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MIRANDA'S EXCEPTIONS IN A POST-DICKERSON WORLD

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Can the holding in *Miranda v. Arizona*,[1] as well as the numerous exceptions to its dictates, be adequately justified after the United States Supreme Court's latest pronouncement in *Dickerson v. United States*?[2] Chief Justice Warren in *Miranda* held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of a procedural safeguard effective to secure the privilege against self-incrimination."[3] While this holding appeared to enshrine the four warnings[4] into the Fifth Amendment itself, this interpretation was short-lived. Chief Justice Burger, in crafting an impeachment exception in *Harris v. New York*,[5] began a series of exceptions based upon the premise that a violation of *Miranda* does not necessarily violate the Constitution.[6] Conservative le-

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

[2] 530 U.S. 428 (2000).

[3] *Miranda*, 384 U.S. at 444.

[4] The procedural safeguards mandated by the Court require officers to deliver four warnings to a suspect suffering custodial interrogation and to obtain a waiver of these rights before taking a statement. A suspect must be informed that he has a right to remain silent, that anything he says can be used against him in court, that he has the right to consult with an attorney and to have that attorney present during interrogation, and that if he cannot afford an attorney one will be appointed. *Id.* at 467-73. As an icon of criminal procedure put it, "I venture to say that *at the time* the *Miranda* opinion was handed down almost everyone who read it (including the dissenting Justices) understood that it was a constitutional decision—an interpretation of the Fifth Amendment privilege against self-incrimination." Yale Kamisar, *Forward: From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 883 (2001) (emphasis in original).

[5] 401 U.S. 222 (1971) (creating impeachment exception to exclusion of statements obtained via custodial interrogation without warnings).

[6] *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 306 (1985) (noting that *Miranda* "serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It

gal scholars responded to the deconstitutionalization of *Miranda* by suggesting that the Court had no authority, pursuant to Article III of the federal Constitution, to reverse state criminal convictions absent an actual constitutional violation.[7] A rogue Assistant United States Attorney and conservative law professor convinced the Fourth Circuit that a largely ignored statute Congress enacted in 1968 to overrule *Miranda* had done just that.[8] Finally, Chief Justice Rehnquist, in the terribly disappointing *Dickerson* case reversing the Fourth Circuit, opined that *Miranda* has "constitutional underpinning"[9] yet still permits exclusion of "statements which may be by no means involuntary" under Fifth Amendment and due process standards,[10] without attempting to explain this seeming contradiction or to assess the status of *Miranda*'s exceptions. We are left with the same questions burning before *Dickerson.* If *Miranda* is required by the Fifth Amendment, how can we admit unwarned statements into evidence in a criminal trial even for impeachment? Conversely, if *Miranda* is not required by the Fifth Amendment, how can we reverse state court convictions for its violation?

Professor George Thomas and I, in a recent symposium issue of the Michigan Law Review, reach the same general con-

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may be triggered even in the absence of a Fifth Amendment violation."). This list of exceptions includes *Elstad,* 470 U.S. 298 (fruits exception where second statement obtained as a result of unwarned statement); New York v. Quarles, 467 U.S. 649 (1984) (public safety exception); Oregon v. Hass, 420 U.S. 714 (1975) (impeachment exception after request for attorney); Michigan v. Tucker, 417 U.S. 433 (1974) (fruits exception where live witness found as a result of unwarned statement).

[7] *See* OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, TRUTH IN CRIMINAL JUSTICE REPORT NO. 1, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (1986), *reprinted in* 22 U. MICH. J.L. REFORM 437, 543 (1989) (asserting that *Miranda* "constituted a usurpation of legislative and administrative powers"); *see also* Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer,* 55 U. CHI. L. REV. 174 (1988); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda,* 54 U. CHI. L. REV. 938 (1987) (defending the finding of the Department of Justice report); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy,* 80 NW. U. L. REV. 100 (1985); Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law,* 91 HARV. L. REV. 1117, 1124 (1978) (suggesting that prophylactic rules are "neither constitutional nor common law but pragmatism without either precedent or principle—judicial realism radicalized and rampant").

[8] United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999) (*Miranda* was not a constitutional holding, and therefore 18 U.S.C. § 3501 (West 1985) successfully reversed it). "The Department of Justice, elevating politics over law, prohibited the U.S. Attorney's Office from arguing that Dickerson's confession is admissible under the mandate of § 3501." *Id.* at 672.

[9] *Dickerson,* 120 U.S. at 2234.

[10] *Id.* at 2336.

clusions regarding both the justification of *Miranda* (it can be satisfactorily explained), and the fate of the pre-*Dickerson* exceptions to *Miranda* (they healthily survive). However, we reach these conclusions by radically different routes: Professor Thomas utilizes the malleable Due Process Clause,[11] while I rely upon the flexibility of constitutional prophylactic rules.[12] While this difference may not seem striking when focusing solely upon the *Miranda* warnings, it is stark when attempting to justify the Warren Court revolution as a whole, and to account for many subsequent criminal procedure holdings. Pivotal decisions outlining procedures required to uphold Fourth, Fifth, Sixth, and Fourteenth Amendment guarantees can be properly and accurately characterized only as prophylactic rules rather than "true" constitutional edicts.[13] Reversing every one of these decisions or shoehorning every one of these rights into the Due Process Clause would be disastrous.

In this brief commentary, I will respond to Professor Thomas' thoughtful and creative but, in my opinion, ultimately unpersuasive attempt to relocate the *Miranda* warnings from the

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[11] *See* George C. Thomas III, *Separated At Birth But Siblings Nonetheless: Miranda And The Due Process Notice Cases*, 99 MICH. L. REV. 1081 (2001).

[12] *See* Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1032-33 (2001) (developing a conceptual framework for constitutional prophylactic rules which justifies not only *Miranda* but a host of other Warren, Burger, and Rehnquist Court criminal procedure decisions. A prophylactic rule is a doctrinal rule for deciding whether an explicit constitutional rule is applicable, triggered upon less than a showing that the explicit rule was violated but providing a similar remedy, and appropriate only where providing relief upon a showing of an explicit violation is ineffective and the rule is effective while involving acceptable costs); *see also* Susan R. Klein, *Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 482-83 (1994) (suggesting that it is the Court's obligation under the Constitution to create remedies or procedures necessary to safeguard a particular constitutional provision otherwise at risk. While these remedies and procedures may be "temporary and/or conditional" this "'constitutional common law' has the same status as 'true' constitutional interpretation" for purposes of civil rights actions).

[13] Klein, *supra* note 12, at 1037-44 (providing numerous examples of prophylactic rules such as the procedure to protect an indigent defendant's right to appellate counsel in Smith v. Robbins, 528 U.S. 259 (2000); the rule establishing a *prima facie* case of an equal protection violation without evidence of purposeful discrimination in Batson v. Kentucky, 476 U.S. 79 (1986); the presumption against multiple punishments for the same offense in Missouri v. Hunter, 459 U.S. 359 (1983); the rule against reapproaching a suspect in Edwards v. Arizona, 451 U.S. 477 (1981); the presumption of incompetent counsel where there is a conflict of interest in Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); the presumption of judicial vindictiveness in North Carolina v. Pearce, 395 U.S. 711 (1969)); and the exclusion of in-court identification of post-indictment counselless lineup in United States v. Wade, 388 U.S. 218 (1967)).

Fifth Amendment's Self-Incrimination Clause to the Fourteenth Amendment's Due Process Clause. As a descriptive matter, the *Miranda* warnings were designed to prevent compelled statements in violation of the Self-Incrimination Clause, not to protect due process values such as ensuring a fundamentally fair criminal trial, providing notice and an opportunity to be heard before the deprivation of a property or liberty interest, and preventing conscience shocking behavior by state actors. As a normative matter, principles of federalism and separation of powers militate strongly against an open-ended substantive or procedural due process monster. In Part I, I explain why, contrary to Professor Thomas' thesis, *Miranda* and its progeny do not fit comfortably (or at all, for that matter) in the Supreme Court's substantive due process, procedural due process, or administrative due process jurisprudence. Part II then clarifies why Professor Thomas' attempt to place *Miranda* in the Due Process Clause does not save its many exceptions.

None of my criticisms, however, detract from the key insight provided by Professor Thomas in his article—*Miranda* has been effectively transformed over the years from a case that all but mandated defense attorney participation in custodial interrogations to dispel inherent compulsion, to a case about providing the minimal amount of notice to a defendant about his privilege against self-incrimination such that a court can uphold his confession as voluntary. The decision, however, remains one concerned primarily with compulsion, and is concerned with notice only to the extent that notice dispels compulsion. Moreover, the answer to this unfortunate transformation is not to leave *Miranda* untouched and simply move it from the Self-Incrimination Clause to the Due Process Clause. The answer, instead, is to insist that the Supreme Court define what constitutes a "voluntary" confession, consider whether the *Miranda* warnings in fact make statements taken during custodial interrogation more or less "voluntary" than alternative procedures, and design rules to ensure that the Self-Incrimination Clause is protected in a manner the Court can enforce.

I. MIRANDA WAS DESIGNED TO DISPEL COMPULSION

Professor Thomas argues that Miranda is a case protecting three potential due process liberty interests: 1) the "liberty in-

terest in not being subjected to custodial interrogation;"[14] 2) the liberty interest in making an "an informed choice whether to answer police questions;"[15] and 3) the "liberty interest not to disclose what we wish to keep secret."[16] Thus, *Miranda* is about providing notice, not about prohibiting compulsion, and as such it reflects due process rather than self-incrimination values. Professor Thomas claims this interpretation provides a better description of *Miranda* and its progeny because it explains why waivers of *Miranda* are so easily found,[17] why non-Mirandized but clearly voluntary statements are nonetheless excluded,[18] and why sometimes the *Miranda* presumption of compulsion is applied and sometimes it isn't.[19]

Neither of Professor Thomas' suggestions, to relocate the *Miranda* warnings in the Due Process Clause of the Fifth or Fourteenth Amendment, or, less radically, to retain its status as a protector of the Self-Incrimination Clause but utilize due process values to determine when to apply the prophylaxis,[20] are helpful. I disagree with Professor Thomas on three levels. First, I disagree with the need for shifting the *Miranda* warnings from the Fifth Amendment to the Due Process Clause in order to explain post-*Miranda* exceptions and *Miranda*'s waiver doctrine. We are not limited to the three choices identified by Professor Thomas: 1) accepting Justice Scalia's reasoning that *Miranda* has been deconstitutionalized by later cases and therefore can be ignored entirely by the states; 2) reconstitutionalizing *Miranda* and overruling its exceptions; or 3) finding another constitutional home for *Miranda*.[21] As I have argued elsewhere, the

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[14] Thomas, *supra* note 11, at 1091.

[15] *Id.* at 1114.

[16] *Id.* at 1115.

[17] *See id.* at 1098-1101.

[18] *See id.* at 1082, 1091-92.

[19] *See id.* at 1085, 1109-11.

[20] *See id.* at 1112.

[21] *See id.* at 1088, 1111-12. In response to my criticism, Professor Thomas has conceded a fourth option: that Miranda might be what he now calls a "weak force" constitutional rule, but dismisses this as failing to provide "a theory about why the Fifth Amendment privilege deserves a constitutional prophylaxis." *Id.* at 1091. I have provided just such a theory. *See* Klein, *supra* note 12, at 1032-33 (noting that where the Court is "unable to precisely track the constitutional criminal procedural guarantee before it," it often creates prophylactic rules "that assist it in identifying and adjudicating constitutional violations," and providing theoretical and practical justifications for such practice, such as the difficulty of fact-finding in certain situations, the need to guide law enforcement officials making snap judgments without legal

Court could have retained the *Miranda* doctrine and its exceptions by properly labeling it a constitutional prophylactic rule, defining what that is, and detailing why a prophylactic rule was necessary to protect the privilege against self-incrimination.[22] My approach reaps the same advantage of flexibility of deciding when to apply the rule, what exceptions to create, and what form of waiver to require that Professor Thomas claims for his theory. Instead of a general and vague balancing of "fairness to the suspect on one side and the interest of the state in accurate fact-finding on the other,"[23] the flexibility of a prophylactic rule consists of applying it only where the rule is necessary to fulfill its function. We should judge whether the prophylactic rule is effective in dispelling the compulsion inherent in custodial interrogation and in assisting the Court in adjudicating claims of a violation of the privilege against self-incrimination. We should consider the costs of lost confessions only to the extent that the prophylactic rule over-protects the privilege or fails to assist law enforcement and the courts in obeying and adjudicating the privilege.[24] Moreover, a significant advantage to my approach is that it allows Congress, state legislatures, and state and federal law enforcement departments to share in fashioning any prophylactic rules necessary to protect the privilege, though the final decision still rests with the Court.[25]

My second level of disagreement with Professor Thomas' solution is that the *Miranda* decision does not fit comfortably, as either a normative or descriptive proposition, in the Due Process Clause. My final criticism is that moving *Miranda* to the Due Process Clause would not make post-*Miranda* cases coherent. I will start with the former claim. Before we can discuss whether *Miranda* can be redescribed as a due process case we must iso-

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training, the reality that the Court has limited time to hear individual cases, and the high stakes of underprotecting constitutional rights where liberty is at stake).

[22] *See* Klein, *supra* note 12, at 1071-77 (arguing that Chief Justice Rehnquist failed miserably on all counts in *Dickerson*).

[23] Thomas, *supra* note 11, at 1117.

[24] *See* Klein, *supra* note 12, at 1032-37, Appendix A at 1079 (suggesting that unlike explicit constitutional interpretation, subconstitutional doctrines such as prophylactic rules, to the extent they overprotect the constitutional right at issue, can be created, excepted and modified to account for costs such as lost convictions).

[25] *See id.* at 1052-68 (arguing that prophylactic rules encourage dialogue and cooperation between the federal judiciary and state and federal executive and legislative officers, fosters experimentation with new procedures that may work better, and provides the flexibility to respond to new empirical and social science data without reversing constitutional decisions).

late what kind of due process Professor Thomas has in mind. The Court generally divides Fourteenth Amendment due process into three component parts.[26] First, it selectively incorporates specific provisions defined in the Bill of Rights.[27] Second, the Due Process Clause contains a substantive component that prevents the government from engaging in conduct that "shocks the conscience,"[28] or enacting legislation which interferes with rights "implicit in the concept of ordered liberty,"[29] regardless of the fairness of the procedures used. Third, the Due Process Clause guarantees that government action depriving a person of life, liberty or property be implemented in a fair manner.[30] The third component, procedural due process, can further be subdivided into procedural due process as applied to criminal actions,[31] and procedural due process as applied to civil and administrative actions.[32]

Though Professor Thomas does not tell us into which of these categories of due process he would place the *Miranda* warnings, they fit into none. I do not say this because I believe, as Professor Thomas suggests, that the existence of criminal procedural guarantees in the Bill of Rights "sucked most of the 'criminal process' oxygen from the Due Process Clause."[33] Rather, I fully agree that both history and text support the idea that due process has independent life in both the criminal and civil contexts apart from the particular provisions in the Bill of Rights.[34] However, I do believe, as does the present Court, that

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[26] *See* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 2.2-2.7 (2d ed. 1999) (providing a lucid description of the three components of due process, the arguments for and against total and selective incorporation, and the impact of incorporation on the fundamental fairness doctrine).

[27] *See* Malloy v. Hogan, 378 U.S. 1 (1964) (holding that privilege against self-incrimination was a fundamental right, thus guarantee "would be enforced against the State under the Fourteenth Amendment according to the same standards" as against the federal government).

[28] Rochin v. California, 342 U.S. 165, 172 (1952).

[29] Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

[30] *See* United States v. Salerno, 481 U.S. 739, 746 (1987); *see also* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[31] *See* Chambers v. Mississippi, 410 U.S. 284 (1973).

[32] *See* Mullane v. Central Hanover Bank and Trust Co., 408 U.S. 471 (1972).

[33] Thomas, *supra* note 11, at 1093.

[34] *See* Hurtado v. California, 110 U.S. 516, 534 (1884); *see also* LAFAVE ET AL., *supra* note 26, § 2.4(b) (chronicling the voluminous debate over the original meaning of the Fifth Amendment's Due Process Clause); Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS L. REV. 303 (2001) (detailing how the Due Process Clause of the Fourteenth Amendment

the Warren Court's incorporation of the Bill of Rights through the Fourteenth Amendment, and its expansive interpretation of the criminal procedural guarantees contained in the Bill of Rights, leaves little room for additional procedures save those necessary to ensuring a fair and accurate trial.

A. MIRANDA AS SUBSTANTIVE DUE PROCESS[35]

The line between substantive and procedural due process is not clearly drawn. The Court has identified certain legislative[36] and executive action that simply cannot be countenanced regardless of the procedures used. I would add that the law or executive action must not infringe on interests related to the fairness of the trial (though a substantive due process claim may also result in a claim as to the procedures involved at trial). In other words, the individual's substantive rights are violated independent of his right to fair adjudication in a criminal trial, and the violation of these substantive rights results in an immediate constitutional violation that demands a remedy (though it may also require the exclusion of evidence in a subsequent criminal adjudication). We may fit Professor Thomas' understanding of *Miranda* into the substantive due process component of the Fourteenth Amendment using this definition. Under Professor Thomas' theory, a suspect has a substantive right to be free of custodial interrogation without *Miranda*-style notice that he need not answer questions, and/or in maintain-

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parallels that of the Fifth Amendment). Regardless of the intent of the framer's of the Bill of Rights and drafters and ratifiers of the Fourteenth Amendment, the Court has utilized the fundamental fairness doctrine since reconstruction, and is unlikely to stop now.

[35] The first component of the Due Process Clause, the incorporation doctrine, is clearly inapplicable.

[36] The use of substantive due process to restrict the content of substantive criminal law is not relevant to Thomas' proposal In the interest of full disclosure, since I am criticizing Professor Thomas' attempt to use due process as overly subjective, I must admit that Nancy J. King and I have recently devised a sixth factor substantive due process test for determining when the government can partially circumvent constitutional criminal procedural guarantees by labeling a fact an affirmative defense or a sentencing factor instead of an element. *See* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1535-42 (2001). I note that in this situation, as in the situation where the legislature attempts to completely circumvent criminal procedural guarantees by labeling an action "civil," substantive due process is absolutely essential to our constitutional architecture. Thomas' utilization of the Due Process Clause is absolutely unnecessary in light of the Miranda Court's decision to apply the Fifth Amendment at the station house.

ing his innermost thoughts.[37] Such interests are clearly not tied to the truthseeking function of adjudication, though they may result in a claim as to the procedure involved in his criminal trial. For example, the suspect may seek to exclude evidence obtained in violation of his substantive right. Rather than implementing a set of procedures to adjudicate this newly created liberty interest in receiving *Miranda*-style warnings, Professor Thomas appears to claim that while countervailing law enforcement interests may be adequate, no set of procedures will ever be enough to deprive a person of his interest in notice.

This same definition would include the substantive due process right to be free from stomach pumping recognized by the Court in *Rochin v. California*,[38] the right not to be forcibly medicated in the absence of a showing that the medication was medically appropriate recognized by the Court by *Riggins v. Nevada*,[39] and potentially the right of an actually innocent person not to be executed by the state, mentioned by the Court in *Herrera v. Collins*.[40] Though the Court did not, I would include in this list the whippings barred by *Brown v. Mississippi*,[41] which seems to me an immediate and actionable wrong regardless of whether evidence obtained by the torture is offered at a criminal trial.[42]

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[37] Thomas, *supra* note 11, at 1114-15.

[38] 342 U.S. 165 (1952) (holding that the violation of bodily integrity inherent in enforced stomach pumping shocks the conscience of the Court).

[39] 504 U.S. 127 (1992).

[40] 506 U.S. 390 (1993).

[41] 297 U.S. 278, 286 (1936) (criminal conviction based upon confession obtained by a white state official severely whipping an African-American defendant offended the fundamental traditions and conscience of society, and therefore "the use of the confession . . . obtained [through physical torture] as the basis for conviction and sentence was a clear denial of due process.").

[42] As a procedural due process case, it probably could not sustain a civil rights action under 42 U.S.C. § 1983. All the procedure due persons in such cases is the exclusion of any evidence obtained by these deprivations in a criminal trial, and the availability of a state tort or criminal law remedy. *See* Parratt v. Taylor, 451 U.S. 527 (1981), *overruled on other grounds by* Daniel v. Williams, 474 U.S. 327 (1986); *see also* Ingraham v. Wright, 430 U.S. 651 (1977). Likewise the Fifth Amendment's Self-Incrimination Clause is not violated unless evidence is admitted in the criminal trial. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that a Fourth Amendment violation is complete upon the search or seizure, whereas a violation of the Self-Incrimination Clause cannot occur until trial); *Kastigar v. United States*, 406 U.S. 441 (1972) (government can compel a statement so long as it does not use the results in a criminal proceeding). In today's post-incorporation world, however, the police misconduct in *Brown* would be actionable as a Fourth Amendment excessive force violation. *See* Graham v. Connor, 490 U.S. 386, 395 (1989) (holding that excessive force in making

The attempt to find a substantive due process home for a *Miranda* violation will fail for three reasons. First, there is no liberty interest as described by Professor Thomas that history, tradition, current American consensus, or state law establishes as being worthy of due process protections. The Court has been understandably reluctant to extend substantive due process beyond "matters relating to marriage, family, procreation, and the right to bodily integrity."[43] Since the *Miranda* warnings protect none of these interests, that alone should end the matter. The Court has also made clear that it will not recognize any substantive due process liberty interests occasioned by an arrest beyond the protections already provided by the Fourth Amendment.[44] That, again, should end the matter. However, even assuming the Court would be willing to add additional liberty protections, precisely what Professor Thomas offers as his new liberty interest is not entirely clear. On one reading of his theory, it is an interest in obtaining the warnings themselves,[45] on another it is a liberty interest in being free from custodial interrogation,[46] and a third possibility is the interest in not revealing one's "innermost thoughts."[47] None is a proper liberty interest protected by the substantive due process components of the Fifth or Four-

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arrest should be analyzed only under Fourth Amendment).

[43] Albright v. Oliver, 510 U.S. 266 (1994); *see also* County of Sacramento v. Lewis, 523 U.S. 833 (1998) (Kennedy, J., concurring) (loss of life implicated a protected liberty interest).

[44] *See, e.g., Albright*, 510 U.S. at 274 (holding that the matter of pre-trial deprivation of liberty addressed by the Fourth Amendment); *see also Ingraham*, 430 U.S. at 679-80 (holding that the deprivation of liberty occasioned by an arrest does not trigger the strict judicial scrutiny of substantive due process because the system provides adequate procedural control such as warrants and judicial determinations of probable cause); *Lewis*, 523 U.S. at 833 (holding that substantive due process analysis appropriate for high speed police chase case because victim was not yet seized, and therefore the conduct was not covered by the Fourth Amendment).

[45] Professor Thomas writes that "*Miranda* is about fair notice that suspects have no duty to answer police questions." Thomas, *supra* note 11 at 1102. He also claims that there is a "due process right to notice that suspects do not have to answer police questions . . . ." *Id.* at 1104. Professor Thomas comments that "a . . . due process liberty interest is the suspect's option to make an informed choice whether to answer police questions and risk providing the state with evidence against him that increases the risk of conviction." *Id.* at 1114.

[46] Professor Thomas contends that "a permissible understanding of *Miranda* is that it protects the liberty interest in not being subjected to custodial interrogation . . ." *Id.* at 1091. He argues that "The denial of autonomy and human dignity by custodial interrogation might constitute a deprivation of a due process liberty interest." *Id.* at 1112.

[47] *See id.*, at 1115.

teenth Amendments.[48] I will start with a liberty interest in notice that one need not answer police questions, regardless of whether any subsequent cooperation or revelation was voluntary or compelled.

A requirement of notice outside the trial setting regarding constitutional criminal procedural guarantees has been routinely rejected by the Court. In addition to the lack of any constitutional or historical basis for a notice requirement, this practice reflects, in part, the lack of a principled basis for determining when and how much notice is required. For example, how is the Court to decide which specific constitutional criminal protections trigger an independent Due Process Clause right to be notified that one's conduct might impair the future utilization of this right? Why not require police to notify an individual that he need not consent to a search in order to protect his Fourth Amendment right to a judicial warrant based upon probable cause?[49] Should the government give notice to a suspect that one of his "friends" is actually an undercover operative working for the police, in order to protect his Sixth Amendment right to counsel?[50] Should a suspect be informed that the invocation of his right to remain silent allows reapproach by an officer to interrogate on a different offense, whereas his invocation of his right to an attorney does not?[51] Must the defendant

[48] I will not discuss the third proposed liberty interest. An extensive and complex body of jurisprudence under the First Amendment's free speech and Fifth Amendment's Self-Incrimination Clause already protects freedom of thought. Throwing free standing or substantive due process into the mix adds nothing but confusion.

[49] *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (holding that knowledge of right to refuse consent to search simply one factor in determining whether consent voluntarily given, for purposes of determining whether the warrant or probable cause clauses are triggered).

[50] *Compare* Maine v. Moulton, 474 U.S. 159 (1985) (holding that incriminating information elicited from indicted defendant via confidential informant violated defendant's Sixth Amendment right as to the theft charge to which the Sixth Amendment right had attached, it did not require exclusion of evidence pertaining to potential additional charges to which the Sixth Amendment right to counsel had not attached), *with* Illinois v. Perkins, 496 U.S 292 (1990) (holding that where Sixth Amendment right to counsel has not attached the Sixth Amendment does not require that undercover officer blow his cover by Mirandizing a suspect before eliciting information from him).

[51] *Compare* Michigan v. Mosely, 423 U.S. 96 (1975) (holding that after a defendant asserts his *Miranda* rights, he can be questioned at a later time regarding a different crime after receiving a new set of warnings), *with* Arizona v. Roberson, 486 U.S. 675 (1988) (holding that once defendant invokes his *Miranda* right to an attorney, he cannot be questioned even about a different crime).

be informed that the attachment of his Sixth Amendment right to counsel on a specific charge will not bar questioning on a different charge unless the defendant invokes his *Miranda* right to an attorney?[52] Must an individual detained pursuant to a valid traffic stop be informed that the traffic stop is over and that he is free to go before the officer may engage in further questioning?[53] Must an individual be informed that there is a method for recovery of property seized pursuant to a valid search warrant?[54] Must an individual be informed that he can refuse to answer non-custodial questions by federal law enforcement agents in order to protect his Fifth Amendment privilege against self-incrimination in a future criminal trial against him involving the answers to those questions?[55] Must an individual be Mirandized by a government agent requesting an oral or written factual declaration in order to protect his privilege against self-incrimination?[56] The Court has answered each of these questions in the negative. It is incumbent upon the individual to be aware of and assert his rights.

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[52] *See* McNeil v. Wisconsin, 501 U.S. 171 (1991) (holding that the attachment of Sixth Amendment right to counsel for robbery charge did not bar custodial interrogation after *Miranda* waiver on unrelated burglary).

[53] *See* Ohio v. Robinette, 519 U.S. 33 (1996) (rejecting per se rule that the traffic stop becomes an illegal detention unless the officer informs the detainee that he is free to go before requesting consent to search his car).

[54] *See* City of West Covina v. Perkins, 525 U.S. 234 (1999) (holding that when police seize property pursuant to a search warrant for a criminal investigation, due process does not require that they provide the owner with notice of state law remedies which are established by published, generally available state statutes in caselaw); *see also* FED. R. CIV. P. 41(d) (providing that federal agents give subject of search a copy of the warrant, but making no provision for notifying the subject about the procedures for seeking return of property).

[55] *See* Brogan v. United States, 522 U.S. 398 (1998) (holding that defendant's denial of a bribery allegation to federal agents questioning him violates 18 U.S.C. § 1001 proscription against false statements, "exculpatory no" doctrine is not required by the privilege against self-incrimination despite suspect's fear that his silence will be used against him later or his lack of knowledge that silence was an available option).

[56] *See* United States v. Bajakajian, 524 U.S. 321 (1998) (affirming guilty plea to violation of 31 U.S.C. § 5316, where defendant lied to customs inspector when asked, without *Miranda* warnings, whether he had currency in excess of $10,000 to declare, but upholding Ninth Circuit determination that criminal forfeiture of entire $357,144 constituted an excessive fine); *see also* Marchetti v. United States, 390 U.S. 39 (1968) (holding that defendant can assert Fifth Amendment privilege to preclude criminal punishment for refusing to comply with occupational tax statute where payment subjects taxpayer to substantial hazard of federal and state criminal wagering prosecution).

Professor Thomas cannot explain why there is no liberty interest in notice of Fourth, Fifth, and Sixth Amendment criminal procedural protections outside of the trial setting, but there is a liberty interest in notice that one need not answer questions when in police custody. He does attempt to justify giving a due process notice right to *Miranda* warnings yet offering no due process notice of a Fourth Amendment right to refuse to give consent to a search, stating that the difference is in:

> . . . the level of pressure between typical cases of police approaching an individual on the street and asking a question, and police conducting a sustained interrogation of a suspect who is under arrest. Under arrest, in an unfamiliar room, suspects face police interrogators who are capable of relentless questioning and who imply, if they do not state, that the suspect must answer. This is about as extreme a pressure to answer as interrogation can get short of physical threats or physical coercion.[57]

This justification is an admission that Professor Thomas is not concerned with a suspect obtaining information or notice that he is free to refuse to answer questions, but rather is concerned that the suspect be free from compulsion. Notice is necessary here only to dispel compulsion. This brings us right back to the privilege against self-incrimination.[58]

Moreover, once we accept a new liberty interest in notice regarding the privilege against the Self-Incrimination Clause's freedom from answering questions that might incriminate one in a criminal trial, why stop at the four *Miranda* warnings in describing this liberty interest? If Professor Thomas is truly worried about "the unfairness which comes with making a choice based on incomplete or false information,"[59] why not require officers to give notice to arrestees that they will lie to them during the custodial interrogation? How about telling the suspect that his attorney, were he to ask for one, would certainly insist that he remain silent? How about notice to the suspect that if he re-

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[57] Thomas, *supra* note 11, at 1102-03.

[58] Unlike the lack of *Miranda*-style warnings outside the trial setting found in the *Bajakajian*, 524 U.S. 321, and *Brogan*, 522 U.S. 398, cases, the Supreme Court has declined to decide whether a grand jury witness must be warned of her Fifth Amendment privilege. *See* United States v. Washington, 431 U.S. 181, 190-91 (1977). However, whichever way it may eventually rule, it is clearly a Fifth Amendment Privilege against self-incrimination issue, not one of due process.

[59] Thomas, *supra* note 11, at 1105.

fuses to waive his *Miranda* rights, his statements may still be used to impeach him and to obtain leads as to other evidence and witnesses? There is simply no principled stopping point for determining how much notice is required.

Next, let us suppose this liberty interest is the freedom from the custodial interrogation itself. If by this Professor Thomas means the right to be free from custodial interrogations that compel a statement from a suspect, he is correct but his theory is unnecessary. Forcing a suspect to talk by prolonged interrogation or other coercive means would, of course, make the statement involuntary under the Fifth Amendment's Self-Incrimination Clause.[60] If Professor Thomas means the freedom of a suspect not be subjected to any police questioning at all, he is incorrect. Questioning a suspect, even without giving him notice that he need not answer these questions, is insufficiently shocking to constitute a violation of substantive due process. Though Professor Thomas and his students apparently disagree, I suspect many people see nothing "fundamentally unfair" or "shocking" about the police asking a suspect to explain himself once there has been sufficient indication he has committed a crime to justify an arrest. In fact, short of actual compulsion,[61] the Court has acknowledged a "need for police questioning as a tool for the effective enforcement of criminal law. Without such investigation, those who are innocent might be falsely accused, those who are guilty might wholly escape prosecution, and many crimes would go unsolved."[62] Thus we force witnesses and suspects into the grand jury,[63] and even onto the stand of a criminal case not their own.[64] Like a suspect suffering custodial interrogation, individuals subpoenaed to the grand jury or a criminal

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[60] *See* Malloy v. Hogan, 378 U.S. 1 (1964).

[61] Of course if there is actual compulsion in the interrogation the Fifth and Fourteenth Amendments' prohibition against coerced confessions will step in.

[62] Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973).

[63] *See* FED. R. CIV. P. 17; *see also* Branzburg v. Hayes, 408 U.S. 665 (1972) (holding that every person within the jurisdiction of the government is bound to appear before the grand jury when properly summoned); United States v. Calandra, 413 U.S. 338 (1974) (holding that the grand jury has authority to call witnesses and citizens are required to attend); United States v. Nixon, 418 U.S. 683 (1974) (trial subpoenas).

[64] *See* United States v. Monia, 317 U.S. 424 (1943) (holding that witness in criminal trial must claim the privilege). Of course this is not true of a criminal defendant, who has a Fifth Amendment right not to be called in his own trial. *See* Griffin v. California, 380 U.S. 609 (1965) (holding that prosecutor may not comment upon defendant's failure to testify).

trial have no liberty interest in freedom from the prosecutorial interrogation. Similarly, the government requires the production of financial and other information that may be incriminating in filings such as federal income tax forms[65] and in reports submitted at the international border[66] on pain of criminal sanction. Though, like a suspect suffering custodial interrogation, they may assert their privilege, they have no liberty interest in freedom from filling out the forms.

Cases where the Court did find police conduct to be shocking all involved instances of intentional police brutality that directly resulted in serious physical injury.[67] The Court was not shocked by reckless police behavior that directly caused the death of innocent persons,[68] nor was it shocked by intentional omissions that indirectly resulted in the death of innocent persons.[69] It seems more than an overstatement to describe a world without *Miranda* as shocking, or as depriving the defendant of "that fundamental fairness essential to the very concept of justice."[70] Police conduct in questioning a suspect, questioning him without providing the *Miranda* warnings, and attempting to get him to reveal his participation in a crime is simply not comparable to the forced emetic administered in *Rochin.* I find even that case questionable under the present interpretation of the substantive Due Process Clause (though happily covered now by

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[65] *See, e.g.*, 26 U.S.C. § 7201 (West 2000) (criminalizing willfully attempting to evade taxes); 26 U.S.C. § 7203 (West 2000) (criminalizing willfully failing to file return).

[66] *See, e.g.*, 31 U.S.C. § 5316 (1994) (requiring that individuals and entities report to the U.S. Customs Service when importing or exporting over $10,000 in U.S. currency or its foreign monetary equivalent); *see also* 31 U.S.C. § 5233 (1994) (criminalizing the willful failure to file such report).

[67] *See* Ingraham v. Wright, 430 U.S. 651 (1977) (ruling against plaintiff's 42 U.S.C. § 1983 action founded on Eighth Amendment and procedural due process, leaving open a substantive due process claim based on corporal punishment of a public school child); *see also* Rochin v. California, 342 U.S. 165 (1952).

[68] *See* County of Sacramento v. Lewis, 523 U.S. 833 (1998) (holding that police recklessly engaging in a high speed chase resulting in the death of a citizen was not sufficiently egregious to shock the conscience).

[69] *See* Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992) (holding that city's failure to train or warn its employees about known hazards beneath the city streets, resulting in death by asphyxia in a manhole, was insufficiently shocking to constitute a violation of substantive due process); *see also* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (holding that substantive due process guarantee against state deprivation of safety does not apply to social workers who have no affirmative duty to prevent a parent from maiming his child, even where the worker had knowledge of the abuse).

[70] Lisenba v. California, 314 U.S. 219, 236 (1941).

the Fourth Amendment itself), given Alabama's recent experiment with chain gangs,[71] the general public's reaction to the caning of a young American vandal in Singapore,[72] the Court's sanctioning the punishment of an innocent spouse in *Bennis v. Michigan*,[73] and the Court's acceptance of a sixteen-hour painful detention of a drug mule with balloons of cocaine heroically retained in her alimentary canal until a court-ordered rectal exam finally caused defecation.[74] Scholars and Justices may legitimately argue about whether this cabining of substantive due process is as it should be; opponents noting that whether the Constitution has been violated should depend upon more than the level of squeamishness of five of nine Justices,[75] and advocates suggesting that the Court consider evolving concepts of fairness.[76] Regardless of one's position on the propriety of sub-

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[71] *See* Alan Sverdlik, *Chain Gangs: Crime Deterrent or Brutality? Alabama Brings Back Shackles*, ATLANTA J.-CONST., May 4, 1995, at D4, *available at* 1995 WL 6518766 (describing the first day of chain gang labor, and noting the 70% approval rating chain gangs receive in the state of Alabama). Chain gangs were discontinued four years later after a series of lawsuits, ostensibly to alleviate a guard shortage. *See Alabama, Short of Guards, Ends Chain Gangs*, MILWAUKEE J. SENTINEL, Oct. 31, 1999, at 9, *available at* 1999 WL 21546632.

[72] Editorials and letters to the editor throughout the country expressed support for Singapore's corporal punishment of Fay. *See, e.g.*, Jason C. Smith, *Editorial: Michael Fay Got What He Deserved*, CHARLESTON DAILY MAIL, May 18, 1994, at 7A, *available at* 1994 WL 12896851; Michael F. Mazza, *Voice of the People (Letter): Michael Fay Got What He Deserved*, CHI. TRIB., May 16, 1994, at 10 , *available at* 1994 WL 6534075; Elizabeth Schuett, *Op. Ed.: Junior High Students Unanimously Agree: Michael Fay Deserves His Punishment*, DAYTON DAILY NEWS, May 4, 1994, at 11A, *available at* 1994 WL 4289825.

[73] 516 U.S. 442 (1996) (holding that substantive due process is not offended by permitting the state to confiscate an automobile from an innocent owner because her husband used it as a site to commit an illicit sexual act with a prostitute).

[74] *See* United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

[75] *See* Dickerson v. United States, 530 U.S. 428, 454 (2000) (Scalia, J., dissenting); *see also* Bowers v. Hardwick, 478 U.S. 186 (1986); Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting).

[76] *See, e.g.*, Justice Frankfurter in Rochin v. California, 342 U.S. 165, 170-71 (1952) (arguing that the fundamental fairness standard does not allow judges to exercise "merely personal and private notions" of justice, but that there are limits "derived from considerations that are fused in the whole nature of judicial process . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession.") (citation omitted); Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453 (1997) (contrasting the Court's willingness to apply substantive due process to strike an excessive monetary sanction against a corporate civil tortfeasor in BMW v. Gore, 517 U.S. 559 (1996), with its unwillingness to rigorously apply substantive due process against state legislation authorizing forfeiture of property belonging to innocent owners if used by criminals in *Bennis*, 516 U.S. 442).

stantive due process and the merits of prior cases, however, a *Miranda* violation isn't even close.

A third reason why an attempt to place *Miranda* in the substantive due process component of the Fourteenth Amendment fails is the Court's wise holding that where a particular constitutional guarantee protects against a particular type of challenged government action, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing [those] claims."[77] This rule makes good sense in a post-selective incorporation world for exactly the same reason that the Court shifted in the 1960s from the fundamental fairness standard to the selective incorporation doctrine. That is, the Court is reluctant to "expand the concept of substantive due process because the guideposts for responsible decision-making in this chartered area are scarce and open-ended,"[78] or, as Justice Scalia said more colorfully, it turns the Court into a "nine-headed Caesar."[79] The argument in favor of both total[80] and selective incorporation[81] of the Bill of Rights into the Fourteenth Amendment is that it avoids the subjectivity inherent in the application of the fundamental fairness doctrine pre-incorporation.

This more-specific-provision rule cuts off Professor Thomas' due process proposal, and should cause the Court to recharacterize some older substantive due process cases should that same misconduct arise in a post-selective-incorporation world. It cuts off Professor Thomas' claim because the *Miranda* warn-

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[77] Graham v. Connor, 490 U.S. 386, 395 (1989) (holding that claims that law enforcement officers have used excessive force must be analyzed under the Fourth Amendment and not the substantive Due Process Clause); *see also* Albright v. Oliver, 510 U.S. 266 (1994) (refusing to recognize a substantive due process right to be free from criminal prosecution except upon probable cause, finding instead that the Fourth Amendment addresses the matter of pre-trial deprivations of liberty).

[78] Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

[79] Dickerson v. United States, 530 U.S. 428 (2000); *see also* Bowers v. Hardwick, 478 U.S. at 195 ("There should be . . . great resistance to expand the substantive reach of . . . [the Due Process Clause], particularly if it requires redefining the category of rights deemed to be fundamental.").

[80] *See* Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting) (contending that the fundamental fairness doctrine permitted the Court to "substitut[e] its own concepts of decency and fundamental justice for the language of the Bill of Rights.").

[81] Selective incorporation is less subjective than fundamental fairness in two ways: 1) it points to a textual source of the right; and 2) once the right is incorporated the scope of the right is dependent upon case law surrounding that constitutional clause, there is no discretion in deciding which parts of the clause are necessary to ordered liberty.

ings protect a defendant's Fifth Amendment right not to be compelled to be a witness against himself, and as such ought to be analyzed under the Self-Incrimination Clause. *Rochin v. California*[82] would certainly be treated as a Fourth Amendment case after *Graham v. Connor*.[83] Cases such as *Brown v. Mississippi*[84] would likely be viewed today as either Fourth or Fifth Amendment rather than substantive due process cases.[85]

That the *Miranda* warnings are better placed in the Fifth Amendment than in substantive due process is evident from Professor Thomas' own explanation of the value of providing such notice. He claims that notice is needed 1) because suspects otherwise believe they have a legal duty to answer police questions; 2) to assist suspects in making an informed choice whether to answer police questions and risk providing the state with evidence against them; and 3) because suspects will otherwise forfeit their liberty interest in choosing whether to reveal their innermost thoughts. As an empirical matter I believe the need for *Miranda* warnings solely to provide "notice" is, at this point in time, superfluous. After the wave of television cop shows from Hill Street Blues to NYPD Blue, any American with a TV set has some awareness of the *Miranda* warnings.[86] But even

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[82] 342 U.S. 165 (1952).

[83] Graham v. Connor, 490 U.S. 386 (1989). The Court said as much in County of Sacramento v. Lewis, 523 U.S. 833, 849 n.9 (1998) (explaining that *Rochin* "was decided long before *Graham v. Connor* . . . and today would be treated under the Fourth Amendment, albeit with the same result.").

[84] 297 U.S. 278 (1936).

[85] The value I see in calling coerced confessions a violation of substantive due process rather than the Fifth Amendment Self-Incrimination Clause is that this will allow coerced persons to bring a 42 U.S.C. § 1983 claim despite the fact that a confession may never have been given, or, if given, may never have been used in Court, and therefore the Fifth Amendment was never violated. *See* Cooper v. Dupnik, 924 F.2d 1520 (9th Cir. 1991) (no civil rights action for intentional violation of *Miranda* where no charges filed, as Self-Incrimination Clause is not violated until statement admitted into criminal trial), *rev'd en banc*, 963 F.2d 1220 (1992) (civil rights plaintiff's substantive due process rights violated), *cert. denied*, 506 U.S. 953 (1992).

[86] *See* Richard A. Leo, *The Impact of Miranda Revisited*, J. CRIM. L. & CRIMINOLOGY 621, 651 (1996) (noting that 93% surveyed in a national poll knew they had a right to an attorney if arrested, and 80% of the respondents in another poll knew they had a right to remain silent if arrested). Of course being able to partially recite the warnings may be a far cry from actually understanding and being able to apply the warnings. *See* Thomas Grisso, *Juveniles' Capacity to Waive Miranda Rights: An Empirical Analysis*, 68 CAL. L. REV. 1134 (1980) (finding that many adults failed to fully understand all four warnings even after the recitation, and contending that they would have to explain their criminal involvement in court if questioned by the judge). However,

if I'm wrong, and a suspect does lack notice that he can terminate the interview and keep those innermost thoughts all to himself, why do these particular kinds of erroneous beliefs bother us any more than the hundreds of other erroneous factual beliefs held by citizens regarding the criminal justice system and life in general? It bothers us because we fear that otherwise, suspects will be compelled to speak against their will. The act of notice by the interrogating police officer reassures the defendant that the officer is prepared to recognize the defendant's Fifth Amendment privilege, and will not attempt to badger or beat a statement out of him.[87] Thus, *Miranda* protects a quintessential Fifth Amendment value.

B. MIRANDA AS CRIMINAL PROCEDURAL DUE PROCESS

It sometimes appears that Professor Thomas makes a procedural due process claim as when, for example, he tell us there is a "free standing due process protection by which state criminal proceedings can be evaluated."[88] He also appears to make this claim when he analogizes *Miranda* to other criminal procedural due process cases such as *Pennsylvania v. Ritchie*[89] and *Chambers v. Mississippi*.[90] As with substantive due process, we must first find a liberty or property interest that is being infringed by the state. I have already explained why I believe Thomas' notion of a liberty interest to information regarding whether one can cut off questioning, to information whether one needs to

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Thomas does not cure these defects. He does not require officers or more neutral parties to actually explain the warnings; he simply moves their constitutional home.

If *Miranda* warnings were terminated, however, it may be true that over time, depending upon reruns, they would fade from popular media and thus from public awareness as well. Or we might imagine a world without the *Miranda* decision. In that case, a suspect is in the same position regarding her fifth-amendment rights as she is with all others criminal procedure rights—she can learn them herself or ask the officer for information. Moreover, neither Professor Thomas nor I are proposing to eliminate the warnings, nor do we suggest it was a mistake to institute them. Our difference is simply in whether they are more accurately described and more appropriately placed in the privilege against self-incrimination or free-standing substantive or procedural due process.

[87] *See supra* notes 54-55 and accompanying text.

[88] Thomas, *supra* note 11, at 1096.

[89] 480 U.S. 39 (1987) (holding that the state is obliged to provide the defense with subpoena access to possibly favorable agency records).

[90] 410 U.S. 284 (1973) (holding that due process requires right to cross-examine hostile defense witnesses and offer testimony of defense witnesses).

cooperate with police, and information on whether it is necessary to reveal one's innermost thoughts, is far-fetched.

One could instead posit that a liberty interest is infringed upon by the state when the state attempts to incarcerate a defendant through a criminal trial that utilizes procedures that violate fundamental fairness. There are two problems with this procedural due process proposal. The first is that virtually all practices struck down on this ground, pre-, peri- and post-selective incorporation, impinged upon the truthseeking function of the trial. Cases regulating the standard and burdens of proof in a criminal trial,[91] securing the right to present a defense,[92] prohibiting prejudicial delay in the bringing of charges,[93] and requiring an impartial judge,[94] all ensure the reliability of the verdict and can stake some claim to either history or consensus. A trial conducted with evidence obtained in violation of *Miranda* but not the Fifth Amendment's Self-

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[91] *See* Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that due process requires that any fact, other than a prior conviction, that increases the penalty for an offense beyond the prescribed statutory maximum be submitted to a jury and proven beyond a reasonable doubt); *see also* Cooper v. Oklahoma, 517 U.S. 348 (1996) (holding that state cannot prosecute an individual who has shown by a preponderance of the evidence that he is incompetent to stand trial); Cage v. Louisiana, 498 U.S. 39 (1990) (striking down misleading jury instructions as to reasonable doubt standard); Carella v. California, 491 U.S. 263 (1989) (rejecting conclusive presumptions); *In re* Winship, 397 U.S. 358 (1970) (requiring the state to prove every element of an offense beyond a reasonable doubt).

[92] *See* Arizona v. Youngblood, 488 U.S. 51 (1988) (prohibiting intentional destruction of or failure to preserve exculpatory evidence); *see also* Rock v. Arkansas, 483 U.S. 44 (1987) (holding that defendant has constitutional right to testify at her own trial); *Ritchie*, 480 U.S. 39 (state obliged to provide the defense with subpoena access to possibly favorable agency records); United States v. Bagley, 473 U.S. 667 (1985) (requiring prosecutor to disclose evidence necessary to impeach government witnesses); Ake v. Oklahoma, 470 U.S. 68 (1985) (providing indigent who has shown his sanity is likely to be a significant factor at trial with access to experts to establish insanity defense); *Chambers*, 410 U.S. 284 (right to cross-examine hostile defense witness and offer testimony of defense witnesses); Brady v. Maryland, 373 U.S. 83 (1963) (requiring prosecutors to disclose exculpatory materials to the defense).

[93] *See* United States v. Marion, 404 U.S. 307, 326 (1971) (rejecting the defendant's claim of prejudicial delay in bringing an indictment because it was brought within the statute of limitations, but nevertheless noting "the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost").

[94] *See* Mayberry v. Pennsylvania, 400 U.S. 455 (1971) (holding that defendant has a due process right to an unbiased judge); *see also* Tumey v. Ohio, 273 U.S. 510 (1927) (holding that defendant had a due process right to an impartial judge with no pecuniary interest in obtaining a conviction); Moore v. Dempsey, 261 U.S. 86 (1923) (holding that defendant had a due process right to a trial free from mob domination).

Incrimination Clause is still a trial that is fundamentally fair, and will generate a reliable verdict.

A second roadblock to a procedural due process right to *Miranda* warnings is that the Court has instituted the same more-specific-provision rule as in the substantive due process area. First in *Dowling v. United States*[95] and then in *Medina v. California*,[96] the Court held that the primary source of regulation of state criminal trials is the criminal procedural guarantees selectively incorporated into the Due Process Clause. The Court is reticent to expand procedural due process beyond the specific guarantees enumerated in the Bill of Rights because:

> . . . [t]he Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the [D]ue [P]rocess [C]lause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.[97]

Thus, most of the procedural due process protections discussed above involve issues unregulated by any more specific clause of the Bill of Rights. The values underlying the *Miranda* warnings are Fifth Amendment privilege against self-incrimination values. The giving of the warnings does not generally make the trial more fair, at least in the sense of making the result more accurate or reliable.

Professor Thomas argues that the Warren Court might have easily used the line of procedural due process cases rather than the Self-Incrimination Clause in deciding *Miranda*.[98] It seems to me that an even stronger argument for moving *Miranda* to the procedural component of the Due Process Clause even after the Court's more-specific-provision rule is that the Court continues to use procedural due process as well as the Self-Incrimination Clause as the rationale for excluding actually coerced confessions, as opposed to excluding *Miranda* violations.[99] This prac-

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[95] 493 U.S. 342, 352 (1990) ("Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.").

[96] 505 U.S. 437 (1992).

[97] *Id.* at 443.

[98] *See* Thomas, *supra* note 11, 1097-98.

[99] *See* Withrow v. Williams, 507 U.S. 680, 693 (1993) (acknowledging that eliminating habeas review of *Miranda* issues would not serve federalism or efficiency as it would "not

tice can be explained, however, in two ways. First, the use of due process is primarily due to the historical accident that particularly egregious coerced confession cases occurred before the Self-Incrimination Clause was incorporated into the Fourteenth Amendment and applied to the states.[100] These state police practices had to be stopped and, prior to *Malloy*, it was due process or bust.[101] Second, using the "due process" rather than "Self-Incrimination Clause" label allows the Court to easily distinguish actually compelled confessions from voluntary confessions taken in violation of *Miranda*.[102] Due process has simply become shorthand for compelled statements, though a self-incrimination violation, as incorporated against the states through the Fourteenth Amendment's Due Process Clause, is a more accurate description.

C. MIRANDA AS ADMINISTRATIVE DUE PROCESS

Finally, Professor Thomas might be suggesting that the *Miranda* warnings are protected by the notice and opportunity to be heard that procedural due process requires before liberty or property is taken away in an administrative or civil setting. Professor Thomas focuses on a line of cases requiring notice of any hearing that might lead to a deprivation of property or liberty, and that use a balancing test to determine what kind of notice and procedures are required by the Due Process Clause. He cites the seminal due process notice case in civil procedure, *Mullane v. Central Hanover Bank and Trust Co.*,[103] which required a

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prevent a state prisoner from simply converting his barred *Miranda* claim into a due process claim that his conviction rested on an involuntary confession."); *see also* Colorado v. Connelly, 479 U.S. 157, 163 (1986) ("The Court has retained this due process focus, even after holding, in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment privilege against compulsory self-incrimination applies to the States") (citation omitted).

[100] *See Malloy*, 378 U.S. 1 ("Whenever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by [the self-incrimination] portion of the Fifth Amendment.") (quoting Bram v. United States, 168 U.S. 532, 542 (1897)).

[101] Federal police practices were controlled by the Fifth Amendment's Self-Incrimination Clause. *See Bram*, 168 U.S. 532.

[102] *See* Withrow v. Williams, 507 U.S. 680 (1993); *see also* Alfredo Garcia, *Is Miranda Dead, was it Overruled, or is it Irrelevant?*, 10 ST. THOMAS L. REV. 461, 499-502 (1998) (noting that once the *Miranda* issue is addressed, many lower courts neglect to inquire into the voluntariness of the resulting confession).

[103] 339 U.S. 306 (1950) (holding that individual beneficiaries have a due process right to notice of a hearing before the bank closes a trust; representation by a special

bank to mail notice to known beneficiaries of a trust before that trust could be closed. Professor Thomas also cites to *Morrissey v. Brewer*[104] and *Wolff v. McDonnell*,[105] two other due process cases. In *Morrissey*, the Court held that the Iowa Board of Parole had to hold an administrative hearing prior to revoking the defendant's parole and that the defendant must be given notice of the hearing and an opportunity to challenge the allegation that he violated parole by buying a car under an assumed name. In *McDonnell*, the Court held that the Nebraska Department of Prisons must give notice and an opportunity to be heard to prisoner Mr. McDonnell before depriving him of good time credit and privileges and confining him in a disciplinary cell as punishment for misconduct. There are a number of insurmountable hurdles to applying the rationale of these cases to the *Miranda* situation.

The first problem, already covered in my discussion of substantive due process, is the lack of any liberty interest being taken without due process. Mr. Mullane had a state-created property interest in the corpus of the trust,[106] Mr. Morrissey had a state-created liberty interest in the continuation of parole so long as he abided by its conditions,[107] and Mr. McDonnell had a state-created liberty interest in retaining his good time credits and privileges absent serious prison misconduct.[108] There is clearly no state-created liberty interest in receiving *Miranda* warnings,[109] and, as noted in my substantive due process discussion, the Court has time and again rejected any constitutional right to notice of criminal procedural guarantees outside the criminal trial setting.[110]

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guardian constitutionally insufficient where the bank knew the names and addresses of the interested parties) (cited by Thomas, *supra* note 11, at 1114).

[104] 408 U.S. 471 (1972) (cited by Thomas, *supra* note 11, at 1099 n.85, 1113 n.145).

[105] 418 U.S. 539 (1974) (cited by Thomas, *supra* note 11, at 1099 n.85, 1113 n.146).

[106] *See Mullane*, 339 U.S. at 313 ("[t]his proceeding does or may deprive beneficiaries of property").

[107] *See Morrissey*, 408 U.S. at 480 ("Revocation deprives an individual . . . of the conditional liberty properly dependent on observance of special parole restrictions.").

[108] *Wolff*, 418 U.S. at 558 ("We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State.").

[109] The *Miranda* requirements were imposed upon the states of Arizona and New York by the Court quite against their will. *Miranda*, 384 U.S. at 438 (listing Attorney Generals of Arizona and New York as respondents).

[110] *See infra* notes 50-57.

Second, the purpose of this procedural due process notice requirement is to ensure that the person whose property or liberty interest will be infringed attends and is properly prepared for a hearing, so he has the opportunity to present evidence and make arguments before his property or liberty interest is extinguished.[111] Professor Thomas does not intend to give suspects a hearing, administrative or otherwise, regarding the deprivation of their liberty interest in receiving the *Miranda* warnings. There are simply no facts to contest were we to hold such a hearing. In *Morrissey* and *McDonnell*, it is appropriate for the state to deprive those individuals of good time credits and parole rights if, in fact, the individuals violated the parole conditions or prison disciplinary rules. The hearing is necessary to determine whether the violations occurred. Professor Thomas provides no standard for when it is acceptable for the state to deprive someone of their liberty interest in receiving notice of their Fifth Amendment right and notice that they need not reveal their innermost thoughts, or what would be argued at a hearing regarding such deprivation.

II. SHIFTING MIRANDA TO THE DUE PROCESS CLAUSE WILL NOT SAVE ITS EXCEPTIONS

Perhaps we could live with a due process theory, despite its doctrinal shortcomings, if this theory accomplished Professor Thomas' stated goals of explaining waivers, justifying the overprotection of the Self-Incrimination Clause, and accounting for *Miranda*'s exceptions, especially if there were no better alternative.[112] However, my final disagreement with Professor Thomas regards these claims. In fact, his theory does not adequately ex-

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[111] *See, e.g.* United States v. James Daniel Good Real Prop., 510 U.S. 43 (1993) (predeprivation hearing required prior to government seizure of real property); Burns v. United States, 501 U.S. 129 (1991) (construing the Sentencing Reform Act, 18 U.S.C. § 3551 (1984), as requiring that a criminal defendant be given notice before a district court departs upward from the Sentencing Guidelines so that he may contest the fact upon which the court bases the upward departure, and noting that an interpretation that did not require notice in such a circumstance would cause serious constitutional problems); Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 (1985) (holding that a state employee must be given a hearing before being terminated for cause); Addington v. Texas, 441 U.S. 418 (1979) (requiring clear and convincing evidence before the State can civilly commit an insane individual); Mathews v. Eldridge, 424 U.S. 319 (1976) (finding a full evidentiary hearing after the termination of disability benefits sufficient).

[112] *See* Thomas, *supra* note 11, at 1098-1101.

plain any of what he calls "*Miranda*'s mysteries."[113] It is true that trial rights are less easily waived than *Miranda* rights. However, moving *Miranda* to the Due Process Clause does not provide a justification for this difference. First of all, it does not explain why the Self-Incrimination Clause is also easily waived on the witness stand, even during a grand jury proceeding.[114] I doubt Professor Thomas is willing to say an assertion of the privilege in those situations is also a due process rather than a Fifth Amendment right. Moreover, Professor Thomas fails to explain why the waiver of a due process liberty interest should be waived "carelessly, inattentively, and without counsel,"[115] but a Self-Incrimination Clause waiver should not be. A better response is that by agreeing to answer questions, a suspect is waiving his right, under the prophylactic rule of *Miranda*, to a presumption of compulsion. The standard for this waiver should not necessarily be the same standard for waiving a trial right. Rather, it should reflect whether the purposes underlying the prophylactic rule—to dispel compulsion, guide officer conduct, and ease Court adjudication—is served by that particular standard.[116] We should not be surprised to find that waiver of a prophylactic right is easier to accomplish than waiver of a true constitutional right.

Professor Thomas further claims that his due process test will retain all of *Miranda*'s exceptions, such as the admission in a prosecutor's case-in-chief of incriminating statements made in the absence of *Miranda* warnings where the questioning was necessary for public safety,[117] the exception allowing statements taken in violation of *Miranda* to impeach a defendant should he take the stand,[118] and the exception allowing derivative evidence in a prosecutor's case-in-chief that was obtained as the fruits of a *Miranda* violation.[119] George Thomas fairly chides the Court for never providing a standard as to when *Miranda*'s warnings and exceptions should come into play and when they should not.[120]

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[113] *Id.* at 1083.

[114] *See* United States v. Murdock, 284 U.S. 141 (1931) (privilege considered waived unless invoked by the grand jury witness).

[115] Thomas, *supra* note 11, at 1082.

[116] Klein, *supra* note 12, at 1035-36.

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

[118] *See* Harris v. New York, 401 U.S. 222 (1971).

[119] *See* Michigan v. Tucker, 417 U.S. 433 (1974).

[120] *See* Thomas, *supra* note 11, at 1085-86.

While this criticism is dead-on, Professor Thomas's decision to view *Miranda* as providing due process notice rather than Fifth Amendment protection against compelled self-incrimination does an even worse job at explaining or justifying the exceptions. For example, the exception laid out in *New York v. Quarles* is clearly a notice violation, as Mr. Quarles received no *Miranda* warnings at all.[121] The notice theory also fails to explain *Oregon v. Elstad*,[122] though Professor Thomas argues otherwise. He claims Mr. Elstad suffered no deprivation of his liberty interest in *Miranda*-style notice because he received the warnings and then made a statement.[123] The problem with this analysis is that Mr. Elstad first made a statement that was a direct result of a violation of *Miranda*. Although he received *Miranda* warnings at that point, this notice was something less than timely.[124] Had he received his due process right to notice as Professor Thomas envisions, he would have gotten it before the first statement and probably would never have made the second.[125] Likewise, it is challenging to justify the admission of the fruits of the *Miranda* violation in *Michigan v. Tucker*, as again the defendant failed to receive the required notice of his rights.[126] Finally, the application of the rule in *Edwards v. Arizona*, excluding even voluntary statements made during a second interrogation after the invocation of a *Miranda* right during a previous interrogation, fails under a notice theory because the defendant did receive notice of his *Miranda* warnings prior to both sets of custodial interrogations.[127]

Next, Professor Thomas claims that even where notice is not provided, his due process test is flexible enough to retain the exceptions by its ability to balance a suspect's interest in fairness and notice against the state's interest in admission of trustworthy evidence.[128] Unfortunately, this kind of balancing is not ap-

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[121] *See Quarles*, 467 U.S. at 652. In *Quarles*, an officer asked an apprehended rape suspect about the location of a gun in a public supermarket without Mirandizing him.

[122] 470 U.S. 298 (1985).

[123] *See* Thomas, *supra* note 11, at 1111.

[124] *See Elstad*, 470 U.S. at 300-01.

[125] He made the second statement assuming the cat was out of the bag, because he did not understand that the first statement was made in violation of *Miranda* and was therefore inadmissible.

[126] *See* Michigan v. Tucker, 417 U.S. 433, 436 (1974) (holding statement given without full *Miranda* notice that led to identity of witness was admissible).

[127] Edwards v. Arizona, 451 U.S. 477, 479 (1981).

[128] *See* Thomas, *supra* note 11, at 1111.

propriate under any of the due process components. Substantive due process disallows conscience-shocking action that infringes a liberty interest regardless of what procedures are used; the Court does not engage in balancing.[129] Likewise, with procedural due process in the criminal justice setting, the Court in *Medina v. California*[130] claimed it was unwilling to use the *Mathews v. Eldridge*[131] procedural due process balancing test. Rather the Court judges the independent content of procedural due process under the traditional fundamental fairness standard.[132] If custodial interrogation without *Miranda* warnings is fundamentally unfair, it is difficult to see how it is more or less fundamentally unfair depending upon whether failure to provide the warnings might help the government by providing derivative evidence or keeping a defendant off the stand.

One could make a plausible argument, however, that the *Mathews v. Eldridge* utilitarian balancing test performed by the Court in civil settings ought to apply in the criminal justice area, at least outside the confines of the trial itself. Justice O'Connor recently argued that *Mathews v. Eldridge* would be particularly helpful "in the context of modern administrative proceedings" such as "the new administrative regime established by the Federal Sentencing Guidelines."[133] Though *McDonnell* and *Morrissey* were both decided prior to *Mathews v. Eldridge* and *Medina*, the Court used a *Mathews v. Eldridge*-like balancing test in both of those cases.[134] Even accepting that a defendant has a liberty interest in receiving the *Miranda* warnings, and likening the custodial interrogation to some kind of administrative proceeding, the *Mathews v. Eldridge* balancing test would not save the *Miranda* exceptions.

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[129] See cases cited *supra* notes 39-42, 44-45.

[130] 505 U.S. 437 (1992).

[131] 424 U.S. 319 (1976).

[132] *See* Patterson v. New York, 432 U.S. 197 (1977).

[133] *Medina*, 505 U.S. at 454 (O'Connor, J., concurring). Justice Souter made the same argument in *Burns*, 501 U.S. 129, 147-48 (1991) (Souter, J., dissenting).

[134] *Morrissey*, 408 U.S. at 481 (holding that "due process is flexible and calls for such procedural protections as the particular situation demands," and balancing the individual's interest in liberty against the risk to society that the parolee will commit additional antisocial acts); *McDonnell*, 418 U.S. at 556 (holding that minimal procedural requirements under due process are determined by a "mutual accomodation between institutional needs and objectives and the provisions of the Constitution that are of general application.").

First, the right to notice before the deprivation of a liberty or property interest is a bright line with very little balancing, unlike the right to certain procedures. Where the identity of the party is known, due process requires individual notice.[135] Very occasionally, the Court balances the costs and benefits of providing notice to those affected, but only where notice is difficult to provide because the identities of those with an interest are not readily ascertainable.[136] In the custodial interrogation setting, the government always knows the identity of the individual meriting notice, and the monetary and logistical cost of notice to that individual is nil.

Second, the *Mathews v. Eldridge* balancing test is used to determine what kind of procedures the government must use in a hearing to adjudicate a liberty or property right, not to determine whether there will be any adjudication at all. A court balances three factors: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation, and the value of additional procedural safeguard; and 3) the government's interest, including fiscal and administrative burdens,[137] in order to determine whether more or better procedures are indicated. What Professor Thomas is asking is not what kind of procedures or method of adjudication we ought to use in deciding whether to violate the individual's liberty interest in receiving his *Miranda* warnings, but the substantive question of whether and under what circumstances we ought to deprive him of that liberty interest entirely, procedures be damned. In other words, he is asking whether the government's interest in crime fighting and truth seeking is sufficiently high that we ought to deprive the individual of his liberty interest period, by either not giving the warnings at all or giving the warnings but then ignoring the individual's invocation of his rights.

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[135] *See* Martin v. Wilks, 490 U.S. 755 (1989) (holding white firefighters not bound by consent degree to which they were not parties); *see also* Tulsa Prof'l Collection Services, Inc. v. Pope, 485 U.S. 478, 484-91 (1988) (requiring actual notice to "known and ascertainable creditors" in probate proceedings); Mullane v. Cent. Hanover Bank & Trust Co., 399 U.S. 306 (1950).

[136] *See generally* Douglas Laycock, *Due Process of Law in Trilateral Disputes*, 78 IOWA L. REV. 1011, 1014-21 (1993) (Due Process and F.R.C.P. 23 require individual notice to identifiable claimants, and adequate representation where individual notice is impractical).

[137] *Eldridge*, 424 U.S. at 335.

This is not a due process balancing test, but a Fifth Amendment balancing test.[138]

Viewing *Miranda* and its exceptions as part of a prophylactic rule designed to protect Fifth Amendment values, as I recommend, we ought to be asking entirely different questions. First, does the exclusion of evidence taken in violation of the *Miranda* rule further the goals of dissipating the compulsion inherent in custodial interrogation, easing the Court's task in determining whether statements were compelled, and providing guidance to law enforcement officers in obtaining statements? Second, do the exceptions to this rule compromise its efficacy?[139] The answers to these questions should come not solely from the Court but from Congress, state legislators, and social scientists.[140] The process by which our society develops these rules and considers whether they are functioning properly should not be limited to the Self-Incrimination Clause, but should be more generally applicable to all rules designed to safeguard constitutional criminal procedural guarantees.

Finally, Professor Thomas' last *Miranda* mystery, the exclusion of voluntary statements, is easily explained by the very definition of prophylactic rules. When it is impossible to precisely track the constitutional clause at issue, the Court is forced to either over or underprotect. I call the subconstitutional doctrines

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[138] I believe that all constitutional clauses are subject, in the most extreme cases, to a balancing of harms test: one cannot yell "fire" in a crowded theater despite the First Amendment. *See* Schenck v. United States, 249 U.S. 47 (1919); *see also* Warden v. Hayden, 387 U.S. 294 (1967) (law enforcement can search without a warrant where a life is at stake despite the Fourth Amendment). However, the balancing of the individual's right to silence versus law enforcement need for information in the ordinary case was resolved in favor of the individual by the enactment of the privilege against self-incrimination.

[139] I believe this responds to Professor Thomas' primary criticism of my approach—that relying on the good faith nature of the *Miranda* violation to determine exclusion has nothing to do with the Self-Incrimination Clause, unless one believes that an intentional violation more likely leads to a coerced confession. Thomas, *supra* note 11, at 1118-19. First, it does appear to me true that if an officer refuses to offer *Miranda* warnings, or offers them but then ignores their invocation, the suspect might rightly feel that he privilege will not be honored. More importantly, determining the contours and areas of application for a prophylactic rule is not dependent upon it reflecting the values of the constitutional clause it is protecting, but rather upon its efficiency in protecting that clause. While an intentional or accidentally caused compulsion may equally violate the Self-Incrimination Clause, it may well be that *Miranda*'s prophylactic rule will effectively protect the privilege if complied with in good faith, but not adequately protect the privilege if intentionally flouted.

[140] Klein, *supra* note 12, at 1057-68.

the Court uses to do this prophylactic rules and safe harbors.[141] The decision as to which device is more appropriate will depend entirely upon the purpose of the constitutional clause and the reason the Court is unable to provide more explicit constitutional interpretation.

III. CONCLUSION

I applaud Professor Thomas' goal of granting the Court some flexibility both in crafting *Miranda* warnings and in delineating *Miranda* exceptions. However, enshrining *Miranda* in due process divorces it from the values animating the warnings, and subjects the Court to the charge of judicial usurpation of executive and legislative functions, in imposing its own collective opinion in the guise of a constitutional mandate. Professor Thomas' placement of *Miranda*'s prophylactic rule into the Due Process Clause solves the legitimacy question only for that single decision. Unless Professor Thomas is willing to move every other prophylactic rule into the Due Process Clause as well, or to eliminate them entirely, he doesn't fully resolve *Miranda*'s mysteries. My more complete and conceptually pleasing proposal not only resolves what Professor Thomas calls the three *Miranda* mysteries, but also accounts for many similar doctrinal devices, and their mysteries, throughout constitutional criminal procedure. It does this by sharing power with the other branches of the federal and state governments, rather than usurping their authority. Finally, it will stimulate social science empirical research into the facts on the ground and alternative improved procedures.

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[141] Klein, *supra* note 12, at 1032-33.