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A NEW SOLUTION TO AN OLD PROBLEM: LIMITED USE IMMUNITY AS A BETTER ALTERNATIVE TO *MIRANDA*'S PROCEDURAL SAFEGUARDS

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"One of the overriding concerns of the criminal justice system is that the innocent must not be convicted."[1]

INTRODUCTION

Police interrogations and their resulting confessions[2] have long posed a conundrum for the criminal-justice system. On the one hand, cognitive scientists have warned for decades that standard police interrogation techniques are well-designed to extract confessions from the innocent as well as the guilty.[3] On the

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[1] R. v. Oickle, [2000] 2 S.C.R. 3 (Can.), at ¶ 36.

[2] This Article uses the term "confession" in its broadest sense to include not only complete confessions to crimes but also statements that are partially inculpatory at the time that they are made, as well as statements that are neutral or even exculpatory at the time that they are made but are subsequently used by the prosecution at trial (*e.g.,* the provision of a provably false alibi). *See* Miranda v. Arizona, 384 U.S. 436, 476-77 (1966) ("No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of an offense . . . . Similarly, . . . no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement . . . and thus to prove guilt by implication."); *see also* Opper v. United States, 348 U.S. 84, 91-92 (1954) ("The need for corroboration extends beyond complete and conscious admission of guilt—a strict confession . . . . [S]tatements of the accused out of court that show essential elements of the crime . . . necessary to supplement an otherwise inadequate basis for a verdict of conviction . . . . have the same possibilities for error as confessions. They, too, must be corroborated . . . . [E]xculpatory statements . . . may not differ from other admissions of incriminating facts. Given when the accused is under suspicion, they become questionable just as testimony by witnesses to other extrajudicial statements of the accused. They call for corroboration to the same extent as other statements."); *see, e.g.,* Marc Bookman, *The Confessions of Innocent Men,* THE ATLANTIC (Aug. 6, 2013), https://www.theatlantic.com/national/archive/2013/08/the-confessions-of-innocent-men/278363 [http://perma.cc/JNK4-68L7] ("Some people make matters worse for themselves in the face of strong evidence by providing an alibi or identifying another person as the perpetrator. Many succumb to the wiles of homicide detectives and implicate themselves to some lesser degree in the crime, heeding the admonition that a partial loss is better than going down for the whole thing.").

[3] *See* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 235-73 (1992); Brandon L. Garrett, *The Substance of False Confessions,* 62 STAN. L. REV. 1051 (2010); Saul M. Kassin, *The Psychology of Confession Evidence,* 52 AM. PSYCHOLOGIST 221 (1997); Allyson J. Horgan et al., *Minimization and Maximization Techniques: Assessing the Perceived Consequences of Confessing and Confession Diagnosticity,* 18 PSYCHOL., CRIME & L. 65, 76 (2012);

other hand, confessions can be crucial evidence that can not only inculpate the guilty but also exculpate the innocent, and, in the absence of interrogation, guilty parties are not likely to admit their culpability.[4] For almost a century, the Supreme Court has wrestled with crafting a constitutional jurisprudence that encouraged true confessions while discouraging false ones. The Court's earliest jurisprudence focused on police misconduct: first, physical violence ("the third degree"),[5] then later psychological coercion (typically, some combination of threats and offers of leniency sufficient to overcome a suspect's free will).[6] When the

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Saul M. Kassin & Katherine L. Kiechel, *The Social Psychology of False Confessions: Compliance, Internalization, and Confabulation,* 7 PSYCHOL. SCI. 125, 127 (1996); Jennifer T. Perillo & Saul M. Kassin, *Inside Interrogation: The Lie, The Bluff, and False Confessions*, 35 L. & HUM. BEHAV. 327, 335 (2011); Robert A. Nash & Kimberley A. Wade, *Innocent but Proven Guilty: Eliciting Internalized False Confessions Using Doctored-Video Evidence*, 23 APPLIED COGNITIVE PSYCHOL. 624, 633 (2009); Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 485 (2005); William Douglas Woody, *Lowering the Bar and Raising Expectations: Recent Court Decisions in Light of the Scientific Study of Interrogation and Confession,* 17 WYO. L. REV. 419, 426 (2017); *see also* JAMES L. TRAINUM, HOW THE POLICE GENERATE FALSE CONFESSIONS: AN INSIDE LOOK AT THE INTERROGATION ROOM (2016).

[4] *See* United States v. Havens, 446 U.S. 620, 626 (1980) (explaining how truthful confessions promote the primary purpose of a criminal trial: the search for truth); United States v. Washington, 431 U.S. 181, 187 (1977) ("[A]dmissions of guilt by wrongdoers, if not coerced, are inherently desirable."); Miranda v. Arizona, 384 U.S. 436, 478 (1966) ("Confessions remain a proper element in law enforcement."); Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity,* 41 VALPARAISO U. L. REV. 1, 6 (2006) ("[T]ruthful confessions are singularly capable of promoting the search for truth . . . .") (internal citations omitted).

[5] *See* Brown v. Mississippi, 297 U.S. 278 (1936) (holding that the Due Process Clause of the Fourteenth Amendment prohibited criminal convictions that rested solely upon confessions extorted by police by brutality and violence); *see generally Miranda,* 384 U.S. at 446.

[6] *See* Clewis v. Texas, 386 U.S. 707 (1967) (suppressing Clewis's confession because it was extracted after a nine-day interrogation with little food or sleep); Haynes v. Washington, 373 U.S. 503 (1963); Reck v. Pate, 367 U.S. 433, 439-40 n.3 (1961) (suppressing the confession of a developmentally disabled juvenile who was held for incommunicado interrogation for a week, "during which time he was frequently ill, fainted several times, vomited blood . . . and was twice taken to the hospital on a stretcher"); Blackburn v. Alabama, 361 U.S. 199, 206 (1960) (describing the coercive effects of psychological pressure during interrogation and finding Blackburn's confession to have been involuntary as a result); Spano v. New York, 360 U.S. 315 (1959) (holding that Spano's will was overborne by psychological pressure, fatigue, and a fake sympathy ploy used by his interrogators such that his resulting confession was involuntary and therefore inadmissible); Payne v. Arkansas, 356 U.S. 560, 562 (1958);

problem of unreliable and potentially false confessions continued, the Court shifted to procedural safeguards—advice of rights and the provision of counsel—to alleviate the inherent psychological pressure of custodial police interrogation, even in the absence of coercive misconduct by the interrogators.[7] The problem with these solutions, however, is that it increasingly appears that there is no way to thread this particular needle because the techniques that extract confessions from the guilty inherently also coerce them from the innocent.[8] This Article, therefore, proposes a different tact: rather than permitting or prohibiting particular interrogation techniques and environments, it proposes eliminating the evidentiary use of any confession derived from custodial interrogation, but not the use of any evidence derived from statements made during interrogation.

Section I describes the problem that the inherent coercion of custodial interrogations poses for the reliability of confessions that results from them, which the Court first fully identified in *Miranda v. Arizona*[9] and documents the continuing role that it plays in confessions of questionable reliability today.

Section II describes *Miranda*'s proposed solution to this problem: the procedural safeguards of warnings and waiver. It describes the mismatch between the problem that the Court identified in *Miranda* and the solution that it crafted, which has been the source of judicial and scholarly controversy ever since. It also discusses some of the primary alternatives to the *Miranda* warning regime that other scholars have suggested and explains

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Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944) (holding that Ashcraft's confession, coming after thirty-six hours of continuous grilling by investigating officers, who were holding him incommunicado in the County jail, was involuntary and therefore inadmissible at his subsequent criminal trial); Chambers v. Florida, 309 U.S. 227, 238 (1940) (the protracted incommunicado questioning of young Black men by a group of white police officers and civilians, after their suspicion-less, dragnet arrests, in a fourth-floor jail room, constituted compulsion that rendered their subsequent confessions involuntary and therefore inadmissible); *see also* Jackson v. Denno, 378 U.S. 368 (1964) (reversing Jackson's murder conviction because it was based on a confession extracted after Jackson was shot, losing blood, on pain medication, and asking to be taken to the hospital).

[7] *See infra* Section III.

[8] *See infra* Section II.

[9] 384 U.S. 436 (1966).

why those alternatives do not fully satisfy the common critiques of the *Miranda* doctrine.

Section III offers an alternative proposal: a type of use immunity for suspects who confess after police interrogation. It proposes that confessions that result from custodial interrogation should be inadmissible at a subsequent criminal trial of the suspect, but that evidence derived from statements made during custodial interrogation should be admissible—*i.e.,* it proposes a limited use immunity for custodial statements that does not extend to derivative use of the information discovered. It argues that the use immunity addresses the concerns with the reliability of confessions that lack corroboration that find expression in the common-law *corpus-delicti* rule, as well as the concerns with social costs that are often expressed by critics of *Miranda* and other exclusionary rules. It also argues that limited use immunity is the best way to link confession doctrine with the values of reliability and accuracy in criminal trials, as well as recognizing the act of true confession as a potentially restorative one for a guilty suspect.

The Article concludes that the proposed use immunity can function as a compromise between the competing desires of accountability for the guilty and avoiding wrongful convictions of the innocent, while preserving the underlying purpose of the privilege against self-incrimination—requiring the prosecution to make its case without extracting it from the mouth of the defendant.

I. THE PROBLEM: INHERENT COERCION AND UNRELIABLE CONFESSIONS

In its landmark *Miranda* opinion, the Court went to great lengths to describe the inherently compulsive "nature and setting" of the typical custodial police interrogation of a suspect: the "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements . . . ."[10] The Court outlined several common features of police interrogation, which gave rise to compulsion concerns: engineered incommunicado isolation in unfamiliar territory, confidence in the

[10] *Id.* at 445.

suspect's guilt, dismissal and hostile confrontation in the face of denials of guilt, offering alternative scenarios for the crime that seem to minimize the suspect's moral blame while nonetheless eliciting a damning confession (*e.g.,* an implausible claim of accident or self-defense), and outright trickery and deceit.[11] The Court described the standard techniques of interrogation as "tactics" that were "designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty."[12] The Court noted that these techniques were designed to extract confessions (rather than exploring the possibilities of guilt or innocence with an open mind) and expressed concern at their "potentiality for compulsion," concluding: "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner."[13]

The coercive interrogation techniques that the Court identified in *Miranda* are known eponymously as the "Reid Technique" of interrogation, after one of their creators, and they continue to be trained and widely employed in the United States.[14] In light of this fact, perhaps it is not surprising that one of the legacies of the innocence movement has been documenting a large number of individuals who are now known indisputably to have

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[11] *See id.* at 449-54.

[12] *Id.* at 450.

[13] *Id.* at 455, 457.

[14] *See* JOHN E. REID & ASSOCIATES, INC., http://www.reid.com [http://perma.cc/Y23G-KLBL] (last visited Nov. 10, 2017); *see generally* GUDJONSSON, *supra* note 3, at 62 ("According to the [Reid] model, a suspect confesses (i.e. tells the truth) when the perceived consequences of a confession are more desirable than the anxiety generated by the deception (i.e. denial)."); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C. L. REV. 891, 913 (2004); RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 77 (2008) ("American police interrogators still presume the guilt of the suspects they interrogate; still attempt to overcome their resistance and move them from denial to admission; still try to convince them—if by fraud rather than force—that they have no real choice but to confess; and still exert pressure to shape and manipulate their postadmission narratives."); Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963), *reprinted in* YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 1 (1980).

confessed falsely to crimes for the commission of which DNA testing has now conclusively exonerated them.[15]

II. *MIRANDA*'S SOLUTION: PROCEDURAL SAFEGUARDS

A. Warnings & Waiver

The solution that the *Miranda* Court chose for the potential coerciveness of custodial interrogation was a regime of warnings and waiver. The Court's proscribed warnings are familiar to anyone with a television. *Miranda* requires that suspects subject to custodial interrogation "be informed in clear and unequivocal terms [of] the right to remain silent."[16] "The warning of the right to remain silent [had to] be accompanied by the explanation that anything said c[ould] and w[ould] be used against the individual in court."[17] The Court also dictated that "an individual held for interrogation [had to] be clearly informed that he ha[d] the right to consult with a lawyer and to have the lawyer with him during

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[15] *See* Drizin & Leo, *supra* note 14; Richard A. Leo, *The Impact of* Miranda *Revisited,* 86 J. CRIM. L. & CRIMINOLOGY 621 (1996); David A. Moran, *In Defense of the Corpus Delicti Rule,* 64 OHIO ST. L.J. 817, 819 (2003) (explaining that the DNA exonerations "have confirmed that juries all too frequently convict the innocent based entirely on uncorroborated and unreliable confessions"); Thomas P. Sullivan et al., *The Case for Recording Police Interrogations,* 34 LITIG. 30 (2008) ("[T]he growing number of convicted defendants exonerated by DNA evidence, along with recent social science research, forces us to conclude that a significant minority of suspects falsely confessed to crimes they did not commit, despite the panoply of procedural protections that our criminal justice system provides . . . ."); Woody, *supra* note 3, at 425; Bookman, *supra* note 2 ("DNA exonerations over the past 24 years have established not only how error-prone our system of justice is, but how more than a quarter of those wrongly convicted have been inculpated by their own words."); Douglas Starr, *The Interview: Do Police Interrogation Techniques Produce False Confessions?,* NEW YORKER, Dec. 9, 2013, at 42 ("Of the three hundred and eleven people exonerated through post-conviction DNA testing, more than a quarter had given false confessions—including those convicted in such notorious cases as the Central Park Five."); *see, e.g.,* Sue Russell, *A Porn Stash and a False Confession: How to Ruin Someone's Life in the American Justice System,* PAC. STANDARD (Aug. 23, 2012), https://psmag.com/news/confession-45410 [http://perma.cc/Q5UM-MZTX]; *see also* BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 92 (2000); Danielle E. Chojnacki et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions,* 40 ARIZ. ST. L.J. 1, 5 (2008).

[16] *Miranda,* 384 U.S. at 467-68.

[17] *Id.* at 469. The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

interrogation" and "also that if he is indigent a lawyer w[ould] be appointed to represent him."[18]

The Court required suspects to waive the rights described in the warnings before interrogation could proceed: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation [had to] cease."[19] The Court also dictated:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.[20]

In order for the police to interrogate a suspect after the warnings were given, the suspect had to affirmatively waive the rights to silence and counsel. "[A] valid waiver w[ould] not be presumed simply from the silence of the accused after warnings [we]re given or simply from the fact that a confession was in fact eventually obtained."[21]

B. The Mismatch

Today, one of the common critiques of *Miranda*'s procedural-safeguards solution to the problem of coercive interrogation environments and techniques is that its proposed solution (advice of rights and honoring of invocation) does not match the identified problem (the inherent coerciveness of custodial police interrogation).[22] *Miranda* has been assailed by conservative commentators for the "social costs" of going too far[23] and by liberal

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[18] *Miranda,* 384 at 471-73.

[19] *Id.* at 473-74.

[20] *Id.* at 474.

[21] *Id.* at 475.

[22] *See, e.g.,* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders,* 90 NW. U. L. REV. 1084 (1996); Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices,* 99 MICH. L. REV. 1211 (2001).

[23] *See* United States v. Patane, 542 U.S. 630 (2004); Oregon v. Elstad, 470 U.S. 298, 312 (1985) (complaining that the loss of "highly probative evidence of a voluntary confession" from strict enforcement of the *Miranda* exclusionary rule was a "high cost

commentators for not going far enough (at least as currently interpreted and limited by the Court).[24]

The fundamental premise of *Miranda*'s regime of warnings and waiver was that, "[i]n order to combat the[] [psychological] pressures [of custodial interrogation] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused [had to] be adequately and effectively apprised of his rights and the exercise of those rights [had to] be fully honored."[25] The *Miranda* majority believed that a suspect's "right to cut off questioning" was sufficient to prevent "the setting of in-custody interrogation" from "overcom[ing] free choice in producing a statement . . . ."[26] The Court suggested that a confession that occurred after a suspect's waiver of the *Miranda* rights in a lengthy custodial interrogation was itself "strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement [wa]s consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so."[27] The Court declared that its prescribed warnings were "an absolute prerequisite in overcoming the inherent pressures of the

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[for] law enforcement"); New York v. Quarles, 467 U.S. 649, 657 (1984) (concluding that the need for answers to questions in a situation posing a threat to the public safety outweighed the need for *Miranda*'s "prophylactic rule" protecting the Fifth Amendment's privilege against self-incrimination); *Miranda,* 384 U.S. at 517 (Harlan, J., dissenting) ("The social costs of crime are too great to call [*Miranda*'s warning and waiver] rules anything but a hazardous experimentation."); Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment,* 90 NW. U. L. REV. 387 (1996) [hereinafter Cassell, *Social Costs*]. The Supreme Court was asked to overrule *Miranda*, in part based on these perceived social costs, in *Dickerson v. United States,* 530 U.S. 428 (2000), and narrowly declined to do so.

[24] *See, e.g., Elstad,* 470 U.S. at 320 (Brennan, J., dissenting); Moran, *supra* note 15, at 819 ("*Miranda* does nothing to protect the mentally unstable suspect who confesses in a non-custodial setting or after waiving her *Miranda* rights."); Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1830 (1987) ("[I]n my view, the *Miranda* rules do not go far enough in protecting the due process and fifth amendment values that underlie the decision."); Russell L. Weaver, *Reliability, Justice and Confessions: The Essential Paradox,* 85 CHI.-KENT L. REV. 179 (2010); Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1523 (2008) ("[I]t turns out that following *Miranda*'s hollow ritual often forecloses a searching inquiry into the voluntariness of a statement."); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998).

[25] *Miranda,* 384 U.S. at 467.

[26] *Id.* at 474.

[27] *Id.* at 476.

interrogation atmosphere."[28] Even the dissenting justices believed that the procedural safeguards announced in *Miranda* would stymie the police from extracting confessions from suspects.[29]

The problem with *Miranda*'s advice-and-waiver regime, however, is that it takes place in the same inherently coercive atmosphere, with the same psychological pressures, as the interrogations that follow the waiver of rights (or that occurred before the Court required them).[30] The Court acknowledged as much in *Miranda,* when it explained: "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators."[31] There is now empirical evidence that, despite what the *Miranda* Court envisioned, very few suspects actually invoke the rights that are described to them in the *Miranda* warnings: silence or counsel.[32] And all of the exonerated

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[28] *Id.* at 468.

[29] *See id.* at 542 (White, J., dissenting) (lamenting that "a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now . . . either not be tried at all or will be acquitted . . . .").

[30] *See Miranda,* 384 U.S. at 535-36 (White, J., dissenting) ("[E]ven if one assumed that there was an adequate factual basis for the conclusion that all confessions obtained during in-custody interrogation are the product of compulsion, the rule propounded by the Court will still be irrational, for, apparently, it is only if the accused is also warned of his right to counsel and waives both that right and the right against self-incrimination that the inherent compulsiveness of interrogation disappears . . . . And why if counsel is present and the accused nevertheless confesses, or counsel tells the accused to tell the truth, and that is what the accused does, is the situation any less coercive insofar as the accused is concerned?"); Edwin D. Driver, *Confessions and the Social Psychology of Coercion,* 82 HARV. L. REV. 42, 60 (1968) ("The *Miranda* warnings of course do not directly affect the limits set by 'voluntariness' on permissible tactics, but merely add several safeguards."); Weisselberg, *supra* note 24, at 1523 ("[I]t turns out that following *Miranda*'s hollow ritual often forecloses a searching inquiry into the voluntariness of a statement.").

[31] *Miranda,* 384 U.S. at 469. The Court's solution to this problem was to recognize a suspect's right to counsel during custodial interrogations. *See id.* at 469-70.

[32] *See* Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases,* 1975 U. ILL. L.F. 518, 538 (1975) ("[C]onsiderable empirical evidence suggests that the *Miranda* warnings, when given, are rarely sufficient to overcome the 'atmosphere of coercion' in custodial interrogation, that the warnings are often not fully understood by the arrested parties, and that a large majority of suspected persons waive their rights to counsel and to remain silent."); Gerald M. Caplan, *Questioning* Miranda*,* 38 VAND. L. REV. 1417, 1462-63 (1985) ("[Empirical] studies reveal that, contrary to the intent of the Court, suspects more often have surrendered their rights than exercised them"); Saul M. Kassin et al.*, Police*

individuals now known to have confessed falsely, of course, were advised of their *Miranda* rights and waived them, or there would have been no confessions to admit in evidence in their cases.[33]

C. Alternatives

The *Miranda* remedy is not, and was not intended to be, an exclusive one. In *Miranda,* the Court left room for alternatives to the regime of warnings and waiver that it outlined, explaining: "Congress and the States are free to develop their own safeguards for the privilege [against self-incrimination], so long as they are fully as effective as [the *Miranda* warnings] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it."[34] It was a tempting invitation. Since *Miranda,* commentators have proposed myriad such alternatives to reduce the coerciveness of the interrogation environment and minimize false confessions, including recording interrogations,[35] limiting the duration of interrogations,[36] prohibiting interrogators from lying,[37] prohibiting un-counseled interrogations,[38] and

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Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs, 31 L. & HUM. BEHAV. 381, 383, 394 (2007) ("Research suggests that roughly four out of five people waive their rights."); Richard A. Leo, *Inside the Interrogation Room,* 86 J. CRIM. L. & CRIMINOLOGY 266, 276 tb1.3 (1996); Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century,* 99 MICH. L. REV. 1000, 1003 (2001) ("[D]espite the fourfold warnings, suspects frequently waived their *Miranda* rights and chose, instead, to speak to their interrogators."); Alan C. Michaels, *Rights Knowledge: Values and Tradeoffs,* 39 TEX. TECH. L. REV. 1355, 1364-65 (2007) ("Indeed, while the empirical evidence is certainly limited, the weight of the evidence is that *Miranda*'s effects on overall outcomes is 'vanishingly small.' In many cases, but of course not all, in which police seek a statement, suspects waive their *Miranda* rights."); George C. Thomas III, *A Philosophical Account of Coerced Self-Incrimination,* 5 YALE J.L. & HUMAN. 79 (1993). *But see* Cassell, *Social Costs, supra* note 23; *cf.* Maryland v. Shatzer, 559 U.S. 98, 106 (2010) (explaining that the benefits of an exclusionary rule for compelled confessions should be "measured by the number of coerced confessions it suppresses that otherwise would have been admitted").

[33] *See* Garrett, *supra* note 3, at 1058 (describing a sample of forty exonerated defendants who had confessed falsely, all of whom had waived their *Miranda* rights).

[34] *Miranda,* 384 U.S. at 490.

[35] *See* Drizin & Leo, *supra* note 14; Sullivan et al., *supra* note 15; George C. Thomas III, *Regulating Police Deception During Interrogation,* 39 TEX. TECH L. REV. 1293, 1294-95 (2007).

[36] *See* Drizin & Leo, *supra* note 14.

[37] *See* Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB.

banning custodial interrogation entirely.[39] The proposals at the less radical end of this spectrum (limiting the length and/or content or requiring the recording of interrogations) are too modest truly to remove all of the inherent compulsion of a police-station interrogation that the Court identified in *Miranda.* The proposals at the more radical end of this spectrum (prohibiting custodial interrogation entirely, at least when conducted without defense counsel present) would end (either *de jure* or *de facto*) almost all confessions, a solution that is unlikely in the foreseeable future to be palatable to a majority of the Court.

III. THE PROPOSAL: LIMITED USE IMMUNITY

A. Use Immunity as an Optimal Remedy

What this Article proposes is a type of limited use immunity for statements that result from custodial interrogation. The proposed rule would bar all custodial statements from being admitted as evidence in a subsequent prosecution of the suspect, but it would not bar evidence derived from the statements.[40] In other words, it proposes a type of use immunity that stops short of the typical derivative-use immunity given to immunized Grand Jury testimony or granted to cooperating witnesses.[41] The police would, therefore, be able to follow investigative leads that suspects provide during custodial interrogation (*e.g.,* the location of physical evidence, like a body or a murder weapon), but the statements themselves, as admissions, would be inadmissible.[42]

L.J. 791 (2006); *cf.* Frazier v. Cupp, 394 U.S. 731 (1969) (declining to hold that the Due Process Clause prohibited the police from lying to suspects during interrogation).

[38] *See* Ogletree, *supra* note 24, at 1830.

[39] *See* Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions,* 68 N.C. L. REV. 69, 113 (1989).

[40] *Cf.* Kastigar v. United States, 406 U.S. 441, 443 (1972) (discussing the difference between use immunity, derivative use immunity, and transactional immunity).

[41] *See id.*

[42] *Cf.* Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation, 392 U.S. 280, 284 (1968) (allowing the State to use economic compulsion to secure incriminating statements as long as it granted the suspect immunity).

This Article accepts the jurisprudential dichotomy that the Court has espoused, in cases like *Oregon v. Elstad,*[43] between involuntariness and the mere fact of custodial interrogation, which manifests itself in two different constitutional protections. Voluntariness is guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments.[44] The inherent compulsion identified in *Miranda* poses concerns under the Self-Incrimination Clause of the Fifth Amendment.[45] The voluntariness inquiry focuses on the conduct of interrogating police officers and typically prohibits conduct like threats, promises, and other inducements that pose the likelihood of overbearing a suspect's will.[46] Typical practices that arise in lower-court litigation include: referencing to potential punishment (*e.g.,* the death penalty) and the positive view that prosecutors might have of cooperation;[47] a suspect's

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[43] 470 U.S. 298 (1985) (declining to extend the *Miranda* exclusionary rule to derivative evidence ("fruits") discovered by virtue of a voluntary confession extracted after a "technical" violation of *Miranda*).

[44] *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); Clewis v. Texas, 386 U.S. 707 (1967); Haynes v. Washington, 373 U.S. 503 (1963); Reck v. Pate, 367 U.S. 433 (1961); Blackburn v. Alabama, 361 U.S. 199 (1960); Spano v. New York, 360 U.S. 315 (1959); Payne v. Arkansas, 356 U.S. 560 (1958); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

[45] *See* U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."); Miranda v. Arizona, 384 U.S. 436 (1966). This doctrinal distinction becomes murky in practice because the Self-Incrimination Clause of the Fifth Amendment has been incorporated to the States via the Due Process Clause of the Fourteenth Amendment. *See* Malloy v. Hogan, 378 U.S. 1 (1964) (holding that the Fifth Amendment's protection from compulsory self-incrimination was protected by the Fourteenth Amendment against abridgement by the States).

[46] *See* sources cited *supra* notes 4 & 5.

[47] *Compare* People v. Jimenez, 580 P.2d 672 (Cal. 1978) (holding that referring to the death penalty during an interrogation in a way that implied sentencing leniency if Jiminez confessed rendered his subsequent confession involuntary); People v. McClary 571 P.2d 620 (Cal. 1977) (holding that an officer's suggestion to a juvenile suspect that she might face the death penalty if she did not "change[] her story" rendered her subsequent confession involuntary); Edwards v. State, 793 So.2d 1044 (Fla. Dist. Ct. App. 2001) (holding that the threat of more serious charges rendered Edwards's subsequent confession involuntary); State v. Garcia, 301 P.3d 658 (Kan. 2013) (holding that the implicit suggestion that Garcia would be charged with robbery rather than murder if he confessed rendered his confession involuntary); *with* People v. Holloway, 91 P.3d 164 (Cal. 2004) (holding that officers had not engaged in coercive interrogation tactics in interviewing Holloway when they urged him to be honest and pointed out the

family members and other loved ones as potential alternate suspects;[48] and a suspect's known religious principles during a

benefits of a truthful confession even when they made reference to the death penalty in the process); People v. Williams, 233 P.3d 1000 (Cal. 2010) (holding that references to the death penalty and the benefits that Williams would receive from honestly admitting his guilt did not render Williams's subsequent confession involuntary because his confession occurred a few days later and was motivated by being confronted with significant incriminating evidence); People v. Clark, 857 P.2d 1099 (Cal. 1993) (holding that answering Clark's questions about the potential penalty that he faced did not render his subsequent confession involuntary where the answers implied promises of leniency); People v. Benson, 802 P.2d 330 (Cal. 1990) (holding that the mention of the death penalty during Benson's interrogation did not render his subsequent confession involuntary because it came up naturally in conversation); People v. Thompson, 785 P.2d 857 (Cal. 1990) (holding that a reference to the death penalty during interrogation did not render Thompson's subsequent confession involuntary because it occurred naturally and did not imply leniency if he confessed); Bussey v. State, 184 So.3d 1138 (Fla. Dist. Ct. App. 2015) (holding that generally advising a suspect of potential penalties and encouraging cooperation was not improper coercion); State v. Walter, 970 So.2d 848 (Fla. Dist. Ct. App. 2007) (holding that informing Walter of realistic penalties and urging him to tell the truth did not render his subsequent confession involuntary).

[48] *Compare* Spano v. New York, 360 U.S. 315 (1959) (holding that Spano's will was overborne by the suggestion that his failure to confess would cause serious negative consequences for a long-time friend); United States v. Vargas-Saenz, 833 F. Supp. 2d 1262 (D. Or. 2011) (finding that an interrogator's threat to have Vargas's parents deported rendered her subsequent confession involuntary); United States v. Ruiz, 797 F. Supp. 78 (D.P.R. 1992) (finding that an agent's threats of danger to Ruiz's wife and children rendered his subsequent confession involuntary); United States v. Pacheco, 819 F. Supp. 2d 1239 (D. Utah 2011) (holding that Pacheco's confession was involuntary when police officers induced it with threats against his family); State v. Ackerman, 397 S.W.3d 617 (Tenn. Crim. App. 2012) (holding that the police arranging for Ackerman's child's mother to threaten him with losing visitation rights if he did not confess to raping the child rendered his subsequent confession involuntary) *with* United States v. Hufstetler, 782 F.3d 19 (1st Cir. 2015) (holding that officers' statements to Hufstetler during interrogation that his girlfriend would be a suspect unless new information came to light to discount her culpability did not render his confession involuntary because officers had probable cause to hold his girlfriend and did not condition her release on Huftstetler's willingness to speak); Johnson v. Trigg, 28 F.3d 639 (7th Cir. 1994) (holding that the police arrest of a suspect's terminally ill mother for failing to bring him in for questioning did not render his subsequent confession involuntary); United States v. Harris, 613 F. Supp. 2d 1290 (S.D. Ala. 2009) (finding that threatening Harris that his wife would go to jail if he did not tell the truth did not render his subsequent confession involuntary); United States v. Goldtooth, 111 F. Supp. 3d 1020 (D. Ariz. 2015) (finding that Goldtooth's will was not overborne when agents implied that his son was a suspect and appealed to his desire to protect him); United States v. Ortiz, 943 F. Supp. 2d 447 (S.D.N.Y. 2013) (finding that a police officer's threat to arrest Ortiz's mother and aunt unless he told them who owned a gun found in their apartment rendered his subsequent confession involuntary); People v. McWhorter, 212 P.3d 692 (Cal. 2009) (holding that a police officer's statements to

pre-charge interrogation.[49] The *Miranda* inquiry focuses on the inherent compulsion of an incommunicado interrogation by police officers and its likelihood of coercing a suspect's waiver of the right to remain silent.[50] In practice, these two inquiries share much factual overlap, and cognitive-science research suggests that the distinction is a weak one at best.[51] Many of the police interrogation practices identified by the Court in *Miranda* are also factors in the totality-of-circumstances test for involuntariness under the Due Process Clauses: confrontation, minimizing moral seriousness and offering legal excuses, trickery and deception, and minimizing the right to remain silent.[52]

This Article nonetheless embraces the distinction between police conduct that renders a confession involuntary, in the due-process sense, and the subtler coercion that exists in a custodial police interrogation that does not violate due process but nonetheless creates coercion concerns. It does so for two practical reasons. The first is that the distinction between interrogation practices that overbear a suspect's will and the mere background coercion of the police station interrogation room is well-entrenched in the Court's interrogation jurisprudence to the extent that a proposal that required its disentanglement might fail simply from the complication of the task required.[53] The second is that the

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McWhorter that his wife could be charged as an accessory did not render his subsequent confession to murders involuntary); People v. Mateo, 811 N.E.2d 1053 (N.Y. 2004) (holding that capitalizing on Mateo's reluctance to involve his family members in the criminal investigation or secure their release from custody did not render his subsequent confession involuntary in the absence of a promise of lenient treatment for them).

[49] *Compare* People v. Jones, 949 P.2d 890 (Cal. 1998) (holding that paraphrasing Bible passages in a way that implied leniency rendered Jones's subsequent confession involuntary) *with* Nelson v. State 850 So.2d 514 (Fla. 2003) (holding that police exhortations to Nelson to help them give a murder victim a "proper burial" was not a direct reference to Nelson's Christianity and therefore did not render his subsequent confession involuntary).

[50] *See supra* Section II.

[51] *See supra* Section I.

[52] *See supra* Section II.

[53] For example, the privilege against self-incrimination recognized in *Miranda* attaches only when a suspect is in custody and subject to interrogation. *See* Oregon v. Mathiason, 429 U.S. 492 (1977); Miranda v. Arizona, 384 U.S. 436, 444 (1966). A confession that occurs outside of police custody, as *Miranda* and its progeny defines that concept, and theoretically even a confession that is not the result of interrogation,

distinction bears on the appropriate remedy. The Court has treated the due-process exclusionary rule differently than the *Miranda* exclusionary rule after *Elstad*. Unlike the exclusionary rule for *Miranda* violations, the exclusionary rule for confessions that are deemed involuntary under the Due Process Clauses extends beyond the confession itself to derivative evidence.[54] Extending the immunity proposal in this Article to all confessions, rather than only those that the Court has drawn outside of the *Miranda* exclusionary rule under *Elstad,* would lower the protections that defendants have from coercive interrogation practices (and, correspondingly, the incentives that police interrogators have to avoid them) in comparison to the *status quo*. It would also amount to fixing a system that does not seem to be broken. By embracing this distinction between due-process involuntariness and "mere" inherent compulsion under *Miranda,* the immunity proposal in this Article does not have to supplant the Court's longstanding due-process-based voluntariness jurisprudence,[55] but rather only its *Miranda* warnings regime. In that sense, it is fundamentally different than Akhil Amar's proposal to permit the Government to compel testimony even from criminal defendants and to use the fruits of that compelled testimony.[56] Therefore, the use immunity that this Article proposes applies only to a confession that is voluntarily given in the sense of the Due Process Clauses but that is nonetheless compelled, in the *Miranda* sense, by the mere inherent nature of custodial interrogation. For these confessions, the immunity proposal is simple: the confession is out; any derivative evidence that the police might find is in. One obvious virtue of this rule is that it is an easily administrable bright-line rule, both for police in

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as the Court defined that term in *Rhode Island v. Innis,* 446 U.S. 291 (1980), could nonetheless be involuntary under the Due Process Clauses.

[54] *See, e.g.,* People v. Neal, 72 P.3d 280 (Cal. 2003) (holding that Neal's confession was tainted by a *Miranda* violation the previous day, despite a break in interrogation and Neal's voluntary resumption of interrogation, and therefore was inadmissible).

[55] *See supra* note 5 and accompanying text.

[56] *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 70-71 (1997).

the field and courts in ruling on the (in)admissibility of custodial statements.[57]

The use immunity proposed by this Article is analogous, in both form and function, to the use immunity established by Federal Rule of Evidence 410 and its state counterparts, which forbid the admission of statements made during plea negotiations.[58] Rule 410 is intended to foster and incentivize plea negotiations by immunizing statements made during them.[59] Analogously, the use immunity proposed in this Article is intended to incentivize reliable confessions by immunizing statements made during interrogations that comply with the Due Process Clauses. Neither extends to derivative-use immunity.

The theory behind this proposal is simple: a true confession should be able to be substantially corroborated in almost all cases,[60] particularly in this day and age with technological advances in forensic science, high-tech surveillance, and data analysis.[61] As the Court explained more than half a century ago in

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[57] Of course, commentators disagree about the benefit of bright-line rules. *Compare* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 414-29 (1974); Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma,* 1974 SUP. CT. REV. 127 (1974); Wayne R. LaFave, *Constitutional Rules for Police: A Matter of Style,* 41 SYRACUSE L. REV. 849 (1990); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982); Carl McGowan, *Rule-Making and the Police,* 70 MICH. L. REV. 659 (1972) *with* Cass R. Sunstein, *Problems with Rules,* 83 CALIF. L. REV. 953 (1995); Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment,* 45 U. PITT. L. REV. 227 (1984). *See generally* Kathleen M. Sullivan, *The Justices of Rules and Standards,* 106 HARV. L. REV. 22, 56-69 (1992). That particular debate is beyond the scope of this Article.

[58] *See* FED. R. EVID. 410(a)(4) ("In a . . . criminal case, evidence of the following is not admissible against the defendant who . . . participated in the plea discussions: . . . a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.")

[59] *See* FED. R. EVID. 410 advisory committee's notes.

[60] *Cf.* Haynes v. Washington, 373 U.S. 503, 519 (1963) ("[H]istory amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence . . . .").

[61] *See generally* DAVID L. FAIGMAN et al., MODERN SCIENTIFIC EVIDENCE: FORENSICS (2008) (describing advances in forensic-science technology and their ability to improve justice); RICHARD SAFERSTEIN, CRIMINALISTICS: AN INTRODUCTION TO FORENSIC SCIENCE (11th ed. 2014) (describing recent advances in DNA analysis, computer forensics, and Internet resources); NATIONAL CLEARINGHOUSE FOR SCIENCE,

Escobedo v. Illinois[62]: "[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 which depends on extrinsic evidence independently secured through skillful investigation."[63]

If a confession can be substantially corroborated by extrinsic evidence, then it is likely reliable as a matter of accuracy, but also no longer necessary for the prosecution to make its case against the suspect.[64] This is particularly true in light of the fact that the

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TECHNOLOGY AND THE LAW, http://ncstl.org [http://perma.cc/33GE-TEXD] (last visited Nov. 11, 2017); *see, e.g.,* CATH ENNIS, INTRODUCING EPIGENETICS: A GRAPHIC GUIDE (2017) (describing the new forensic-science field of "epigenetics," the study of reversible chemical modifications to chromosomes that play a role in determining which genes are activated in which cells, which permits highly detailed profiles of criminal suspects by predicting a suspect's age, weight, childhood trauma history, environmental exposures, and lifestyle choices, based on signature changes in the human genome over time); Carrie Leonetti, *If a Tree Falls: Bulk Surveillance, the Exclusionary Rule, and the Firewall Loophole,* 13 OHIO ST. J. CRIM. L. 211 (2015) (arguing that the Supreme Court's current Fourth Amendment jurisprudence places few limits on the ability of law-enforcement agencies to engage in high-tech surveillance and data mining); Marcin Budka & Matthew Robert Bennett, *Shape of Things: How Footprint Technology is Making Bold Steps Forward for Forensic Science,* NEWSWEEK (Nov. 1, 2016, 1:27 PM), http://www.newsweek.com/footprints-crime-3d-printing-archeology-technology-police-515812 [https://perma.cc/5X58-AT2Q] (describing the use of three-dimensional imaging to reproduce and analyze shoeprints from crime scenes); Tyler Grant, *On Police Drones, Lawmakers Are Behind the Times,* NAT'L REV. (Nov. 9, 2017, 9:00 AM), http://www.nationalreview.com/article/453544/police-drones-law-falling-behind-technology [http://perma.cc/4CRQ-VJ5U] (describing the use of advanced drone technology for surveillance by police agencies); Ron Nixon, *U.S. Postal Service Logging All Mail for Law Enforcement,* N.Y. TIMES (July 3, 2013), http://www.nytimes.com/2013/07/04/us/monitoring-of-snail-mail.html?pagewanted=all [http://perma.cc/44LJ-A538]; *Making Faces: Researchers Produce Images of People's Faces from Their Genomes,* THE ECONOMIST (Sept. 9, 2017), https://www.economist.com/news/science-and-technology/21728613-facial-technology-makes-another-advance-researchers-produce-images-peoples [https://perma.cc/8FZM-RZTB].

[62] 378 U.S. 478 (1964).

[63] *Id.* at 488-89.

[64] This Article does not consider the possible necessity of an impeachment exception to the immunity rule that it proposes in a case in which the defendant sought to exploit the immunity by, for example, testifying contrary to the contents of the immunized confession. *Cf.* Oregon v. Hass, 420 U.S. 714 (1975) (holding that Hass's previously suppressed inculpatory statements were admissible in evidence for impeachment purposes after he took the stand and testified contrary to the inculpatory information, knowing that the information had been ruled inadmissible in the State's case in chief); Harris v. New York, 401 U.S. 222 (1971) (holding that statements taken from Harris in violation of *Miranda* were properly usable for impeachment purposes to

foundation for admissible evidence does not itself need to be admissible.[65] In other words, under the use immunity proposed in this Article, the prosecution could use the fact of a defendant's confession to authenticate derivative evidence even though the confession itself would not be admissible as trial evidence.[66] While *the fact of the confession* would certainly be persuasive to a trier of fact,[67] with additional diligent investigation, it is not necessary (or admissible) for proof beyond a reasonable doubt.

Confessions that cannot be materially corroborated, on the other hand, are precisely the ones with which the system should be most concerned and the ones whose persuasive impact on a jury may be nefarious rather than helpful to accurate verdicts.[68] As

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attack the credibility of his trial testimony as long as they otherwise satisfied legal standards of trustworthiness); Walder v. United States, 347 U.S. 62 (1954) (holding that Walder's testimony that he had never possessed any narcotics opened the door, for purposes of attacking his credibility, to evidence of his drug possession that had previously been suppressed because it was obtained in violation of the Fourth Amendment). *But cf.* New Jersey v. Portash, 440 U.S. 450 (1979) (declining to create an impeachment exception for statements for which derivative-use immunity have been granted pursuant to *Kastigar,* 406 U.S. 441).

[65] *See* Bourjaily v. United States, 483 U.S. 171 (1987) (holding that evidentiary foundations needed to be proven to the trial court only by a preponderance of evidence and that the court's determination of their sufficiency was not governed by the rules of evidence so that they did not themselves have to be admissible).

[66] *See* FED. R. EVID. 901 (permitting the authentication of evidence by producing evidence "sufficient to support a finding that the item is what the proponent claims it is").

[67] *See* Arizona v. Fulminante, 499 U.S. 279, 312 (1991) ("[I]n particular cases [a confession] may be devastating to a defendant."); Drizin & Leo, *supra* note 14, at 922 (explaining that juries treat confessions as the most probative type of evidence); Kassin, *supra* note 3, at 221 ("[C]onfession evidence is a prosecutor's most potent weapon—so potent that . . . the introduction of a confession makes the other aspects of a trial in court superfluous.") (internal quotation omitted); Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence, in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67, 67 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985) ("What could have more impact during the course of a trial than a revelation from the witness stand that the defendant had previously confessed to the crime? The truth is, probably nothing.").

[68] *See* Moran, *supra* note 15, at 819 ("[A] confession that cannot be corroborated even to the extent of establishing that a crime has occurred is always insufficiently reliable to justify a conviction."); *see also* Linda A. Henkel et al., *A Survey of People's Attitudes and Beliefs about False Confessions*, 26 BEHAV. SCI. & L. 555, 576 (2008); Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 L. & HUM. BEHAV. 469, 475-76 (1997); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of*

Justice Brennan explained in his dissenting opinion in *Connelly*: "Because the admission of a confession so strongly tips the balance against the defendant in the adversarial process, we must be especially careful about a confession's reliability."[69] For this reason, the proposed use immunity serves similar purposes as the traditional *corpus-delicti* rule, which has largely died over the past few decades,[70] to the chagrin of many commentators.[71] The American common-law *corpus-delicti* rule dictated that a defendant could not be convicted on the basis of an extra-judicial confession alone, but rather that the elements of the crime

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Psychological Interrogation, 88 J. CRIM. L. & CRIMINOLOGY 429, 476 (1988) (explaining how juries find confessions to be the most damning prosecution evidence); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions,* 32 HARV. C.R.-C.L. L. REV. 105, 138-39 (1997) (noting that juries do not understand how an innocent person could confess to a crime); Woody, *supra* note 3, at 425 (describing "the false and persistent belief that no one would falsely confess to a crime in the absence of . . . torture[] or mental illness"); Bookman, *supra* note 2 ("Even when they are false, confessions are incredibly powerful."); *see, e.g.,* Rachel Aviv, *The Trials of a Muslim Cop*, NEW YORKER (Sept. 11, 2017), https://www.newyorker.com/magazine/2017/09/11/the-trials-of-a-muslim-cop [http://perma.cc/5UCG-4UQZ]; Sandy Garossino, *What if Omar Khadr Isn't Guilty?,* NAT'L OBSERVER (July 7, 2017), https://www.nationalobserver.com/2017/07/07/opinion/what-if-omar-khadr-isnt-guilty [https://perma.cc/C8LG-NFZM].

[69] Colorado v. Connelly*,* 479 U.S.157, 182 (Brennan, J., dissenting). Again, the facts of *Connelly* are exemplary, as Justice Brennan explained:

> [T]he record [wa]s barren of any corroboration of the mentally ill defendant's confession. No physical evidence link[ed] the defendant to the alleged crime. Police did not identify the alleged victim's body as the woman named by the defendant. Mr. Connelly identified the alleged scene of the crime, but it ha[d] not been verified that the unidentified body was found there or that a crime actually occurred there. There [wa]s not a shred of competent evidence in this record linking the defendant to the charged homicide. There [wa]s only Mr. Connelly's confession.

Id. at 183.

[70] *See* People v. LaRosa, 293 P.3d 567 (Colo. 2013); State v. Hardy, 268 P.3d 1278 (N.M. Ct. App. 2011); Fontenot v. State, 881 P.2d 69 (Okla. Crim. App. 1994); State v. Mauchley, 67 P.3d 477 (Utah 2003); *but see* People v. McMahan, 548 N.W.2d 199 (Mich. 1996) (retaining Michigan's *corpus-delicti* rule).

[71] *See* Moran, *supra* note 15, at 817-18 (arguing that the *corpus-delicti* rule is worth retaining because it serves its purpose of preventing wrongful convictions in the small class of cases in which there is not independent evidence of criminality); *but see* Thomas A. Mullen, *Rule Without Reason: Requiring Independent Proof of the Corpus Delicti As a Condition of Admitting an Extrajudicial Confession,* 27 U.S.F. L. REV. 385 (1993).

established by the confession had to be independently corroborated.[72] The *corpus-delicti* rule was thus a rule of sufficiency of evidence rather than admissibility. It was aimed not at concerns with compulsion, but rather with concerns with the reliability of confessions as evidence.[73] The Court has described the purpose of the *corpus-delicti* rule as a response to the doubt that "persists that the zeal of the agencies of prosecution to protect the peace, the self-interest of the accomplice, the maliciousness of an enemy or the aberration or weakness of the accused under the strain of suspicion may tinge or warp the facts of the confession."[74] According to the Court, "the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense."[75]

Use immunity goes beyond the *corpus-delicti* rule, however, requiring not merely corroboration of a confession in order for it to be legally sufficient to establish guilt.[76] Instead, immunizing the confession from evidentiary use requires that the corroborating

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[72] *See* Wong Sun v. United States, 371 U.S. 471, 488-89 (1963) ("It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused."); Smith v. United States, 348 U.S. 147 (1954) (holding that an accused could not be convicted solely on an uncorroborated confession); Opper v. United States, 348 U.S. 84, 89 (1954) (holding that admissible, voluntary exculpatory statements required corroboration as to all elements of the offense as a matter of sufficiency of the evidence); Moran, *supra* note 15, at 817; Mullen, *supra* note 71, at 385; Woody, *supra* note 3, at 421.

[73] *See* Moran, *supra* note 15, at 817 ("The common law corpus delicti rule . . . . [was] designed to prevent the conviction of the coerced and the mentally unstable for fictitious crimes . . . ."); Mullen, *supra* note 71, at 385 ("The main purpose of the corpus delicti rule is to prevent deranged people from being punished for imaginary crimes they claim to have committed.").

[74] *Opper,* 348 U.S. at 89-90.

[75] *Id.* at 93.

[76] *See* Smith v. United States, 348 U.S. 147 (1954) (holding that the corroborative evidence required by the *corpus-delicti* rule did not have to prove the offense beyond a reasonable doubt, or even by a preponderance of the evidence, as long as there was substantial independent evidence that the offense had been committed and the evidence as a whole proved beyond a reasonable doubt that the defendant was guilty); *Opper,* 348 U.S. at 93 ("[T]he corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti* . . . . It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt.").

evidence itself be sufficient to stand alone to secure a conviction. The police can follow any leads that a custodial confession generates, but only the evidence derived through that investigation is admissible at the suspect's subsequent criminal trial. This proposal, therefore, allows the police to exploit their effective interrogation techniques, but it does not allow the product of those techniques, standing alone, to convict the defendant.[77] This is consistent with the central purposes of the Self-Incrimination Clause of the Fifth Amendment: prohibiting a defendant from being forced to produce the evidence to be used against him/herself and preserving the integrity of the adversarial system by forcing the prosecution to shoulder the entire burden of proof.[78]

This proposal also does a better job than the *Miranda* rules of addressing the concerns expressed by the dissenting judges in *Dickerson v. United States*[79] and the majority opinions in *Michigan v. Tucker,*[80] *Elstad,*[81] and *United States v. Patane*[82]—that the social costs of excluding reliable, accurate confessions are too great—while nonetheless preserving the spirit of *Miranda* and the lessons of the innocence movement—that allowing juries to rely upon coerced confessions poses too great a risk of miscarriages of justice.[83] In *Elstad,* the Court explained that the purpose of the *Miranda* exclusionary rule was to "prohibit[] use by the prosecution . . . of *compelled* testimony."[84] In *Tucker,* the Court

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[77] *Cf.* Woody, *supra* note 3, at 431 (explaining that "confessions carry so much power that people often ignore inconsistencies between the confession and the independent evidence, regardless of whether states rely on the *corpus delicti* rule").

[78] *See* U.S. CONST. amend. V; Maness v. Meyers, 419 U.S. 449, 461 (1975); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415 (1966); United States v. White, 322 U.S. 694, 698-99 (1944).

[79] 530 U.S. 428 (2000).

[80] 417 U.S. 433 (1974) (refusing to apply the fruit-of-the-poisonous-tree doctrine to the discovery of a prosecution witness that stemmed from statements taken from Tucker in violation of *Miranda*).

[81] 470 U.S. 298 (1985).

[82] 542 U.S. 630 (2004) (holding that the failure of the police to give a suspect *Miranda* warnings did not require suppression of the physical fruits of the suspect's unwarned but voluntary statements).

[83] *Cf. Dickerson,* 530 U.S. at 443-44 (describing the *Miranda* exclusionary rule as barring the use of unwarned statements "as evidence in the prosecution's case in chief").

[84] 470 U.S. at 306-07.

explained that the primary purpose of the *Miranda* rule was to assure the trustworthiness of trial evidence.[85] In *Patane,* the Court described privilege against self-incrimination that the *Miranda* rules protect as "a fundamental *trial* right."[86] The Court in *Dickerson* identified the "disadvantage of the *Miranda* rule" as being "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."[87]

The problem with *Elstad*'s proposed solution (excluding only involuntary statements but not statements derived from mere "technical" violations of *Miranda* or other evidence derived therefrom), however, is that cognitive-science evidence increasingly suggests that courts cannot distinguish voluntary and involuntary statements, as the Court defines those terms in *Elstad*.[88] The reality is that any statement extracted by traditional police interrogation methods is often compelled and sometimes simply false. This problem applies to the Court's broader voluntariness jurisprudence, as well. After more than half a century of trying to come up with a doctrinal solution to divide the confessions that are likely voluntary and reliable from the ones that are likely coerced and false, the Court has failed to find a meaningful test to divide the two.

B. Competing Values

1. Reliability

Various courts and commentators have identified values advanced (or impeded) by limiting the coercive nature of custodial interrogation through the *Miranda* warnings regime and the due-process exclusionary rule, the most prevalent being the dignity and autonomy of the suspect[89] and the reliability of any resulting

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[85] *See* 417 U.S. at 448.

[86] 542 U.S. at 641 (citations omitted) (internal quotation marks omitted).

[87] *Dickerson,* 530 U.S. at 444.

[88] *See supra* note 2 and accompanying text.

[89] *See* Couch v. United States, 409 U.S. 322, 327 (1973) (explaining that the privilege against self-incrimination protected "a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation"); Miranda v. Arizona, 384 U.S. 436, 457-58 (1966).

confession (and its impact on the accuracy of the fact-finding process of a criminal trial).[90] This Article sometimes treats voluntariness and reliability as if they are interchangeable, but, of course, they are not. It is possible to coerce a true confession from a guilty suspect. It is also possible for a suspect to spontaneously and voluntarily provide a false confession, particularly when mental illness is at issue.[91] The distinction between voluntariness and reliability reflects the underlying difference between the two primary sets of values that underlie the Court's jurisprudence regarding police interrogation. Voluntariness is a dignity and autonomy concern. Accuracy is a reliability concern. This Article focuses on the latter: ways to sort truthful confessions from false ones, preserving the evidentiary value of the former while preventing the miscarriages of justice that result from the latter.[92]

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[90] *Cf.* Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 936-41 (1995) (discussing the Court's waning focus on reliability in its due-process voluntariness test for the admissibility of confessions).

[91] *See* Woody, *supra* note 3, at 439 ("Voluntariness hearings evaluate the voluntariness of a confession, but not the reliability or truth value of the confession . . . ."); Bookman, *supra* note 2 ("Voluntary false confessions are . . . prompted not by police behavior but rather by a need for attention or self-punishment."). The facts of *Colorado v. Connelly,* 479 U.S. 157 (1986), are exemplary. Francis Connelly suffered from chronic schizophrenia and had a lengthy history of psychosis, the symptoms of which included disorientation, delusions, command hallucinations, and multiple prior inpatient commitments. *See id*. at 160-61; *id.* at 174 (Brennan, J., dissenting). One day, after he had been off of his prescribed anti-psychotic medication for at least six months, he flew from Boston to Denver, approached a uniformed patrol officer, and spontaneously confessed to a local murder that he claimed to have committed a year earlier. *See id*. at 160; *id.* at 174 (Brennan, J., dissenting). He later testified that he had confessed because the voice of God had commanded him to do so. *See id.* at 161. The Court held that the constitution did not require suppression of Connelly's confession because it was voluntarily given and not the product of police misconduct. *See id.* at 159. As Justice Brennan noted in dissent, the concerns with the reliability of Connelly's confession were different than the voluntariness concerns described by the majority opinion. *See id.* at 181 (Brennan, J., dissenting).

[92] This choice has itself been criticized by commentators. *See* Meghan J. Ryan, Miranda*'s Truth: The Importance of Adversarial Testing and Dignity in Confession Law*, 43 N. KY. L. REV. 413 (2016) (arguing that a focus on the value of truth-finding is overstated and that more attention should be paid to the constitutional values of adversarial testing and human dignity). It has also been expressly eschewed by a majority of the Court in *Connelly*: "[T]he voluntariness determination has nothing to do with the reliability of jury verdicts . . . . [V]oluntariness is irrelevant to the presence or absence of the elements of a crime, which must be proved beyond a reasonable doubt." *Connelly,* 479 U.S. at 168.

The choice to focus on reliability, rather than voluntariness, is a practical one. Like much of the work of the innocence movement, accuracy tends to be an area where commentators and judges from all ends of the ideological spectrum can agree.[93] In that sense, the use immunity proposed in this Article is a compromise: it avoids suppressing the evidentiary fruits of even confessions that are involuntary but accurate while preventing the use of all confessions as evidence in the first instance because of their documented history of falseness and miscarriages of justice. This compromise is intended, in part, to capture one of the legitimate concerns expressed by opponents of exclusionary rules generally: that they impose remedies that are disconnected from the harms that they are intended to prevent.[94]

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[93] *See* Withrow v. Williams, 507 U.S. 680, 692 (1993) (explaining that the protections of *Miranda* could not be "divorced from the correct ascertainment of guilt"); *Withrow*, 507 U.S. at 703 (O'Connor, J., concurring in part and dissenting in part) ("[B]ecause *voluntary* statements are 'trustworthy' even when obtained without proper warnings, their suppression actually *impairs* the pursuit of truth by concealing probative information from the trier of fact.") (internal citation omitted) (emphasis in original); Joseph D. Grano, *Ascertaining the Truth*, 77 CORNELL L. REV. 1061 (1992); *cf.* Frank J. Macchiarola, *Finding the Truth in an American Criminal Trial: Some Observations,* 5 CARDOZO J. INT'L & COMP. L. 97 (1997) (describing the importance of the perception of accurate truth-finding to the perception of the criminal-justice system's legitimacy); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 40 AM. L. REV. 729 (1906).

[94] The debate between dignitary values and reliability values that plays out in the context of the *Miranda* exclusionary rule is analogous to the one between judicial integrity and deterring police misconduct that plays out in the context of the Fourth Amendment exclusionary rule. *Compare* Hudson v. Michigan, 547 U.S. 586, 621 (2006) (Breyer, J. dissenting) ("[W]here a search is unlawful, the law insists upon suppression of the evidence consequently discovered, even if that evidence or its possession has little or nothing to do with the reasons underlying the unconstitutionality of a search."), *and* Mapp v. Ohio, 367 U.S. 643, 660 (1961) (holding that the Due Process Clause of the Fourteenth Amendment forbade the admission of evidence obtained in violation of the Fourth Amendment because of the "judicial integrity so necessary in the true administration of justice"), *with* Utah v. Strieff, 136 S. Ct. 2056 (2016) (refusing to suppress evidence seized from Strieff during a search incident to arrest that stemmed from an illegal, suspicion-less investigatory detention because substantial social costs of applying the exclusionary rule outweighed the deterrent value of doing so), *Hudson*, 547 U.S. 586 (holding that a violation of the Fourth Amendment knock-and-announce rule did not require the suppression of the evidence found in the subsequent search because applying the exclusionary rule would not further the deterrence purpose of the exclusionary rule), *and* United States v. Leon, 468 U.S. 897 (1984) (refusing to apply the Fourth Amendment exclusionary rule to evidence obtained pursuant to a defective search warrant when the officers relied in good faith on its issuance because applying the rule would not significantly deter police

Unlike in the context of an illegal search or seizure of evidence, an illegally obtained confession gives rise not just to process or fairness concerns but to accuracy ones, as well.[95] It is this accuracy-detrimental aspect of the coerced confession that creates common ground. While coercion is certainly a harm unto itself, it is one whose remedy might better lie with something other than the use immunity proposed in this Article, including the Court's existing due-process jurisprudence.[96]

2. Restoration

The proposed use immunity also seeks to preserve another value related to confessions: preserving the autonomy, dignitary, and spiritual values of a voluntary confessional purge for the guilty suspect who wants to engage in one. The choice between strict and lenient interrogation rules often seems to assume that the legitimacy and volition of a suspect's confession and its admissibility are coextensive. Those who want strict exclusionary rules around custodial confessions seem to object, in principle, to the act of confession itself.[97] Those who abhor exclusionary rules often take the opposite tact, arguing that courts ought not to interfere with an act of contrition that is good for the suspect's soul, as well as justice.[98] There is some support in criminal law

misconduct). The difference between these cases and the interrogation cases, of course, is that reliability is not a concern in the context of evidence obtained in violation of the Fourth Amendment in the way that it is with regard to confessions obtained in violation of the Fifth and Fourteenth Amendments.

[95] *See* Colorado v. Connelly, 479 U.S. 157, 181 (1986) (Brennan, J., dissenting) ("[A]n accusatorial system must place its faith in determinations of guilt by evidence independently and freely secured.") (internal quotation and citations omitted).

[96] *See* Mincey v. Arizona, 437 U.S. 385, 397-98 (1978) (holding that involuntary statements that Mincey made while he was hospitalized could not be used against him in his subsequent criminal prosecution); *see also* Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989) (holding that a suspect could bring a constitutional tort action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), for police conduct during custodial interrogation that violated the Due Process Clause).

[97] *See* Miranda v. Arizona, 384 U.S. 436, 537-38 (White, J., dissenting) ("The obvious underpinning of the Court's decision [in *Miranda*] is a deep-seated distrust of all confessions . . . . This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself.").

[98] *See, e.g.,* Minnick v Mississippi, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting) ("[I]t is wrong, and subtly corrosive of our criminal justice system, to regard an honest confession as a 'mistake.' While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he

and psychology (not to mention religion) for the idea that a confession can be in the rehabilitative and restorative interests of a perpetrator, as well as the affected community at large.[99] For example, "acceptance of responsibility" is a common factor that courts consider at sentencing, giving more leniency to defendants who admit guilt and express remorse.[100]

To the extent that the claim that confession is good for the soul is genuine, however, it is not contingent on the confession's admissibility. The use immunity proposed in this Article preserves the restorative value of a genuine confessional purge, without forbidding the police to attempt to prove its veracity but forbids the use of the soul-purging act as evidence in a criminal trial. In this sense, the proposed immunity shares a common philosophical ground with other restorative-justice proposals like truth-and-reconciliation commissions.[101] In fact, concepts of restorative justice and reconciliation often have immunity at their core—the idea that making amends does not have to come at the cost of a criminal conviction and that real accountability requires the creation of a safe space for an offender to account for past wrongs without necessarily requiring the looming, omnipresent, coercive involvement of the carceral state.[102]

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deserves."); Robert F. Cochran, Jr., *Crime, Confession, and the Counselor-at-Law: Lessons from Dostoyevsky,* 35 HOUS. L. REV. 327, 333 (1998) (arguing that confession can bring "peace, joy, forgiveness, reconciliation, and a renewed sense of one's identity," even though it also entails criminal conviction and punishment); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U. CIN. L. REV. 671, 680 (1968) (extolling the virtues of confession).

[99] *See* NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION (1991).

[100] *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM'N 2016) (directs sentencing courts to decrease defendants' offense levels under the Guidelines if they clearly demonstrate "acceptance of responsibility" for the offense).

[101] *See, e.g.,* Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor,* 95 AM. J. INT'L L. 952 (2001).

[102] *See* Natalie Pierce, *Picking Up the Pieces: Truth and Justice in Sierra Leone,* 6 N.Z. J. PUB. & INT'L L. 117, 119 (2008) (contrasting retributive justice's focus on "righting wrongs" with restorative justice's focus on "reconciliation rather than judgment"); *see generally* HOWARD ZEHR, CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE (1990). *But see* JEFFRIE MURPHY, GETTING EVEN: FORGIVENESS AND ITS LIMITS (2003).

CONCLUSION

The Supreme Court has been arranging the chairs on the deck of the *Titanic* of custodial interrogations, the Reid method, and false confessions for almost a century. Opponents of the *Miranda* rules believe that they are victories of technicality over substance and truth.[103] Even *Miranda*'s supporters largely believe that the opinion (or what is left of it) does not go far enough to protect unwitting suspects from the powerfully coercive nature of an incommunicado interrogation by a skilled professional.[104] This Article attempts to foster a more fruitful compromise, by suggesting that courts stop trying to define and detect involuntary confessions and focus instead on whether they can be corroborated—not merely as a test for harmless error on appellate review of the denial of a motion to suppress a putatively unconstitutional confession,[105] but rather by immunizing custodial confessions as evidence. This proposal would force the police to do what the *Miranda* Court exhorted them to do more than fifty years ago: make their cases without resorting to forcing the defendant to do it for them:

> To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.[106]

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[103] *See supra* Section III.B.

[104] *See id.*

[105] *See* Arizona v. Fulminante, 499 U.S. 279 (1991) (holding that the harmless-error rule applied to the admission of involuntary confessions).

[106] Miranda v. Arizona, 384 U.S. 436, 460 (1966) (citations omitted).