directions may honestly but erroneously think that a certain road is the shortest route to the destination we wish to reach. When he tells us which road to take, what he says is false, but not a lie. However, if he does in fact know another road to be shorter and withholds that information from us, then his statement is not only a false one, but also a lie.

ADLER, SIX GREAT IDEAS, *supra* note 244, at 38.

²⁶⁹ *Id.*

²⁷⁰ See generally Stephen J. Safranek, *The Legal Obligation of Clients, Lawyers, and Judges to Tell the Truth*, 34 IDAHO L. REV. 345 (1998) (discussing the importance of truth in the legal process).

²⁷¹ It is "external" in the sense that it is directed toward the good of another. See *infra* notes 272-74.

²⁷² AQUINAS, SUMMA THEOLOGIAE, *supra* note 6, at Q. 58, art. 1.

²⁷³ This should not be taken as the only theory of justice; there are several others of note. One such approach is the social-contract theory, reflected preeminently in writings of John Rawls, in particular in his *A Theory of Justice*. In this work, Rawls proposes a notion of "justice as fairness" and a theoretical "original position" from which to determine the principles that order a just society. See generally JOHN RAWLS, *A THEORY OF JUSTICE* (Oxford Univ. Press 1999).

²⁷⁴ "[Justice] is complete virtue in its fullest sense, because it is the actual exercise of a complete virtue. It is complete because he who possesses it can exercise his virtue not only in himself but towards his neighbor also . . . justice, alone of the virtues, is thought to be 'another's good', because it is related to our neighbor . . ." ARISTOTLE, NICOMACHEAN ETHICS V1129B 30 - 1130a 5, *supra* note 204, at 1003-04 (citing Plato's REPUBLIC).

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however, it remains fundamentally a disposition of the individual.²⁷⁵ This basic definition of justice originated with Plato²⁷⁶ and Aristotle.²⁷⁷ Christian thinkers, building upon these premises,²⁷⁸ reached various conclusions about justice by adding in elements drawn from theology.²⁷⁹ Notwithstanding these variations, several common understandings about justice can be confidently asserted.

Foremost among these is that justice cannot be sustained in the absence of truth. This is so because justice, by its very nature, is an equitable judgment directed to the external in the guise of other persons.²⁸⁰ As Aquinas instructs, the purpose of justice is “to direct man in his relations with others . . . because it denotes a kind of equality, as its very name implies.”²⁸¹ This does not mean, of course, that *justice* and

²⁷⁵ *Id.*

²⁷⁶ PLATO, REPUBLIC bks. I & II, 331b - 369e, in PLATO COMPLETE WORKS 975-1009 (John M. Cooper ed., G.M.A. Grube trans., 1997) (discussing various theories of justice before reaching a conclusion as to its nature).

²⁷⁷ “We see that all men mean by justice that kind of state of character which makes people disposed to do what is just and makes them act justly and wish for what is just” ARISTOTLE, NICOMACHEAN ETHICS V1129a 6-10, *supra* note 204, at 1002.

²⁷⁸ “To everyone the idea of justice inevitably suggests the notion of a certain equality. From Plato and Aristotle, through St. Thomas Aquinas, down to the jurists, moralists and philosopher of our own day runs a thread of universal agreement on this point.” Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 n.20 (1982) (quoting HENRY SIDGWICK, THE METHODS OF ETHICS 380 (7th ed. 1907)).

²⁷⁹ As Gilson writes of Aquinas:

St. Thomas hastens to profit by this admission to make a distinction between Greek justice, which is entirely directed to the good of the city, and a particular justice, enriching the soul which acquires and exercises it as one of the most precious perfections. This time it is no longer in Aristotle that St. Thomas finds the text which authorizes him to proclaim that this justice exists, it is in St. Matthew’s Gospel: “Blessed are they who hunger and thirst after justice.”

GILSON, CHRISTIAN PHILOSOPHY, *supra* note 241, at 308.

²⁸⁰ See AQUINAS, SUMMA THEOLOGIAE, *supra* note 6, at Q. 17, art. 4 (“True and false are opposed as contraries, and not, as some have said, as affirmation and negation For as truth implies an adequate apprehension of a thing, so falsity implies the contrary.”).

²⁸¹ *Id.* at Q. 57, art. 1.

equality are synonymous, as justice is an “unlimited good”²⁸² while equality is not.²⁸³

Just as truth is the conformity of the intellect with reality, so to justice is the equitable conformity of our intentional acts²⁸⁴ with reality in relation to other persons.²⁸⁵ As some have noted, in a society of friends there would be no need for justice; as a matter of historical reality, justice is the mortar that binds men together.²⁸⁶ To act justly (equitably in regard to others) necessarily demands conformity of the intellect with reality so that proper judgments can be made. In this sense, lying or deceptive silence²⁸⁷ can compound the injury to justice, as this may

²⁸² Adler writes:

[A]ll real goods are not of equal standing. . . . Some real goods are truly good only when limited. Pleasure is a real good, but we can want more pleasure than we need or more than is good for us to seek or obtain. The same is true of wealth. These are limited real goods. In contrast, knowledge is an unlimited real good. We can never seek or obtain more than is good for us. . . . [J]ustice is an unlimited good, as we shall presently see. One can want too much liberty and too much equality—more than it is good for us to have in relation to our fellowmen, and more than we have any right to. Not so with justice. No society can be too just; no individual can act more justly than is good for him or for his fellowmen.

ADLER, *SIX GREAT IDEAS*, *supra* note 244, at 137. As Aristotle writes of justice, “‘neither evening nor morning star’ is so wonderful” ARISTOTLE, *NICOMACHEAN ETHICS* 1129b 26-29, *supra* note 204, at 1003.

²⁸³ See *supra* note 278.

²⁸⁴ Aristotle, for one, claims that “a man acts unjustly or justly whenever he does such acts voluntarily; when involuntarily, he acts neither unjustly nor justly except in an incidental way; for he does things which happen to be just or unjust.” ARISTOTLE, *NICOMACHEAN ETHICS* 1135a 15-17, *supra* note 204, at 1015. In this sense, T commits an unjust act but is not unjust if he testifies, with all sincerity, that A⁺ was the man he saw murder B—the reality being that A⁺ has been long lost and as his yet unknown twin brother, A⁻, was the real killer. Even though A⁺ will be unjustly convicted, T is not guilty of being unjust. Were results all that mattered, then absurd possibilities would be allowed, as where one who intended to unjustly deprive an investor of money by selling a worthless piece of property could be considered to have acted justly if the land is later discovered to have large oil reserves on it and turns a nice profit for the investor.

²⁸⁵ See *supra* note 268-69 and accompanying text.

²⁸⁶ ADLER, *ARISTOTLE FOR EVERYBODY*, *supra* note 267, at 100. As Adler goes on to state: “Where love is absent, justice must step in to bind men together in states, so they can live peacefully and harmoniously with one another, acting and working together for a common purpose.” *Id.* at 104.

²⁸⁷ No claim is made here that all permissions of falsity in another’s mind are unjust. For instance, few (not members of the SS) would claim that the patrons of Ann Frank would have been committing injustice by refusing to let Nazis erroneously believe she was in the home. ANNE FRANK, *ANNE FRANK: THE DIARY OF A YOUNG GIRL* (B.M. Mooyart trans., 1993). The question of affirmative lying is more complicated and has spurred great debate. Even Albertus Magnus and his pupil, Aquinas, are reported to have disagreed on such

create (by intentional act or omission) disparity between the intellect and reality in another's mind.

Lying can thus be doubly injurious to justice. First, it can frustrate the desires of another for true knowledge. Second, it can separate the intellect of another from reality, thereby causing skewed judgment and baseless actions.²⁸⁸ Such discordant conduct is commonly referred to as injustice. In other words, while justice is the equitable conformity of action with reality, injustice conversely is the inequitable discordance of action and reality.²⁸⁹

In summary, several conclusions about justice can be deduced. First, justice is a habit or disposition of character for acting with equity toward another. Second, conformity between act and reality requires conformity between intellect and reality, i.e., truth. Third, the relationship between truth and justice creates a special necessity between them, and it gives truth a doubled value in the order of justice—not only as what is due another, but also as what effects the justice of one's relations with others. Accordingly, truth occupies a position of prominence in any system of justice, so much so that even the earliest mythologies accorded truth and justice a complimentary and exalted status.²⁹⁰ As both truth and justice are necessary for the fulfillment of the human person and, therefore, are required for an ordered society, they share an indispensable relationship to the common good.

matters. "Aquinas, like Kant and apparently unlike his teacher Albert the Great, was a rigorist in allowing no exceptions to the prohibition of lying." A.S. McGrade, *What Aquinas Should Have Said? Finnis's Reconstruction of Social and Political Thomism*, 44 AM. J. JURISPRUDENCE 125, 132 (1999).

²⁸⁸ Thus, if A lies to B, claiming that C took his TV when A really was the thief, then A doubly injures justice. First, A intentionally confounds B's desire for knowledge of what happened to his TV. Second, A directs blame (and possibly punishment) toward the undeserving C. Hence, B will be rightly angry should he discover A's fraud, not only that he was lied to, but also because of any retributive acts he was tricked into imposing against C.

²⁸⁹ "[W]e speak of injustice in reference to an inequality between one person and another, when one man wishes to have more goods, riches for example, or honors, and less evils, such as toil and losses, and thus injustice has a special matter and is a particular vice opposed to particular justice." AQUINAS, *SUMMA THEOLOGIAE*, *supra* note 6, at Q. 59, art. 1.

²⁹⁰ "The origin of the Goddess of Justice goes back to antiquity. She was referred to as Ma'at by the ancient Egyptians and was often depicted carrying a sword with an ostrich feather in her hair (but no scales) to symbolize truth and justice." Barbara Swatt, *Themis, Goddess of Justice*, (Marian Gould Gallagher Law Library), <http://lib.law.washington.edu/ref/themis.html> (last visited Aug. 25, 2006).

3. The Common Good

The “common good,”²⁹¹ in the classic sense, refers to “the complete set of conditions necessary for every member of the community to flourish as a member of the community.”²⁹² The common good, therefore, is not attained by some communal calculus, where 51% of the people exist happily on the suffering of the other 49%.²⁹³ Nor can it ever contemplate the Leviathan-type government that consumes its members, turning them into atomic particles of its structure.²⁹⁴ The common good has a human relevance far beyond simple numbers and percentages, or mere interdependence. As Jacques Maritain described it:

The common good is common because it is received in persons, each one of whom is a mirror of the whole. Among the bees, there is a public good, namely, the good functioning of the hive, but not a common good, that is, a good received and communicated. The end of society, therefore, is neither the individual good nor the collection of the individual goods of each of the persons who constitute it. . . . The common good of the city is neither the mere collection of private goods, nor the proper good of a whole which, like the species with respect to its individuals or the hive with respect to its bees, relates the parts to itself alone and sacrifices them to itself. *It is the good human life of the multitude, of a multitude of persons; it is their communion in good living.* It is therefore common to both the whole and the part into which it flows back and which, in turn, must benefit from it.²⁹⁵

²⁹¹ This notion appears in the *Politics* of Aristotle. “The true forms of government, therefore, are those in which the one, or the few, or the many, govern with a view to the common interest” ARISTOTLE, *POLITICS*, in *THE BASIC WORKS OF ARISTOTLE* 1185 (Richard McKeon trans., 1941) [hereinafter ARISTOTLE, *POLITICS*].

²⁹² Robert Kennedy, *The Virtue of Solidarity and the Purpose of the Firm*, in *RETHINKING THE PURPOSE OF BUSINESS* 53 (S. A. Cortright & Michael J. Naughton eds., 2002) (“[T]he proper definition of the common good for a society is not simply a matter of liberties and protections, but is instead the complete set of conditions necessary for every member of the community to flourish as a member of the community.”).

²⁹³ JACQUE MARITAIN, *THE PERSON AND THE COMMON GOOD* 52 (John J. Fitzgerald trans., 1947) [hereinafter MARITAIN, *THE COMMON GOOD*] (“The common good includes all of these and something more besides For it includes also, and above all, the whole sum itself of these; a sum which is quite different from a simple collection of juxtaposed units. (Even in the mathematical order, as Aristotle points out, 6 is not the same as 3 + 3.”)).

²⁹⁴ *Id.* at 100-01.

²⁹⁵ *Id.* at 49-51 (emphasis added).

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Justice and truth, although not proposed as the only values necessary for the common good,²⁹⁶ are inextricably connected to a proper conception of the common good. For if the common good is understood as a “communion in good living,” then such living must perforce consist of acts that are in accord with, *inter alia*, justice and truth.²⁹⁷ Indeed, only a society defined by justice and truth can satisfy all of its constituents’ basic human needs and fulfill all of its communal responsibilities.²⁹⁸

The common good, in this sense, presupposes certain individual duties and societal imperatives. With respect to truth and justice, the common good creates a duty on the part of each individual to live life in such a way as to promote these values, while calling upon society to advance and foster the same.²⁹⁹ In the absence of truth and justice, the common good is little more than an idealized impossibility, which is largely disconnected from the real world and actual human activity. Even so, it must be remembered that basic human dignity cannot itself be compromised in meeting the requirements of human flourishing, lest the endeavor be lost before it begins. Put simply, the individual person

²⁹⁶ Security and happiness as mentioned elsewhere in this Article are included in the content of the common good. See *infra* Part IV.B.3. As the *Catechism of the Catholic Church* teaches, “[T]he common good requires peace, that is, the stability and security of a just order.” CATECHISM OF THE CATHOLIC CHURCH, *supra* note 5, § 1909. This is by no means an exhaustive list. Professor Finnis has explained that

in the case of political community, the . . . common good of such an all-round association was said to be the securing of a whole ensemble of material and other conditions that tend to favour the realization, by each individual in the community, of his or her personal development. . . . ‘[T]he common good’ refer[s] to the factor or set of factors . . . which, as considerations in someone’s practical reasoning, would make sense of or give reason for his collaboration with others and would likewise, from their point of view, give reason for their collaboration with each other and with him.

FINNIS, NATURAL LAW, *supra* note 10, at 154 (citations omitted).

²⁹⁷ As Adler writes:

What do others have the right to expect from us? That we keep the promises we make to them. That we tell them the truth whenever telling them a lie would hurt them in some way. . . . That we do not steal what belongs to them. . . . It is their need for real goods that gives them a right to them, and it is their right to them that we are obliged to respect – if we ourselves are just.

ADLER, ARISTOTLE FOR EVERYBODY, *supra* note 267, at 105-06.

²⁹⁸ *Id.*

²⁹⁹ The “common good of political society is . . . the sum or sociological integration of all the civic conscience, political virtues and sense of right and liberty, of all the activity, material prosperity and spiritual riches, of unconsciously operative hereditary wisdom, of moral rectitude, justice, friendship, happiness, virtue and heroism in the individual lives of its members.” MARITAIN, THE COMMON GOOD, *supra* note 293, at 42.

cannot be treated unjustly to achieve communal justice. For this reason, some discussion of human rights and human dignity is appropriate and necessary.

4. Human Rights and Human Dignity

Any serious reflection about the human person and society inevitably leads to contemplation of human rights and human dignity. Rights and human dignity flow from each other, with dignity informing rights and rights upholding dignity.³⁰⁰ Truth, justice, and the common good are inextricably related to duties and dignities.³⁰¹ From this, some consideration of human rights,³⁰² natural rights,³⁰³ or fundamental rights,³⁰⁴ as they are alternately called,³⁰⁵ inevitably follows.

The idea of human or natural rights is certainly one of the most contentious in philosophy.³⁰⁶ As David Ritchie wrote of it, the words “are constantly bandied about in controversy as if they settled quarrels, whereas they only provoke them by their ambiguity.”³⁰⁷ With this in mind, an initial disclaimer as to the insufficiency of the instant treatment of human rights is necessary. The present purpose is not to settle long-standing disputes or to frame new ones; rather, it is merely to skim the surface to glean a basic understanding of rights and establish a frame of reference for later use. Nor is this section intended to evaluate rights in the sense that they are guaranteed by the Constitution or granted by the Supreme Court. To the extent that these matters are addressed at all in this Article, it occurs elsewhere.³⁰⁸

³⁰⁰ FINNIS, NATURAL LAW, *supra* note 10, at 218-21.

³⁰¹ GILSON, CHRISTIAN PHILOSOPHY, *supra* note 241, at 306.

³⁰² See generally LAURA HITT, HUMAN RIGHTS (2002).

³⁰³ See generally DAVID G. RITCHIE, NATURAL RIGHTS (1894).

³⁰⁴ “[T]he right to marry is part of the fundamental ‘right of privacy’ implicit in the Fourteenth Amendment’s Due Process Clause.” *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

³⁰⁵ Unless otherwise indicated, the terms “human rights,” “natural rights,” and “fundamental rights” are used interchangeably.

³⁰⁶ In writing on natural rights theory, Ritchie fears the he “occupied in slaying the already slain,” but nonetheless notes that “it yet remains a commonplace.” RITCHIE, *supra* note 303, at ix.

³⁰⁷ *Id.* at 20. Ritchie goes on to point out several uses and debates on the words “nature” and “natural.” *Id.*

³⁰⁸ The constitutional parameters of Fifth and Fourteenth Amendment rights pertaining to criminal confessions is addressed in *supra* Part II. Additional discussion of these rights is found generally in *infra* Part V, and is particularly referenced *infra* note 327.

It is nonetheless worthwhile for present purposes to address, if only briefly and in an abstract manner, the philosophical view of human or natural rights. This does not require an examination of distinct rights such as, for example, liberty³⁰⁹ or alternatively self-determination,³¹⁰ equality,³¹¹ the right to worship freely and without coercion,³¹² and more

³⁰⁹ Sometimes this is taken to extremes. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Casey v. Planned Parenthood*, 505 U.S. 833, 851 (1992). At face value, the quoted proposition is incomprehensible. Such room for diversity of opinion as to what existence is or is not, what the universe is or is not, or what meaning is or is not, could hardly hope to operate in a society of individuals who, nevertheless, must function as a unit. For example, the proposition that Blacks are inferior to Whites and fit for enslavement has been tried in this country and rightly rejected. Although there are members of certain organizations who decry this lack of legal recognition of their own concept of meaning, the mystery of human life, and existence, most would not consider it a loss of liberty to say that one cannot own slaves. Fewer still would consider it the heart of liberty.

³¹⁰ See generally JOSEPH RICKABY, *FREE WILL AND FOUR ENGLISH PHILOSOPHERS* (1906) (discussing Thomas Hobbes, John Locke, David Hume, and John Stuart Mill). Adler takes self-determination to be the more accurate nomenclature for what is commonly referred to as liberty. Adler writes:

We must, therefore, find some term other than these to identify the freedom which a large group of authors attributes to anyone who is a man. The identifying designation must not only be wholly unobjectionable, in the sense of being without prejudice to the theory of any author in this group; but it must also be capable of conveying unambiguously a meaning that is distinctive of natural freedom. We propose to use "self-determination" for this purpose.

MORTIMER J. ADLER, *THE IDEA OF FREEDOM* 402 (1958) [hereinafter ADLER, *IDEA OF FREEDOM*].

³¹¹ See generally *EQUALITY* (J. Roland Pennock & John W. Chapman eds., 1967) (series of essays by legal and philosophical societies).

³¹² Pope Paul VI, *Dignitatis Humanae: Declaration on Religious Freedom*, CATHOLIC DOSSIER, Nov/Dec 1965, at 34. While stating that the "one true religion subsists in the Catholic and Apostolic Church," Pope Paul VI teaches

The council exhorts Catholics, and it directs a plea to all men, most carefully to consider how greatly necessary religious freedom is, especially in the present condition of the human family. All nations are coming into even closer unity. Men of different cultures and religions are being brought together in closer relationships. There is a growing consciousness of the personal responsibility that every man has. All this is evident. Consequently, in order that relationships of peace and harmony be established and maintained within the whole of mankind, it is necessary that religious freedom be everywhere provided with an effective constitutional guarantee and that respect be shown for the high duty and right of man freely to lead his religious life in society.

Id. at para. 15 (emphasis added).

modern incarnations such as the right to vote³¹³ or to bear arms.³¹⁴ A greater discussion of the right of self-determination will be undertaken shortly, as this right directly bears on confession. The immediate discussion, however, will consist of a generalized treatment of the limits rights must inevitably endure, which in turn implicates how rights alternatively affect and are affected by the common good.

In order to understand the nature of rights, one must accept that “human rights can only be securely enjoyed in certain sorts of milieu—a context or framework of mutual respect and trust and common understanding, an environment which is physically healthy and in which the weak can go about without fear of the whims of the strong.”³¹⁵ To contemplate the substance of rights, therefore, is to contemplate the limits they must accept for the sake of internal consistency.³¹⁶ Stated more concretely, the exercise of a right by one should not deny the same right (or other rights) as held by another. For example, one’s capacity to exercise his right to self-determination is limited by the need to respect the self-determination of others. Similar complementary constraints upon the exercise of other rights are derived from an understanding of human nature, which, as Professor Finnis explains, can limit freedom:

On the one hand, we should not say that human rights, or their exercise, are subject to the common good: for the maintenance of human rights is a fundamental component of the common good. On the other hand, we can appropriately say that most human rights are subject to or limited by each other and by other *aspects* of the common good, aspects which could probably be subsumed under a very broad conception of human rights but which are fittingly indicated . . . by expressions such as “public morality,” “public health,” “public order.”³¹⁷

Human rights and the common good thus relate to each other in a circular fashion. As Professor Finnis puts it, rights are both

³¹³ See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000) (discussing the history of voting rights in the United States).

³¹⁴ U.S. CONST. amend II. One need hardly be a student of history to see that the right of the populace to bear arms was one not recognized in most political systems.

³¹⁵ FINNIS, *NATURAL LAW*, *supra* note 10, at 216.

³¹⁶ *Id.* at 215-16.

³¹⁷ *Id.* at 218.

“fundamental component[s] of the common good” and are “limited” by other aspects of the common good. Accordingly, no individual right can be ignored by the common good, nor may it assume absolute priority within the common good.

Referring back to the earlier discussion in this Part, two important and generalized limitations upon rights can be deduced. First, rights are limited by the natural desire of humanity for truth and by the justice we owe others. Not only are we individually called toward truth as a desire of nature, but we are also called by justice to promote truth for the benefit of others and, especially, not to frustrate *their* natural desire for truth. Second, and as just mentioned above, rights are limited by the common good and the duties that we owe to the advancement of it. With the preceding in mind, we can now turn to confession, the paradigm situation in which truth, justice, the common good, and human rights all converge.

C. *Confessions: A Philosophical “Complex of Values”*

As described above, the act of confessing provides an intersection for humanity’s desire for truth, impulse for justice, and need for both to achieve the common good, balanced against the imperative of human rights and dignity. The human person relates to the act of confession through its intimate connection to the truth. As observed earlier, truth is a natural human desire. Accurate confession is a naturally desirable act because it bestows truth on the listener. In the context of justice generally—and in particular a criminal justice system—truth reigns supreme. A truthful confession is an efficacious means to the truth, and thus it has a normative and practical value. Because a truthful confession is singularly capable of using the truth to achieve justice—and thereby promoting the common good—it occupies a preeminent position within a properly oriented society. Although the inestimable value of a truthful confession from the perspective of the common good is an important normative consideration, the matter of human rights and dignity must be addressed to complete the analysis.

Confession cannot be divorced from the rights and dignities of human individuals, as these are realized within the common good. As mentioned above, the common good and human rights are intimately related to each other, with the latter informing the former and the former limiting the latter. This interdependence sets the parameters for any discussion of whether and to what extent a confession may be coerced through physical or mental discomfort. Stated broadly, human dignity

cannot be cast aside in seeking the common good because at the heart of the common good is human dignity itself. In the context of confession, this most clearly arises in regard to the right to self-determination.

The right of self-determination mentioned briefly above,³¹⁸ which is sometimes described as the right of free choice or liberty, helps form the common good in a way that denies the legitimacy of using some means to obtain confessions. The understanding of human nature that proposes a free will and the power of individual choice also proposes a view of human dignity that is offended by certain coercive measures.³¹⁹ This holds true even when the state is the actor exerting influence.³²⁰ For example, torture is recognized in most societies as an illegitimate means of obtaining confessions.³²¹ The dignity of the human person prevents the right of self-determination from being suborned through torture, without regard to whether it might promote truth or effectuate a correct determination of guilt or innocence, i.e., justice. Accordingly, a guilty suspect's dignity may limit the state's legitimate authority to compel his confession. Contrariwise, a guilty suspect's dignity is not diminished, but rather it can be enhanced, when he freely chooses to confess.

At the same time, the right to exercise self-determination is not unfettered. It is limited, as noted earlier, not only by the rights of other individuals but also by aspects of the common good. The criminal justice system is established and maintained with the primary purpose of preventing individuals from exercising an unrestrained free will to the detriment of society.³²² Indeed, the object of restraining will is a justification for criminal punishment.³²³ Likewise, with respect to

³¹⁸ *Supra* note 310.

³¹⁹ ADLER, IDEA OF FREEDOM, *supra* note 310, at 202 (discussing the forms of self-realization and the varying weight different thinkers have accorded individual choice).

³²⁰ *Id.* at 224 (discussing human liberty and the law).

³²¹ This current proscription of torture has not existed throughout history and at times it was considered a legitimate means of obtaining information from suspects. LANGBEIN, *supra* note 19, at 5-8 (describing how with the abolition of ordeals, confessions obtained by torture became an accepted means of proving guilt in the thirteenth century Europe); Milhizer, *Justification and Excuse*, *supra* note 173, at 761.

³²² This is literally Hornbook law. WAYNE R. LAFAVE, CRIMINAL LAW (*Hornbook Series*) 22 (3d ed. 2000) ("The broad purposes of the criminal law are, of course, to make people do what society regards as desirable and to prevent them from doing what society considers to be undesirable. Since criminal law is framed in terms of imposing punishment for bad conduct, . . . the emphasis is more on the prevention of the undesirable . . .").

³²³ Professor Falvey discusses the relationship of criminal punishment and coercing free will as follows:

[T]o constitute punishment, the act [of punishment] must be opposed to the will. If the essence of punishment includes deprivation of some

confession, the right of a guilty suspect to self-determination is not absolute. It should be exercised in accord with the natural desire for truth and justice, and consistent with the need for both in the context of the common good. Sound public policy would support this, recognizing that failing to inform those in a position to confess of the power and good it represents to them as individuals and to society in general is no less a departure from the needs of human nature than overly coercive questioning. One violates the rights of the individual, the other violates the rights of others and the needs of the common good.

It was Plato who suggested that if we are properly ordered, we would choose our punishment rather than seek to avoid it.³²⁴ This is a lofty ideal indeed. Yet, as the forgoing discussion demonstrates, it is one that is connected with our human nature. We not only naturally desire truth and justice, but we need them to achieve the common good. Our rights, as such, do not exist in a vacuum of inordinate goals; rather, they are powers and privileges to be exercised in accord with our natural desires. When human rights are in discord with natural desires, the result is the oft-lamented tribulations of depression, guilt, anxiety, and regret. Although sometimes harmful,³²⁵ these feelings can also be symptomatic of something far more damaging and sinister.³²⁶ Individuals need to conform their actions, and society its laws and policies, to a correct understanding of truth, justice, the common good, and the human person. The goal is to advance the common good and rights of all without unduly infringing on the human dignity of the individual. When these values and goals are considered in the context of

good, punishment must be opposed to the will because no one wills to be deprived of some good. . . . In committing a crime, a criminal follows his own will beyond what is allowable under the law. For justice to be restored, it is necessary that the criminal be deprived, because of this excessive indulgence of his will, by undergoing something contrary to his will.

Joseph L Falvey, Jr., *Crime and Punishment, A Catholic Perspective*, 43 CATHOLIC LAWYER 149, 153-54 (2004). Accord FINNIS, NATURAL LAW, *supra* note 10, at 263 (punishment seeks to restore fairness and accomplish justice “by depriving the criminal of what he gained in his criminal act . . . [through] the exercise of self-will or free choice”).

³²⁴ “On my view of it, Polus, a man who acts unjustly, a man who is unjust, is thoroughly miserable, the more so if he doesn’t get his due punishment for the wrongdoing he commits, the less so if he pays and receives what is due at the hands of both gods and men.” PLATO, GORGIAS, *supra* note 3, at 816.

³²⁵ ANTOINE VERGOTE, GUILT AND DESIRE 43-61 (M.H. Wood trans., 1988) (discussing what he calls the “Religious Neurosis of Culpability”).

³²⁶ Recall that modern psychology tends to treat guilt and shame as harmful in the broadest (and not a symptomatic) sense. See *supra* notes 149-62 and accompanying text.

contemporary criminal confession jurisprudence, the need for radical change becomes abundantly apparent.

V. TRANSLATING PRINCIPLES INTO PROCEDURES

Having just described the values that should inform a principled approach to confessions, the final step is to consider ways in which they can be effectively incorporated into police practices. Neither the Court's pre-*Miranda* nor its post-*Miranda* jurisprudence satisfactorily accomplishes this. What is needed is a new approach, which is oriented toward achieving the most beneficial end (reliable confessions) through the use of virtuous and efficacious means (procedures that encourage guilty suspects to confess for the right reasons), while concomitantly rejecting and condemning immoral practices and procedures regardless of their propensity for producing reliable confessions. A critique of the Court's approach to confessions, and some proposed revisions for interrogating suspects, is presented in Part V.

One caveat is necessary before proceeding. Although the constitutionality of some of the proposed changes is obliquely considered here, a detailed examination of the origins, meaning, and parameters of the Fifth and Fourteenth Amendments' protections is beyond the scope of this Article. Accordingly, while it is contended that all the proposed changes are constitutionally permitted, no claim is made that any are constitutionally required.³²⁷ Legislatures and other legitimate rule-making authorities are capable of instituting all of the various components of the proposals made in Part V regardless of whether they define, exceed, or simply correspond to constitutional minimums.³²⁸

³²⁷ The relationship between constitutional rights on the one hand, and transcendent values and norms on the other, is a complicated subject and beyond the scope of this Article. See generally GARVEY, *supra* note 97 (considering freedom from the perspective of constitutional rights and moral choices); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) (argues that modern American political discourse, by emphasizing an ever-expanding catalogue of rights to the exclusion of duties and responsibilities, has lost its central role in civic life as envisioned by the Founding Fathers).

³²⁸ The Supreme Court has instructed that "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." *Oregon v. Hass*, 420 U.S. 714, 719 (1975). See generally Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 217 (1988) (reporting that in hundreds of cases state courts have recognized rights not available under the federal constitution). Sources for the protection of rights above and beyond those in the U.S. Constitution, as interpreted by the Supreme

A. *The Most Beneficial End*

Before specific procedural means relating to confessions can be offered and evaluated, it is necessary to identify the ends that they should seek to accomplish. This involves translating abstract and universal norms identified in Part IV into more tangible and specific values, and then further refining these so that they apply to the American criminal justice system generally and police interrogations in particular. The treatment here is brief and superficial. Its limited purpose is to inform and guide efforts to reform police practices, so that they better respect and promote basic values and appropriately resolve any tensions that might arise between them.

The immutable norms relating to the common good identified in Part IV include truth, justice, security, and happiness. Within the context of the criminal justice system, these norms are directly and obviously realized when the system seeks and produces accurate and reliable results. Such results, by definition, comport with and promote truth. They help achieve justice by giving each his due. They make people more secure by reducing crime and needless intrusions upon their privacy and liberty. They make people less anxious by minimizing the fear of false accusations and convictions.³²⁹

In a narrow sense, the criminal justice system achieves accuracy and reliability through correct verdicts, where the guilty are convicted and the innocent are acquitted,³³⁰ as well as by other just dispositions of cases.³³¹ More broadly, the desire for accuracy and reliability extends to the investigatory and pretrial processes, which involves identifying and

Court and other federal courts, include state constitutions, federal statutes and rules of criminal procedure, regulations promulgated by law enforcement agencies, and even the Court's "supervisory authority" over the administration of criminal justice in the federal courts. See DRESSLER, *supra* note 18, § 1.02 (discussing sources of procedural law).

³²⁹ See generally Safranek, *supra* note 270, at 352-53 (discussing the importance of predictability for a legal system, and relating predictability to truth).

³³⁰ This does not imply the acquittal of a guilty suspect is as harmful as the conviction of an innocent person. As Justice Harlan once explained:

In a criminal case, . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . . In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.

In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

³³¹ In this regard, drawing distinctions between "legal" and "factual" guilt is unnecessary for the present discussion and beyond the scope of this Article. See generally Arenella, *supra* note 133, at 214 (discussing factual and legal guilt).

bringing the guilty to justice while ensuring that the innocent are not falsely accused or otherwise unnecessarily burdened. Police investigation of crime generally, and the interrogation of suspects in particular, implicates accuracy and reliability in both the narrow and broader sense.

Accuracy and reliability are seriously undervalued, however, when they are treated as merely two of many comparably important goals. Quite to the contrary, accuracy and reliability together ought to be the defining purpose—the lodestar and *raison d’etre*—of a moral and efficacious criminal justice system. Common sense, philosophical norms, our legal tradition, and practical experience all tell us this. We authorize the police to investigate crime on our behalf in order to identify and apprehend the guilty, and, derivatively, exonerate the innocent. We use criminal trials to accomplish the same end with greater confidence and finality.³³² Too much inaccuracy and unreliability can undermine the legitimacy of the criminal justice system, real and perceived.³³³ The Supreme Court has repeatedly lauded the fundamental importance of accuracy and reliability,³³⁴ and even those who emphasize countervailing values acknowledge the worthiness of pursuing these goals.³³⁵

Of course, no criminal justice system is absolutely accurate or completely reliable, nor can it be seriously claimed that perfection is needed for legitimacy. The real issues concerning accuracy and reliability involve degrees of certainty and their corresponding costs. One can easily imagine a variety of methods that would improve the accuracy and reliability of the justice system, such as the compelled use of truth serum and hypnosis, allowing the police unfettered authority to search

³³² Criminal trials and criminal investigations have many differences besides degrees of confidence and finality. A criminal trial can lead to a criminal conviction, which constitutes a formal condemnation and stigmatization of the one who is convicted. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404 (1958). A conviction can serve as a basis for criminal punishment to achieve retribution and other purposes. Falvey, *supra* note 323, at 155-66. Condemnation, stigmatization, and retribution, among other consequences, are not immediately served by criminal investigations.

³³³ *In re Winship*, 397 U.S. at 364. In discussing the reasonable doubt standard, the Court wrote “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.” *Id.*

³³⁴ *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *United States v. Havens*, 446 U.S. 620, 626 (1980); *United States v. Nobles*, 422 U.S. 225, 230 (1975). *But see* *Sawyer v. Whitley*, 505 U.S. 333, 356 (1992) (Blackmun, J., concurring) (criticizing the Court’s “single-minded focus” on finding the truth).

³³⁵ *E.g.*, Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 *LAW & SOC. INQUIRY* 533, 534 (1999) (“the pursuit of truth—is not the only, or even, perhaps, the most important, principle at work”).

and seize, and refusing to recognize any testimonial privileges. These and other means are rightly rejected because they offend other important rights and values.³³⁶ The search for truth must be more than a mere slogan, however, and the Court has correctly cautioned in other contexts that “we [should not] be too ready to erect constitutional barriers to relevant and probative evidence which is also accurate and reliable.”³³⁷ Accordingly, the salient inquiry involves identifying what we will permit because it promotes accuracy and reliability, and what we will prohibit despite its doing so.

These questions acknowledge that the means used can implicate discrete normative considerations apart from those that are integral to the ends being sought. When framed in this manner, four possibilities are apparent. In the first category are situations where discretely moral means are available to promote the moral ends of accuracy and reliability. Unless some other countervailing values are thereby transgressed,³³⁸ we are morally obliged to use such means. The second category involves situations where intrinsically immoral means are available to promote accuracy and reliability. Clearly these must be rejected, as it is axiomatic that the “ends do not justify the means.”³³⁹ The third category relates to situations where morally “neutral” means³⁴⁰ are available to promote accuracy and reliability. Such means should be used in the absence of weighty, countervailing moral and practical considerations. The fourth and final category concerns situations where the means at issue, although not intrinsically immoral, have associated

³³⁶ See *Pearse v. Pearse*, (1846) 63 Eng. Rep. 957, 970 (Ch.) (“[t]ruth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much”); see also *Rose v. Clark*, 478 U.S. 570, 577-78 (1986).

³³⁷ *United States v. White*, 401 U.S. 745, 753 (1971) (discussing the Fourth Amendment protections in the context of electronically transmitted conversations).

³³⁸ It is possible, for example, that moral means could promote the end of enhancing accuracy and reliability but detract from some other overarching goal, such as efficiency. As discussed shortly, in such cases the legitimate authority would have the responsibility for establishing policy based on a prudent balancing of these competing goals.

³³⁹ “The end cannot justify the means, for the simple and obvious reason that the means employed determine the nature of the ends produced.” ALDOUS HUXLEY, *ENDS AND MEANS* (1937) (cited in *THE OXFORD DICTIONARY OF QUOTATIONS*, *supra* note 1, at 397). Not surprisingly, Holmes would disagree. OLIVER WENDELL HOLMES, *THE COMMON LAW* 35 (Mark DeWolfe Howe ed., Harv. Univ. Press 1963) (1881) (“[T]he law does undoubtedly treat the individual as a means to an end”).

³⁴⁰ As is ubiquitously observed, whether one drives on the right- or left-hand side of the street is not determined by the application of immutable norms. Once the legitimate authority has made this determination, however, one is morally bound to comply. Depending on the circumstances – the amount of traffic, the capacity of the roads, etc. – the legitimate authority might even be morally obliged to specify such traffic laws.

moral and practical costs. In these circumstances, all of the countervailing benefits and burdens must be prudently balanced when choosing a course of action. Although the real world is undeniably complex and nuanced,³⁴¹ the above-described categories provide a useful construct for beginning our consideration of the legitimacy of specific police procedures that seek to obtain accurate and reliable results.

The complexity of the relationship between means and ends, and the wide array of values thereby implicated, can be illustrated with a simple example. Consider an initiative that would allow the police greater discretion to search and seize. Assume none of the specific proposals contained in the initiative are intrinsically evil or violate the Constitution. Evaluated in relation to the common good, the initiative would be beneficial insofar as it contributes to the accuracy of verdicts and the efficiency of investigations, but detrimental insofar as it detracts from security and happiness.³⁴² The wisdom of such a program is, therefore, debatable, and neither its adoption nor rejection is morally compelled. Such initiatives should be prudently evaluated by legitimate decision-makers in two ways: qualitatively, with reference to the importance of the particular values at stake (for example, accuracy and efficiency versus security and happiness);³⁴³ and quantitatively, with respect to how much it enhances or detracts from each of these values.

Obviously, the relevant normative considerations pertaining to police questioning of suspects are not bound exclusively to the common good. Many relate directly to the suspect as an individual,³⁴⁴ with their connection to the common good more derivative and attenuated. Among the most important and salient of these personal values is respect for human dignity of suspects and the protection of their rights,

³⁴¹ An abundance of complicating and potentially important factors exist beyond the boundaries of this construct, such as questions involving interrelationship of norms, culture, and law. For the present purposes of this Article, these and other intricacies are intentionally avoided.

³⁴² The impact on security and happiness may not be one-sided. For example, allowing the police greater discretion to search and seize may cause people to feel less secure and more anxious because their right to privacy is thereby diminished. They may also feel more secure and happy because crime is reduced and they are less likely to be victimized. These are the types of complexities that the legitimate authority must prudently address when making rules and fashioning policy.

³⁴³ Some values, however, are of incommensurable importance and thus not susceptible to such an evaluation. FINNIS, *NATURAL LAW*, *supra* note 10, at 115.

³⁴⁴ Other individual interests are involved besides those relating to suspects, e.g., victims and those who administer the system. For reasons that should be obvious, this analysis of confession jurisprudence focuses primarily on the individual interests of suspects.

constitutional and otherwise.³⁴⁵ Although these norms find expression in a variety of ways within the criminal justice system,³⁴⁶ they are considered here exclusively in relation to accurate and reliable outputs—including verdicts, charging decisions, search authorizations, and so forth—because these goals, as submitted earlier, are the touchstones for a principled evaluation of the legitimacy and efficacy of the process.

Truthful confessions, self-evidently and for all of the reasons recounted earlier, enhance the accuracy and reliability of the criminal justice system. Starting with this proposition and applying the preceding analysis, the following conclusions can be drawn regarding ends and means. First, the police may never use intrinsically evil means in order to obtain truthful confessions. Second, the police ought to use morally beneficial means, such as those that respect the dignity and rights of suspects, in order to obtain truthful confessions. Third, decision-makers may balance the benefits of obtaining and using truthful confessions against any resulting degradation of a suspect's dignity and rights, as well as other costs and benefits, in reaching a prudent accommodation of these competing values, provided that the means under consideration are constitutional and not intrinsically evil. If "truth is the primary goal, however, the rules of procedure will sacrifice truth only when necessary to accomplish other goals of overriding importance."³⁴⁷ With this guidance as prologue, the legitimacy of police practices for obtaining confessions, and the Court's rationale in addressing them, can now be evaluated.

³⁴⁵ These values are sometimes expressed as "fairness." The term "fairness" is avoided here because it is imprecise and not as philosophically grounded as the terms "human rights" and "human dignity." For example, fairness sometimes is used to mean equality, in which case some might argue that favorable procedures or outcomes for some subjects should be degraded so that they more closely approximate the undesirable conditions endured by other suspects. The terms "human dignity" and "rights" are instead used because they have their own venerable philosophical pedigrees and better resist being defined in relative and potentially negative terms. See *infra* Part IV.C (discussing human rights and dignity in the context of criminal confessions).

³⁴⁶ For example, two overarching values of the criminal justice system are equality and limiting governmental overreaching. These values implicate the common good as well as the individual person, as does accuracy and reliability, but they are also distinctive. A consideration of other overarching values is unnecessary to the thesis of this Article and is beyond its scope.

³⁴⁷ Grano, *Changing World*, *supra* note 16, at 403; see also *Fisher v. United States*, 425 U.S. 391, 403 (1976) (attorney-client privilege is limited in scope because it hinders the search for truth).

B. Permitted and Prohibited Means

Contrary to the view of the *Miranda*'s defenders, the traditional voluntariness approach to confessions was not all bad. In the pre-*Miranda* cases, the Court frequently offers sound commentary on some of the values implicated by police questioning of suspects, and it is occasionally even stirring in its eloquence.³⁴⁸ Further, the Court has at times been rightly critical of particularly outrageous police behavior because it is offensive.³⁴⁹ What is lacking in the cases, however, is a proper recognition and consistent application of the overarching norms that ought to inform the Court's voluntariness decisions. These failings are exacerbated in the post-*Miranda* cases, which rest in part on the infirm foundation of the Court's pre-*Miranda* jurisprudence.

The Court's pre-*Miranda* approach to voluntariness is normatively deficient in many respects, four of which are addressed in Part V.B of the Article. The first and most obvious is the Court's willingness to progressively marginalize and ultimately discount a confession's reliability when assessing its constitutionality. In early cases, reliability was the *sine qua non* for constitutionality.³⁵⁰ Over time, the Court recast reliability as one of several values bearing on the constitutionality of a confession.³⁵¹ In its most recent decision on the subject, the Court rejected reliability as a factor in the voluntariness inquiry.³⁵² Although the Court's recognition of countervailing values besides reliability is appropriate, its failure to acknowledge that reliability is a factor—let alone the preeminent goal—of the criminal justice system is normatively unsupportable and renders the resulting analysis fatally flawed. If reliability is the touchstone for the propriety of a confession, then the voluntariness inquiry is capable of addressing whether certain countervailing costs are acceptable in order to promote this goal. Having instead deemed reliability to be irrelevant, the evaluation of competing considerations becomes untethered, inordinate, and ultimately meaningless. The remedy is simple—the Court and rule-makers, both substantively and rhetorically, need to return reliability to its proper,

³⁴⁸ "Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal. The rack and torture chamber may not be substituted for the witness stand." *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936).

³⁴⁹ See *infra* notes 365-69.

³⁵⁰ E.g., *Hopt v. Utah*, 110 U.S. 574, 584 (1883).

³⁵¹ E.g., *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960).

³⁵² *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). The *Connelly* court instructed that reliability was instead exclusively a matter for state evidentiary law. In my judgment, the rules of evidence, as presently constituted, are inadequate to address reliability. A more detailed discussion of their inadequacy is beyond the scope of this Article.

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elevated status in assessing the voluntariness of a confession.³⁵³ To the extent that the Court declines to do this, legislators and rule-makers can fill the void through statutes³⁵⁴ and other rules and procedures.³⁵⁵

Having discarded reliability, the Court resorts to its “complex of values” for normative content and, ultimately, legitimacy. As explained in Part III.A, the Court’s decisional authority identifies three ostensibly discrete considerations that reside within its value complex: fidelity to the adversary system, opposition to especially overbearing police practices, and deterrence of police misconduct. As deterrence is necessarily derivative of other values,³⁵⁶ only two considerations—those

³⁵³ Rediscovering the importance of reliability would help realize the additional benefit of achieving greater symmetry between Fourth Amendment voluntariness (consent to search) and Fifth and Fourteenth Amendment voluntariness (consent to speak with police). See *supra* Part II.A.

³⁵⁴ See *Moran v. Burbine*, 475 U.S. 412, 428 (1986) (“Nothing we say today disables the States from adopting different requirements for . . . conduct[ing custodial interrogations, which are more protective of suspects’ rights against compelled self-incrimination, by] . . . its employees and officials as a matter of state law.”). For example, under military law, before custodial interrogation a suspect must be advised, *inter alia*, of the “nature of the accusation” that is to be the subject of the questioning. Uniform Code of Military Justice, art. 31(b), 10 U.S.C. § 831(b) (2000) [hereinafter UCMJ]. This additional advice, which is not required by *Miranda*, see *Colorado v. Spring*, 479 U.S. 564 (1987), is imposed upon the military by statute.

³⁵⁵ In *Miranda*, the Court describes the Federal Bureau of Investigation procedures predating its decision in that case, 384 U.S. 436, 483-86 (1966), which the Court characterized as being “consistent with the procedure which we delineate today.” *Id.* at 484. Rule-makers are presently likewise capable of establishing additional procedural requirements for police interrogations and confessions, relating to reliability and other values, provided they comply with the minimum requirements specified by *Miranda*.

³⁵⁶ Deterrence is a derivative goal insofar as police misconduct is deterred because it is judged to be unconstitutional, unlawful, or harmful, and not for the sake of deterrence itself. See generally *United States v. Calandra*, 414 U.S. 338, 348 (1974) (the exclusionary rule is “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved”). The Court has treated deterrence somewhat differently in the case of traditional involuntariness and *Miranda* violations. Compare *Oregon v. Hass*, 420 U.S. 714 (1975), with *Harris v. New York*, 401 U.S. 222 (1971) (statements taken in violation of *Miranda* can be used to impeach a defendant’s testimony), and *Mincy v. Arizona*, 437 U.S. 385 (1978) (statements that were actually coerced under the traditional due process standard cannot be used for impeachment purposes). Regardless of the specific approach used, the goal of minimizing future police misconduct is unassailable, even to those who question its constitutionality or effectiveness. The proposals offered here would achieve the same goals and more by directly providing greater control and structure to police interrogations, and thereby creating an enhanced moral and professional climate within the stationhouse. Deterrence, on the other hand, seeks to accomplish a less ambitious end by resorting to the dubious syllogism that an interrogator will decide not to violate the rights of a suspect that he would otherwise transgress because of a generalized fear that a judge will later suppress a confession. The contention here is that the proposed changes would

involving the adversary system and those relating to overbearing police practices—have independent meaning. Even granting that these remaining values should play a role in assessing voluntariness, the Court’s treatment of them betrays a misunderstanding of their normative content, and thus this is the second major problem in its pre-*Miranda* jurisprudence.

Take, for example, the Court’s use of the adversary system as a value proxy. Although the Court’s reasoning on the subject is rather vague, the gist of its approach, which seems clear enough, cannot be reconciled with a principled understanding of accuracy and reliability as systemic touchstones. If accurate and reliable results are the end to which the criminal justice process is properly oriented, then the adversary system’s fundamental purpose should be to serve as a means for achieving that end. While the origins and precise contours of the adversary system remain a matter of disagreement,³⁵⁷ certainly no reasonable observer would dispute that its basic goal is to produce reliable results.³⁵⁸ It is likewise nonsensical to conclude that reliability is merely a serendipitous by-product of some other overarching but unspecified purpose of the adversary system, or that adversary procedures are beneficial for their own sake.³⁵⁹

But this, in essence, is what the Court seems to do when it imports adversary rhetoric (and later, in the post-*Miranda* cases, adversary content) into the inquisitorial, pretrial stages of the process.³⁶⁰ Clearly,

result in less “bad” confessions for better reasons, and therefore less need to suppress reliable confessions in order to accomplish deterrence.

³⁵⁷ See generally LAFAYE ET AL., CRIMINAL PROCEDURE, *supra* note 18, § 1.49(c), at 173-88 (discussing the origins and parameters of the American adversarial system).

³⁵⁸ Some, however, have tried. Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 121-22 (1987) (the adversarial process is not conducive to a reliable verdict). See generally Safranek, *supra* note 270, at 346 nn.3-4 (collecting sources contending that the legal process does not or cannot seek the truth, and that the public does not believe the legal process has a relationship to the truth).

³⁵⁹ For a contrary view, see Marvin E. Frankel, *The Search for Truth: An Empirical View*, 123 U. PA. L. REV. 1031, 1037 (1975) (the adversary process obtains truth “only as a convenience, a byproduct, or an accidental approximation”).

³⁶⁰ There is, of course, a comparatively well-established body of Sixth Amendment (U.S. CONST. amend. VI) decisional authority that requires that an accused have the benefit of the presence of counsel before trial during the critical stages of a criminal proceeding, i.e., “any stage in the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.” *United States v. Wade*, 388 U.S. 218, 226 (1967). In *Brewer v. Williams*, the Court held

Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have

the Court's purpose is not to aid the search for truth, as any impediments to reliable confessions act in opposition to this end. The Court instead seems preoccupied with the misguided goal of preserving a sporting chance for a suspect's acquittal, which would certainly be compromised by the introduction into evidence of his reliable, pretrial confession on the merits. It is possible, of course, that legitimate countervailing values, which are imbedded in the adversary system, may sometimes outweigh the search for truth and justify the imposition of pretrial adversary procedures. The Court, however, has not satisfactorily identified any such values nor has it persuasively relied on this reasoning as a basis for its voluntariness decisions. Because the Court's pre-*Miranda* jurisprudence is not grounded on reliability and accuracy, its characterization and use of the adversary system as a value proxy predictably misapprehends the significance of truth, justice, and other bedrock values, and it is, therefore, normatively unsound.

Even when the Court takes a proper moral stand—as it sometimes does with respect to police brutality and overt police coercion—it generally eschews clear and consistent pronouncements based on immutable value-based criteria in favor of situationally dependent resolutions. What is needed from the Court, but is all too often lacking, is firm and comprehensive normative guidance, which declares that certain specified practices and procedures are absolutely off limits to police.³⁶¹ This refers to the second category described above, i.e., the use of intrinsically immoral means to seek a moral end. Such guidance would express categorical prohibitions rather than ad hoc, after-the-fact denunciations. It would be based on reasoning that is unconcerned with

been initiated against him—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

³⁶¹ There is a Fourth Amendment analogue to this. In *Rochin v. California*, 342 U.S. 165 (1952), the Court held that the police conduct in that case—" [i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . offend[s] even hardened sensibilities." *Id.* at 172. The Court concluded that the Fourteenth Amendment due process clause prohibited the use at trial of even reliable evidence if it is secured in a manner that violates "certain decencies of civilized conduct." *Id.* at 173. To hold otherwise "would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." *Id.* at 173-74. *Rochin* has been interpreted narrowly in subsequent cases. *E.g.*, *Irvine v. California*, 347 U.S. 128 (1954) (holding the government could introduce trial statements obtained by police who had illegally entered the defendant's home and installed a hidden microphone). The *Irvine* Court distinguished *Rochin* because that case, unlike *Rochin*, did not involve "coercion, violence, or brutality to the person." *Id.* at 133. *Rochin*, which remains valid Fourth Amendment law, could thus be instructive with respect to the issue of traditional involuntariness relating to confessions.

the totality of all the circumstances or the psychological peculiarities of a suspect. It would state that the illegitimacy of immoral means does not turn on the vulnerabilities, fortitude, age, or intelligence of the person questioned, nor does it depend on the subjective motivations or experience of the questioner. It would instruct that some methods are never allowed, regardless of whether they result in a reliable confession or leave the freedom of a suspect's will relatively undisturbed. Immoral means should always be rejected because they are intrinsically immoral, regardless of the ostensibly moral ends that they seek to achieve or the circumstances involved, and the Court has largely failed in its obligation to make this point. Even assuming that certain immoral means are constitutionally permitted and thus beyond the Court's purview, legislators and rule-makers can act decisively to prohibit them within constitutional bounds.³⁶²

Torture and extreme police brutality³⁶³ are the most obvious examples of intrinsically immoral means.³⁶⁴ To its credit, the Court has over time condemned a wide range of such conduct, including whipping³⁶⁵ or beating³⁶⁶ a suspect, depriving him of food,³⁶⁷ water,³⁶⁸ or

³⁶² See *supra* notes 352-53.

³⁶³ Because there are definitional issues regarding what constitutes "police brutality" in the abstract, the text refers to the categorical prohibition of *extreme* police brutality. Professor Troutt has explained that the problem in using too general a definition of police brutality is that such "[d]efinitions . . . are multiple and sometimes contradictory, and statistics are rarely standardized." Alexa P. Freedman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 684-710 (1996) (explaining the numerous problems and concerns inherent in broad definitions of police brutality); David Dante Troutt, *Screws, Koon, and Routine Aberrations: The Use of Fictional Narratives in Federal Police Brutality Prosecutions*, 74 N.Y.U. L. REV. 18, 102 (1999). See also *id.* at 98-105 (illustrating the definitional and applicational problems with the term "police brutality"). Although "torture" is also an imprecise term, compare Declaration on the Protection of All Persons from Being Subjected to Torture, General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/1034 (1975) (providing a definition of torture with respect to international law), with Torture Victims Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified as amended at 28 U.S.C. § 1350 (2000)) (defining torture for purposes of human rights cases brought in the United States), there seems to be less need of a qualifying adjective here. Regardless of whether the term "torture" or "police brutality" is used, the Court has instructed that the traditional due process standard would be applied to those cases involving "police torture or other abuse that results in a confession." *Chavez v. Martinez*, 538 U.S. 760, 773 (2003) (internal quotations omitted).

³⁶⁴ See *supra* Part IV.C.

³⁶⁵ *Brown v. Mississippi*, 297 U.S. 278, 281-83 (1936).

³⁶⁶ *Reck v. Page*, 367 U.S. 433, 440 (1961).

³⁶⁷ *Brooks v. Florida*, 389 U.S. 413, 414 (1967); *Reck*, 367 U.S. at 436-39; *Payne v. Arkansas*, 356 U.S. 560, 564 (1958).

³⁶⁸ *Brooks*, 389 U.S. at 414.

sleep,³⁶⁹ holding a gun to his head,³⁷⁰ keeping him in a naked state,³⁷¹ and threatening him with mob violence.³⁷² In *Stein v. New York*,³⁷³ the Court made a fitting normative pronouncement when it declared that certain excesses were always prohibited with “no need to weigh or measure its effects on the will of the individual victim.”³⁷⁴ Since then, the Court has seemed to retreat from this categorical judgment. In the much more recent decision of *Arizona v. Fulminante*,³⁷⁵ for example, the Court did not apply *Stein’s* rhetoric to a case involving “a credible threat of physical violence unless Fulminante [the suspect] confessed.”³⁷⁶ The Court instead concluded suppression was appropriate because “Fulminante’s will was overborne in such a way as to render the confession the product of coercion.”³⁷⁷ Citing *Payne v. Arkansas*,³⁷⁸ the Court explained that suppression of a confession requires both a credible threat of violence and an actual overbearing of a suspect’s will.

While the Court’s decision in *Fulminante* might be constitutionally defensible,³⁷⁹ its reasoning is nonetheless morally lacking. Even granting that outrageous police misconduct might not always require the suppression of a later confession on constitutional grounds,³⁸⁰ it remains the case that constitutional compliance does not equate to moral fidelity.³⁸¹ It is incumbent upon all—the Court, the legislature, and the

³⁶⁹ *Reck*, 367 U.S. at 436-39.

³⁷⁰ *Beecher v. Alabama*, 389 U.S. 35, 36 (1967).

³⁷¹ *Brooks*, 389 U.S. at 414; *Malinski v. New York*, 324 U.S. 401, 403 (1945).

³⁷² *Payne*, 356 U.S. at 564-66; *Chambers v. Florida*, 309 U.S. 227, 229-31 (1940).

³⁷³ 346 U.S. 156 (1953).

³⁷⁴ *Id.* at 182.

³⁷⁵ 499 U.S. 279 (1991).

³⁷⁶ *Id.* at 287. Fulminante confessed to a fellow prisoner who was also a paid undercover F.B.I. Agent informant, after the latter expressed concern about threats to Fulminante’s safety posed by other inmates, and offered to protect Fulminante if he told the agent the truth about the alleged child murder. *Id.* at 283.

³⁷⁷ *Id.* at 288. The dissenting justices did not rest their opinion on *Stein’s* admonition, but instead concluded that Fulminante’s will was not too overborne. *Id.* at 305-06 (Rehnquist, C.J., dissenting).

³⁷⁸ 356 U.S. 560 (1958).

³⁷⁹ As noted in the beginning of this Part, the constitutionality of particular police practices is beyond the scope of this Article.

³⁸⁰ In the appropriate case, one might contend that due process is not offended where there is an insufficient nexus between police brutality and a later confession. See *United States v. Jenkins*, 938 F.2d 934, 939 (9th Cir. 1991) (“[I]t appears most likely that *Stein’s per se* approach is limited to those confessions made substantially concurrently with physical violence.”). Of course, this argument begs questions about the role of deterrence and preserving the integrity of the system as bases for justifying suppression.

³⁸¹ The history of the Court’s constitutional interpretations sometimes reflects a lack of congruence between what is constitutional and what is morally right. See *Roe v. Wade*, 410 U.S. 113 (1973) (finding a constitutional right to abortion); *Plessy v. Ferguson*, 163 U.S. 537

executive, as is constitutionally fitting for each—to condemn unconditionally and prohibit the use of immorally brutal methods for obtaining confessions.³⁸² Such action would inform and shape constitutional adjudication and policy debate. It would help inculcate values within the law enforcement community and establish legitimate expectations for suspects. It would assist in defining the parameters for redress. It would respect the dignity of individual suspects and serve the common good.

The Court’s approach to police deception and trickery is likewise replete with missed opportunities to provide definitive normative guidance. In the post-*Miranda* line of cases, the Court has called such conduct distasteful and unethical,³⁸³ and *Miranda* itself was highly critical of such practices.³⁸⁴ The Court has never held, however, that lying by police requires suppression of a confession notwithstanding compliance with *Miranda*’s rights warnings requirements. In the pre-*Miranda* cases, the Court has treated police deception as one of many relevant factors to be considered in judging the voluntariness of a confession.³⁸⁵ If a confession is “otherwise voluntary,” then police deception does not render it inadmissible.³⁸⁶ In both lines of cases, the Court has framed its criticism of police deception in the context of standards for admissibility, as it is obligated to do when passing on the constitutionality of a confession consistent with its deterrent rationale for

(1896) (upholding the “separate but equal” doctrine of racial discrimination); *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (upholding slavery as a valid property right).

³⁸² The condemnation and prohibition of police misconduct does not necessarily imply that the resulting confession must be suppressed. Rather, a petitioner may sue a particular officer or government department for violations of constitutional rights. See *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (bringing civil suit against a police officer for an alleged violation of petitioner’s Fourth Amendment rights). Congress has also provided some statutory causes of action against unconstitutional actions by government officials. E.g., 42 U.S.C. § 1983 (2000) (recognizing a cause of action when any person “under color of any statute, ordinance, regulation, custom, or usage, of any State” subjects another “to the deprivation of any rights, privileges, or immunities secured by the Constitution”); 28 U.S.C. § 2680(h) (recognizing a cause of action for private persons whose constitutional rights are violated by federal officers). If the disallowed practice were nonetheless constitutional, then suppression would not be required for deterrent purposes. See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (citing *Elkins v. United States*, 364 U.S. 206, 217 (1961)) (explaining that the “purpose of the exclusionary rule ‘is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.’”) (emphasis added).

³⁸³ *Moran v. Burbine*, 475 U.S. 412, 424 (1986).

³⁸⁴ 384 U.S. 436, 453, 455 (1966).

³⁸⁵ *Frazier v. Cupp*, 394 U.S. 731, 739 (1969) (police misrepresent the strength of the existing case against the suspect).

³⁸⁶ *Id.* at 739.

suppression. The Court has never authoritatively declared, however, that police should never lie to suspects because this is normatively unacceptable. To the contrary, the Court's often-tepid rhetoric about police deception suggests that it believes that such moral judgments are beyond its constitutional charter, or perhaps that it lacks the moral certainty to act decisively in this area.

Lying, of course, is morally illicit.³⁸⁷ Police deception and trickery, even short of outright lying, can damage the dignity of suspects and compromise their rights.³⁸⁸ Accordingly, it is incumbent upon all—the Court, the legislature, and the executive, as is constitutionally fitting for each—to condemn unconditionally and prohibit the morally illicit deception of a suspect by the police in order to obtain a confession.³⁸⁹ Such action would benefit individuals and the common good, for many of the same reasons as the earlier proposed condemnation and prohibition of torture and excessive force by police. Further, it would enhance the integrity of the criminal justice system and help set a proper tone for principled reforms to the rights warning protocols, such as those proposed in Part V.D, which encourage suspects to speak truthfully and candidly with police.

An unequivocal denunciation of excessive force and lying would not resolve all issues concerning prohibited means, but it would be a good beginning. Questions regarding absolute limitations would still abound, e.g., when is physical force unconditionally too brutal, and how are lines drawn between illicit lying and licit deception.³⁹⁰ Once categorical

³⁸⁷ See generally *supra* Part IV.B.1-2.

³⁸⁸ Whether all police deception is morally illicit is beyond the scope of this Article. See generally *supra* note 286. It should be noted, however, that such a categorical ban would have implications far beyond the paradigm situation of police-suspect questioning considered in this Article, and would reach circumstances such as the use of police undercover agents, see *Illinois v. Perkins*, 496 U.S. 292 (1990), the questioning of prisoners of war; GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR pt. III, § 1, art. 17 (1949), and the interrogation of terrorist suspects and unlawful combatants, see Ralph Ruebner, *Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel – A Comparative Perspective*, 31 GA. J. INT'L & COMP. L. 493, 500-45 (2003), including scenarios where a grave attack is imminent and potentially preventable.

³⁸⁹ See generally *Stein v. New York*, 346 U.S. 156, 182 (1953) (announcing that certain physical excesses used to obtain confessions are always prohibited with “no need to weigh or measure its effects on the will of the individual victim”).

³⁹⁰ As Professor Finnis recognizes, “[e]ven the most developed legal systems rightly allow a use of force” for various purposes within the criminal justice context. FINNIS, *NATURAL LAW*, *supra* note 10, at 261. The same would hold true for coercion and deception. The question, therefore, is not whether force and deception should be categorically prohibited, but rather, what are the absolute limits beyond which they are always intrinsically evil. See *supra* notes 363 (physical force), 388 (deception).

parameters are established, however, the inquiry can move into the third and fourth categories, where countervailing values are prudently balanced. It is here where the most contentious matters are likely to be confronted, such as how much morally licit physical force and stress ought the police be allowed to employ, or what kinds of licit deception ought they be permitted to use, in seeking confessions? Judges, legislators, and executive agents are presently less capable of addressing these difficult issues as a consequence of our collective failure to identify moral boundaries and set a proper moral tone.

One other type of police conduct deserves mention. In *Bram v. United States*,³⁹¹ the Court declared that a confession “obtained by any direct or implied promises, however slight,” is involuntary.³⁹² The Court’s per se condemnation of police promises was later disavowed in *Fulminante*,³⁹³ where the Court explained that “under current precedent [*Bram*] does not state the standard for determining the voluntariness of a confession.”³⁹⁴ This time the Court got it right because promises to suspects, unlike brutality or lying, are not always morally objectionable. A suspect’s dignity is not inevitably harmed, nor is his capacity to choose freely always diminished, by a quid pro quo exchange of a promised benefit for a truthful confession. Indeed, some promises may even dignify a suspect and enhance the reliability of a confession, such as where the police accurately represent that they will convey to the victim that the suspect willingly accepted responsibility and was genuinely remorseful. Many promises would be morally objectionable for a variety of reasons, but there is no normative basis for absolutely prohibiting all promises that contribute to obtaining a confession.

A third major problem with the Court’s voluntariness approach relates not to what is contained in its “complex of values,” but what is omitted from it. The Court, for instance, has never taken the position that truthful confessions dignify the confessor, or that moral police practices dignify the interrogator. The Court has also increasingly minimized and ultimately discounted the role of virtue and conscience in its confession jurisprudence. Moreover, the Court, even apart from its rejection of reliability, has failed to predicate its decisions upon a principled understanding of truth, justice, the common good, and human dignity, as these values have been traditionally understood and

³⁹¹ 168 U.S. 532 (1897).

³⁹² *Id.* at 542-43 (quoting 3 W. RUSSELL, CRIMES AND MISDEMEANORS 478 (H. Smith & A. Keep, eds., 6th ed. 1896)).

³⁹³ 499 U.S. 279 (1991).

³⁹⁴ *Id.* at 285.

constitutionally imbedded. These errors of omission compound the harm caused by the Court's application of its ill-conceived "complex of values," as this construct is neither informed nor offset by these unaccounted for but critical normative considerations, which ought to guide judges and other authorities in the exercise of their respective powers. The remedy is simple to state but will be difficult to realize—the Court and other decision-makers must discover or recapture, as appropriate, the genuine values that ought to inform a principled approach toward criminal confessions, and then apply them. The proposed rights advisement, proposed in Part V.D, can serve as a good beginning.

A fourth major problem with the Court's voluntariness approach involves its inapt treatment of a suspect's free will. The Court begins with the presumption that if a rational suspect confesses, then this must be attributable to some overbearing of his free will.³⁹⁵ The Court, after consulting its "complex of values," endeavors to reach a factual determination of how overbearing the police actually were, and correlatively how "unfree" the suspect actually was. As discussed earlier, treating the relative freedom of a suspect's will as a question of fact is dubious and ill conceived for a variety of reasons. To begin with, one must assume that this judgment can be factually determined with sufficient confidence. This contemplates that the Court establish intermediate thresholds of "free will" that are, in part at least, also factually determined. And, it involves the use of problematic and ephemeral empirical sources to assist in defining thresholds and finding facts.

But the difficulties with an empirical approach extend beyond its accurate execution. A case-by-case factual calibration of the relative freedom of a suspect's will implies that normatively derived benchmarks, including imperatives and absolutes, are either irrelevant or do not exist. In particular, an empirical approach, or at least the Court's version of it, is oblivious to the intangible benefits of reliable and

³⁹⁵ In other contexts, the Court has been willing to acknowledge that a suspect may choose to confess as an expression of his free will, even in the absence of police prompting. In *Wong Sun v. United States*, 371 U.S. 471 (1963), for example, the Court held that the taint between an unlawful arrest and a later confession was sufficiently attenuated to allow its admission into evidence because the confession was the product of the defendant's free will. *Id.* at 491. The defendant had been released from jail and voluntarily returned to the police station, answered questions, and provided a written statement. *Id.*; see also *Colorado v. Connelly*, 479 U.S. 157 (1986) (mentally disturbed suspect went to police station of his own accord and confessed).

heartfelt confessions. It is reductionist, in that it does not fully respect the human dignity of suspects, nor does it account for a natural inclination and acquired habit of accepting responsibility for wrongdoing. It likewise fails to comprehend the immutable content and import of truth and justice, nor does it understand or best serve the common good. The Court's empirical approach at once considers too much of what is irrelevant or undeterminable, and too little of what really matters.

The Court, insofar as it is the arbiter of constitutional standards, has a legitimate voice in addressing these questions relating to the interrogation of suspects. The quarrel here is not that the Court has acted in the realm, but how it has acted. Too often the Court hides behind its totality of the circumstances approach to avoid definitive statements about what should and should not be absolutely prohibited.³⁹⁶ It routinely embarks on fruitless and misguided psychological forays in search of empirical clues about whether this particular suspect's will was free enough.³⁹⁷ When all else fails, it reverts to its "complex of values" incantation, which operates more like a forgiving expedient than a sound rationale, and, in the end, is neither particularly complex nor value based.

In our tripartite government, legislators and the executive also play important if diminished roles in establishing and enforcing the rules for taking confessions.³⁹⁸ Their failure to act more boldly can be attributed in part to the Court's expansive treatment of criminal procedure issues as constitutional matters.³⁹⁹ But these officials cannot be completely absolved for their reticence, since all of the proposed reforms identified in this Article can be effectively implemented within the present

³⁹⁶ A good example of this is *Spano v. New York*, 360 U.S. 315 (1959). Rather than specifying the sufficiency or insufficiency of any particular factor standing alone to establish involuntariness, the Court "conclude[d] that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused[.]" *id.* at 323, not to mention the petitioner's repeatedly denied requests to consult with his lawyer. *Id.* at 318.

³⁹⁷ See, e.g., *Burger v. Kemp*, 483 U.S. 776 (1987) (where the Court consulted a number of psychologists' studies and defendant's psychological history before determining that the petitioner's habeas claim must be dismissed).

³⁹⁸ As Justice Brandeis famously noted, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . ." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³⁹⁹ DRESSLER, *supra* note 18, at 36 ("The United States Supreme Court took the leading role in formulating rules of criminal justice during the 1950s, continuing through the early 1970s.").

constitutional parameters set by the Court.⁴⁰⁰ In any event, these decision-makers have inherent authority, and even inherent responsibility, to prescribe procedures and prohibit practices so that the common good is truly served and suspects are genuinely respected.⁴⁰¹ This requires prudent rules and policies, which seek moral and efficacious results through moral and efficacious means. Recognizing that each of the branches has its own complimentary responsibilities, all three should be oriented toward encouraging reliable and heartfelt confessions through means that dignify suspects.

In summary, we must fundamentally reexamine our approach to voluntariness. This begins with recognizing that reliable and heartfelt confessions are beneficial to the individual and society, and thus they should be encouraged. In seeking such confessions, we should use means that respect the right of guilty suspects not to confess while encouraging them to be virtuous by choosing to confess. Concomitantly, we should not hesitate to declare that certain illicit police practices are always wrong regardless of the circumstances. As a proper approach to voluntariness is rooted in values and not fact finding, psychology and the social sciences would assume a supportive but diminished role. While these disciplines might be useful, for example, in explaining how particular police practices tend to promote or detract from normative

⁴⁰⁰ See *supra* notes 352-53. This is particularly evident in light of how state statutory requirements regarding the voluntariness of confessions have been interpreted since the *Miranda* decision. E.g., ARIZ. REV. STAT. § 13-3988 (1977) (prohibiting involuntary confessions), as interpreted by *State v. Ross*, 886 P.2d 1354 (Ariz. 1994), *cert. denied*, 516 U.S. 878 (1995) (advice regarding the benefits of telling the truth, without threat or promise of leniency, does not render a confession involuntary); GA. CODE ANN. § 24-3-50 (2004), as interpreted by *Porter v. State*, 591 S.E.2d 436 (Ga. 2003) (an accurate explanation of how telling the truth could aid defendant while giving false information could come back to haunt him at trial was not a threat or a promise of leniency and so did not render defendant's confession involuntary); 725 ILL. COMP. STAT. 5/103-2 (1963), as interpreted by *People v. Cages*, 403 N.E.2d 565 (Ill. App. 1980) (admonitions to tell the truth do not render confessions involuntary); N.Y. CRIM. PROC. LAW § 60.45 (1971), as interpreted by *People v. Spellman*, 562 N.Y.S.2d 652 (1990), *app. den.*, 575 N.E.2d 413 (N.Y. 1991) (statement by police officer to defendant that he should tell the truth or he will be "digging a deeper hole" for himself did not render the confession involuntary).

⁴⁰¹ Professor Amsterdam, often a proponent of expansive protections for criminal suspects has argued that reform "must be done . . . by local legislators, executives, the police command structure and citizens in their communities." Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 810 (1970). He continues, however, that "In light of past performance—or, rather, nonperformance—by all of these persons, this may seem a vain hope." *Id.*

goals,⁴⁰² they would no longer be consulted in a foolish attempt to provide normative content or empirically determine the relative freedom of a particular suspect's will. To the extent that such fact-finding is appropriate, this can be left to the sound discretion of trial judges and juries. With these foundational predicates in place, we can turn to improving upon the current *Miranda* warnings by fashioning a more meaningful and value-based rights advisement.

C. *More Virtuous and Efficacious Means*

Contrary to the view of *Miranda*'s detractors, the approach taken in the *Miranda* line of cases is not all bad. Indeed, as a matter of abstract principle and policy, much of it makes good sense.⁴⁰³ As a general matter, all suspects, including those who are guilty, ought to be advised of correct and accurate information pertaining to their decision whether to talk to the police, and ultimately whether to confess. *Miranda* is beneficial to the extent that it requires the police to provide some of this information to a suspect, thereby assisting him in choosing how to exercise his right against compelled self-incrimination.⁴⁰⁴ The proposed approach that follows improves upon *Miranda*, in that it would require police to provide additional, correct, and relevant information to suspects. This would facilitate a better informed, and thus a more meaningful expression of a suspect's free will.

⁴⁰² For example, psychology might tell us that the color blue is soothing and promotes candor, or is threatening and causes distress. This would inform police departments about whether they should paint the walls in their interrogation rooms blue or some other color.

⁴⁰³ The constitutional soundness of *Miranda* may be quite another matter. *Miranda* has been criticized as having "no significant support in the history of the privilege or in the language of the Fifth Amendment." *Miranda v. Arizona*, 384 U.S. 436, 526 (1966) (White, J., dissenting); see WIGMORE, EVIDENCE, *supra* note 2, at 401 (the privilege against self-incrimination does not apply to police interrogations); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right To Remain Silent*, 94 MICH. L. REV. 2625, 2631 (1966) ("neither the English nor the American version of the privilege afforded suspects and defendants a right to refuse to respond to incriminating questions"). Even assuming *Miranda* was constitutional when it was first decided, its continued constitutionality has been called into question in light of congressional attempts to overrule it. *Dickerson v. United States*, 530 U.S. 428, 446 (2000) (Scalia, J., dissenting) (by reaffirming of *Miranda* in the face of a proposed Congressional substitute, the Court has assumed for itself "the power not merely to apply the Constitution but to expand it, imposing what it regards as useful 'prophylactic' restrictions upon Congress and the States," which is a "frightening antidemocratic power"). For purposes of this Article, the initial and continuing constitutionality of *Miranda* is assumed.

⁴⁰⁴ In this regard, it might be said that *Miranda* did not provide new rights at the stationhouse, but rather merely provided "a mechanism by which the defendant could give up these rights." Louis M. Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 744 (1992).

Enhancing the quality of a suspect's decision-making benefits him as a person. An individual's character is shaped by the choices made over a lifetime. The subjective quality of any particular choice can be measured only with reference to what the person actually knew when choosing, and perhaps what he reasonably should have known. For example, if a person assumes a risk to help another without being aware of the danger involved and believing he had no other choice, his act is objectively beneficial and his motives are not objectionable. If, on the other hand, he assumes the same risk despite knowing that he could avoid danger without any adverse consequences, then his objectively beneficial actions are more heroic and praiseworthy. The proposed, augmented *Miranda* warning, although not requiring confession,⁴⁰⁵ provides an opportunity for suspects to choose more virtuously, and thus to become more virtuous.

The proposed changes to the *Miranda* rights warnings do more than simply expand upon the status quo; rather, they broach fundamental considerations that are ignored by the present advisement. With rights come responsibilities, and all decisions—including whether to exercise one's constitutional rights—have consequences. The proposed additional advisements address, in general terms, a suspect's obligations to the common good and the repercussions of his decision whether to exercise his rights. They also identify some of the reasons why it benefits all suspects to speak honestly and candidly with the police. The end product is a more balanced and comprehensive rights advisement, which in turn facilitates a more thoughtful and well-considered expression of a suspect's informed free will.

The proposed rights advisement rests upon normative assumptions and beliefs discussed in Part IV, which are quite different from those that

⁴⁰⁵ It is not argued here that a guilty suspect owes a duty to confess his guilt, even though doing so might be virtuous. A comparison can be made to the law's view of justification as a defense to a crime and, conversely, basing criminal guilt on a failure to act (an omission). Although an act based on necessity or lesser evils (such as trespassing to rescuing a drowning swimmer) may be moral and beneficial, the failure to act is not ordinarily criminalized because the law does not "typically oblig[e] the justified actor to act upon the justifying circumstances." Milhizer, *Justification and Excuse*, *supra* note 173, at 814. The law can, of course, encourage such action. See ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 661 (3d ed. 1982) (explaining that the "so-called 'Good Samaritan Statutes' . . . do not require aid be given . . . [t]hey merely encourage doctors to stop and give aid"); see also Carl V. Nowlin, *Don't Just Stand There, Help Me!: Broadening the Effect of Minnesota's Good Samaritan Immunity Through Swenson v. Waseca Mutual Insurance Co.*, 30 WM. MITCHELL L. REV. 1001 (2004) (discussing the law's treatment of omissions). This is what is intended by the augmented *Miranda* warnings proposed in this Article—to encourage guilty suspects to confess.

undergird the current jurisprudence. The proposed advisement's expanded protocols better promote truth and justice, as these values are correctly understood, as contrasted to the present regime's emphasis upon self-serving decision-making. Additionally, the proposed advisement accepts that reliable and heartfelt confessions benefit society and thus ought to be encouraged, and that guilty silence is detrimental to the common good and thus should be disfavored. It respects the dignity of guilty suspects by empowering them to choose rationally to admit wrongdoing and accept a just punishment, while rejecting the implication of the present advisement that they should remain silent so as to preserve a fighting chance for an acquittal. In the end, the proposed advisement seeks to achieve what is truly best for suspects and society, rather than to establish ground rules for managing an unsatisfactory equilibrium between the two. In light of its morally beneficial ends and means, the proposed advisement falls within the first category of potential circumstances where discretely moral procedures are advocated to achieve moral goals. We are obliged, as was contended earlier, to respond favorably to such opportunities.

As a practical matter, the proposed approach builds upon the present rights advisement because any revisions of police procedures for custodial interrogations would have to be compatible with the framework established by the Court in *Miranda*. Although "battered and bruised,"⁴⁰⁶ *Miranda* lives on. It has survived despite wholesale changes in the Court's membership,⁴⁰⁷ a Congressional attempt to overrule it,⁴⁰⁸ facially inconsistent interpretations of its scope,⁴⁰⁹ and decisions that recast its very essence.⁴¹⁰ Through all of these challenges the *Miranda*

⁴⁰⁶ Kamisar, *Warren Court*, *supra* note 77, at 54 (discussing the Warren Court's leading interrogation cases).

⁴⁰⁷ *Miranda* was decided in 1966. It was reaffirmed as recently as June 28, 2004, by a Court composed of entirely new membership. See *United States v. Patane*, 542 U.S. 630 (2004).

⁴⁰⁸ *Dickerson*, 530 U.S. at 444 (explaining that "Congress may not supersede [*Miranda*] legislatively . . . [and] we decline to overrule *Miranda* ourselves," referring to 18 U.S.C. § 3501).

⁴⁰⁹ *E.g.*, *Harris v. New York*, 401 U.S. 222, 224 (1971) (in a decision permitting the use of statements taken in violation of *Miranda* for impeachment purposes, the majority acknowledges that the *Miranda* decision itself indicates that unwarned statements are barred for all purposes).

⁴¹⁰ In several cases, the Court has referred to the *Miranda* warnings as a "prophylactic" rule, *e.g.*, *New York v. Quarles*, 467 U.S. 649, 653 (1984); *Michigan v. Payne*, 412 U.S. 47, 53 (1973), and "not themselves rights protected by the Constitution." *Michigan v. Tucker*, 417 U.S. 437, 444 (1974). In a later case, the Court explained that "*Miranda* announced a constitutional rule" and thus was something more than a mere prophylaxis. *Dickerson*, 530 U.S. at 444. Later still, the Court again referred to the *Miranda* rules as prophylactic rule.

warnings, like all bright-line rules, continued to provide “[a] single, familiar standard . . . to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interest involved in the specific circumstances they confront.”⁴¹¹ Although some have criticized *Miranda* as representing a triumph of formalism over substance and reason,⁴¹² the decision nonetheless expresses an understandable but flawed reaction to the widespread criticism of the imprecision and uncertainty that marked the traditional involuntariness standard.⁴¹³

Miranda’s lines may seem bright, but they are not rigid. As is true anytime the Court tries to establish a bright-line rule, *Miranda* has in some sense merely shifted the contours of the gray areas.⁴¹⁴ Notwithstanding the Court’s seemingly unequivocal instruction that *Miranda* warnings were required anytime a suspect was subjected to custodial interrogation, it has invested considerable time and effort refining and readjusting *Miranda*’s boundaries. The Court, for example,

Patane, 542 U.S. at 639 (“these prophylactic rules (including the *Miranda* rule) necessarily sweep beyond the actual protections of the Self-Incrimination Clause”).

⁴¹¹ *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (commenting on a Fourth Amendment, bright-line rule); see *Berkemer v. McCarty*, 468 U.S. 420, 430 (1984) (“[o]ne of the principal advantages of [*Miranda*] . . . is the clarity of that rule”). See generally Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359, 363 n.19 (1994) (arguing that bright-line rules enhance adjudication); Wayne R. LaFave, “Case-by-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (1974) (arguing that bright-line rules enhance law enforcement).

⁴¹² See, e.g., Grano, *Miranda v. Arizona and the Legal Mind*, *supra* note 35.

⁴¹³ See *supra* notes 40-41.

⁴¹⁴ The blurring of bright lines is not limited to the *Miranda* line of cases. Litigators seek to advantage their clients by challenging bright-line rules and seeking to redefine their scope. See *Robbins v. California*, 453 U.S. 420, 443 (1981) (Rehnquist, J., dissenting) (lawyers are “trained to attack ‘bright lines’ the way hounds attack foxes”); Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 375 (1974) (lawyers want rules to be “responsive to every relevant shading of every relevant variation of every relevant complexity” that might arise in a criminal case). Courts respond by developing fine distinctions that invariably blur the lines. See CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 38, 77-81 (1993).

has wrestled with the meaning of “custody”⁴¹⁵ and “interrogation,”⁴¹⁶ and it has been willing to create exceptions and draw distinctions that have further muddied the waters.⁴¹⁷ One scholar has ironically observed that although “*Miranda* was intended as a bright-line alternative to the much-criticized, totality-of-the-circumstances ‘voluntariness’ standard that preceded it[,] . . . ‘voluntariness’ jurisprudence has returned . . . in the disguise of the *Miranda* waiver law.”⁴¹⁸

With respect to the content of the warnings themselves, the Court’s decisional authority has been marked by two prominent themes—the presumptive adequacy of the standard warnings and the willingness to allow modifications to them provided they satisfy certain conditions. As to the former, the Court has consistently instructed that more elaborate or comprehensive warnings, beyond a mere advisement of the rights specified in *Miranda*, are unnecessary regardless of whether they are correct and helpful.⁴¹⁹ It has similarly held that police are not required to honor or clarify an ambiguous or equivocal assertion of *Miranda* rights,⁴²⁰

⁴¹⁵ A formal arrest clearly qualifies as custody for *Miranda* purposes. *Berkemer*, 468 U.S. at 434. Some lesser intrusions do not. *Id.* (holding roadside questioning of a motorist detained pursuant to a traffic stop does not constitute custodial interrogation for the purposes of *Miranda*). Even the questioning of a prisoner does not automatically constitute custodial interrogation. *Illinois v. Perkins*, 496 U.S. 292 (1990). Despite *Miranda*’s desire to impose bright lines, a court must examine all of the circumstances surrounding the interrogation in assessing whether it was custodial. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); see also *Yarborough v. Alvarado*, 541 U.S. 652 (2004).

⁴¹⁶ Interrogation includes explicit questioning and its “functional equivalent,” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), a standard that is sometimes difficult to apply. See also *Pennsylvania v. Muniz*, 496 U.S. 582, 590 (1990) (holding routine booking questions do not trigger the requirement for *Miranda* warnings); *Arizona v. Maur*, 481 U.S. 520 (1987) (holding police did not interrogate suspect within the meaning of *Miranda* when they allowed him to speak with his wife in the presence of a police officer).

⁴¹⁷ *E.g.*, *New York v. Quarles*, 467 U.S. at 658 (by recognizing a public safety exception to *Miranda*, the Court “acknowledge[d] that to some degree we lessen the desirable clarity of that rule”).

⁴¹⁸ DRESSLER, *supra* note 18, at 490; see *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (declaring that the “totality of the circumstances approach is adequate to determine whether there has been a [valid *Miranda*] waiver”).

⁴¹⁹ *E.g.*, *Colorado v. Spring*, 479 U.S. 564 (1987) (holding police not required to advise suspect of the offenses that would be the subject of the questioning); *Moran v. Burbine*, 475 U.S. 412 (1986) (holding police not required to advise suspect that his sister had retained counsel for him, or that counsel had talked with the police); *Oregon v. Elstad*, 470 U.S. at 316 (1985) (holding police not required to advise suspect that an earlier statement taken in violation of *Miranda* could not be used against the suspect when seeking to obtain a statement).

⁴²⁰ *Davis v. United States*, 512 U.S. 452, 462 (1994) (holding suspect’s statement “Maybe I should talk to a lawyer” was insufficient to constitute an assertion of Fifth Amendment right to counsel).

even if this would “often be good police practice.”⁴²¹ Literal adherence to *Miranda* has even been declared sufficient in the face of unethical and deceptive police conduct designed to secure a confession.⁴²² Because “the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves,”⁴²³ a formalistic compliance with its procedural requirements is almost always adequate for Fifth Amendment purposes.⁴²⁴

On the other hand, the Court has been surprisingly permissive in allowing departures from the standard *Miranda* warnings. *Miranda* itself recognized that Congress could devise alternative means to prevent involuntary confessions.⁴²⁵ Additionally, the Court “has never indicated that the ‘rigidity’ of *Miranda* extends to the precise formulation of the warnings given”⁴²⁶ Elaborations or modifications to the standard rights advisement must, however, satisfy two conditions. First, they must be accurate. In *Duckworth v. Eagan*,⁴²⁷ for example, the Court approved of an augmented advisement regarding the actual representation by counsel⁴²⁸ because it “accurately described the procedure for the appointment of counsel in Indiana”⁴²⁹ and conformed

⁴²¹ *Id.* at 461.

⁴²² *Burbine*, 475 U.S. at 423-24.

⁴²³ *Davis*, 512 U.S. at 460.

⁴²⁴ See *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (advising that an express waiver of proper *Miranda* rights advisement is “usually strong proof” of Fifth Amendment compliance). *Miranda* warnings and waivers have even been held adequate where the police deceive or mislead suspects, provided this does not amount to a deprivation of due process. *Burbine*, 475 U.S. 412.

⁴²⁵ *Miranda v. Arizona*, 384 U.S. 436, 490 (1966) (“[T]he Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards . . . so long as they are fully as effective” as the *Miranda* warning and waiver requirements). Years later, however, the Court held that Congress could not overrule *Miranda*. *Dickerson v. United States*, 530 U.S. 428 (2000).

⁴²⁶ *California v. Prysock*, 453 U.S. 355, 359 (1981); see *Duckworth v. Eagan*, 492 U.S. 195, 202 (1989). See generally LAFAYETTE ET AL., CRIMINAL PROCEDURE, *supra* note 18, § 6.8(a) (collecting cases involving the content of *Miranda* warnings).

⁴²⁷ 492 U.S. 195 (1989).

⁴²⁸ In *Duckworth*, the police provided *Miranda* warnings that included the following (italicized) remarks:

Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.*

Id. at 198 (emphasis in original, with some emphasis in original omitted).

⁴²⁹ *Id.* at 204.

to *Miranda*, which “does not require that attorneys be producible on call.”⁴³⁰ Second, the modified warnings must “reasonably ‘conve[y] to [a suspect] his rights as required by *Miranda*.”⁴³¹ This contemplates that any additional remarks by an interrogator may not undermine or confuse a suspect’s understanding of his Fifth Amendment rights. Taken together, the Court’s precedent allows for (but does not require) deviations from the standard *Miranda* warnings, provided they are correct as a matter of law and fact, and they do not detract from the efficacy of the standard advisement.⁴³²

D. A Revised *Miranda* Warning

Consistent with this precedent and in furtherance of these goals, a proposal for a revised *Miranda* warning is set out below.⁴³³ Added language is italicized; optional language is also in bold print. Deleted language is over-struck.

- (1) You have the right to remain silent.
- (2) Anything you say *may* ~~can and will~~ be used against you in a court of law.
- (3) You have the right to talk to a lawyer and have him present with you while you are being questioned.
- (4) If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish.

⁴³⁰ *Id.*

⁴³¹ *Id.* at 203 (quoting *Prysock*, 453 U.S. at 361).

⁴³² See *Commonwealth v. Singleton*, 266 A.2d 753, 755 (Pa. 1970) (disapproving of a variation of the *Miranda* warnings because it is likely to undercut the effect of the warning by offering an inducement to speak).

⁴³³ A few preliminary comments about the proposed warnings are necessary. First, no claim is made that the substantive content of the additional warnings, or the proposed language itself, is constitutionally required or even the best that can be offered. Quite to the contrary, the proposed warnings can certainly be improved upon, and to the extent that they are not constitutionally required states have discretion to experiment with different variations of them. Second, no claim is made that any additional warnings that are adopted thereby become constitutionally required, so that the failure to provide them to a suspect renders a subsequent confession inadmissible. Police sometimes give warnings in stressful and fast-moving situations, and it is not realistic to require that they memorize and easily recite the more comprehensive warnings proposed here. But where the interrogation takes place in calmer and controlled circumstances, a more elaborate warning can be used.

(5) You can decide at any time to exercise these rights and not answer any questions or make any statements.

(6) *If you decide to waive these rights and answer questions, you should do so truthfully and candidly.*

(7) *If you are innocent and provide truthful statements, these may operate to your benefit at trial, or even by avoiding the need for a trial altogether.*

(8) *If you are guilty and provide truthful statements, these may operate to your benefit insofar as you can clear your conscience and take responsibility for your actions.*

(9) *If you are guilty and provide truthful statements, these may be beneficial **to the victims, if any, and** to society generally.*

(10) *If you are guilty and provide truthful statements, these may be indicative of your rehabilitative potential, and they will be communicated to the appropriate authorities.*

Some comments are appropriate with regard to specific proposed revisions. *Item 1* and *Items 3-5* remain unchanged. These are correct statements about a suspect's Fifth Amendment rights. *Item 2* is revised so that the misleading language generally used in the present advisement—"can and will"⁴³⁴—is replaced with alternative phrasing—"may"—which is both more accurate and less hostile toward confessions generally.⁴³⁵

Item 6 seems so obvious as to need no explanation. It is axiomatic that if a suspect chooses to speak with the police, he ought to do so truthfully.⁴³⁶ Besides promoting moral behavior, such advice helps protect suspects from exposure to new and separate offenses, such as

⁴³⁴ See *supra* notes 75-76 and accompanying text.

⁴³⁵ The *Miranda* Court elsewhere in its opinion used this alternative language, 384 U.S. 436, 444 (1966) (a suspect "must be warned . . . that any statement he does make *may* be used as evidence against him") (emphasis added), and this phrasing has been consistently approved by the lower courts. E.g., *Morris v. State*, 184 S.E.2d 82 (Ga. 1971); *State v. Davis*, 172 S.E.2d 569 (W. Va. 1970).

⁴³⁶ A police interrogator would not necessarily act in contravention of *Miranda* by encouraging a suspect to tell the truth and cooperate with police. Cf. *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) (appealing to a suspect's "interest in telling the truth and being helpful to a police officer" was not indicative of custody for purposes of requiring *Miranda* warnings).

false swearing, which could arise because they lied to the police.⁴³⁷ It is especially fitting to advise suspects to be truthful if police prevarication is disallowed or minimized, as recommended earlier in Part V.B. Of course, a suspect can be truthful without being candid. Accordingly, frank and forthcoming responses are affirmatively encouraged, as they can be especially beneficial for suspects and the common good for the many reasons described in Part IV.

Item 7 is a correct statement of law and fact, and it complements the advice contained in revised *Item 2*. Exculpatory statements, such as a convincing alibi, may benefit a suspect in several ways. They may establish the suspect's innocence, resulting in the avoidance of charges. They may assist in minimizing the need for further, intrusive investigation of the suspect. Even when a suspect later stands trial, exculpatory statements may be admitted in his defense or used to cross-examine or impeach government witnesses. Exculpatory statements may also benefit the common good, such as when they point a police investigation in the correct direction and cause guilty parties to be brought to justice.

The Court has instructed that the privilege against compulsory self-incrimination, although "sometimes a 'shelter to the guilty,' is often 'a protection to the innocent.'"⁴³⁸ Building on this observation, some may contend that the present version of the *Miranda* warnings, which has no advice expressly directed to innocent suspects, does a better job of protecting the innocent than would proposed *Item 7*. They may argue that if *Item 7* were added to the standard advisement, innocent suspects would become more susceptible to rendering a false confession.⁴³⁹

However, proposed *Item 7* can be defended against such criticism in several ways. First, *Items 1-5* apprise all suspects, guilty and innocent alike, of the full *Miranda* warnings, including an advisement that they can decline or cut off questioning as they wish. Second, it is doubtful that many innocent suspects would falsely confess if appropriate due process standards of involuntariness are enforced, such as those recommended in Part V.B. Third, even when confessions are coerced,

⁴³⁷ See *Harris v. New York*, 401 U.S. 222, 225 (1971) (finding that "petitioner was under an obligation to speak truthfully and accurately" when he spoke to the authorities, and that petitioner's Fifth Amendment right against self-incrimination "cannot be construed to include the right to commit perjury").

⁴³⁸ *Murphy v. Waterfront Comm'r of N.Y. Harbor*, 378 U.S. 52, 55 (1964) (quoting *Quinn v. United States*, 349 U.S. 155, 162 (1955)).

⁴³⁹ See Schulhofer, *Some Kind Words*, *supra* note 62, at 326.

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they are generally reliable and corroborated by other credible evidence of a suspect's guilt. If the fear is that innocent suspects will be wrongly convicted based on coerced and false confessions, then this can be addressed by strengthening the evidentiary requirements for corroboration and reliability.

The more cogent Fifth Amendment concerns revolve around the potential consequences of compelling an innocent defendant to testify *at trial*. One can imagine all sorts of legitimate reasons why an innocent defendant might want to avoid testifying—he may have substandard communication skills, a highly prejudicial record, poor demeanor, a vague memory, and so forth. Although similar disadvantages may come into play during a police interrogation, they do not have the same detrimental impact on a suspect as would problematic trial testimony. The police, unlike fact-finders at trial, do not convict or acquit based on credibility judgments and the perceived strength of the evidence; rather, they investigate potentially fruitful leads regardless of credibility of their sources. Most importantly, police suspicion and investigation has a qualitatively different effect upon an individual than does a criminal conviction, which is formally stigmatizing and can serve as the basis for a just punishment.⁴⁴⁰ Proposed *Item 7* respects these distinctions and does not disturb any of the Fifth Amendment jurisprudence pertaining to trial testimony, and thus any criticism of this addition on that basis is misplaced.

Items 7-9 satisfy the dual requirements for elaborations discussed earlier. First, they are accurate; all of the specific advice contained in these items is legally and factually correct. Any concern about the appropriateness of the advice for the circumstances of a particular case is alleviated by the manner in which it is expressed, i.e., by using “may” instead of “will” when describing the potential consequences of confessing. Also, the optional language in *Item 9* can be omitted in cases without a discrete victim,⁴⁴¹ and thus it can conform more closely to the circumstances in the case at hand.

⁴⁴⁰ See *supra* note 330.

⁴⁴¹ The term “victim” is imprecise and subject to multiple interpretations. A more specific and detailed definition of the term “victim” is beyond the scope of this Article. See generally *Payne v. Tennessee*, 501 U.S. 808 (1991) (discussing the constitutionality of victim impact statements); Albin Eser, *The Principle of “Harm” in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345 (1965) (discussing the social harm component of crimes).

Second, none of the additional information found in *Items 7-9* detracts from the efficacy of the standard rights advisement, provided *Miranda* is applied consistent with a correct understanding of human rights and dignity, and the common good. The addition of *Items 7-9* helps achieve a balanced and principled rights advisement, which would no longer emphasize individual rights to the exclusion of corresponding responsibilities, with the ultimate purpose of indiscriminately discouraging confessions. Rather, these proposed additions appeal to the better nature of suspects by encouraging those who are innocent to be forthcoming and helpful, and those who are guilty to accept responsibility and make reliable and heartfelt confessions. Such advice empowers suspects. It honors their rights and respects their capacity to make rational decisions by more fully informing their choice of whether to speak with police. This facilitates the exercise of free will by contributing to, as the Court might put it, a “freer will.” *Items 7-9* further all of these desirable goals, and they do so without undermining the standard rights advisement that is retained in *Items 1-5*.⁴⁴²

For the reasons discussed earlier, the first portion of *Item 10*—that truthful statements of guilt “may be indicative of [a suspect’s] rehabilitative potential”—is legally and factually correct.⁴⁴³ As for the second portion—that a suspect’s truthful confession “will be communicated to the appropriate authorities”—several courts have approved of police promises to bring a suspect’s cooperation to the attention of the prosecutor.⁴⁴⁴ Some courts have also held that it is not objectionable for the police to tell a suspect that the prosecutor would discuss leniency if he confesses,⁴⁴⁵ or that if the suspect confesses the prosecutor might “look at your case a little bit different.”⁴⁴⁶ These decisions correctly recognize that the police may allude to the potentially mitigating impact of a confession without coercing a suspect to confess. While the police should refrain from making promises that implicate the

⁴⁴² For example, in *People v. Jones*, 949 P.2d 890 (Cal. 1998), the court held that a police officer’s exhortation to a suspect that “the truth is going to set you free” did not render his confession involuntary. *Id.* at 900. Similarly, in *Ball v. State*, 699 A.2d 1170 (Md. 1997), the court instructed that it was not improper for the police to tell a suspect that it would be “better” for him to tell his story. *Id.* at 1179.

⁴⁴³ See *supra* note 7.

⁴⁴⁴ E.g., *United States v. Roman-Zarate*, 115 F.3d 778 (10th Cir. 1997); *United States v. Mendoza*, 85 F.3d 1347 (8th Cir. 1996); *United States v. Tingle*, 658 F.2d 1332 (9th Cir. 1981); see also *LAFAYETTE ET AL., CRIMINAL PROCEDURE*, *supra* note 18, at 454 n.98 (collecting cases standing for this proposition).

⁴⁴⁵ *Commonwealth v. Mandile*, 492 N.E.2d 74 (Mass. 1986).

⁴⁴⁶ *State v. Lacy*, 929 P.2d 1288, 1295 (Ariz. 1996).

plea-bargaining process⁴⁴⁷ or constitute veiled threats,⁴⁴⁸ these concerns are not raised by proposed *Item 10*.

Some broader potential criticisms of the proposed approach deserve brief comment. Some may argue that the practical effect of the recommended expansion to rights advisement is to assist police in coercing suspects to confess. If *Miranda* warnings are truly needed to offset the inevitable coerciveness of custodial interrogation, then some may contend that the proposed elaborations could tip the balance and compel fence-sitting suspects to confess, especially when result-oriented officers employ them.

Several responses can be offered. As explained earlier, none of the proposed changes are innately coercive. Quite to the contrary, they each enhance rather than detract from a suspect's ability to exercise an informed free will. With respect to the possible misuse of the elaborations, it should be remembered that disreputable interrogators are presently able to manipulate the current *Miranda* warnings for their own purposes, and may even get away with lying about whether the required advice was given or the suspect waived his rights.⁴⁴⁹ Despite these and other vulnerabilities, *Miranda's* defenders have argued that the recitation of the warnings⁴⁵⁰ helps protect suspects⁴⁵¹ and educate the police,⁴⁵² while imposing ground rules that guide well-intentioned

⁴⁴⁷ *E.g.*, *United States v. Rogers*, 906 F.2d 189 (5th Cir. 1990) (holding that it is improper for police to promise that a suspect will not be prosecuted if he confesses); *Tingle*, 658 F.2d 1332 (holding that it is improper for police to promise a suspect that lesser punishment may be received if the suspect confesses); *Williams v. United States*, 328 F.2d 669 (5th Cir. 1964) (holding that it is improper for police to promise a suspect that certain charges will be dropped if the suspect confesses).

⁴⁴⁸ *E.g.*, *Lyman v. Illinois*, 372 U.S. 528 (1963) (holding that the confession was coerced where the suspect was told that she could lose her welfare payments and custody of her children if she did not cooperate, but that the police would help her and recommend leniency if she did cooperate).

⁴⁴⁹ Schulhofer, *Confessions*, *supra* note 36, at 882 (remarking that "*Miranda* does nothing whatsoever to mitigate the pitfalls of the swearing contest [between the suspect and the police]").

⁴⁵⁰ Defenders and critics alike generally assume that the police ordinarily comply with *Miranda's* literal requirements, although they may disagree about the subjective motivations for this compliance.

⁴⁵¹ Seidman, *supra* note 404, at 743 (contending that "if the defendant already understands his rights, the very fact that the police must recite them may help to dispel the sense of total isolation and powerlessness that otherwise pervades much custodial interrogation").

⁴⁵² OTIS STEPHENS, *THE SUPREME COURT AND CONFESSIONS OF GUILT* 64 (1973) (arguing that the recitation of *Miranda* serves an "educational purpose" for the police, by repeatedly reminding them of suspects rights).

officers⁴⁵³ and constrain those having more sinister motives. The proposed warnings would do a better job of advancing these same benefits. If the ultimate result is that more fence-sitting, guilty suspects choose to confess for the right reasons, then this should be welcomed.

Some may also argue that the proposed elaborations are unnecessary and burdensome because police are presently able to advise a suspect about this added information once he has decided whether to invoke or waive his rights. Such a criticism misapprehends the law and misses the point. Under current Supreme Court jurisprudence, once a suspect invokes his “*Miranda* rights,” police questioning, including supplemental advising, must immediately cease.⁴⁵⁴ Accordingly, the initial rights warnings should contain all of the information crucial to a suspect’s waiver decision since an under-informed post-warnings rights invocation would delay, and could prevent, any further advisements. Regardless of whether a suspect ultimately waives his rights, we should endeavor to make the pre-interrogation advisement as morally sound and balanced as practical because it is, in most cases, the principle means of assuring that a suspect exercises an informed free will when deciding whether to talk with police. Absent unusual circumstances, there would be scant justification for withholding critical information bearing on a suspect’s decision about whether to confess until after he has decided whether to invoke or waive his rights. Better advice leads to better choices.

Moreover, adding the additional information to the mandatory advisement is an efficacious way of controlling interrogators. All agree that the police should not enjoy unfettered discretion during custodial questioning. The proposed advisement, or some variant of it, empowers the appropriate decision-makers (be they judges, legislators, or executive agents),⁴⁵⁵ as representatives of the people, to exercise greater influence

⁴⁵³ See Seidman, *supra* note 404, at 743.

⁴⁵⁴ Once a suspect invokes his “*Miranda* right” to silence, the police must “scrupulously honor” his rights, which has been interpreted as meaning that the interrogation must immediately cease but can be later re-initiated by police in some circumstances. *Michigan v. Mosely*, 423 U.S. 96, 101 (1973). If a suspect invokes his “*Miranda* right” to counsel, the suspect “is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police.” *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). In *Minnick v. Mississippi*, the Court later announced that this means that once a suspect in custody invokes his “*Miranda* right” to counsel, the police must not only permit him to consult with an attorney, but they may not re-initiate questioning unless counsel is present. 498 U.S. 146, 153 (1990).

⁴⁵⁵ See *supra* note 326.

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over what occurs in the stationhouse.⁴⁵⁶ Beyond this, it affixes an imprimatur to the contents of the formal advisement, which can be normatively expressive and enforcing. In summary, the augmented advisement allows the people, through their legitimate representatives, to exert greater and more formal control over the substance and sequencing of events during an important stage of the interrogation process.

Perhaps the most intractable criticism of the proposed warnings can be leveled with equal force at the present rights-advisement regime. Even assuming a more elaborative advisement is abstractly correct, one may argue that a suspect would be better equipped to evaluate these additional considerations and make decisions regarding them with the assistance of counsel. Of course, the present *Miranda* warnings contemplate that suspects will routinely decide whether to waive their Fifth Amendment right to counsel without benefit of consulting with a lawyer first. In this regard, the proposed advisement imposes no additional burdens on suspects or the exercise of their rights. Moreover, the subject matter of the additional advice does not concern essentially legal issues. Whether a confession is virtuous or serves the common good is predominately a question of values and morals, and not law. Attorneys may have a fiduciary duty to evaluate such considerations when providing legal advice,⁴⁵⁷ but these are not matters that are committed to their special expertise. Suspects are advised in *Items 3-5* that they may call upon a lawyer for assistance when making these decisions, and nothing more is constitutionally required or morally necessary.

In the end, it is uncertain whether more confessions would be obtained if all of the proposed recommendations were adopted, i.e., those pertaining to both the pre- and post-*Miranda* jurisprudence.⁴⁵⁸ Some of the proposals, such as specific advisements designed to

⁴⁵⁶ An issue may arise whether the failure to provide any of the additional advice would result in the suppression of a confession thereby obtained. Suppression would not be constitutionally required, as the Court's decisional law does not require this advice. Whether some other authority mandates suppression would depend on the remedies that it specifies.

⁴⁵⁷ See MODEL RULES OF PROF'L CONDUCT R. 1.2 (attorney-client communications), R. 1.6 (attorney-client confidences) (2002).

⁴⁵⁸ Under military law, before custodial interrogation a suspect must be advised, *inter alia*, of the "nature of the accusation" that is to be the subject of the questioning. UCMJ, *supra* note 354, at art. 31(b). The author is unaware of any research or anecdotal evidence suggesting that the providing of this additional information to suspects has lead to fewer confessions.

encourage suspects to speak with police, would predictably lead to more confessions. Other proposals, such as categorical prohibitions of certain police deception and physical coercion, would predictably lead to fewer confessions. The actual results would probably be mixed and vary depending on the circumstances. No doubt some guilty suspects who would confess pursuant to the recommended approach would remain silent under the current rules, while some guilty suspects who would confess under current rules would remain silent pursuant to the recommended approach. So be it. The goal is not more confessions at any cost, but more reliable confessions obtained in the right way for the right reasons. One would hope that the proposal's emphasis on values, the common good, and individual dignity would, over time, not only cause more good confessions to be rendered, but also help create a culture where there is less occasion to seek them.

VI. CONCLUSION

Imagine that a guilty suspect is brought to the police station for questioning. Although he is distraught and scared, he knows that the police will not rough him up or lie to him. As for the investigating officers, these options never even cross their minds. Disreputable police practices such as these are expressly prohibited by internal guidelines based on court decisions and statutes, but this is not the reason that officers reject them. The investigators find such techniques to be more than simply unprofessional; they are personally repugnant and morally objectionable, and the officers feel no institutional pressure to resort to them.

The officers, of course, want the suspect to confess if he is guilty. Even if he is innocent, they seek his truthful and candid cooperation. The suspect, on the other hand, is deeply conflicted. His initial reaction is to avoid accepting responsibility and punishment. Another part of him—perhaps it is his conscience—is a source of disquieting dissonance. Somewhere deep inside, perhaps so deep that he is not even conscious of it, the suspect wants to get things off his chest and come clean.

The police begin the session with a reading of the mandatory rights warnings. The first portion advises the suspect of his constitutional rights. The police then explain to the suspect, in language dictated by legitimate authorities entrusted with the common good, why he should act in accordance with his better impulses and take responsibility for his misconduct. The appeal to conscience works, and the suspect freely

chooses to confess his guilt, for the right reasons, during the course of a respectful interrogation.

As a consequence of the heartfelt confession, the crime is definitively solved and no innocent persons have to suffer the indignities of an intrusive investigation. The suspect later pleads guilty and is convicted. His punishment is mitigated because he accepted responsibility and was sincerely remorseful. Through his virtuous act of confessing and his suffering a just punishment, the suspect becomes a better person and an asset to society.

The community feels more secure by the suspect's unassailable conviction. Its confidence in the legitimacy, efficacy, and integrity of the criminal justice system is reinforced. Justice has been done. The victim also gains a sense of closure. Truth, justice, the common good, and the suspect's dignity (not to mention his constitutional rights) are preserved and promoted.

If such a scenario took place today, it would be largely in spite of our contemporary approach to confessions. We must begin insisting that our jurisprudence, with all of its associated rules and procedures, be grounded upon immutable values and expressed in practical applications that promote those values, or at a minimum are not inconsistent with them. This would reform our criminal justice system so that it truly serves the common good and respects the dignity of suspects, and thereby encourages beneficial resolutions like the one described above. Individually and collectively, we would all be better for it.