

## Article

# Reformulating the *Miranda* Warnings in Light of Contemporary Law and Understandings

Mark A. Godsey<sup>†</sup>

Since *Miranda v. Arizona*<sup>1</sup> was decided in 1966, scholars have devoted much attention to both the theoretical underpinnings and the real world impact of that decision. Commentators have debated, among other things, whether the warnings unduly hamper the ability of the police to obtain confessions,<sup>2</sup> whether the Court correctly construed the Fifth Amendment's

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<sup>†</sup> Associate Professor of Law, University of Cincinnati College of Law; Faculty Director, Lois and Richard Rosenthal Institute for Justice/Ohio Innocence Project. Former Assistant United States Attorney, Southern District of New York, 1996–2001. E-mail: mark.godsey@uc.edu. I would like to thank Professors Gabriel (Jack) Chin of Arizona; Margaret Raymond of Iowa; Joshua Dressler, Ric Simmons, Alan Michaels, and Marc Spindelman of Ohio State; Christopher Slobogin of Florida; and John Valauri and Michael Mannheimer of Northern Kentucky University for reviewing drafts of this Article and providing helpful feedback. I would also like to thank the faculties at the University of Cincinnati, Ohio State, Florida, and Northern Kentucky for the helpful comments they provided to me when I presented this piece at their respective schools. Finally, I would like to thank UC law student Michelle Berry for her outstanding research assistance, and the Harold C. Schott Foundation for providing a grant to further this scholarly endeavor. Copyright © 2006 by Mark A. Godsey.

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

2. See, e.g., Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996) [hereinafter Cassell, *Miranda's Social Costs*] (arguing that the *Miranda* warnings impose high social costs in the form of many lost confessions); Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—And From Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998) (arguing that the *Miranda* warnings prevent police from obtaining confessions, which harms the innocent by permitting criminals to remain on the streets); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996) (arguing that *Miranda's* costs in terms of lost confessions are small); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500 (1996) (same).

Self-Incrimination Clause<sup>3</sup> in crafting the warnings,<sup>4</sup> whether the warnings requirement itself constitutes a legitimate exercise of the Court's authority,<sup>5</sup> and whether the warnings are constitutional in nature.<sup>6</sup>

Little attention, however, has been paid to the substance or content of the warnings. As anyone who watches television crime dramas knows, a suspect subjected to custodial interrogation must first be advised that she has a right to remain silent, that anything she says may be used against her in court, that she has a right to an attorney during questioning, and that if she cannot afford an attorney one will be appointed for her.<sup>7</sup> The Supreme Court has often stated that the *Miranda* warnings requirement is a prophylactic rule that can change and evolve.<sup>8</sup> However, in spite of forty years of legal developments

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3. The Fifth Amendment's Self-Incrimination Clause provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

4. See, e.g., Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987) (arguing that the *Miranda* Court correctly construed the Self-Incrimination Clause); Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 174-81 (1988) (arguing to the contrary).

5. See, e.g., Schulhofer, *supra* note 4, at 453-55 (arguing that the Court properly exercised its authority in crafting the *Miranda* warnings); Grano, *supra* note 4 (arguing to the contrary).

6. See, e.g., Debate, Paul Cassell v. Robert Litt, *Will Miranda Survive?: Dickerson v. United States: The Right to Remain Silent, the Supreme Court, and Congress*, 37 AM. CRIM. L. REV. 1165 (2000) (Professor Paul Cassell debating Mr. Robert Litt over the issue at the Georgetown University Law Center on Mar. 28, 2000); see also Mark A. Godsey, *Miranda's Final Frontier—The International Arena: A Critical Analysis of United States v. Bin Laden, and a Proposal for a New Miranda Exception Abroad*, 51 DUKE L.J. 1703, 1735-52 (discussing the status of *Miranda* warnings as a constitutional prophylactic rule and providing numerous citations to law review articles debating this issue).

7. *Miranda v. Arizona*, 384 U.S. 436, 469-73 (1966) (describing the warnings required prior to "in-custody interrogation").

8. In *Dickerson v. United States*, for example, the Court cited several cases establishing that *Miranda* is a flexible, prophylactic rule and stated:

These decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.

*Dickerson v. United States*, 530 U.S. 428, 441 (2000) (citing *New York v. Quarles*, 467 U.S. 649 (1984) and *Harris v. New York*, 401 U.S. 222 (1971)).

and practical experience, the content of these famous four warnings has never been modified or even been subjected to systematic scrutiny.

This Article proposes that the substance of the *Miranda* warnings should be reconsidered as the rules of law underlying the warnings substantially evolve, and as we gain new insights into their effectiveness (or lack thereof). In light of the significant legal changes of the last four decades, and the real world experience gained with the warnings during this time, *Miranda's* fortieth anniversary presents an opportune time to reexamine the content of the warnings. This examination should ensure that the warnings remain consistent with and continue to reflect the evolving legal principles that support and justify their existence, and to reaffirm that they remain effective in upholding and enforcing the constitutional rights of suspects.

A close examination of the warnings suggests that they are out of date. If the warnings were redesigned today by a Court as mindful of properly balancing the competing interests as was the *Miranda* Court, they would probably take a different form.<sup>9</sup> In contemplating this new form, my purpose in this Article is not to delve into every conceivable modification to the warnings that one might consider. Rather, my goal is to introduce the concept of updating the warnings using a few examples, with the hope that I will generate discussion on this important issue. I attempt to do this by suggesting and discussing a few potential changes to the warnings that appear to me to be among the most pressing.<sup>10</sup>

First, I propose that the first two warnings, relating to the right to silence, should be buttressed by a new “right to silence” warning that provides something to the effect of: “If you choose to remain silent, your silence will not be used against you as

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9. In some ways, the task this Article undertakes might be seen as an academic exercise. Indeed, I am asking in part what the *Miranda* Court would have done had it known what we know today. As one commentator stated when I presented this paper at a workshop, “The *Miranda* Court disliked confessions . . . . The current Court likes them.” This is another way of saying that the current Court would likely have no interest in improving the warnings or bringing them up-to-date. Nevertheless, the Court’s views may change in time, and the suggestions in this Article could be adopted by state legislatures.

10. While the Supreme Court could, of course, modify the *Miranda* warnings, the most likely venue for policy changes of the magnitude suggested in this Article might be state legislatures. The Court would then be faced with the question of whether the legislated changes are constitutional.

evidence to suggest that you committed a crime simply because you refused to speak.”

Next, the third and fourth warnings, relating to the right to counsel, should be removed and replaced with three new requirements, reflecting legal developments and practical lessons that have come to light since 1966. The first requirement would be a new warning as follows: “If you choose to talk, you may change your mind and remain silent at any time, even if you have already spoken.” The second requirement would be a rule mandating that the police reinstruct suspects of the new *Miranda* warnings at intervals throughout lengthy interrogations. Finally, the police would be required to videotape interrogations. These three new requirements would more effectively achieve the intended policy goals of the right to counsel warnings and, thus, should be considered as replacements to the right to counsel warnings in the prophylactic scheme.

This Article first examines, in Part I, a few specific post-*Miranda* changes and developments in law, understandings, and practical knowledge. Part II then asks whether modifications to the warnings to reflect such new developments make sense in light of the various justifications and theories of *Miranda* put forth by scholars and courts.

Specifically, Part I begins the journey into the suggested modifications by exploring the changes that have occurred in *Miranda*'s surroundings since 1966. Part I.A explains how the theoretical underpinnings of the *Miranda* warnings have evolved since that time. *Miranda* has morphed from an inflexible constitutional command to a flexible prophylactic rule that can be modified in the manner suggested in this Article. With this fact in mind, Part I.B focuses on post-*Miranda* developments regarding the right of a suspect to bar the prosecution from using her decision to remain silent against her as evidence of guilt at trial. This substantive right did not clearly exist at the time that *Miranda* was decided. Although it was formally recognized as a substantive right in 1976, it was not at that time added to the litany of rights police are required to recite under *Miranda*. In addition, this Part develops the hypothesis that one of the leading reasons why *Miranda* has not had its anticipated effect—why most suspects feel compulsion and waive their *Miranda* rights—is because suspects are not informed of this right. In other words, suspects may waive their rights simply because they erroneously conclude that remain-

ing silent “looks bad” and will ultimately hurt their chances in court, basing their decision on a set of warnings that has not yet caught up with the law. This pressure, or fear of a severe penalty, may constitute compulsion in violation of the Self-Incrimination Clause.

Part I.C examines post-*Miranda* developments regarding the right to counsel during interrogations. The right to counsel warnings were designed for several reasons, the primary of which was to ensure that suspects have a “continuous opportunity to exercise”<sup>11</sup> their right to remain silent. This Part focuses on the demonstrably ineffective nature of the right to counsel warnings in practical application, and posits that these warnings have not had their intended effect. This Part also explores the erosion of the substantive, legal right to counsel during interrogations that has occurred since *Miranda* was decided.

Part II then addresses the impact these specific modern developments should have on the warnings themselves in light of various modern justifications of *Miranda* set forth by courts and scholars. It asks whether these suggested modifications to the warnings can be supported and would be made under several of these distinct, competing justifications for the warnings. Part II.A analyzes whether changes to the warnings should be made, in light of the modern developments set forth in Part I, under the *Miranda* decision’s original “compulsion” theory. Part II.B analyzes the appropriateness of the proposed modifications under the due process “voluntariness” theory of *Miranda* jurisprudence, which currently has many adherents. Part II.C analyzes whether changes to the warnings should be made under the due process notice theory proffered by leading *Miranda* scholar George C. Thomas III. Finally, Part II.D analyzes the proposed modifications under the “objective penalties” theory of *Miranda*.

## I. MODERN DEVELOPMENTS: 1966–2006

### A. THEORETICAL JUSTIFICATION FOR THE WARNINGS

At the outset, it is important to briefly explore how the Court’s doctrinal justification for the warnings has evolved over time. This effort is necessary to support the notion that changing or modifying the warnings, which this Article will discuss

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11. *Miranda*, 384 U.S. at 467.

in its remainder, is an exercise that does not run afoul of the Court's teachings.

1. The *Miranda* Court: 1966

It is likely that in 1966, the *Miranda* Court would have looked askance at the suggestion of modifying the warnings decades later. The Court stated that the warnings were not intended to be a "constitutional straightjacket."<sup>12</sup> Congress and the states were free to experiment with alternative methods of "apprising accused persons of their right of silence" and assuring that such individuals have "a continuous opportunity to exercise it."<sup>13</sup> The Court suggested, however, that any "potential alternatives for protecting the privilege"<sup>14</sup> had to be at least as effective in conveying the substantive content of the four warnings as the procedure set forth by the Court.<sup>15</sup> In other words, while the Court appeared open to modifying the mechanism by which suspects could be informed of their rights, a fair reading of *Miranda* suggests that the Court was not open to changing the *content* of the information that must be conveyed.<sup>16</sup>

Because it is difficult to imagine a politically palatable method by which suspects could be advised of their rights other than the suggested procedure of having police officers recite the warnings,<sup>17</sup> it is arguable that the Court was merely paying

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* (stating that alternative procedures had to be "at least as effective in apprising accused persons" of their rights as the method set forth in the *Miranda* decision).

16. In *Duckworth v. Eagan*, the Court approved a set of warnings where the officer in question had slightly altered them from the standard *Miranda* warnings, holding that the warnings need not be given in the "exact form" provided by the *Miranda* decision. 492 U.S. 195, 202–05 (1989). The *Duckworth* Court reminded, however, that whatever form of warnings an officer devises must "touch[] all of the bases" of *Miranda* to pass constitutional muster. *See id.* at 203. Thus, in 1989, the Court appeared to disfavor the idea of dramatically changing the content of the warnings in the manner suggested in this Article, although the question of overhauling the warnings in light of modern developments was not directly before the Court at that time.

17. Perhaps the *Miranda* Court had in mind a rule that counsel must be provided to each suspect prior to interrogation. This would allow the substance of the warnings to be conveyed by the suspect's own attorney, and would satisfy the concerns surrounding the inherent compulsion of custodial interrogation expressed by the *Miranda* Court. As the Court was unwilling to go this far itself in the *Miranda* decision, it likely viewed this as an alternative that Congress and the states were unlikely to adopt. Time has proven this hy-

diplomatic lip service to the idea that Congress and the states were free to experiment with alternative procedures. In reality, the four warnings did act as a straightjacket,<sup>18</sup> and the Court's unequivocal and strong language throughout the rest of its opinion hammered home the point that the basic content of all four warnings must be conveyed to suspects prior to custodial interrogation.<sup>19</sup>

The notion that the *Miranda* Court would not have been amenable to the idea of future modifications in the substance of the warnings is fortified not only by the Court's strong language, but by the theory that it employed to justify the warnings themselves. Indeed, the Court required the warnings as a direct result of its interpretation of the word "compelled" in the text of the Self-Incrimination Clause.<sup>20</sup> The Court held that the atmospheric pressure or coercion inherent in custodial interrogation equates with compulsion and, thus, runs afoul of the

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pothesis to be correct, as no jurisdiction has adopted this alternative method of apprising suspects of their rights. The Court might also have envisioned a system whereby suspects were to be brought before a neutral magistrate prior to custodial interrogation, with the magistrate then apprising them of their rights. As this procedure is even more suspect-friendly than the rule devised in *Miranda*, it too was likely not seen as a politically feasible alternative, and it has not been subsequently adopted except in limited situations in the context of advising juveniles of their *Miranda* rights. See Jennifer J. Walters, Comment, *Illinois' Weakened Attempt to Prevent False Confessions by Juveniles: The Requirement of Counsel for the Interrogations of Some Juveniles*, 33 LOY. U. CHI. L.J. 487, 504 n.149 (2002) (discussing magistrate warning rule for juveniles in Texas).

18. Notably, jurisdictions in the United States did not widely experiment with alternative methods of advising suspects of their rights after the *Miranda* decision. This is likely because the police-based procedure the *Miranda* Court set forth was the most politically palatable method imaginable. In 1968, Congress attempted to create a new procedure by enacting 18 U.S.C. § 3501, which made the recitation of warnings merely one factor in determining the voluntariness of a confession. See Godsey, *supra* note 6, at 1742–43. Because this statute was generally seen as unconstitutional, as it deviated from *Miranda*'s dictates, it was largely ignored by federal prosecutors until it was held unconstitutional by *Dickerson v. United States*, 530 U.S. 428, 441 (2000). See Godsey, *supra* note 6, at 1742–52.

19. For example, the *Miranda* Court stated that the substance of the warnings "must" be provided and is an "absolute prerequisite to interrogation," *Miranda*, 384 U.S. at 471–72, and a prerequisite to the admissibility of any resulting confession, *id.* at 476.

20. See *id.* at 461–62; see also Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 499–505 (2005) (discussing the *Miranda* Court's recognition of the Self-Incrimination Clause's ban on compelled statements as the proper test for confession admissibility).

Fifth Amendment's Self-Incrimination Clause.<sup>21</sup> Rather than ban custodial interrogation outright, however, the Court held that interrogations could ensue in such circumstances if the pressure was first dispelled by the recitation or waiver of warnings.<sup>22</sup>

In delineating the four required warnings, the Court viewed each as having its own unique and important role in dispelling the pressure. The Court required the first warning, "You have a right to remain silent," for several related reasons: to inform the suspect of this "fundamental" right, to assure the suspect that she will not be penalized for refusing to talk, and to let even the most educated suspect know that the police are playing by the rules and that she has the power to stop the interrogation if she chooses.<sup>23</sup> The Court required the second warning, "Anything you say may be used against you in a court of law," to make the suspect aware of the consequences of speaking, and to ensure that the suspect understands that she has entered an adversarial phase of the criminal justice system and that the police may not have her best interests in mind.<sup>24</sup>

The Court deemed the third warning, "You have a right to an attorney during the interrogation," necessary for three reasons. First and foremost, it was seen as a fortification of the first warning.<sup>25</sup> Because the Court viewed custodial interrogation as a practice that can quickly "overbear the will of one merely made aware of"<sup>26</sup> her right to silence, a suspect with counsel present in the interrogation room would have an ally to constantly remind her of her rights and look out for her interests.<sup>27</sup> The presence of counsel would ensure that compulsion did not seep back into the interrogation room. Other benefits of the right to counsel warning include the fact that the police would be unlikely to engage in third-degree interrogation tactics with counsel present, that counsel could be a witness to such police conduct if it occurred, and that counsel could ensure that the accused gives an accurate statement that is correctly recorded by the police.<sup>28</sup> The final warning, "If you cannot af-

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21. See *Miranda*, 384 U.S. at 461, 469.

22. *Id.* at 467-77; see also Godsey, *supra* note 20, at 499-505.

23. *Miranda*, 384 U.S. at 468-69.

24. *Id.* at 469.

25. See *id.*

26. *Id.*

27. *Id.* at 469-70.

28. *Id.* at 470.

ford an attorney one will be appointed for you,” was designed to make clear that the right to counsel is available to all, so that an indigent suspect does not feel compulsion because she wrongly assumes that this right applies only to those who have sufficient means to procure a lawyer.<sup>29</sup>

Thus, the Court viewed each warning as directly tied to, and stemming from, the Self-Incrimination Clause. Each warning played a role by itself and in combination with the others in dispelling the inherent pressure and removing the “compulsion” from the interrogation setting, and in ensuring that the interrogation room remains compulsion-free for the duration of the interview. Accordingly, removing one of the warnings would be tantamount to removing a brick from a dam, as it would cause the protective barrier to crumble and render the warnings ineffective.

## 2. Post-*Miranda*: 1966–2006

Shortly after *Miranda* was decided, however, the Court retreated from its “compulsion” theory as originally delineated in *Miranda*. In a line of cases that includes *Harris v. New York*,<sup>30</sup> *New York v. Quarles*,<sup>31</sup> *Michigan v. Tucker*,<sup>32</sup> *Dickerson v. United States*,<sup>33</sup> and *United States v. Patane*,<sup>34</sup> among others, the Court made two important changes to confession jurisprudence. First, the Court retracted its compulsion analysis of the *Miranda* decision, and reasserted the pre-*Miranda* voluntariness test as the primary standard for determining the admissibility of confessions.<sup>35</sup> Second, the Court recast the *Miranda* warnings requirement as a flexible, prophylactic rule, which is designed as a first-step litmus test to determine whether or not a confession was made voluntarily.<sup>36</sup>

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29. *Id.* at 473.

30. 401 U.S. 222, 225–26 (1971) (holding that a statement taken from a defendant during custodial interrogation where no *Miranda* warnings had been administered may be used for impeachment purposes at trial).

31. 467 U.S. 649, 655–56 (1984) (creating a “public safety” exception to the *Miranda* warnings requirement).

32. 417 U.S. 433, 445–46, 450–52 (1974) (ruling that the fruit of the poisonous tree doctrine does not apply with full force to *Miranda* violations).

33. 530 U.S. 428, 432 (2000) (holding that *Miranda* is a constitutional prophylactic rule that cannot be overruled by an act of Congress).

34. 542 U.S. 630, 642 (2004) (holding that the “fruit of the poisonous tree” doctrine does not apply to *Miranda* warnings).

35. See Godsey, *supra* note 20, at 505–08, 515.

36. *Id.* at 508. The complicated process by which the Court achieved these

Today, the *Miranda* warnings are most accurately considered a judge-made, prophylactic rule, the application of which can be subjected to a balancing test.<sup>37</sup> While the warnings have a “constitutional basis,”<sup>38</sup> no longer is each warning tied to the Self-Incrimination Clause with a unique and clearly defined role to play in dissipating the “inherent compulsions of the interrogation process” described in *Miranda*.<sup>39</sup> Rather, in a less-defined manner, the recitation-and-waiver process now simply creates a presumption of voluntariness and admissibility.<sup>40</sup>

While the Court has never directly held that the content of the warnings are subject to modification, the detachment of the warnings from the concept of *Miranda*-compulsion, and the recasting of the warnings requirement as a flexible, prophylactic rule, create leeway for modification. The authority supporting modification will be explored in more detail in Part II. Before turning to that discussion, however, it is imperative to first explore the post-*Miranda* changes in law and practical knowledge that create a foundation for the proposed modifications. These changes are discussed in turn in Parts B and C below.

## B. USING A SUSPECT’S POST-MIRANDA WARNING SILENCE AGAINST HER

### 1. Legal Developments

At the time that *Miranda* was decided, the law was not clear as to whether a suspect’s silence after receiving the warnings could be used against her at trial as evidence of guilt. However, one could infer from the Court’s teachings that such use of silence was probably impermissible. In *Miranda*, for example, the Court implied that the first warning, “You have a right to remain silent,” was required in part because a rational suspect might otherwise conclude that “silence in the face of accusation is itself damning and will bode ill when presented to a jury.”<sup>41</sup> From this somewhat vague statement, one can glean

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results is beyond the scope of this Article. For a full discussion of this transformation, see *id.* at 505–15.

37. See *id.* at 507.

38. *Id.* at 512; see also *Dickerson*, 530 U.S. at 441.

39. See *Miranda v. Arizona*, 384 U.S. 436, 467–74 (1966).

40. See Godsey, *supra* note 20, at 513; see also *infra* notes 111–15 and accompanying text (discussing the presumption of voluntariness).

41. *Miranda*, 384 U.S. at 468.

that perhaps the Court viewed the first warning as carrying with it an implicit promise that silence will not later be used against the suspect at trial.<sup>42</sup> The *Miranda* Court apparently believed that this implicit promise worked in hand with the explicit warnings to dissipate the coercion inherent in custodial interrogation.

Also, in *Griffin v. California*,<sup>43</sup> decided the term prior to *Miranda*, the Court held that when a defendant invokes his Fifth Amendment right not to testify at trial, the prosecutor and judge cannot suggest to the jury that it consider such silence as indicative of guilt.<sup>44</sup> *Griffin* is not directly on point, however, because the Court has interpreted the Self-Incrimination Clause in the formal context such as trials in a very different manner than it has interpreted the same clause in the pretrial interrogation context.<sup>45</sup> Nonetheless, *Griffin* provided some support by analogy to the argument that a suspect's interrogation silence could likewise not be used against her at trial.<sup>46</sup>

It was not until *Doyle v. Ohio*<sup>47</sup> in 1976, however, that the Court expressly held that a suspect's decision to remain silent during an interrogation, after the recitation of *Miranda* warnings, could not be used against her by the prosecution at trial to infer guilt.<sup>48</sup> Although the precise holding in *Doyle* was that the prosecution cannot use such silence to impeach the defendant,<sup>49</sup> nearly all courts have agreed that this holding carries with it the obvious implication that post-warning silence likewise cannot be used by the prosecution in its case-in-chief.<sup>50</sup> The Court in *Doyle* "stressed that the warnings carry at least an implicit assurance that silence will not be used against the arrestee—

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42. The *Miranda* Court provided a glimpse of what was to come in dicta buried in an obscure footnote, stating, "[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not . . . use at trial the fact that he stood mute or claimed his privilege . . ." See *id.* at 468 n.37.

43. 380 U.S. 609 (1965).

44. *Id.* at 615.

45. See Godsey, *supra* note 20, at 492–95, 502–05, 515–17.

46. See Marcy Strauss, *Silence*, 35 LOY. L.A. L. REV. 101, 111 & n.42, 134 (2001).

47. 426 U.S. 610 (1976).

48. *Id.* at 617–18.

49. *Id.*

50. See Strauss, *supra* note 46, at 112 n.43 (citing cases).

that the exercise of the right to remain silent carries no penalty.”<sup>51</sup>

The implicit nature of the assurance is apparently derived from the fact that the warnings describe the suspect’s decision to remain silent as a “right.” While this inference is perhaps less than obvious, the expectation of the *Miranda* Court was that suspects will understand that if their silence were to be used against them later, then their decision to remain silent is not really much of a right at all. In other words, because silence is couched as a “right,” suspects will conclude that their silence will not be used against them. The prosecution’s act of breaking this implied promise by introducing the suspect’s silence into evidence at trial, therefore, is “fundamentally unfair” and constitutes a deprivation of due process.<sup>52</sup>

## 2. Practical Experience

Forty years of experience has shown that the substantive right the *Doyle* Court believed was implicit in the *Miranda* warnings—that silence will not be later used against the suspect—is not recognized or understood by most suspects undergoing custodial interrogation. In what likely would have been a major surprise to the *Miranda* court,<sup>53</sup> modern studies demonstrate that roughly eighty percent of suspects waive their *Miranda* rights and talk to the police.<sup>54</sup> These individuals have

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51. *Id.* at 110.

52. *Doyle*, 426 U.S. at 618. The *Doyle* decision was grounded in due process rather than the Self-Incrimination Clause. *Id.* at 619. Because the use of post-*Miranda* warning silence to infer guilt at trial constitutes an impermissible penalty, the *Doyle* Court could have grounded its decision in the Self-Incrimination Clause. See generally Godsey, *supra* note 20, at 515–17 (proposing an objective penalty test for compulsion in interrogation).

53. See Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1448 (1985) (noting that the *Miranda* Court anticipated that waiver would occur rarely and only in extraordinary cases); George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1977 (2004) (suggesting that the *Miranda* Court would have been “stunned” by waiver rates).

54. See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 842, 860 tbl.3 (1996) (waiver rate of eighty-four percent); *id.* at 843–49 (discussing various studies on the effects of *Miranda*); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 tbl.3 (1996) [hereinafter Leo, *Inside the Interrogation Room*] (waiver rate of seventy-eight percent); Thomas, *supra* note 53, at 1972 tbl.2 (waiver rate of sixty-eight percent). See generally Cassell, *Miranda’s Social Costs*, *supra* note 2 (discussing results of various empirical studies of *Miranda*’s impact, with focus on “lost confessions” rate); Leo, *supra* note 2, at 632–52 (same); Schulhofer, *supra* note 2

been informed that they may remain silent and have the guidance of an attorney, yet they choose to go it alone and talk. While many reasons certainly contribute to the willingness of Mirandized suspects to talk to the police,<sup>55</sup> a major factor undoubtedly is that many suspects naturally believe, albeit incorrectly, that remaining silent will make them “look guilty” and will be used against them as evidence of guilt.

Indeed, common sense and everyday intuition suggest that the fear of silence being used as a penalty plays an important role in this phenomenon. Philosopher Jeremy Bentham once expressed, “[S]ilence . . . by common sense, at the report of universal experience, [is] certified to be tantamount to confession.”<sup>56</sup> The fact that suspects naturally assume that their silence will be used against them is captured in Kent Greenawalt’s classic essay, *Silence as a Moral and Constitutional Right*.<sup>57</sup> Greenawalt sets forth a hypothetical in which Ann has evidence to conclude that her friend Betty has stolen her bracelet.<sup>58</sup> If Ann confronts Betty with the charge, and Betty remains silent, Ann should, based on common sense and everyday conceptions of morality, “rightly perceive Betty’s silence . . . as substantially probative of guilt; . . . no possible bar will exist to her according silence the weight it naturally has in this context. . . . Ann would be justified in acting as if Betty had committed the original wrong.”<sup>59</sup>

Silence in the face of accusation so intuitively carries the label of guilt that the criminal courts of England allow jurors to infer guilt in cases where the defendant was questioned by the police and refused to talk.<sup>60</sup> The fact that the law in the United

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(same).

55. See PETER BROOKS, TROUBLING CONFESSIONS 8–64 (2000) (discussing some of the deep-seated psychological and cultural reasons why suspects choose to speak to the police and confess); Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1828–29 (1987) (discussing a suspect’s “almost irresistible impulse to respond to . . . accusations”); Claudio Salas, Note, *The Case for Excluding the Criminal Confessions of the Mentally Ill*, 16 YALE J.L. & HUMAN. 243, 254–55 (2004) (listing reasons why suspects feel compelled to confess).

56. 7 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 39 (John Bowring ed., Russell & Russell, Inc. 1962) (1838).

57. R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981).

58. See *id.* at 22.

59. *Id.* at 25.

60. See Gregory W. O’Reilly, *England Limits the Right to Silence and Moves Toward an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOL.

States recently prohibited such use of silence is counterintuitive to this natural human instinct, and would therefore probably not be obvious or apparent to most American suspects without having it expressly stated to them. Because the outdated *Miranda* warnings do not disabuse suspects of this erroneous assumption, suspects waive their rights and talk “just to avoid the guilty implication of silence.”<sup>61</sup>

Research findings back up this claim. Richard J. Ofshe and Richard A. Leo, two of the leading empirical researchers of *Miranda* and its impact, have written that suspects tend to waive their *Miranda* rights and speak to the police at a high rate in part because they “view invoking *Miranda* as either wrong and/or tantamount to an admission of guilt.”<sup>62</sup> Even the educated are sometimes unable to grasp the “implicit promise” of *Miranda*. Indeed, Ofshe and Leo cite an example of a middle-class university student who provided the following reason why he waived his rights: “Somehow it seems—it feels to me that if I ask for a lawyer that I’m admitting guilt and I know I’m not, but it’s, you know, it’s just a preposterous idea to me that it’s even considered.”<sup>63</sup>

The findings of Ofshe and Leo are buttressed by an examination of materials and pamphlets produced by criminal defense attorneys for their potential clients. One example is a pamphlet prepared by attorney Katya Komisaruk for the Just Cause Law Collective entitled, *What To Do if You’re Approached for Questioning by the FBI or Other Law Enforcement Agencies*.<sup>64</sup> The pamphlet goes to great length to disabuse potential suspects of the natural but mistaken belief that silence will be used against them:

Exercising your right to remain silent doesn’t make you seem guilty . . . . To make sure that no one is punished for remaining silent, the authorities are forbidden to use your refusal to answer questions as

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OGY 402, 428–29, 445 (1994).

61. See Salas, *supra* note 55, at 255.

62. Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 1002 (1997); see also MALIN ÅKERSTRÖM, BETRAYAL AND BETRAYERS: THE SOCIOLOGY OF TREACHERY 71 (1991) (“The inmates I interviewed all believed that silence during an interrogation was interpreted as guilt.”).

63. Ofshe & Leo, *supra* note 62, at 1002.

64. KATYA KOMISARUK, JUST CAUSE LAW COLLECTIVE, WHAT TO DO IF YOU’RE APPROACHED FOR QUESTIONING BY THE FBI OR OTHER LAW ENFORCEMENT AGENCIES (2003), available at <http://www.adcsf.org/HandlingFBIDraft03-24-03.pdf>.

an excuse for searching or arresting you. And in court, judges will declare a mistrial if the prosecutor even *implies* that your being silent means you're guilty.<sup>65</sup>

This pamphlet and others of similar ilk<sup>66</sup> suggest that criminal defense attorneys, with years of experience representing clients who have confessed after receiving *Miranda* warnings, know that their clients often waive their rights and talk simply because they are not informed of *all* of their relevant rights.<sup>67</sup> In particular, suspects do not understand that they have nothing to lose by remaining silent. Criminal defense attorneys find it necessary to supplement the warnings with this important new right that the *Miranda* warnings continue to omit.<sup>68</sup>

In sum, suspects who remain silent in the face of *Miranda* warnings cannot be penalized for doing so in light of law that developed a decade after *Miranda* was decided. Yet suspects remain uninformed of this fact. Common sense and research

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65. *Id.* at 3; see also Scott Turow, *Miranda's Value in the Trenches*, N.Y. TIMES, June 28, 2000, at A27 ("Confronted with an accusation, most people can't resist the impulse to explain, probably fearing that remaining silent would make them look guilty.").

66. See, e.g., CMTY. LEGAL EDUC. ONTARIO, TALKING TO POLICE 4 (2002), available at <http://www.cleo.on.ca/english/pub/onpub/pdf/youth/talking.pdf> ("Your right to remain silent won't be used against you. You might worry about what will happen if you refuse to talk to the police. You might think it will make you look guilty, or that it will be held against you. It won't."); Kelly W. Parker, *The Right to Remain Silent: What You Should Know* (2000), <http://library.findlaw.com/2000/Feb/1/132011.html> ("It is always instructive to remember there is no penalty that can be imposed for exercising your right to remain silent. The fact that you exercised this right cannot be used against you at trial.").

67. See Ogletree, *supra* note 55, at 1828 (describing his experience with clients who, "notwithstanding the warnings," believed that their silence could either be used against them as evidence of guilt or would forfeit their opportunity for pretrial release).

68. In a paper prepared for a January 25, 2003, education program for the Law Society of Upper Canada, a Canadian criminal defense attorney instructed:

In addition to the basic advice set out above, experience suggests that it will be helpful to the client if you go further in your discussion of their right to remain silent. I always reinforce with clients that the fact that they choose to remain silent cannot be introduced in evidence against them. People are always concerned that they will look guilty if they do not talk to the police. Tell them this is not so. The fact that they remain silent will seldom be admissible in evidence.

FLETCHER DAWSON, *THE POLICE ARE ON YOUR CLIENT'S DOORSTEP: WHAT CIVIL LITIGATORS NEED TO KNOW* (2003), available at <http://www.cohenhighley.com/articles/crimlaw002.htm>.

findings suggest that the Court is incorrect in assuming that suspects recognize and understand this “implicit” right. Suspects waive their rights and speak at a high rate in part because they fear that if they remain silent, the inference of guilt will be drawn against them.<sup>69</sup> This fear may constitute the type of compulsion that the Self-Incrimination Clause prohibits. Accordingly, the warnings as currently constructed are not effective in dispelling the inherent coercion of custodial interrogation that the Court envisioned in *Miranda*. Whether these more recent legal changes and modern research findings lead to the conclusion that a new warning should be added to the *Miranda* litany will be discussed in Part II.

### C. THE RIGHT TO COUNSEL DURING INTERROGATIONS

As previously noted, the *Miranda* Court envisioned the right to counsel warnings playing several important roles in ensuring that coercion did not seep back into the interrogation room as the interview progressed, so that the suspect would have a “continuous opportunity to exercise” the right to remain silent.<sup>70</sup> First, the physical presence of the suspect’s own counsel would ensure that she does not become overwhelmed by the ongoing interrogation and forget her right to remain silent or become too intimidated to invoke it.<sup>71</sup> Counsel would be by her side to keep her calm and remind her of this fundamental right when the police begin to tighten the screws. The Court also believed that the presence of a defense attorney in the interroga-

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69. Commentator Alexander Nguyen summed up this phenomenon perfectly:

*Miranda* never really addressed the most important of the “inherently compelling pressures” of police interrogations: the belief that if suspects keep quiet, they will look guilty. The root of this problem may be in the wording of *Miranda* itself. The warnings indicate the consequences of talking to the police (“Anything you say may be used against you in a court of law”). But they do not indicate the consequences of refusing to answer questions—which, in theory, should be nothing other than the continued presumption of innocence. It may be ignorance of this fact that causes suspects to waive their rights at such a high rate.

Alexander Nguyen, *The Assault on Miranda*, AM. PROSPECT, Mar. 27–Apr. 10, 2000, at 61 (emphasis added); see also Timothy O’Neill, *Why Miranda Does Not Prevent Confessions: Some Lessons From Albert Camus, Arthur Miller and Oprah Winfrey*, 51 SYRACUSE L. REV. 863, 873 (2001) (arguing that the fact that silence appears damning to most suspects contributes to high *Miranda* warning waiver rates).

70. *Miranda v. Arizona*, 384 U.S. 436, 467, 490 (1966).

71. See *supra* note 27 and accompanying text.

tion room would restrain the police from engaging in third-degree tactics, would supply the suspect with a witness to any nefarious police conduct, and would guarantee that the suspect gives an accurate statement that is properly memorialized, without the police stretching it to suit their purposes.<sup>72</sup>

Thus, the *Miranda* Court's analysis of the right to counsel warnings hinged on two factual assumptions: first, that suspects would freely invoke their right to counsel, and second, that when they did invoke their right, the police would supply counsel to suspects and then continue the interrogations in the presence of counsel. Indeed, none of the coercion-lessening benefits of the right to counsel outlined by the *Miranda* Court are present unless a defense attorney occupies the interrogation room with the suspect. The *Miranda* Court, of course, was operating without extensive factual knowledge of how the right to counsel warnings would operate in the real world and, thus, was in large part speculating as to their practical effect.<sup>73</sup>

Forty years of experience has demonstrated that the Court's factual assumptions were incorrect. In the vast majority of interrogations in which a suspect invokes her right to counsel, no attorney is provided. Indeed, a careful reading of *Miranda* demonstrates that it does not require that an attorney be supplied to the suspect; an attorney is mandated only if the police wish to continue the interrogation after the suspect invokes her rights. The law enforcement community has learned through experience that if an attorney is contacted or obtained for the suspect, the defense attorney invariably advises the suspect to remain silent and the interrogation ends.<sup>74</sup> Rather

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72. See *supra* note 28 and accompanying text.

73. As described in *Miranda*, the FBI had been advising suspects of their right to remain silent and right to an attorney for more than a decade prior to the *Miranda* decision. 384 U.S. at 483–86. In addition, the FBI began advising indigent suspects of their right to a state-appointed attorney two years before *Miranda* was decided. *Id.* at 484–85. The information supplied to the *Miranda* Court regarding how these warnings worked in practice suggested to the Court that when the FBI advises a suspect of her right to remain silent and right to an attorney, the suspect is allowed access to counsel if counsel appears or can be reached by telephone. *Id.* at 485. The *Miranda* opinion does not address whether or not interrogation typically resumes after the suspect has consulted with an attorney, *id.* at 483–86, but the Court's analysis suggests that the Court assumed interrogations would typically proceed with counsel present.

74. Even a Justice of the Supreme Court has argued that any criminal defense attorney “worth his salt” will advise his client to remain silent rather than submit to police interrogation. See *Watts v. Indiana*, 338 U.S. 49, 59

than waste time going through the elaborate ceremony of contacting the suspect's attorney or having an attorney appointed for her by the court, waiting while the suspect meets with her attorney and then announces that she will no longer submit to interrogation, the police take the obvious shortcut and terminate the interrogation when a suspect invokes the right to counsel, without bothering to fulfill her request for an attorney.<sup>75</sup> In the end, a suspect's invocation of the right to counsel performs none of the functions intended by the *Miranda* Court, but simply operates as an alternative way—in addition to in-

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(1949) (Jackson, J., concurring in part, dissenting in part); see also M.K.B. Darmer, *Lessons From the Lindh Case: Public Safety and the Fifth Amendment*, 68 BROOK. L. REV. 241, 259 (2002) ("Because counsel could be relied upon to advise her client to demur to questioning, the Court essentially required the government to thwart its own investigations."); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 734–35 (1992) ("Virtually any competent lawyer would advise his client in the strongest possible terms to remain silent, and it would be a rare client indeed who would disregard such advice."); H. Richard Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1161 n.90 (1987) (noting that Professor Anthony Amsterdam, in his treatise TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES, § 87 (1984), "recommends that defense counsel advise their clients at the initial interview to say nothing at all to the police or prosecuting attorneys under any circumstances, and not to discuss the case with anyone, particularly not cellmates, codefendants, colawyers, or reporters."); *id.* at 1177 n.144 ("Naturally . . . instances of an attorney advising her accused client to participate in an interview with law enforcement officials seeking to gain evidence incriminating the client should be relatively rare."); Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799, 815 (1998) (explaining that although criminal defense attorneys in Europe typically advise their clients to speak to the police, American defense attorneys "virtually always" terminate the police interrogation). On several occasions prior to *Miranda*, the Court recognized that defense attorneys summoned to the interrogation room would likely advise their clients to terminate the interview. See Caplan, *supra* note 53, at 1424 (quoting several Supreme Court opinions that made this point prior to the *Miranda* decision).

75. See O'Neill, *supra* note 69, at 874 n.100 ("In reality, the *Miranda* promise of a right to counsel is somewhat illusory. If a suspect asks for counsel, police will usually end all attempts at interrogation. Since the police know that an attorney will simply tell the suspect not to answer questions, it is easier to simply stop attempts to interrogate."); see also Leo, *Inside the Interrogation Room*, *supra* note 54, at 276–78 (reporting the results of an empirical study showing that when a suspect invoked one or more *Miranda* rights, the officer typically terminated the interrogation and returned the suspect to jail without supplying an attorney; in a few instances, the officer continued questioning the suspect after invocation of rights without providing an attorney). An additional reason why suspects are not provided with counsel is that in many states no mechanism exists for obtaining counsel for indigent suspects who have not yet been charged with a crime.

voking the right to remain silent—for a suspect to terminate the interrogation *sans* attorney.<sup>76</sup>

It is also important to consider the right to counsel warnings in the historical context in which they were created. *Miranda* purported to provide suspects with a Fifth Amendment right to counsel, designed to effectuate the policies of the Self-Incrimination Clause by ensuring that suspects have a “continuous opportunity to exercise” the right to remain silent.<sup>77</sup> The Sixth Amendment right to counsel, on the other hand, is a distinct right that differs in substance and policy from the right to counsel guaranteed under *Miranda* and under

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76. The dissenters in *Miranda* did not take the majority’s assertions that counsel would be provided at face value. Justice White, joined by Justices Harlan and Stewart, argued:

The obvious underpinning of the Court’s decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. 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.

*Miranda*, 384 U.S. at 537–38 (White, J., dissenting). Thus, the dissenters suggested that the *Miranda* majority was being disingenuous and knew, or at least suspected, that the right to counsel warnings would not work in practice in the manner suggested by the majority.

Professor Gerald Caplan, on the other hand, has argued:

[A]s naive as it now appears, the Court expected the presence of counsel at the station house to be routine and the waiver of rights extraordinary. The Court probably imagined that the typical suspect advised of his rights would elect to exercise them. He would choose to speak to counsel rather than to police, and counsel would ordinarily be provided to the indigent as an alternative to foregoing interrogation altogether. Once summoned, counsel might “advise his client not to talk to police until he has an opportunity to investigate the case, or he may wish to be present during any police questioning.”

Caplan, *supra* note 53, at 1448–49 (quoting *Miranda*, 384 U.S. at 480); see also Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, in POLICE POWER AND INDIVIDUAL FREEDOM 153, 179 (Claude R. Sowlé ed., 1962) (written prior to the *Miranda* decision and suggesting that although defense counsel would ordinarily advise his client to remain silent, it is “not unreasonable to suppose that in many cases where the suspect is innocent,” the lawyer would participate in the interrogation with his client in the manner that the *Miranda* Court later envisioned). Because this Article evaluates the right to counsel warnings in light of the theoretical justification provided by the *Miranda* majority, and evaluates that justification in light of four decades of experience, it is imperative to take the *Miranda* majority’s theory at face value to determine whether it stands the test of time.

77. *Miranda*, 384 U.S. at 444.

the Self-Incrimination Clause.<sup>78</sup> At the time of the *Miranda* decision, it was unclear whether suspects had, or might eventually gain, a Sixth Amendment right to counsel at early stages of a criminal investigation, such as the interrogation stage. While the Court's holding in 1964 in *Escobedo v. Illinois*<sup>79</sup> hinted that the Court might eventually grant suspects that right,<sup>80</sup> the *Miranda* decision recast *Escobedo* as a Fifth Amendment decision.<sup>81</sup> Yet the Sixth Amendment right to counsel was still evolving when the Court decided *Miranda*, and its application to the interrogation setting was far from settled doctrine.

It was not until 1972, in *Kirby v. Illinois*,<sup>82</sup> that the Court finally clarified the application of the Sixth Amendment's right to counsel. *Kirby* held that the Sixth Amendment right to counsel is triggered only "at or after the time that adversary judicial criminal proceedings have been initiated against [the suspect]," whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."<sup>83</sup> The practical effect of this holding was to make the Sixth Amendment right to counsel inapplicable in the vast majority of *Miranda*-type interrogations.

With this history, it is possible to see the right to counsel warnings in *Miranda* as derived from the Fifth Amendment but created by a Court that, in 1966, perhaps envisioned a future role of the Sixth Amendment in some investigative stages of the criminal process. The warnings could be seen as a method of protecting the Self-Incrimination Clause. Alternatively, if the Court's assumptions about how these warnings would work in practice were incorrect, the warnings could function as a method of giving suspects notice of their substantive, Sixth Amendment right to counsel. If the suspect invoked her right to counsel, and the police did not want to continue the interroga-

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78. See George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 282–88 (1988) (stating that the Sixth Amendment right to counsel is substantively different than the Fifth Amendment right to counsel); see also JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 145 (1993) (discussing the differences between the Sixth Amendment right to counsel and the Fifth Amendment right to counsel).

79. 378 U.S. 478 (1964).

80. See *id.* at 485–91.

81. See *Miranda*, 384 U.S. at 464–66.

82. 406 U.S. 682 (1972).

83. *Id.* at 688.

tion in the presence of a defense attorney, the warning would still be relevant as a formal notice of that Sixth Amendment right. At that point, an attorney would be provided to the suspect regardless of whether or not the interrogation continued.<sup>84</sup>

The *Kirby* decision, however, eradicated the Sixth Amendment's chances of landing a leading role in the investigative stages of the criminal process. *Kirby*, therefore, left the Self-Incrimination Clause as the sole provision in the Bill of Rights on which the right to counsel warnings could justify their validity. Because history has proven that these warnings do not perform their Fifth Amendment function as the Court originally envisioned, they struggle to find legitimacy in modern application.

Whether the right to counsel warnings can still be justified and find some validity under more modern interpretations of *Miranda* and confession law, or whether the policies behind the warnings could be better served by moving in another direction, will be explored below in Part II.

## II. THE IMPACT OF MODERN DEVELOPMENTS ON THE SUBSTANCE OF THE WARNINGS

### A. THE IMPACT OF MODERN DEVELOPMENTS ANALYZED UNDER *MIRANDA*'S ORIGINAL COMPULSION THEORY

As stated above, the *Miranda* decision was grounded in the Self-Incrimination Clause and its prohibition on police use of "compulsion" to obtain a confession. The Court equated the coercion inherent in custodial interrogation with unconstitutional compulsion.<sup>85</sup> The Court advised, however, that the compulsion could be dispelled, and custodial interrogation could ensue, if the police first provided the suspect with the required warnings and obtained a waiver.<sup>86</sup>

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84. Because the Sixth Amendment right to counsel is self-executing, a suspect would not have to request counsel to be afforded this right were the Sixth Amendment held to apply to pretrial interrogations. See *Brewer v. Williams*, 430 U.S. 387, 404 (1977); see also Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 *YALE L.J.* 259, 295 (1993) (describing the self-executing nature of the Sixth Amendment right to counsel).

85. *Miranda*, 384 U.S. at 467–74.

86. *Id.* at 467–75.

Analyzed under *Miranda's* original compulsion paradigm,<sup>87</sup> the first two warnings, relating to the right to remain silent, continue to play the important role in dispelling the coercion that the *Miranda* Court envisioned. The two right to silence warnings help to dissipate coercion by informing the suspect of her rights. The warnings let her know that while it may appear that the interrogators hold all the cards, she holds a trump card embossed with the power of the Fifth Amendment. The first two warnings also inform her of the consequences of speaking, so that she can make an informed choice. Certainly, suspects today feel less pressure and are in a better position to control their destinies in the stationhouse interrogation room than they would be without knowing of their right to remain silent or of the consequences of speaking.

But legal developments and empirical findings over the past four decades demonstrate that the right to silence warnings, as currently formulated, are not completely up to the task. Suspects are informed of their right to remain silent and the consequences of speaking. Yet, they are not informed of the consequences of remaining silent—even though the Court has now expressly recognized that the choice of silence by a Mirandized suspect cannot be used as evidence of guilt.<sup>88</sup> Thus, suspects are only partially informed of the legal consequences of their choice to speak or remain silent. Indeed, if it is essential that suspects know the consequences of speaking, then it is equally essential, if not more so, that they also know that no formal consequences will follow from their silence, and that they can exercise that right without penalty.

The *Miranda* Court may have agreed with this point in theory, but believed that the fact that silence carries no penalty was “implicit” and thus did not need to be expressly stated.<sup>89</sup> The *Miranda* Court was incorrect in this assumption. Common sense and empirical findings support the notion that this “implicit promise” does not register with suspects, and that suspects waive their *Miranda* rights at a surprisingly high rate

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87. As the Supreme Court modified its interpretation of “compulsion” in subsequent decisions, the objective compulsion test set out by the *Miranda* Court has morphed into a subjective voluntariness test. See Godsey, *supra* note 20, at 505–15. Part II.A considers the proposed modifications under the original compulsion theory. Part II.B considers the proposed modifications under a voluntariness standard.

88. See *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

89. See 384 U.S. at 468–69.

because they erroneously conclude that their silence will be damning and will have penalizing implications.<sup>90</sup> This fear of penalty, or pressure to speak to avoid this implication, constitutes compulsion as described in *Miranda*.

In order to fill this glaring hole that the past four decades have illuminated, a new right to silence warning should be added. This warning should state something to the effect of: "If you choose to remain silent at the beginning or at any time during the interview, your silence will not be used against you as evidence to suggest that you committed a crime simply because you refused to speak."

The right to counsel warnings, on the other hand, were designed primarily to ensure that the suspect could have a champion for her rights who would keep her from becoming too intimidated to invoke her right to remain silent as the interrogation progressed, so that she would maintain a "continuous opportunity to exercise" her right to remain silent.<sup>91</sup> Forty years of experience has demonstrated that the right to counsel warnings do not serve this purpose.<sup>92</sup> Suspects who invoke the right to counsel are not supplied with an attorney, and none of the benefits listed in the *Miranda* decision are realized. The right to counsel warnings act in practice as a restatement of the right to remain silent in a different form which, cumulative in nature with the first two warnings, offer the suspect a second means of terminating the interrogation. None of the coercion-dispelling benefits that the *Miranda* Court imagined have come to fruition in the rough-and-tumble world of the stationhouse interrogation room.

One can argue that while the right to counsel warnings have not had their intended effect, they still work to dispel coercion in other ways.<sup>93</sup> For example, a suspect undergoing in-

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90. See *supra* Part I.B.2.

91. *Miranda*, 384 U.S. at 467.

92. See *supra* Part I.C.

93. In 1965, Professor Yale Kamisar set forth an equal protection theory for the right to counsel warnings. See Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, From Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME* 3–11, 64–81 (A.E. Dick Howard ed., 1965); see also George C. Thomas III, *Separated at Birth But Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1092 (2001) (summarizing Kamisar's equal protection theory). Under Kamisar's equal protection theory, one could arguably find a legitimate home for the right to counsel warnings. Indeed, a wealthy suspect undergoing custodial interrogation might more naturally request counsel on

terrogation might not realize that her *Miranda* right to counsel is in reality an empty promise, and the false belief that she has a right to an attorney (if she so chooses) might make her feel more confident in the interrogation room.<sup>94</sup> Also, when a suspect invokes her right to counsel, the rules regarding when the police can reengage the suspect are more protective than when a suspect merely invokes the right to remain silent.<sup>95</sup> Thus, the

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her own. For example, she may have previously retained an attorney for such occasions who had earlier advised her to “lawyer up” if the police attempt to question her. Advising indigent suspects that they are entitled to the services of an attorney for free, therefore, would theoretically put such suspects on equal footing with their more affluent counterparts, because it informs them that this possibility exists for them as well. One problem with this argument, however, is that counsel is not in fact provided during interrogations for rich or poor, as interrogations typically terminate when the right to counsel is invoked. The counterargument is that because wealthy suspects will often already have counsel and may have been advised to invoke that right by their attorney, they have a greater ability to terminate interrogations through this method than do indigent suspects to whom, without being told that the services of an attorney are free of charge, the idea of demanding the presence of counsel might seem fanciful. Thus, Kamisar’s equal protection theory provides some support for the right to counsel warnings.

94. See O’Neill, *supra* note 69, at 874 n.100 (stating that suspects are often unaware that the *Miranda* right to counsel is illusory, and falsely believe that if they request an attorney, the police will provide one for them).

95. See Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 88–89 (1989) (discussing varying rules for when a suspect invokes the right to counsel as opposed to the right to silence, and stating: “Subsequent cases have, however, treated these two prongs somewhat differently. Invocation of the right to silence has not resulted in either a per se prohibition of further interrogation or any other measures designed to overcome the effects of continued detention and resumption of questioning. All that appears to be necessary, at least when the resumed questioning relates to another crime, is a renewed warning after a relatively brief respite. When, however, the defendant asks for an attorney, the police cannot initiate further interrogation as to either that offense or an unrelated crime. Although it is true that the Court perhaps has been too eager to find suspect-initiated interrogation, it also has ruled that once a suspect requests counsel, her subsequent responses cannot be used to show that the initial request for counsel was ambiguous. The difference in treatment of these two facets of the *Miranda* warnings may reflect that the *Miranda* Court itself was more explicit about the effect to be given a suspect’s request for a lawyer, or that the Court traditionally has been more protective of the right to counsel than of the right to remain silent.”). In addition, one could argue that the right to counsel warnings reduce coercion by providing the suspect with a less confrontational, and thus preferred, method of invoking the right to remain silent. Indeed, it may be easier for some suspects to assert that they would like to talk to an attorney rather than to simply stop talking. While this is undoubtedly a valid point, the coercion-lessening benefits of this reality are not as extensive as the Court envisioned in *Miranda*, and I believe that the policies behind the right to counsel warnings could be better effectuated by moving in a

argument goes, the right to counsel warnings still provide some protections to suspects undergoing custodial interrogation that lessen the coercion to some degree.

One could further argue that in some rare instances when a suspect invokes the right to counsel, an attorney is in fact provided and the interrogation ensues with the attorney present. In those cases, the benefits of the presence of counsel delineated in *Miranda* are present. Indeed, if the police have a strong case against a suspect but are interested in affording her leniency in order to convince her to cooperate against other potential suspects, the police may prefer to have a criminal defense attorney with her in the interrogation room. In instances where the police and prosecutors are willing to offer immunity or an incredible deal to a suspect if she implicates others, a criminal defense attorney can be helpful to the police because he will explain to the suspect that she is in a lot of trouble and that what is being offered is too good to pass up.<sup>96</sup>

The problem with this argument in favor of the right to counsel warnings, however, is that this same benefit could be obtained in situations where the suspect is not warned of her right to counsel and likewise refuses to cooperate. In such an instance, if the police believe the suspect is making a mistake that is not in her best interest, they can advise her that she should get an attorney—and even obtain one for her—so that the attorney could explain why talking might be in her best interest.<sup>97</sup> In other words, because the police and the suspect's interests align in this context, the police will attempt to obtain

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new direction.

96. When I served as an Assistant United States Attorney, in many instances we sought to arrest several members of a conspiracy and enlist one of them to cooperate and testify against the others in exchange for possible leniency. In such instances, we would identify one conspirator to approach or arrest first, with the hope of convincing her to cooperate and testify against the others or agree to record conversations with those conspirators still on the street and unaware of the investigation. When that scenario presented itself, we often invited the suspect to request counsel as soon as we approached her or as soon as she indicated an unwillingness to cooperate. When the incriminating evidence against this suspect was revealed to her defense counsel, along with the government's willingness to "cut a deal" with her in exchange for cooperation, defense counsel almost invariably recognized that waiving *Miranda* rights and cooperating with the government was in the client's best interest. Thus, the presence of counsel worked in favor of both the suspect and the prosecution.

97. Indeed, when the scenario described in the preceding footnote occurred, the government would often have a prearranged plan to invite the suspect to invoke counsel, as the presence of counsel was seen as beneficial. Thus, suspects will be provided with counsel in these situations regardless of

interests align in this context, the police will attempt to obtain an attorney for the suspect regardless of whether or not she has been advised of her right to counsel.

The fact remains, however, that in most interrogation scenarios, the right to counsel warnings provide none of their intended benefits, and most of the unintended coercion-lessening benefits provided by the warnings are minimal or speculative at best.<sup>98</sup> The *Miranda* Court required the right to counsel warnings primarily because the presence of counsel would ensure that suspects undergoing custodial interrogation have a “continuous opportunity to exercise” the right to remain silent.<sup>99</sup> This policy interest could perhaps be more effectively achieved when analyzed under a “compulsion” analysis of *Miranda* by replacing the right to counsel warnings with a new warning: “If you choose to talk, you may change your mind and remain silent at any time, even if you have already spoken.” This warning directly informs the suspect that just because she has decided to talk, that fact does not mean she cannot invoke her right to silence later if she begins to feel uncomfortable with the direction of the interrogation. This warning would, in part, play the role that her attorney would play in the interrogation room by reminding her that she can invoke her right to silence even after she has given a partial statement. The need for such a warning is so apparent that even some law enforcement agencies have recognized its absence from the *Miranda* equation, and have recited a warning of this nature to suspects even though they are not required to do so by law.<sup>100</sup>

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whether the police are required by law to advise them of their right to counsel, as it is in the best interest of the police to do so.

98. The strict rules regarding reinitiating interrogation when a suspect invokes the right to counsel are substantial, *see* *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981), but these rules would still apply when the suspect is advised only that she has a right to remain silent but nevertheless asks for an attorney. Indeed, suspects ask for attorneys in some instances even when not advised of that right. *See, e.g., Escobedo v. Illinois*, 378 U.S. 478, 479–82 (1964) (involving a suspect who requested counsel during interrogation even though he was not advised of that right).

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

100. For example, in *Duckworth v. Eagan*, 492 U.S. 195 (1989), the officer in question used a standard waiver form created by his local police department which informed suspects that they could stop answering questions at any time, even if they had already answered some questions. *Id.* at 198. In addition, a prominent web-based company that sells equipment to police departments across the country advertises a “virtually indestructible” *Miranda* warning card which includes this “fifth” and additional warning: “You can decide *at any time* to exercise these rights and not answer any questions or make

The coercion could be further dispelled if the police were required to remind her of her right to silence and her right to terminate questioning at any time at intervals throughout the interrogation. A rule could be constructed that would require the police to obtain a written waiver of the right to remain silent, for example, at the beginning of each hour of interrogation. The suspect and the interrogator would sign the waiver form at the beginning of the interrogation, and each would place their initials next to the time of day at each interval at which the re-recitation of the rights took place.<sup>101</sup> This procedure would be far more effective in ensuring that suspects have a “continuous right to exercise” their right to remain silent throughout the duration of the interrogation than the illusory right to counsel warnings. While perhaps not as effective as having her own attorney remind her of this right at periodic intervals, the reality is that defense attorneys do not perform this function as *Miranda* currently operates.<sup>102</sup> A requirement that the interrogation must have periodic breaks where the suspect is reminded of her rights would reinforce the notion that she can invoke her right to silence at any time, and provide her with orchestrated lulls in the action. During these breaks, the suspect could collect her thoughts and reconsider her initial decision to talk.

In addition to ensuring that the suspect has a continuous right to exercise the right to remain silent, the *Miranda* Court listed some secondary functions of the right to counsel warn-

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any statements.” Advertisement, Chief Supply, *Miranda* Warning Card, [www.chiefsupply.com/miranda.phtml](http://www.chiefsupply.com/miranda.phtml) (last visited Mar. 3, 2006). The standard *Miranda* card used by the FBI includes a similar warning: “If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time.” See F.B.I. Advice of Rights Form FD-395 (Feb. 28, 1997) (on file with author).

101. Most law enforcement agencies have preprinted cards containing the *Miranda* warnings. When a suspect is Mirandized, an officer reads the warnings on the card to her, and if the suspect wishes to waive her rights and answer questions, she is required to sign and date the card. Because this procedure is already in widespread use across the country, it would not be difficult to add a requirement that the suspect place her initials and time of day on the card to verify the additional times during the interrogation at which she was re-advised of her rights.

102. An obvious alternative to the procedures set forth herein that might fulfill policies behind the right to counsel warnings would be to require police to actually provide attorneys to suspects during all custodial interrogations. Because such a rule would so significantly undermine the ability of the police to conduct interrogations, I do not consider this option to be a politically realistic alternative.

ings. Namely, that law enforcement officers would be less likely to engage in third-degree tactics if a criminal defense attorney were present; that if officers did engage in such conduct, the defense attorney would be a witness to it; and finally, that the defense attorney could ensure that his client gave an accurate statement to the police and that the officers properly memorialized what was said, rather than spinning it in a way more helpful to their case.<sup>103</sup> Again, the right to counsel warnings do not perform these intended functions, as the notion of counsel being present in the interrogation room has proved an illusory concept in practice.<sup>104</sup>

These subsidiary functions of the right to counsel warnings could be achieved, however, by prophylactically requiring the police to videotape custodial interrogations.<sup>105</sup> Police officers would obviously be less likely to engage in third-degree tactics if they knew their conduct was being recorded and might be viewed by a judge or jury at a later time.<sup>106</sup> In addition, a videotape of the interrogation would be the best evidence of exactly what the suspect said during the interrogation, leaving no room for creative interpretation.<sup>107</sup>

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103. *Miranda*, 384 U.S. at 470.

104. Another obvious option to cure this problem would be to actually require the physical presence of defense counsel, either by the Fifth or Sixth Amendments, in the interrogation room during all custodial interrogations. Although this is certainly a defensible alternative, it would essentially signal the end of custodial interrogation in this country. Because custodial interrogation, when executed properly, is a very important tool for solving serious crimes, I would not support this alternative. Nor do I think that it is remotely feasible from a political standpoint. The Warren Court was not willing to go that route in *Miranda*, and the current Court certainly would not either. Thus, I recognize this option as a viable alternative but make the assumption in this Article that it is not a realistic option at the present time.

105. This requirement could be created as a prophylactic rule to enforce the Self-Incrimination Clause, or as a requirement of substantive due process. See Leo, *supra* note 2, at 681–92 (arguing that substantive due process requires videotaped interrogations).

106. See Joëlle Anne Moreno, *Faith-Based Miranda?: Why the New Missouri v. Seibert Police “Bad Faith” Test Is a Terrible Idea*, 47 ARIZ. L. REV. 395, 417 (2005); see also Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 628 (2004) (suggesting that the videotaping requirement would force police to “keep their own behavior in check”); Leo, *supra* note 2, at 683 (asserting that police officers would “be more self-conscious about their conduct” were interrogations videotaped).

107. See Moreno, *supra* note 106, at 417 (stating that “[J]udges will make more accurate pretrial decisions when they can examine the most objective

Videotaping interrogations was not a realistic possibility at the time *Miranda* was decided but, of course, it is today.<sup>108</sup> While a videotaping requirement raises its own issues such as cost and practicality, several states have adopted this requirement through legislation or court decision,<sup>109</sup> and many more states are currently considering bills mandating taped interrogations.<sup>110</sup> While an exploration of precisely how a videotaping requirement would work would be an article in and of itself and thus is beyond the scope of this Article, suffice it to say that videotaping has been successfully employed in several states and, when administered with flexibility, has proven to be a helpful solution that would nicely complement the proposals set forth in this Article. Indeed, the proposed modifications to the *Miranda* warnings set forth herein, when coupled with a requirement for videotaped interrogations, satisfy the various policy objectives underlying the Self-Incrimination Clause that the *Miranda* Court unsuccessfully attempted to achieve.

In sum, when analyzed through the lens of *Miranda's* original compulsion theory, and in light of legal developments

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and comprehensive factual evidence available,” and that “[v]ideotapes . . . reduce or eliminate problems of biased testimony, faulty or incomplete memories, and influential factors such as inflection and body language that cannot be transcribed.”); *see also* Drizin & Reich, *supra* note 106, at 622–28 (discussing procedural and evidentiary advantages of taped interrogations requirement); Leo, *supra* note 2, at 681–92 (discussing benefits of videotaped interrogation requirement).

108. *See* Moreno, *supra* note 106, at 417 (“Obviously, neither the Framers, nor the Warren Court, could have anticipated the myriad technological developments that have transformed criminal investigations and prosecutions. Videotape recorders provide a simple, inexpensive mechanism that, in effect, can expose the actions of the police by transporting a judge back in time, enabling her to watch the interrogation.”); *see also* Leo, *supra* note 2, at 681–82 (discussing fact that police departments already have the technological capability to videotape interrogations). State legislatures and scholars have debated the various issues that arise with videotaping, such as cost and the availability (or lack thereof) of video cameras during unanticipated or emergency questioning of suspects. *See* Leo, *supra* note 2, at 684–86 (discussing and rejecting various arguments against videotaping interrogations).

109. *See* Moreno, *supra* note 106, at 418 & nn.195–200 (observing that mandatory videotaping of all custodial interrogations is required in Alaska and Minnesota by judicial decision, and that recording of certain types of interrogations is required in Illinois, Maine, Texas, and the District of Columbia by statute).

110. *See id.* at 418 & nn.176–94 (noting nineteen states that introduced bills mandating videotaping and/or audiotaping of interrogations in 2004 and 2005); *see also* Drizin & Reich, *supra* note 106, at 639–45 (discussing the growing trend of jurisdictions requiring videotaped interrogations).

and knowledge gained over the past four decades, the *Miranda* warnings have not achieved their stated goals. Suspects waive their rights and talk to the police at a surprisingly high rate because the inherent compulsion has not been fully dispelled. The *Miranda* Court mistakenly believed that what it later called an “implicit promise”—that the decision to remain silent carries no penalty—would register with suspects, but history has proven that it does not. In order to effectuate the intended purpose of the warnings, a new warning should be added which expressly advises suspects that their silence carries no penalty.

In addition, the right to counsel warnings do not perform their intended function. The policies underlying these warnings could be better served by: (1) informing the suspect that she can choose to remain silent at any time, even after she has started talking to the police; (2) requiring interrogators to reinform the suspect of her rights at periodic intervals during lengthy interrogations; and (3) requiring that the police videotape custodial interrogations.

#### B. THE IMPACT OF MODERN DEVELOPMENTS ANALYZED UNDER THE DUE PROCESS VOLUNTARINESS THEORY

In previous articles, I have thoroughly documented how the Court, in the last four decades, has slowly moved away from *Miranda*'s original compulsion theory as the underlying justification for the warnings.<sup>111</sup> Instead of requiring the warnings to dispel inherent coercion as described in the *Miranda* decision, the Court now uses the warnings as a prophylactic rule to make easier the task of determining the “voluntariness” of a confession in the due process sense of that term.<sup>112</sup> If *Miranda* warnings were provided and waived prior to the confession, the confession is seen as presumptively voluntary.<sup>113</sup> If warnings were not provided and waived, then the confession is consid-

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111. See Godsey, *supra* note 6, at 1734–52; Godsey, *supra* note 20, at 505–15; Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851, 863–67 (2003).

112. See Godsey, *supra* note 20, at 505–15.

113. *Id.* at 513 & n.267 (citing *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984), for its observation that “[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare”).

ered involuntary and inadmissible.<sup>114</sup> In other words, the Court has unmoored the warnings from the *Miranda* concept of compulsion, and now considers them a first-step litmus test for determining the voluntariness of a confession.<sup>115</sup>

The voluntariness test that now underpins the warnings has been described by the Supreme Court in *Schneckloth v. Bustamonte*.<sup>116</sup> The test considers the totality of the circumstances in determining whether a suspect's will was overborne by police conduct.<sup>117</sup> It is a highly subjective test that considers not only the governmental conduct involved, but characteristics unique to the suspect, such as age, background, strength of character, and mental condition at the time.<sup>118</sup> The primary focus of the test is on the state of mind of the suspect. Objective factors, such as the pressure applied by the police, are relevant, but only in respect to the effect such pressures had on the mind of the particular suspect under interrogation.<sup>119</sup> Theoretically, therefore, a particularly hearty suspect could be deemed to have made a voluntary statement in the face of enormous pressure, while a particularly weak suspect could be deemed to have made an involuntary statement in response to much lighter pressures.<sup>120</sup>

Despite this change in underlying rationale, the Court has not reconsidered whether the warnings fit with, and are appropriate for, the voluntariness test it now espouses. Stated another way, the warnings were designed with a specific compulsion theory in mind, as delineated in the *Miranda* decision. The compulsion theory of *Miranda* was objective in nature,<sup>121</sup> and the *Miranda* Court arrived at its warnings by merely adopting

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114. *See id.* at 508.

115. *Id.*

116. 412 U.S. 218, 225–26 (1973).

117. *Id.* at 225; *see also* Godsey, *supra* note 20, at 468–69. *See generally* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997) (discussing the history of the privilege and the involuntary confession rule).

118. *Schneckloth*, 412 U.S. at 226; *see also* Godsey, *supra* note 20, at 468–69.

119. *See* Godsey, *supra* note 20, at 491.

120. *See* Yale Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728, 755–57 (1963) ("For if the Court means what it has said on a number of occasions, the 'voluntariness' test causes constitutionally permissible police interrogation to vary widely, according to the particular defendant concerned.").

121. *See* Godsey, *supra* note 20, at 502.

verbatim the set of warnings that the FBI had started providing to suspects two years prior to its decision.<sup>122</sup> While the test underlying the warnings has morphed through time from an objective compulsion standard to a highly subjective, all-encompassing voluntariness test, the Court has not addressed whether this transformation should carry with it a modification of the warnings to better serve the new standard that the warnings are now intended to complement.

The purpose of this Part, therefore, is to consider how the warnings might be reconstructed if the Court were to start from scratch and design them with a subjective voluntariness test rather than objective, *Miranda*-style compulsion as the underlying touchstone.

In the voluntariness paradigm, the recitation and waiver of *Miranda* warnings creates a presumption that the resulting confession was voluntary. In order for courts administering this presumption to have confidence that the warning-and-waiver procedure actually leads to voluntary confessions in most instances—thus making this presumption sound and meaningful—a logical connection should exist between the concept of voluntariness and the content of the warnings themselves. In other words, a prophylactic warning system designed to ensure voluntariness should be designed in large part to remove from consideration the factors that might cause a suspect to speak involuntarily. If a court knows that the warnings have rendered those considerations irrelevant, it can then feel confident that the resulting confession was made voluntarily.

To be effective, therefore, the warnings should rid the suspect's mind of pressures that she fears might be lurking, but that will not come to pass because of her constitutional rights. At the outset of custodial interrogation, a suspect might have fears that, if not relieved, could substantially contribute to an involuntary confession during the course of an interrogation. Examples include: What will happen if I talk? What will happen if I refuse to talk? Will I be tortured? Must I answer questions because I will be presumed guilty if I refuse? If I start to talk, am I stuck talking, or can I change my mind later? If I talk, will the police be able to twist my words and claim I said something that I didn't really say? If I don't talk, will they question me for hours on end until I tell them what they want to hear? If the police do something bad to me like hit me or de-

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122. *Miranda v. Arizona*, 384 U.S. 436, 483–86 (1966).

prive me of food to get me to talk, will they be able to get away with it because it will be my word against their word?

The voluntariness test is so broad that no list of uninformed fears could be complete or tailored to fit the unique vulnerabilities of each suspect.<sup>123</sup> Nevertheless, a prophylactic rule designed to promote voluntariness should be designed to alleviate as many of these ill-founded fears as reasonably possible. Doing so would permit courts deciding the admissibility of a confession applying a voluntariness test to feel comfortable that the suspect spoke from her own free will and not as a result of these hypothetical fears having overborne her will in cases where warnings were administered and waived. With this goal in mind, this Article proposes the following warnings as illustrative of one potential set of warnings that would more accurately trigger the presumption of voluntariness than the current warnings:

*Introductory Remarks*

You have a number of important constitutional rights that protect you when law enforcement officers ask questions of you. These rights ensure that police interviews are conducted in a civilized and humane manner and that if you talk, it is a choice made by you on your own free will.

*The Right to Remain Silent*

First and foremost, you have a right to remain silent. This means, of course, that you do not have to talk to us.

*Implications of Remaining Silent*

If you choose to remain silent at the beginning or at any time during the interview, you will not be penalized in any way for doing so. You will not be physically harmed or punished, you will not be deprived of any benefits or privileges, and your silence will not be used against you in court to suggest that you have something to hide and must therefore be guilty.

*Implications of Talking*

If you choose to talk, anything you say will be used against you in a court of law. If you choose to talk, you may change your mind and remain silent at any time. In other words, we will honor your request to remain silent at any time, and this interview will last no longer than you wish it to last. We also, as required by law, have already started videotaping our entire interview with you, and this tape will be admissible in a court of law by you or by law enforcement to prove what was said and what happened during this interview.

From the outset, it is important to note the absence of right to counsel warnings in this hypothetical set of warnings. While

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123. See Godsey, *supra* note 20, at 468–70 (describing the breadth of the voluntariness test).

the right to counsel warnings may have a civilized and “feel good” quality to them, they do not, as discussed above in Part I.C, play a significant role in practice.<sup>124</sup> While including right to counsel warnings would not undermine the policies of the voluntariness test, the policies underlying these warnings could be better supported in other ways, as described below.<sup>125</sup>

The first category of warnings above consists of introductory remarks summarizing the applicable rights in plain and clear language. Indeed, if ensuring voluntariness is the goal of the warnings, a suspect should be advised at the outset that the interrogation will be conducted in a civilized and humane manner, and that she need answer questions only if she decides to answer on her own free will. This statement would set the proper tone and inform the suspect that the police will act in a professional manner. Moreover, this introductory statement is helpful because it is not couched in terms of “rights” or legal jargon, as are the remaining warnings, but acts as an easily understandable summary of the more detailed warnings to follow. This statement, therefore, acts in a straightforward way to relieve fears of improper coercion, setting the stage for a discussion in which the suspect will be able to speak on her own free will if and when she decides to talk.

The next warning advises the suspect of her right to remain silent and is followed by two additional warnings that explain what it means to say that silence is a “right.” The third warning, therefore, provides a complete description of the consequences, or lack thereof, of choosing to remain silent. Regarding silence, this warning should fully disabuse the suspect of the notion that she will be penalized if she chooses to remain silent, thus removing this instinctual fear that research has shown is ever present in her mind. Rather than leaving the suspect guessing as to what a “right to remain silent” means, the warnings should adequately explain, in plain language, what it means to say that her choice to remain silent is a

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124. I am by no means hostile to the inclusion of right to counsel warnings in *Miranda*'s prophylactic structure. However, if one applies the same scrutiny to the right to counsel warnings that one does when considering whether new warnings should be added, the weight of the arguments leans against their inclusion. As a compromise, I would agree to remove the right to counsel warnings in exchange for adding the modifications to the warnings proposed in this Article.

125. For an argument that the right to counsel warnings could be supported under an equal protection theory, see *supra* note 93. See *supra* note 104 for a discussion of another alternative.

“right.” She will not be tortured, she will not lose benefits or privileges, and her silence will not be used against her in court.

In the same vein, the warnings proceed in the next section to fully advise the suspect of what will happen if, on the other hand, she chooses to speak. She must be informed at the outset that her statements can be used against her in a court of law, so that she understands the implications of her choice. The warnings must continue by informing her that if she chooses to speak, she can still invoke her right to silence at any time thereafter as the interview progresses. This statement, coupled with a requirement that the police repeat the warnings at periodic intervals during lengthy interrogations, would help play the role that defense counsel would play if present. This procedure would protect against her will becoming overborne as the interrogation progresses and as the initial warnings fade into the recesses of her mind.

Finally, the police should be required to videotape the interrogation and inform the suspect that if she speaks, the entire interview will be recorded. A suspect who knows that the interrogation is being videotaped and that the videotape will be admissible in court, will have substantially less fear that the police will engage in third-degree tactics, and will know that her statement will be accurately recorded. Because the voluntariness test considers the totality of the circumstances, videotaping provides the perfect prophylactic safeguard, as it captures the nuances and subtleties of interrogations that courts currently struggle to reconstruct at suppression hearings.

The hypothetical set of warnings above illustrates that because of the voluntariness test’s breadth, a wide variety of warnings could be considered as part of a warnings requirement. The set of warnings constructed above is by no means intended to represent the ultimate solution to the voluntariness quagmire.

Whether or not the Court ever completely reconstructs the warnings in a manner similar to the hypothetical warnings suggested above, the specific modifications this Article suggests are helpful to a voluntariness analysis. For example, informing a suspect that her silence will not be used against her directly supports the goal of a voluntariness standard. Just as fear of a penalty for remaining silent could constitute compulsion, a suspect’s erroneous fear that she *must* speak or she will otherwise be damned could be an important factor that, along with other pressures, could easily cause a suspect to speak involun-

tarily. Informing a suspect that her silence will not be used in this manner, therefore, removes that factor from consideration. The presumption of voluntariness that is currently made with the recitation and waiver of *Miranda* warnings would be more complete and sound were this warning added to the litany.

The remaining modifications, for the reasons stated, also do a better job of capturing the policies and concerns of the voluntariness test than do the current *Miranda* warnings. Courts employing this updated version of the warnings, including a videotaping requirement, could feel more confident that after these warnings have been provided to a suspect and waived, the presumption of voluntariness that attaches to the resulting confession is more clearly and logically justified than the same presumption that arises under the current rendition of the warnings.

In sum, the current warnings were designed with an objective compulsion theory in mind, and the *Miranda* Court essentially copied verbatim the warnings that the FBI had been using for two years prior to its decision. The Court at that time did not create the warnings with the all-encompassing, highly subjective voluntariness test in mind that it now employs. The modifications to the prophylactic warning procedure proposed in this Article would be better suited to trigger the voluntariness presumption than the outdated warnings currently in use.

### C. THE IMPACT OF MODERN DEVELOPMENTS ON THE WARNINGS ANALYZED UNDER THE DUE PROCESS NOTICE THEORY

Leading *Miranda* scholar George C. Thomas III has argued that the *Miranda* warnings are presently best justified under the Fourteenth Amendment “due process notice” cases.<sup>126</sup> Thomas argues that in many instances the Fourteenth Amendment’s Due Process Clause requires the government to provide notice to citizens before it attempts to deprive them of a liberty interest.<sup>127</sup> Thomas further argues that suspects have a liberty interest in not being subjected to custodial interrogation and a separate liberty interest in making an informed choice as to

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126. See Thomas, *supra* note 93, at 1091, 1112–17. Examples of Fourteenth Amendment “due process notice” cases that Thomas refers to include *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988), *Wolff v. McDonnell*, 418 U.S. 539 (1974), *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). See Thomas, *supra* note 93, at 1109 n.127, 1113 nn.145–46, 1114 n.147.

127. Thomas, *supra* note 93, at 1091, 1113–14.

whether to answer police questions.<sup>128</sup> Because the Self-Incrimination Clause is not self-implementing, the due process notice cases require the government to (1) warn a suspect of rights relevant to custodial interrogation that are found within, or derived as prophylactic rules from, provisions in the Bill of Rights, and (2) provide her with sufficient information about those rights and rules so that she can invoke them and effectively contest the deprivation of a liberty interest if she so desires.<sup>129</sup>

Although Thomas argues that the due process notice cases provide the best justification for the *Miranda* warnings, he has not yet deeply delved into the issue of whether the *content* of the warnings should change were the Court to openly adopt this theory.<sup>130</sup> An adoption of the due process notice doctrine for *Miranda*, however, would certainly require a reformulation of the warnings tailored to fit that theory. Indeed, the current warnings are not up-to-date because they fail to adequately apprise suspects of *all* the applicable rights and prophylactic rules of custodial interrogation, some of which were not recognized until after the warnings were originally crafted. Nor do the current warnings provide suspects with sufficient information to make an “informed choice,” as the consequences of remaining silent, for example, have been clarified post-*Miranda* without updating the warnings to reflect such change.

Viewed through this due process notice theory lens, it is clear that a suspect would need to be notified at the outset, as the *Miranda* warnings currently do, of her right to remain silent under the Self-Incrimination Clause. In addition, however, in order to make an informed choice as to whether she should speak or remain silent, the warnings would need to adequately

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128. *Id.* at 1112–14; see also Susan R. Klein, *Miranda's Exceptions in a Post-Dickerson World*, 91 J. CRIM. L. & CRIMINOLOGY 567, 570–72 (2001) (summarizing and challenging Thomas's due process notice theory). Thomas also identifies a third liberty interest relevant to custodial interrogation: the right not to reveal secrets to the police. Thomas, *supra* note 93, at 1114–15.

129. See Thomas, *supra* note 93, at 1113–14 (discussing the fact that the due process notice cases require not only notice of rights, but also require the state to convey sufficient information about those rights for citizens to make an informed choice as to whether to challenge a deprivation of a liberty interest). For a thoughtful critique of Thomas's due process notice theory, see Klein, *supra* note 128, at 568–96.

130. See Thomas, *supra* note 93, at 1113–14 (recognizing that the content of the warnings might differ under a due process notice theory, but arguing, without significant discussion, that at a minimum the current warnings can be justified on that theory).

advise her of the consequences of both choices, an objective that the *Miranda* warnings currently do not achieve. Thus, warnings created under this theory might provide:

You have a right to remain silent. If you choose to talk, anything you say can and will be used against you in a court of law. If you choose to talk, you may change your mind and remain silent at any time. If you choose to remain silent, on the other hand, you will not be penalized in any way. You will not be physically harmed or punished; you will not be deprived of any benefits or privileges; and your silence will not be used against you as evidence to suggest that you committed a crime simply because you refused to speak.

Each of the “rights” above have been included in the hypothetical warnings because they are actual rights derived from the Court’s interpretation of the Self-Incrimination Clause, and thus would fall within the notification requirements of the due process notice cases. The first sentence, “You have a right to remain silent,” is a notification of the core right in the Self-Incrimination Clause.<sup>131</sup> The second sentence educates the suspect of the consequences of speaking so that she can make an informed choice—also a requirement of Thomas’s due process notice theory. The third sentence informs the suspect that speaking does not waive the right to remain silent, and can be invoked at any time. This warning also reflects a core rule that the Court has derived from the Self-Incrimination Clause.<sup>132</sup> The remaining language informs the suspect of the consequences (or lack thereof) of remaining silent. As described in detail above,<sup>133</sup> clear recognition that a suspect would suffer no penalty for remaining silent did not come until several years after *Miranda* was decided, and was not at that time added to the litany because the Court erroneously believed that it was “implicit” in the warnings.<sup>134</sup> Because this right clearly exists now and empirical findings suggest that it is not, from the perspective of most suspects, “implicit” in the warnings, it would be required under a due process notice theory so that the suspect could make an informed choice as to whether to challenge the deprivation of a liberty interest by invoking her right to remain silent.

The right to counsel warnings would not be included in the litany under a due process notice theory for several reasons.

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131. See *Miranda v. Arizona*, 384 U.S. 436, 467–68 (1966).

132. See *id.*

133. See *supra* notes 47–52 and accompanying text.

134. See *Doyle v. Ohio*, 426 U.S. 610, 618 (1976).

First, the Sixth Amendment right to counsel no longer applies during most interrogations.<sup>135</sup> Thus, no notice is required in connection with that specific provision. Second, no actual Fifth Amendment right to counsel exists during custodial interrogation even under a *Miranda* compulsion theory because invocation of the right to counsel works to terminate the interrogation rather than to supply the suspect with counsel.<sup>136</sup> Third, while the Court has retained the right to counsel warnings to date because it has not attempted to revamp the warnings in light of modern developments, the Court has undermined the “compulsion” theory that originally justified these warnings.<sup>137</sup> In addition, were the Court to reconsider the issue anew, the warnings would not be required under the current voluntariness standard that now underlies the warnings.<sup>138</sup> Finally, if the Court openly endorsed a due process notice theory to *Miranda*, the “compulsion” theory that originally justified the right to counsel during interrogations would be a dead letter, and such right to counsel would not be one of the existing rights for which notice is required.<sup>139</sup> Thus, because the Fifth Amendment right to counsel is illusory in practice, no longer finds clear validity in constitutional doctrine, and would be completely uprooted if the Court adopted a due process notice approach to *Miranda* while abandoning the compulsion theory that originally justified the right to counsel warnings, no warning relating to the right to counsel would be required.<sup>140</sup>

Thus far, all of the modifications suggested in this Article except two—the requirement to repeat the warnings at periodic intervals throughout lengthy interrogations and the requirement to videotape interrogations—would be implemented under a due process notice theory. At the present time, however, neither of these two remaining rules has been found by the

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135. See *supra* note 82 and accompanying text.

136. See *supra* notes 73–76 and accompanying text.

137. See *supra* notes 30–40 and accompanying text.

138. See *supra* notes 111–15 and accompanying text.

139. If the Court fully abandoned the compulsion and voluntariness theories and instead adopted a pure due process notice theory, the original “compulsion dispelling” justification for the warnings described in *Miranda* would no longer be applicable. See Klein, *supra* note 128, at 571–72 (arguing that Thomas’s theory requires an abandonment of the compulsion and voluntariness rationales of *Miranda*).

140. *But see* Thomas, *supra* note 93, at 1113 (stating, without discussion, that the right to counsel warnings would be included under a due process notice theory).

Court to derive from any provision in the Bill of Rights applicable to interrogations. Accordingly, they would not be part of a notice-based warning system. In the future, however, the Court could require these procedures under the Self-Incrimination Clause or notions of substantive due process.<sup>141</sup> If the Court were to rethink the prophylactic rules necessary to more effectively implement the voluntariness test, for example, these requirements would be logical additions to the mix for the reasons discussed in Part II.B.

In sum, nearly all of the modifications suggested in this Article find support under Thomas's due process notice theory of *Miranda*. Regardless of whether the Court justifies the warnings on a theory of compulsion, voluntariness, or due process notice, a substantial modification of the warnings is presently called for to bring them in line with contemporary law and understanding.

#### D. THE IMPACT OF MODERN DEVELOPMENTS ANALYZED UNDER THE OBJECTIVE PENALTIES THEORY

In a pair of recent articles, I set forth yet another modern justification for the Self-Incrimination Clause and *Miranda* warnings.<sup>142</sup> An analysis of the historical origins, text, and policies of the Self-Incrimination Clause suggests that it should be interpreted to ban police imposition of "objective penalties" on suspects to provoke speech or punish silence.<sup>143</sup> A complete description of the objective penalties test has been provided in prior articles and thus need not be rehashed in full here.<sup>144</sup> In short, an objective penalty is defined as any act or threat by the officer that changes a suspect's preinterrogation baseline or status quo to her detriment, if done by the officer to punish silence or provoke speech.<sup>145</sup> For example, depriving a suspect of food or water, taking away her cigarettes, or even threatening to remove her child from her custody could constitute an objec-

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141. Professor Leo has argued, for example, that videotaped interrogation should be made a requirement of substantive due process. *See* Leo, *supra* note 2, at 681–92. In addition, Professor Christopher Slobogin has argued that a videotaping requirement could be mandated under the Due Process Clause, the Self-Incrimination Clause, or the Confrontation Clause. *See* Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 309–22 (2003).

142. *See* Godsey, *supra* note 6, at 1735–52; Godsey, *supra* note 20 *passim*.

143. *See* Godsey, *supra* note 20 *passim*.

144. *See* Godsey, *supra* note 6, at 1735–52; Godsey, *supra* note 20 *passim*.

145. Godsey, *supra* note 20, at 515–40.

tive penalty if the circumstances indicate that it was done by the officer to provoke speech or punish silence.<sup>146</sup> This standard is derived in large part through application of the “formal setting” cases,<sup>147</sup> which establish that any penalty imposed on a suspect to provoke speech or punish silence violates the Self-Incrimination Clause, as it is inconsistent with a true right to remain silent.<sup>148</sup>

While the Court has at various times supported an objective penalties test for the Self-Incrimination Clause, its application has not been adopted in the interrogation context.<sup>149</sup> If this standard were adopted, however, *Miranda*-style warnings would play an important role in administering the test.<sup>150</sup> Although I have delineated the objective penalties test and described the general purpose of the warnings in prior articles, I have not yet addressed whether the content of the warnings would be modified were the Court to adopt this theory of constitutional confession law.<sup>151</sup> This Article presents the perfect opportunity to do so.

Simply stated, an objective penalties test would require a set of warnings that would enable a suspect to maintain her status quo with the police and thereby ensure that the interrogation itself does not become a penalty. Specifically, warnings would be employed as a prophylactic measure to ensure that the act of interrogation itself does not constitute an objective penalty.<sup>152</sup> The most obvious and frequent way in which the act of interrogation itself would constitute a penalty is when an interrogator continues to press the suspect for a particular answer that the suspect is unwilling to provide.<sup>153</sup> When this occurs, the officer’s persistent questioning might cause the suspect to believe that she must answer the officer’s questions

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146. *See id.*

147. *See, e.g.,* Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967); Griffin v. California, 380 U.S. 609 (1965).

148. *See* Godsey, *supra* note 20, at 492–95, 515–40.

149. *Id.* at 492–95, 516–17 (discussing a single case, *Garrity*, 385 U.S. 493, 496–500 (1967), in which the Court seemed to apply the objective penalties test in the interrogation context).

150. *Id.* at 528–30.

151. *Id.* at 530 n.320 (leaving open for a future article the question of what form the warnings would take under the objective penalties test).

152. *Id.* at 529–30.

153. *Id.* at 528.

in the desired manner or face uninterrupted harassment.<sup>154</sup> This restraint on freedom would be a penalty imposed by the officer in response to the suspect's exercise of her constitutional right to remain silent.<sup>155</sup>

To avoid this scenario, therefore, the warnings must make clear to the suspect at the outset that she has a right to remain silent, and that she can cut off questioning at any time and end the interview. This warning protects against the suspect choosing to talk simply to avoid the penalty of liberty-restraining pressure from the officer.<sup>156</sup>

In addition, because a reasonable suspect might fear that if she remains silent she will be penalized, the warnings must disabuse her of that notion. Absent the officer conveying this specific information, the suspect may talk for fear of a future penalty, such as physical abuse or the prosecution using her silence to infer guilt at trial. At the outset, therefore, the warnings would need to provide:

You have a right to remain silent. Anything you say can and will be used against you in a court of law. If you choose to talk, you may change your mind and stop talking at any time. If you choose to remain silent at the beginning or at any time during the interview, you will not be penalized or deprived of your rights in any way as a result of that choice. You will not be physically harmed or punished, you will not be deprived of any benefits or privileges, and your silence will not be used against you as evidence to suggest that you committed a crime simply because you refused to speak.

The remaining modifications to the warnings suggested in this Article would also be imperative for effective implementation of the objective penalties test. For example, creating a prophylactic rule that police officers must re-advise the suspect at

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154. *Id.*

155. *Id.*

156. *Id.* at 528–30. Under an objective penalties test:

*Miranda* warnings might not be required per se, but their application would be at the officer's discretion when he or she perceived the act of interrogation might begin to resemble a penalty. Because the officer who refrained from providing *Miranda* warnings in such a case would assume the risk that a court will later find that a penalty was imposed, the practice would certainly develop that officers would routinely provide *Miranda* warnings at the outset of almost any interrogation to be on the safe side. However, this flexible rule would free officers from having to provide the warnings in certain circumstances where it is not practicable or where they intend to ask only a few questions without pressuring the suspect or changing the suspect's baseline in any way.

*Id.* at 529 n.317.

periodic intervals throughout lengthy interrogations would ensure that the suspect has a “continuous opportunity to exercise” her right to remain silent. If she starts to feel intimidated or unsure of her ability to control her destiny in the interrogation room as the interview progresses, a reaffirmation of her unfettered ability to reinstate her preinterrogation status quo by invoking her right to silence would ensure that the act of interrogation itself does not begin to resemble a penalty. As a prophylactic rule, this requirement would directly support and reinforce the Self-Incrimination Clause’s ban on “objective penalties.”<sup>157</sup>

A prophylactic videotaping requirement would also be appropriate for an objective penalties test. Under the voluntariness test, as currently implemented, courts assume that a confession was made voluntarily if the *Miranda* warnings were provided and waived. As a result, courts provide very little oversight as to what goes on during interrogations after the *Miranda* waiver has been obtained.<sup>158</sup> The objective penalties test, however, requires courts to scrutinize an interrogator’s

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157. Although it has been included in the above recitation of warnings, it is difficult to justify the warning, “Anything you say can and will be used against you in a court of law,” under the objective penalties test. Perhaps the best argument for including this warning in the litany is that if a suspect is not advised of the consequences of speaking, she might choose to speak out of ignorance and thus provide evidence of guilt to the prosecution and, in the process, change her status quo to her detriment. Thus, the act of interrogation might constitute a penalty without this warning, as it would place her in a situation where severe consequences might follow, and where she is not armed with sufficient information to make a decision as to how to maintain her status quo vis-à-vis the state.

158. See Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 497 n.9 (2002) (citing a number of scholars in support of the proposition that “[i]t is now widely recognized that when the police follow *Miranda*’s procedural instructions by administering the warnings and obtaining a waiver, *Miranda* serves as a license, rather than an impediment, to secure usable confessions.”); Godsey, *supra* note 20, at 513; Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 752–54 (1987) (providing five examples of cases where courts have admitted involuntary confessions into evidence in marginal cases); William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 988 (2001) (noting that courts may tolerate more coercion because the burden is on defendants who have waived their rights to show they did not understand the warnings); Welsh S. White, *Miranda’s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1220 (2001) (“A finding that the police have properly informed the suspect of his *Miranda* rights . . . often has the effect of minimizing or eliminating scrutiny applied to post-waiver interrogation practices.”).

conduct throughout the entirety of an interrogation to determine whether a penalty was imposed at any time.<sup>159</sup> In some instances, this scrutiny requires knowledge of the precise statements made by the interrogator to the suspect to determine whether the interrogator threatened the suspect with a negative penalty, or, on the other hand, merely offered her a benefit in exchange for a confession.<sup>160</sup> Therefore, a videotaping requirement would be an essential prophylactic rule to effectively administer the Self-Incrimination Clause's objective penalties test. Instead of litigating a "swearing contest" between the police officer and the suspect concerning what happened in the interrogation room,<sup>161</sup> the court would have a clean record in the form of a video recording to efficiently resolve the factual disputes that naturally arise under this test.

Similar to the other theories explored in this Article, the right to counsel warnings would not be required in the objective penalties rubric. The objective penalties test does not attempt to measure the subjective state of mind of individual suspects under interrogation,<sup>162</sup> so the hypothetical coercion-lessening effects of the right to counsel warnings would not be relevant. While a suspect might assume that the interrogator will prohibit her from bringing her attorney into the interrogation room, this assumption does not constitute a penalty imposed by the interrogator to provoke speech or punish silence if the interrogator has done nothing to instill this fear. Indeed, if the interrogator has provided the suspect with the hypothetical warnings provided above and complies with the procedure set forth herein, then the suspect has been fully equipped with the ability to maintain her status quo. If she does not wish to speak for any reason—from a desire to have her attorney present to a desire to finish her dinner prior to talking—then she may cut off questioning without penalty.<sup>163</sup> The warnings designed herein are sufficiently broad to ensure that the suspect is fully aware that she is in the driver's seat and controls her own des-

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159. See Godsey, *supra* note 20, at 528–30.

160. *Id.* at 531.

161. See Drizin & Reich, *supra* note 106, at 624–25 (describing the "swearing contest" that takes place in court when interrogations are not recorded).

162. See Godsey, *supra* note 20, at 515–40.

163. If a suspect requests the presence of an attorney during the interrogation, then the strict rules of *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981), limiting the interrogator's authority to reinitiate the questioning, would apply in this context.

tiny with respect to the interrogation and the conditions under which she may agree to talk to the police.

#### CONCLUSION

Since *Miranda* was decided in 1966, courts and scholars have devoted very little substantive attention to the content of the warnings. In this time, however, much has changed. Empirical research and four decades of practical experience have demonstrated that the warnings do not fully achieve their intended policy objectives. The legal rights embodied in the warnings have been altered, with new rights being recognized and others falling into the background. In addition, the theoretical underpinnings of the *Miranda* decision have evolved as much as has the technological ability to regulate confession law through modern devices such as video cameras. During this time, the content of the warnings has remained static, failing to keep pace with the dramatic changes in its environs.

In this Article, I have attempted to open the debate about whether and how the *Miranda* warnings should be updated. I have proposed some specific modifications and set forth a format for evaluating potential modifications. This format first examines specific post-*Miranda* changes and developments in law and practical knowledge, and then asks whether modifications to the warnings to reflect such new developments make sense in light of the various justifications and theories of *Miranda* put forth by scholars and courts.

With *Miranda's* fortieth anniversary upon us, the time is ripe to debate this issue in depth to determine whether and to what extent the warnings need to be reformulated to once again make them consistent with the legal theories that justify their existence, and to make them more effective in enforcing and protecting the constitutional rights they were designed to serve.