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The jurisprudence on the use of police deception during interrogations is singularly unhelpful. Police may deceive in order to induce a suspect to confess, the courts tell us, unless they go too far. Police are permitted, for example, to feign sympathy for the suspect, lie about the existence of incriminating evidence, and falsely downplay the seriousness of the offense under investigation. But when police engage in other forms of deception, such as by offering false promises of leniency or misrepresenting the suspect's Miranda *rights, courts will balk and declare the resulting confession coerced. Yet neither courts nor commentators have successfully articulated why exactly the line is drawn where it is. Nor have they been able to prescribe how far the police may go with respect to other types of deception, such as misrepresentation of facts extraneous to the interrogation room, before they cross the line.*

Part of the reason is semantic. In other areas, the law distinguishes between coercion and deception. Coercion is generally thought of as depriving the actor of free will or, to put it more helpfully, putting the actor to an unfair choice of undesirable alternatives. But deception is different. Deception alters the actor's perception of her choices so that, while she perceives herself to be making a rational choice of the more attractive alternative, a rational actor would have decided differently if she were aware of the true facts. That is to say, while the person under duress is not acting of her own free will, the deceived person is exercising her free will to make a choice that is apparently, but not actually, in her best interests.

Thus, police deception is rarely coercive in the true sense of the word. During interrogation, the suspect's reaction to questioning can be seen as a continuous set of decisions on her part as to whether exercise or forgo the right to remain silent. When police lie about the strength of the evidence against the suspect or falsely promise leniency, the suspect still exercises free will to weigh the costs and the benefits of standing by the right to remain silent and to make a reasoned choice between exercising or forgoing that right. Police deception manipulates that choice by altering the perceived costs and benefits of standing by the right to remain silent, but it does so within a framework in which the suspect exercises free will. Thus, most police deception is noncoercive. Police deception is truly coercive only where, if the false information were true, the suspect would be deprived of the ability to make a fair choice, as where the police point an unloaded gun at the suspect's head.

The problem with most police deception is not that it is potentially coercive but that it is potentially fraudulent. And the key to evaluating noncoercive police deception is materiality, an

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element of fraud across many different contexts. A confession induced by noncoercive police deception should be suppressed if the deception relates to a fact material to the suspect's decision to confess. Such a fact is material if, but only if, a reasonable person in the suspect's position would have attached importance to the fact in deciding whether to exercise or forgo the right to remain silent.

This standard explains much of the caselaw in this area. While it might be common for police deception to induce confessions, it is rare that the deception would have caused a reasonable person, particularly one having just been informed of her rights, to speak. Only when, given the deception, a reasonable person aware of her rights would have chosen to forgo the right to remain silent and instead speak can we say that the confession was fraudulently induced and should be suppressed.

INTRODUCTION

When evaluating claims that a confession has been coerced, courts employ a "totality of the circumstances" standard[1] under the Due Process Clause of the Fourteenth Amendment.[2] Yet, today, a good many police interrogation tactics involve deception, including deception about the existence of incriminating evidence, deception about the adversarial role of the police, even deception about whether an official interrogation is taking place. Indeed, deception has largely replaced coercion as the key issue regarding the legality of custodial interrogation tactics.[3] One might say that deception is the new coercion. Yet, faced with claims that inducement of a confession through deception is constitutionally impermissible, courts generally fall back on the same due process standard they have used to determine whether certain tactics are coercive. Under this standard, courts rarely find deception to be impermissible, but they are unable or unwilling to articulate a useable standard for when police deception goes too far.

But deception is not coercion. The rhetoric of classic interrogation jurisprudence, with its emphasis on the "overborne will," is an ill fit for cases involving deception. Every other area of the law recognizes that deception is different from coercion. Coercion is thought to occur when another person deprives an actor of the free will to make a rational choice—that is, when it leaves the actor with an unfair choice between unattractive alternatives. Deception, by contrast, causes a person to exercise free will to make a seemingly rational choice based on false information, absent which the choice would have been different. Most deceptive police practices fall within the rubric of fraud. Far from being instances where the suspect was deprived of the free will to admit, deny, or refuse to answer, in most cases involving police deception, the suspect appears to have made a calculated decision, to have exercised free will, to confess in exchange for some perceived benefit. Only where statements by the police would be coercive irrespective of their truth or falsity can we say that the suspect has been coerced. But where a person makes a seemingly rational decision to provide information based on an illusory promise of a benefit, and a reasonable person in the situation would have done the same, we should call it fraud.

This view of deceptive interrogation practices is fortified by the Supreme Court's current approach to waiver of *Miranda* rights. Although the Court

1 *See* Dickerson v. United States, 530 U.S. 428, 434 (2000) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)) ("The due process test [for coercive interrogations] takes into consideration 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.'").

2 "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. This provision was first interpreted to bar coercive interrogation tactics in *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936).

3 *See* Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L. & SOC. CHANGE 35, 37 (1992) ("Psychological deception has replaced physical coercion as one of the most salient, defining features of contemporary police interrogation.").

has had a permissive attitude toward deception during the interrogation itself, the *Miranda* Court specifically condemned deception meant to trick a person into waiving her rights. But the Court has recently effected a subtle shift in its *Miranda* jurisprudence that posits waiver as a continuing process rather than a singular event. That is to say, every time a suspect in custodial interrogation who has been read her *Miranda* rights answers a question, she implicitly decides to waive[4] those rights rather than invoke or exercise them.[5] This view of waiver dovetails neatly with the view of police deception as potentially fraudulent rather than coercive; rather than depriving her of free will, police deception alters the internal cost-benefit analysis the suspect must make in order to decide whether to speak. Police deception is improper when it falsely skews the relative costs and benefits of speaking so that the suspect is fooled into forgoing rather than invoking or exercising her right to remain silent, and where a reasonable person under the circumstances would have come to the same conclusion.

This Article argues that, putting to one side police statements that would be coercive irrespective of their truth or falsity, police deception during interrogation is constitutionally intolerable if, but only if (1) it causes the suspect to falsely believe that the benefits of speaking outweigh its costs, and (2) a reasonable person in the suspect's position would have the same belief. The Article first and foremost seeks to explain current law. Examination of police deception cases reveals that courts generally follow the principle stated above even if they use the wrong terminology. The Article also argues that this principle makes the most sense given the evolution of *Miranda* doctrine that has grown up around the jurisprudence of coerced confessions.[6]

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4 It might seem odd to speak of "implicit waiver," given that the Court has told us that we cannot "presume a waiver of . . . important federal rights from a silent record." Boykin v. Alabama, 395 U.S. 238, 243 (1969). Outside the *Miranda* context, the Court has acknowledged "that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver," and suggested that "the term 'waiver' " should be reserved for those cases in which "one affirmatively renounces the protection of the privilege." Garner v. United States, 424 U.S. 648, 654 n.9 (1976); *see* Lawrence Rosenthal, *Compulsion*, 19 U. PA. J. CONST. L. 889, 928 (2017). Thus, it would be more accurate to say that a suspect who responds to police questioning but does not make an affirmative renunciation merely "forgoes" her rights rather than "waives" them. Nevertheless, in the *Miranda* context, the Court continues to equate forbearance with waiver. *See* Berghuis v. Thompkins, 560 U.S. 370, 388–89 (2010) (suspect who is made aware of his *Miranda* rights waives them by answering questions); *infra* subsection III.A.2. Therefore, this Article uses the terms "waive" and "forgo" interchangeably.

5 This Article adopts the implicit distinction the Court has drawn between the invocation of the right to remain silent and its exercise. A suspect invokes that right when she unequivocally tells police that she will not speak, *Thompkins*, 560 U.S. at 381–82, or that she will not speak without a lawyer present, Davis v. United States, 512 U.S. 452, 459 (1994). An invocation requires the police to stop interrogating, at least temporarily. By contrast, a suspect exercises the right to remain silent simply by remaining silent, and police may continue the interrogation.

6 This Article is certainly not the first to address deceptive interrogation practices by the police. It is, however, among a very few that attempt to explain current law. *See, e.g.*,

Thus, this Article's contribution to the existing literature is threefold. First, it recharacterizes police deception cases as falling outside of the framework of coercion and instead treats police deception as a variety of fraud. Second, it offers a concise explanation for much of existing law on police deception. Finally, it defends current law on police deception as consistent

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Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of* Miranda *Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157, 1157 (2017); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 803 (1989).

For articles advocating a more extensive or even complete constitutional ban on police deception during interrogation, see Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 967–78 (1997); Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 794–95 (2006); Gary Hamblet, Note, *Deceptive Interrogation Techniques and the Relinquishment of Constitutional Rights*, 10 RUTGERS-CAMDEN L.J. 109, 111–12 (1978); Dorothy Heyl, *The Limits of Deception: An End to the Use of Lies and Trickery in Custodial Interrogations to Elicit the "Truth"?*, 77 ALB. L. REV. 931, 932–33 (2013); Amelia Courtney Hritz, Note, *"Voluntariness with a Vengeance": The Coerciveness of Police Lies in Interrogations*, 102 CORNELL L. REV. 487, 489 (2017); Sean Janda, *Decision-Making During Interrogation: Towards a New Approach for Determining the Propensity of Deceptive Police Techniques to Produce False Confessions*, 43 LINCOLN L. REV. 79, 80–81 (2015–16); Rinat Kitai-Sangero, *Extending* Miranda*: Prohibition on Police Lies Regarding the Incriminating Evidence*, 54 SAN DIEGO L. REV. 611, 612 (2017); Louis M. Natali, Jr., Essay, *Can We Handle the Truth?*, 85 TEMP. L. REV. 839, 839 (2013); Andrea Reed, Note, *The Use of False DNA Evidence to Gain a Confession During Interrogation is Classic Coercion: Why Such Coerced Confessions Should Not Be Admissible in a Criminal Trial*, 104 KY. L.J. 747, 749 (2016); Daniel W. Sasaki, Note, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593, 1612 (1988); James G. Thomas, Note, *Police Use of Trickery as an Interrogation Technique*, 32 VAND. L. REV. 1167, 1201 (1979); Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1214 (1999) [hereinafter White, Miranda*'s Failure*]; Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 586 (1979) [hereinafter White, *Police Trickery*]; Katie Wynbrandt, Comment, *From False Evidence Ploy to False Guilty Plea: An Unjustified Path to Securing Convictions*, 126 YALE L.J. 545, 548 (2016); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425, 427 (1996). *See also* Robert P. Mosteller, *Police Deception Before* Miranda *Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEX. TECH L. REV. 1239, 1240–41 (2007) (advocating a ban on pre-warning deception).

For articles more or less defending the status quo, see Laurie Magid, *Deceptive Police Interrogation Practices: How Far is Too Far?*, 99 MICH. L. REV. 1168, 1172 (2001); Miller W. Shealy, Jr., *The Hunting of Man: Lies, Damn Lies, and Police Interrogations*, 4 U. MIAMI RACE & SOC. JUST. L. REV. 21, 38–43 (2014).

For articles making subconstitutional policy arguments for greater constraints on police deception, see Tonja Jacobi, Miranda *2.0*, 50 U.C. DAVIS L. REV. 1, 7–8 (2016); Phillip E. Johnson, *A Statutory Replacement for the* Miranda *Doctrine*, 24 AM. CRIM. L. REV. 303, 303 (1987); Irina Khasin, Note, *Honesty Is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*, 42 VAND. J. TRANSNAT'L L. 1029, 1032 (2009); Susan R. Klein, *Transparency and Truth During Custodial Interrogations and Beyond*, 97 B.U. L. REV. 993, 1002–3 (2017); Margaret L. Paris, *Trust, Lies, and Interrogation*, 3 VA. J. SOC. POL'Y & L. 3, 9, 44–45 (1995); Laura Hoffman Roppé, Comment, *True Blue? Whether Police Should be Allowed to Use Trickery and Deception to Extract Confessions*, 31 SAN DIEGO L. REV. 729, 732–33 (1994).

both with our understanding of fraud and with modern *Miranda* jurisprudence. Professor George Dix wrote forty-five years ago that "the use of deception to obtain a self-incriminating statement has caused the courts unquestionable discomfort; yet existing doctrine provides no adequate vehicle for concrete judicial expression of this attitude."[7] This Article takes up the task of providing such a vehicle.

Part I examines Supreme Court and lower court precedent on deceptive interrogation practices, separately analyzing several different overlapping types of deceptive tactics. Part II discusses some of the scholarly literature on the subject, which generally: fails to provide (or in most cases, even attempt to provide) a full account of why the law is what it is; places too much emphasis on reliability as a rationale behind constitutional constraints on interrogation; and does not offer a genuinely coherent and useable standard for when such practices are impermissible. Part III argues that deceptive interrogation practices are better examined under the rubric of fraud rather than coercion. It examines how this view fits in well with the Court's evolving jurisprudence on *Miranda* waiver. And it uses the standard articulated above to mostly justify lower court decisions on police deception during interrogation.

I. Police Deception During Interrogations

The Supreme Court has said remarkably little about deceptive police interrogation tactics. Although it criticized such practices in its landmark decision in *Miranda v. Arizona*,[8] it at the same time established the famous warnings-and-waiver protocol in order to arm suspects with information to help them stand up to such tactics. Thus, the *Miranda* Court seemed to presume that such practices would continue. Since then, it has approved of some deceptive interrogation tactics, such as confronting the suspect with false evidence of guilt and failing to disclose certain aspects of the interrogation itself. Lower courts have generally permitted deceptive police interrogation practices, except where the deception involves false promises of leniency, distorts the meaning of the *Miranda* warnings, or, sometimes, involves matters extrinsic to the offense, such as matters affecting the suspect's family. However, courts have failed to offer a principled approach to separating acceptable from unacceptable police deception.

A. The Supreme Court on Police Deception

Both before and after its landmark decision in *Miranda v. Arizona*, the Supreme Court addressed coercion in only a smattering of cases. In these cases, the Court made clear that police deception was acceptable as long as it, along with any other arguably coercive elements of the interrogation, did not overbear the will of the suspect.

7 George E. Dix, *Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions*, 1975 WASH. U. L.Q. 275, 321.

8 384 U.S. 436, 439 (1966).

In some cases, the deception took the form of a police stratagem that hid or downplayed the adversarial nature of the police-suspect relationship. For example, in *Spano v. New York*, the Court held a confession to have been coerced after police used a "false friend" stratagem.[9] Spano had called a childhood friend of his, Bruno, then "a fledgling police officer," shortly after the killing about which Spano was being questioned.[10] Bruno was later told by higher-ups to play on Spano's sympathy by pretending that Spano's phone call to him threatened his future career as a police officer, and consequently the financial security of Bruno's pregnant wife and their three children.[11] Bruno did so, leading to Spano's confession.[12] However, *Spano*'s precedential value on police deception during interrogations is limited, given that the Court relied on a whole host of other factors in concluding that Spano's will was overborne: Spano was "foreign-born," had limited schooling, was emotionally unstable, had no prior contact with the justice system, and was subjected to interrogation by a team of skilled questioners over the course of eight hours, in the face of Spano's repeated refusals to answer and requests to contact his attorney.[13] In this context, the use of Bruno to falsely extract sympathy was just "another factor which deserve[d] mention."[14]

A stratagem to hide the adversarial posture of the police was also utilized in *Leyra v. Denno*,[15] along with a technique of minimizing the seriousness of the offense. There, the Court addressed a series of confessions made after a police psychiatrist, posing as a general practitioner helping a murder suspect with a sinus problem, convinced the suspect to confess.[16] The Court observed that the suspect was encouraged to confess "by the doctor's assurances that he had done no moral wrong and would be let off easily" if he confessed.[17] The full transcript of the interrogation, appended to the Court's decision, indicates that the doctor told the suspect such things as, "[i]f you talk to me and open up, you're going to feel relieved,"[18] and "I am here to help you."[19] The Court held that the confessions were coerced,[20] but because the deceptive aspects of the interrogation were interlaced with the

9 360 U.S. 315, 323 (1959).

10 *Id.* at 317.

11 *Id.* at 319.

12 *Id.*

13 *See id.* at 321–23.

14 *Id.* at 323; *see* Paris, *supra* note 6, at 54 ("*Spano* fails to clarify whether the falsity was even necessary to the Court's decision to reverse the conviction. One strongly senses that deception was not a sufficient cause.").

15 347 U.S. 556, 560 (1954).

16 *Id.* at 559–61.

17 *Id.* at 560; *see also id.* at 562 (transcript of interrogation indicating that doctor had told suspect that "in a fit of temper or anger we sometimes do things that we aren't really responsible for").

18 *Id.* at 563.

19 *Id.* at 565.

20 *Id.* at 561.

psychiatrist's sophisticated, suggestive questioning techniques, *Leyra* is also of limited precedential value as a case about police deception.[21]

In some cases, police falsely threatened to take official detrimental actions against the suspect's loved ones. For example, in *Rogers v. Richmond*, the suspect's confession was induced when the police chief "pretended, in [the suspect's] hearing, to place a telephone call to police officers" telling them to be ready to arrest the suspect's wife.[22] An hour later, after the chief "indicated that he was about to have [the suspect's] wife taken into custody," the suspect confessed.[23] In *Lynumn v. Illinois*, the suspect confessed after police told her that if she did not cooperate, the State would cut off financial assistance to her two young children and that they would be taken from her by the State.[24] In both cases, the Court granted relief from the conviction.[25]

But neither *Rogers* nor *Lynumn* can tell us much about police deception during interrogation. For starters, it is unclear whether the police were even lying in *Lynumn*—the Court's opinion is bereft of any discussion of whether and to what extent Lynumn was in any actual danger of losing her children.[26] But even assuming the tactic in *Lynumn* was deceptive, it was coupled with a more conventional deceptive interrogation tactic, a suggestion that cooperation would lead to leniency. So at best, *Lynumn* could stand for the proposition that both deceptive interrogation tactics together deprived the suspect of due process. But *Lynumn* is of limited usefulness because of a more fundamental reason: the State conceded in the Supreme Court that the confession had been coerced and sought affirmance on procedural grounds.[27] Thus, the Court's conclusion that the confession was coerced[28] can be seen as less than definitive.

Rogers suffers from some of the same defects. First, it is unclear what role deception played in any determination that the confession was coerced. The chief only pretended to threaten to arrest the suspect's wife, true, but the opinion does not tell us whether such an arrest, if it had actually been made, would have been based on reasonable grounds. The Second Circuit

21 *See* George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 201 (1977) (noting that "it is impossible to compare the significance of the deception and of the other elements present in" *Spano* and *Leyra*); Hamblet, *supra* note 6, at 120 (observing that in both *Spano* and *Leyra*, "the deception was coupled with other aggravating conditions which permitted the Court to base its decision on the totality of circumstances").

22 365 U.S. 534, 535 (1961).

23 *Id.* at 535–36.

24 372 U.S. 528, 531–34 (1963).

25 *Rogers*, 365 U.S. at 549; *Lynumn*, 372 U.S. at 529.

26 *See* Paris, *supra* note 6, at 51 ("Although *Lynumn* is cited sometimes as a decision disapproving of false promises of leniency, the Court's decision in no way turned on the falsity of the officers' representations. In fact, the officers' threats may well have been true.").

27 *See Lynumn*, 372 U.S. at 534–35.

28 *Id.* at 534.

opinion in the case indicates that it would have.[29] If so, the chief's bluff takes on the character of an idle threat rather than a complete artifice.[30] In any event, *Rogers*, like *Lynumn*, is of limited utility because the Court never decided that the confession was coerced; indeed, it conceded that "the issue of voluntariness might fairly have gone either way."[31] The case was instead decided on what might be fairly termed procedural grounds: that the defendant was deprived of due process because the state courts had deemed the confession voluntary using an improper standard that focused on the reliability of the confession rather than the effect of the police conduct on the suspect's will.[32]

Three years after *Rogers*, the Supreme Court issued its landmark decision in *Miranda v. Arizona*, which famously declared that custodial interrogation was subject to the constraints of the Self-Incrimination Clause of the Fifth Amendment[33] and compulsion for purposes of that Clause is inherent in all custodial interrogation.[34] The Court required that any statements resulting from custodial interrogation to be preceded by warnings of the suspect's right to remain silent and to have the assistance of counsel during the interrogation, and to be occasioned by a waiver of those rights.[35] In coming to that conclusion, the Court canvassed a number of police interrogation tactics that it gleaned from police interrogation manuals, many of which were deceptive in nature. For example, the manuals advised police to display confidence in the suspect's guilt;[36] to downplay the seriousness of the offense under investigation;[37] to use a rigged identification procedure[38] or a "reverse line-up," in which the suspect is identified as the perpetrator of a fictitious

29 United States *ex rel.* Rogers v. Richmond, 271 F.2d 364, 371 (2d Cir. 1959) (observing that Rogers's wife "was a legitimate subject of police inquiry"), *rev'd*, 365 U.S. 534 (1961).

30 *See* Dix, *supra* note 7, at 305 n.110 ("[P]roperly read, *Rogers* is not a deception case. The substance of the police action was to threaten coercion. The officer's lack of intention to carry out the threat was insignificant compared to his making it." (citation omitted)).

31 *See Rogers*, 365 U.S. at 548 n.5.

32 *Id.* at 544–45. An earlier Supreme Court decision mentioned in passing that the suspect in that case "was falsely told that other suspects had 'opened up' on him." Turner v. Pennsylvania, 338 U.S. 62, 64 (1949). Although the Court concluded that the confession was coerced, *id.* at 65, it did not discuss the falsehood in coming to that conclusion, perhaps because the suspect continued to "repeatedly" deny his guilt after the deception, *id.* at 64, and so the deception likely did not cause him to confess.

33 384 U.S. 436, 467 (1966). The Self-Incrimination Clause provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

34 *See Miranda*, 384 U.S. at 457–58.

35 *Id.* at 444–45. The Court also created the right of the suspect "to cut off questioning," *id.* at 474, though not the right to be informed of this right. *See* Laurent Sacharoff, Miranda*'s Hidden Right*, 63 ALA. L. REV. 535, 552–56 (2012).

36 *Miranda*, 384 U.S. at 450.

37 *Id.* at 450–51.

38 *Id.* at 453.

crime in the hopes that he will confess to the real one;[39] and to employ the "Mutt and Jeff" (or "good cop–bad cop") routine, which relies on one officer offering false sympathy to the suspect.[40] However, the Court was careful not to declare any of these deceptive practices off limits to the police, unlike the physical and psychological coercion seen in thirty years of the Court's cases, which the Court explicitly sought to "eradicate[ ]."[41] The only other mention of deception in the opinion relates not to the interrogation itself but to the waiver of the *Miranda* rights. The Court wrote that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."[42]

Post-*Miranda*, the Court has had little occasion to directly address police deception during interrogations.[43] However, beginning with *Frazier v. Cupp*,[44] a handful of cases have generally permitted such deception.[45] In *Frazier*, the murder suspect was subjected to two different kinds of deception: he was falsely told that his alleged accomplice had already confessed, and he was offered false sympathy by the officer, who suggested that the victim had precipitated his own death "by making homosexual advances."[46] The Court

39 *Id.*

40 *Id.* at 452.

41 *Id.* at 446–47. *See* Jacobi, *supra* note 6, at 64 ("*Miranda* did not prohibit police deception . . . ."); Kitai-Sangero, *supra* note 6, at 621 ("[T]he *Miranda* Court did not restrict lying and deceit during interrogations after the suspect waives his *Miranda* rights."); Magid, *supra* note 6, at 1175 ("Although the *Miranda* Court appeared to take a negative view of deceptive interrogation techniques, the Court imposed few limits on their use."); Robert P. Mosteller, *Moderating Investigative Lies by Disclosure and Documentation*, 76 OR. L. REV. 833, 848 n.57 (1997) ("[A]lthough surely not encouraging deception, *Miranda* anticipated that [such] investigative practices would continue . . . ."); Paris, *supra* note 6, at 57 ("From these passages we can discern the Court's aversion to 'deceptive stratagems' and tricks. Yet, it was neither lies nor tricks upon which the decision in *Miranda* turned."). Some have read this language more hopefully. *See* White, Miranda*'s Failure*, *supra* note 6, at 1217 ("The *Miranda* decision's apparent disapproval of interrogation techniques described in various interrogation manuals . . . could have been interpreted to prohibit interrogators from employing those practices." (footnote omitted)).

42 *Miranda*, 384 U.S. at 476. *See* Magid, *supra* note 6, at 1175 n.37 ("*Miranda* does limit the use of deception in obtaining a waiver . . . ."); White, *Police Trickery*, *supra* note 6, at 582 (observing that the *Miranda* "[d]ictum . . . indicates that police are precluded from using trickery to induce a waiver of a suspect's fifth and sixth amendment rights"); *cf.* Thomas, *supra* note 6, at 1185 (noting that, although "[o]n its face this statement only prohibited the use of trickery in obtaining a waiver," it "led some observers to conclude that the Court had completely outlawed the use of deceptive interrogation techniques." (emphasis omitted)).

43 *See* Klein, *supra* note 6, at 1033 ("[T]he Court has not directly blessed or rejected any of the pre-*Miranda* techniques that the Warren Court found troublesome.").

44 394 U.S. 731 (1969).

45 Jacobi, *supra* note 6, at 64–65 (observing that "both before and after *Miranda*, the Court has explicitly allowed" police deception (footnotes omitted)); Young, *supra* note 6, at 451 ("*Frazier* signaled that the Court's post-*Miranda* interpretation of voluntariness was broad enough to permit police lying.").

46 *Frazier*, 394 U.S. at 737–38.

tersely rejected Frazier's claim that the resulting confession was coerced: "The fact that the police misrepresented the statements that [the accomplice] had made is, while relevant, insufficient . . . to make this otherwise voluntary confession inadmissible."[47]

The Court has also put its imprimatur on deception about whether official questioning is even occurring. In *Illinois v. Perkins*, an undercover police agent posing as a fellow inmate elicited incriminating statements from Perkins while at a county jail.[48] Perkins argued in the Supreme Court that his statement was inadmissible because it was not preceded by *Miranda* warnings,[49] a contention which, if successful, would obviously have spelled the end for undercover elicitation of incriminating statements in a custodial setting. The Court rejected this argument on the ground that the inherent coercion of custodial interrogation was absent when an incarcerated inmate did not know he was being questioned by a law enforcement agent.[50] The Court did find coercion involving undercover questioning of an incarcerated suspect in *Arizona v. Fulminante*.[51] However, there, the deception was beside the point: the Court found coercion because of an implicit threat to leave the suspect unprotected against the private violence of others, a threat that would have been coercive even if the undercover officer had indeed been a fellow inmate.[52] Indeed, the *Fulminante* Court did not say one word about the legal effect, if any, of the deception practiced in that case. *Perkins* and *Fulminante* together strongly suggest that deception about whether an interrogation is even taking place is generally permissible.

In subsequent cases on waiver, the Court has held that omission of some information regarding the incipient custodial interrogation does not render an ensuing waiver invalid. So in *Colorado v. Spring*, the Court held that failure to tell the suspect that the interrogation would concern a different, more serious crime than the one for which he was arrested did not vitiate his waiver.[53] And in *Moran v. Burbine*, the Court held that failure to inform the suspect that a lawyer had been retained on his behalf and sought to represent him during the interrogation likewise did not invalidate the suspect's waiver.[54] In *Spring*, the Court reserved decision on whether an affirmative misrepresentation of the same information, as opposed to a mere omission, would void a *Miranda* waiver.[55] And the *Burbine* opinion suggests the same.[56] The *Burbine* Court allowed only that "on facts more egregious than those

47 *Id.* at 739; *see* Paris, *supra* note 6, at 59.

48 496 U.S. 292, 294–95 (1990).

49 *See id.* at 295–96.

50 *Id.* at 296–97.

51 499 U.S. 279, 286–87 (1991).

52 *Id.* at 287–88; *see also* Payne v. Arkansas, 356 U.S. 560, 564–65, 567 (1958) (holding confession coerced where police implied that lack of cooperation could lead to suspect's being released to angry mob outside jail).

53 479 U.S. 564, 575–76 (1987).

54 475 U.S. 412, 416–18, 421–24 (1986).

55 *Spring*, 479 U.S. at 576 n.8; *see* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 403 (3d ed. 1993) (observing

presented" in that case, "police deception might rise to a level of a due process violation."[57]

In only one case, *Missouri v. Seibert*, has the Supreme Court found a waiver invalid because of police deception, although it involved a fairly distinctive type of deception, and the Court focused on the effectiveness of the warnings rather than the validity of the waiver.[58] In *Seibert*, police used the "question first" tactic, whereby police would question the suspect without benefit of *Miranda* warnings in order to get an initial, albeit inadmissible, confession.[59] Police would then issue the warnings and obtain a waiver in a subsequent round of questioning without revealing the inadmissibility of the prior statements.[60] A plurality of the Court determined that the second statement, too, was inadmissible, because the practice of giving the warnings only after an initial statement was made rendered those warnings ineffective, at least in some cases.[61] Justice Kennedy concurred in the judgment, focusing on the police use of a deceptive stratagem rather than the multifactored test suggested by the plurality: "If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made."[62]

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that *Spring* "suggested that trickery does not occur unless police engage in 'affirmative representation'").

56 *Burbine*, 475 U.S. at 453 (Stevens, J., dissenting) ("[T]here can be no constitutional distinction—as the Court appears to draw—between a deceptive misstatement and the concealment by the police of the critical fact that an attorney retained by the accused or his family has offered assistance . . . ." (citation omitted)); *see also* Mosteller, *supra* note 6, at 1253 ("[T]he failure to state information is potentially distinguishable from an affirmative misrepresentation.").

57 *Burbine*, 475 U.S. at 432 (majority opinion).

58 542 U.S. 600, 612 n.4 (2004) (plurality opinion) ("In a sequential confession case, clarity is served if the later confession is approached by asking whether in the circumstances the *Miranda* warnings given could reasonably be found effective."); *cf.* Oregon v. Elstad, 470 U.S. 298, 318 (1985) (positing the question as whether "a suspect who has once responded to unwarned yet uncoercive questioning is . . . thereby disabled from waiving his rights").

59 *Siebert*, 542 U.S. at 609–11 (plurality opinion).

60 *Id.*

61 *Id.* at 613–14, 615 (pointing to "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first").

62 *Id.* at 622 (Kennedy, J., concurring in the judgment). Although Justice Breyer joined the plurality, which disclaimed reliance on the interrogating officer's state of mind, *id.* at 616 n.6 (plurality opinion) ("[T]he focus is on facts apart from intent that show the question-first tactic at work."), he also wrote a concurring opinion that, like Justice Kennedy's, seemed to hinge on the intent of the officer. *See id.* at 617 (Breyer, J., concurring) ("Courts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith.").

The holding of *Seibert* is unclear. No rationale enjoyed the support of five Justices, and Justice Kennedy's separate opinion placing heavy reliance on the intent of the police, which might otherwise be deemed controlling via the rule of *Marks v. United States*,[63] seems to have been rejected by at least seven other Justices.[64] However, *Seibert* does indicate that deception that "deprive[s] a suspect of an adequate understanding of her *Miranda* rights" is not permissible.[65]

Thus, Supreme Court precedent on police deception during interrogation is both fairly sparse and relatively permissive.[66] The pre-*Miranda* rulings are of limited precedential value, in part precisely because they predate *Miranda*. Most post-*Miranda* cases—*Perkins*, *Burbine*, *Spring*, and *Seibert*—focus on police deception only as it affects the necessity or validity of the *Miranda* warnings-and-waiver protocol itself, not the voluntariness of the confession, and the latter three involve deceptive omissions rather than affirmative misrepresentations. The cursory treatment of deceptive interrogation practices found in the fifty-year-old *Frazier v. Cupp* remains the Court's definitive treatment of the subject.

By contrast, the lower courts have seen a plethora of cases involving police deception during interrogation. Guided by *Frazier*, most such practices have been approved, or at least tolerated, by the courts.

B. Taxonomy of Police Deception

The lower courts have addressed a wide range of what can be considered deceptive police interrogation practices.[67] Taking their cue from the few Supreme Court cases in this area, particularly *Frazier*, they have permitted most kinds of deception.[68] Specifically, they generally permit deception

63 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale . . . enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).

64 *See supra* note 62; *Seibert*, 542 U.S. at 624 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting) ("The plurality's rejection of an intent-based test is . . . correct.").

65 Gohara, *supra* note 6, at 799.

66 Hritz, *supra* note 6, at 492 ("The Supreme Court has declined to clearly define when police deception can be overly coercive."); Thomas, *supra* note 6, at 1183 ("[T]he Supreme Court never squarely addressed the issue of whether a confession induced by trickery was involuntary."); White, Miranda*'s Failure*, *supra* note 6, at 1241 ("[T]he Court has never articulated any basis for evaluating the propriety of particular types of interrogators' trickery."); White, *Police Trickery*, *supra* note 6, at 585 (bemoaning the lack of "concrete guidance needed to determine the legitimacy of particular police practices").

67 Khasin, *supra* note 6, at 1038–43; Roppé, *supra* note 6, at 734–36; Young, *supra* note 6, at 429–32.

68 Gohara, *supra* note 6, at 794; Heyl, *supra* note 6, at 943; Khasin, *supra* note 6, at 1048–49; Kitai-Sangero, *supra* note 6, at 613–15; Magid, *supra* note 6, at 1177; Roppé, *supra* note 6, at 751; Slobogin, *supra* note 6, at 1177; Stuntz, *supra* note 6, at 763; Wynbrandt, *supra* note 6, at 551; Young, *supra* note 6, at 426.

about the adversary role of the police (such as false expressions of sympathy), verbal deception about the existence of other incriminating evidence, and minimization of the offense (i.e., falsely suggesting that the offense is less serious than it really is).[69] A small minority of courts have drawn the line at fabrication of incriminating evidence. And courts generally disapprove of deception that negates the meaning of the *Miranda* warnings, deception that falsely promises leniency in exchange for cooperation, and some deception aimed at matters outside the interrogation room, such as some misrepresentations involving the suspect's family members. However, courts have failed to offer a general account that explains these results.[70]

1. Deception About the Adversary Role of the Police (The False Sympathy Ploy)

Courts generally permit police deception regarding their own adversary role in the criminal justice process. This type of deception typically involves expressions of empathy with and sympathy for the suspect. For example, courts have approved use of the "good cop, bad cop" routine,[71] telling the suspect that confession will make him feel better,[72] and falsely "suggest[ing] that they would act on Defendant's behalf in going to the district attorney."[73] Even in extreme cases, courts are unmoved by this type of deception. For example, in *Mason v. State*, the Texas Court of Appeals held that a confession was not coerced where one interrogating officer told the suspect, believed to have molested a five-year-old girl, that he, too, was a pedophile.[74] Likewise, in *State v. Ulch*, an Ohio appeals court held a confession was not coerced after one officer told the suspect, who was being questioned about injuries to his girlfriend's three-year-old daughter, "that she had done things to her own child that she was not proud of."[75] Thus, false expressions of sympathy and empathy by police are generally considered noncoercive.

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69 Of course, these categories overlap. For example, when police falsely suggest that the murder victim might be in some way responsible for her own death, they are at once expressing false sympathy for the suspect, falsely minimizing the crime, and suggesting the possibility of leniency. Moreover, deception about the existence of incriminating evidence is often accompanied by false expressions of confidence in the suspect's guilt and false suggestions that the crime is more serious than it actually is, which some might treat as separate categories. In addition, when multiple tactics are used, it becomes difficult to attribute causation to any particular tactic. Slobogin, *supra* note 6, at 1177. However, it is useful to separate out these different tactics for purposes of analysis.

70 *See* Heyl, *supra* note 6, at 944 ("Clearly there is a limit to deception, but courts have not articulated where the line is drawn.").

71 *See, e.g.*, Pierce v. State, 761 N.E.2d 821, 824 (Ind. 2002); *cf.* Conner v. State, 982 S.W.2d 655, 660 (Ark. 1998) (expressing discomfort with this technique but finding that it did not induce the confession).

72 *See* State v. Marini, 638 A.2d 507, 512–13 (R.I. 1994).

73 State v. Bunting, 2002 UT App 195, ¶ 26, 51 P.3d 37, 44.

74 116 S.W.3d 248, 260–62 (Tex. Ct. App. 2003).

75 No. L-00-1355, 2002 WL 597397, at *3 (Ohio Ct. App. Apr. 19, 2002).

2. Verbal Deception About Independent Evidence of Guilt (The False Evidence Ploy)

One of the most common uses of deception of which courts almost universally approve is falsely informing the suspect that they already have strong evidence of her guilt. Courts have deemed noncoerced confessions induced by false statements about: physical evidence,[76] including DNA evidence,[77] tying the suspect to the crime; information provided by supposed witnesses to the crime;[78] and statements by the suspect's accomplices.[79] For example, in *State v. Register*, police used a number of these related tactics by falsely telling the suspect "that he had been seen with the [v]ictim the night she was murdered, that his tires and shoes matched impressions and prints found at the murder scene, and that they had irrefutable DNA evidence establishing his guilt."[80] The South Carolina Supreme Court found the police deception

76 *See* United States v. Bell, 367 F.3d 452, 462 (5th Cir. 2004) (falsely telling suspect physical evidence linked him to rape); Goodwin v. State, 281 S.W.3d 258, 266 (Ark. 2008) (falsely telling suspect the crime was caught on videotape); *Ex parte* Jackson, 836 So. 2d 979, 984–85 (Ala. 2002) (falsely telling suspect his fingerprints were found on item tying him to alleged accomplice); Luckhart v. State, 736 N.E.2d 227, 230–32 (Ind. 2000) (falsely telling suspect his fingerprints were found at the crime scene); State v. Kelekolio, 849 P.2d 58, 71–74 (Haw. 1993) (falsely telling suspect that rape victim displayed bruising and evidence of sexual activity); Mason v. State, 116 S.W.3d 248, 258–59 (Tex. Ct. App. 2003) (falsely telling suspect medical evidence showed victim's vagina had been penetrated); *Bunting*, 2002 UT App 195, ¶ 16–18, 51 P.3d at 42–43 (falsely telling suspect medical examiner had determined victim was murdered); State v. Critt, 554 N.W.2d 93, 96 (Minn. Ct. App. 1996) (falsely telling suspect of surveillance video of crime); State v. Davila, 908 P.2d 581, 585 (Idaho Ct. App. 1995) (falsely implying to suspect his fingerprints were found on bag containing drugs); People v. Spellman, 562 N.Y.S.2d 652, 653 (App. Div. 1990) (falsely telling suspect his fingerprints were found at crime scene); *Ulch*, 2002 WL 597397, at *3 (falsely telling suspect knuckle marks and bruising on victim indicated she had been hit by adult male).

77 *See* United States v. Welch, No. 93-4043, 1994 WL 514522, at *5 (6th Cir. Sept. 19, 1994) (per curiam) (unpublished table decision) (falsely telling suspect that DNA evidence showed victim could not have died from Sudden Infant Death Syndrome).

78 *See, e.g.*, Holland v. McGinnis, 963 F.2d 1044, 1051 (7th Cir. 1992) (falsely telling suspect that witness saw his car at the crime scene); Luckhart v. State, 736 N.E.2d 227, 230–32 (Ind. 2000) (falsely telling suspect two witnesses placed her at the crime scene); Rodriquez v. State, 934 S.W.2d 881, 890–91 (Tex. Ct. App. 1996) (falsely telling suspect victim identified him as perpetrator); Farmah v. State, 789 S.W.2d 665, 671–72 (Tex. Ct. App. 1990) (same).

79 *See, e.g.*, State v. Galli, 967 P.2d 930, 936 (Utah 1998) (falsely telling suspect all three accomplices implicated him when only one had); State v. Thaggard, 527 N.W.2d 804, 806, 810–11 (Minn. 1995) (falsely telling suspect accomplice had confessed); State v. Sanford, 569 So. 2d 147, 152 (La. Ct. App. 1990) (falsely telling suspect that accomplice inculpated him).

80 476 S.E.2d 153, 158 (S.C. 1996).

"deplorable" but concluded that the suspect's will was not overborne.[81] This position, it seems, is all but universal.[82]

3. Fabrication of Independent Evidence of Guilt (The Fabricated Evidence Ploy)

One area where a small minority of courts draw the line is at actual creation of false physical or documentary evidence of the suspect's guilt. The leading case is *State v. Cayward*, where police showed the suspect two fabricated forensic reports purporting to show that biological material belonging to the suspect was found on the young victim's underwear.[83] Finding a "qualitative difference between . . . verbal artifices . . . and the presentation of . . . falsely contrived scientific documents," the Florida District Court of Appeal drew a "bright line" forbidding the latter while permitting the former.[84] The court reasoned that "a suspect [may be] . . . more easily induced to confess when presented with tangible, official-looking reports as opposed to merely being told that some tests have implicated him."[85] The court also expressed "distaste" for the practice, comparing it to "the horrors of less advanced centuries in our civilization."[86] Finally, the court expressed some practical concerns regarding the use of fabricated evidence: the potential that such evidence might inadvertently find its way into the courtroom or released to the media, whether inadvertently or intentionally, and that use of fabricated evidence in interrogation would erode public confidence in the police.[87] The Superior Court of New Jersey adopted the reasoning of *Cayward* in *State v. Patton*, though it held more narrowly that police could not use during interrogations "police-fabricated evidence that later finds its way into the trial."[88] It is difficult to understand how a confession can retroac-

81 *Id.*

82 *But see* State v. Baker, 465 P.3d 860, 878–79 (Haw. 2020) (finding coercion in a case where police made repeated "misrepresentations about the existence of incontrovertible physical evidence that directly implicate[d] the accused"); *Ex parte* Hill, 557 So. 2d 838, 842 (Ala. 1989) (disapproving of false evidence ploy in light of suspect's "borderline mental retardation, his schizophrenic personality or schizoid personality disorder, the evidence of possible brain damage, and [his] emotional state at the time of the interrogation").

83 552 So. 2d 971, 972 (Fla. Dist. Ct. App. 1989).

84 *Id.* at 973–74; *see also* State v. Grey, 907 P.2d 951, 955 (Mont. 1995) (holding confession coerced, in part because police placed a video camera in the store where the crime took place to create the false impression that the crime had been recorded); *cf.* Commonwealth v. DiGiambattista, 813 N.E.2d 516, 524–28 (Mass. 2004) (displaying concern about use of false file folder and mislabeled videotape to create the impression of voluminous incriminating evidence, but ultimately deeming confession coerced on other grounds); Roppé, *supra* note 6, at 761 ("[F]alsified documents might taint the entire criminal justice system . . . .").

85 *Cayward*, 552 So. 2d at 974.

86 *Id.*

87 *Id.* at 974–75.

88 State v. Patton, 826 A.2d 783, 804 (N.J. Super. Ct. App. Div. 2003). In *Patton*, the suspect's confession was induced by an audio recording that police falsely told him was an

tively become coerced the instant that materials that were used to elicit it are introduced at trial.

In any event, most courts that have addressed the issue disagree with *Cayward* and *Patton* and hold that fabrication of physical evidence is not coercive. In *People v. Smith*, the defendant challenged as coercive administration of a sham procedure with the unlikely name "Neutron Proton Negligence Intelligence Test," whereby chemicals were administered to his hands, which then turned colors, and he was told the results indicated he had recently fired a gun.[89] The California Supreme Court rejected the argument, deeming the sham test noncoercive.[90] In *State v. Von Dohlen*, the defendant similarly argued that his confession was coerced after the police showed him (1) spent shell casings, falsely telling him they were recovered in relation to his alleged crime, and (2) a supposed composite sketch that was actually drawn by a police artist by viewing the suspect.[91] The South Carolina Supreme Court rejected the argument that these tactics overbore his will.[92] In *Sheriff v. Bessey*, defendant claimed that he was coerced into confessing after an officer showed him a fabricated forensic report showing the presence of semen where his sexual act with an underage girl allegedly occurred.[93] The Nevada Supreme Court rejected the contention, holding this tactic noncoercive.[94] And in *Lincoln v. State*, the Maryland Court of Special Appeals rejected the defendant's contention that showing him fabricated witness statements was coercive.[95]

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interview with an eyewitness to the crime but was, in actuality, a fabricated recording, with one officer pretending to be the eyewitness. *Id.* at 785–89.

89 150 P.3d 1224, 1238 (Cal. 2007).

90 *Id.* at 1241–42; *see also* Whittington v. State, 809 A.2d 721, 734 (Md. Ct. Spec. App. 2002) (deeming similar sham test noncoercive).

91 471 S.E.2d 689, 694 (S.C. 1996).

92 *Id.* at 695–96.

93 Sheriff, Washoe Cty. v. Bessey, 914 P.2d 618, 619 (Nev. 1996).

94 *Id.* at 621; *see also* United States v. Haynes, 26 F. App'x 123, 128–29, 134 (4th Cir. 2001) (per curiam) (rejecting claim of coercion where suspect shown a fabricated ballistics report and boxes purportedly containing evidence in his case but actually containing unrelated materials); Ledbetter v. Edwards, 35 F.3d 1062, 1066, 1070 (6th Cir. 1994) (finding no coercion where suspect shown enlarged photographs of fingerprints supposedly taken from crime scene and falsely told they matched suspect's); Springer v. Commonwealth, 998 S.W.2d 439, 445, 447–49 (Ky. 1999) (finding no coercion where suspect shown video to convince suspect that house where crime occurred was under electronic surveillance); Commonwealth v. Selby, 651 N.E.2d 843, 845–46, 848–49 (Mass. 1995) (finding no coercion where suspect was shown handprint and falsely told it was his and was taken from crime scene); Arthur v. Commonwealth, 480 S.E.2d 749, 751–52 (Va. Ct. App. 1997) (rejecting claim of coercion based on use of false lab reports).

95 882 A.2d 944, 959–60 (Md. Ct. Spec. App. 2005).

4. Deceptive Suggestions That the Offense is Less Serious than It Really Is (The Minimization Ploy)

Courts have also put their imprimatur on "minimization" techniques, by which police try to elicit a confession by deceptively downplaying the seriousness of the crime. For example, in homicide cases, courts have declined to find a statement coerced simply because the police falsely told the suspect that the victim was still alive.[96] They have also declined to find coercion where police misled the suspect by "exaggerat[ing] the difference in punishment that might be imposed on an accomplice rather than a principal" or that "punishment would be much less severe if the murder were not premeditated."[97] One particularly stark example of minimization is *State v. Cooper*.[98] There, the defendant, found guilty and condemned to death for the kidnapping, rape, and murder of a six-year-old girl, claimed his confession had been coerced because the police misled him into thinking that the maximum punishment he faced was a prison term rather than the death penalty.[99] The New Jersey Supreme Court ruled the confession not coerced, finding that the detective's statement was "not entirely inaccurate," because "[a]lthough a police officer may suspect that the murder will be death-eligible, the officer has no way of knowing for sure."[100] Given the facts of the case, this reasoning borders on the farcical and betrays instead a level of comfort with the officer's deception.

Sometimes, minimization takes the form of suggestions that the suspect has a viable defense or that the victim was partly to blame. For example, in *People v. Fundaro*, the defendant claimed that his confession was coerced because "the officers kept telling him that it sounded like it was an accident or self-defense and that it would be better for him if he would just tell them what happened."[101] The Court of Appeals of Michigan concluded that "[a]lthough the officers might have helped [Fundaro] rationalize his actions in such a way that he might hope that he would not be charged with murder," they rejected the contention "that his will was overborne or [that] his capacity for self-determination was critically impaired."[102] Likewise, in *Martin v. State*, the Florida Supreme Court rejected a claim of coercion where the detective told the suspect "I think what happened here was an accident," and went on to say: "There is [sic] many a times that I have had cases where it was justified, excusable, there was not intent. Stuff like that, okay and it just disappeared. But you know what happened in all those cases[?] Everybody stepped up and told the truth."[103] And in *State v. Hatfield*, the Arizona Court

96 *See, e.g.*, People v. Jordan, 597 N.Y.S.2d 807, 808–09 (App. Div. 1993).

97 State v. Bacon, 658 A.2d 54, 64 (Vt. 1995).

98 700 A.2d 306 (N.J. 1997).

99 *Id.* at 313, 319.

100 *Id.* at 320.

101 No. 301194, 2012 WL 247759, at *5 (Mich. Ct. App. Jan. 26, 2012) (per curiam).

102 *Id.* at *6.

103 107 So. 3d 281, 307, 310 (Fla. 2012) (per curiam).

of Appeals held that the police were not coercive when they suggested to a rape suspect that the thirteen-year-old victim "came on to [him]."[104]

Courts have held minimization to be impermissible only by conflating it with a promise of leniency, which is discussed below.[105] For example, in *State v. Ritter*, the defendant claimed his confession was coerced because the police falsely told him that the victim was still alive.[106] The court found that this deception "constituted an implied promise that Ritter could not be charged with murder if he gave a statement to the police."[107] Having interpreted the deception about the severity of the crime as a promise of leniency in exchange for a confession, the court held the confession properly suppressed.[108] This reasoning is transparently faulty: the deception caused the suspect to believe that he could not be charged with murder regardless of whether he gave a statement to the police, not as consideration for a confession. Similarly, in *Commonwealth v. DiGiambattista*, the Supreme Judicial Court of Massachusetts pointed to the minimization techniques used by officers and held the confession coerced because use of such techniques "implies leniency if the suspect will adopt that minimized version of the crime."[109] But the touchstone of such a case is the implied promise of leniency; overwhelmingly, courts have concluded that minimization of the severity of the crime itself is not sufficient but is relevant only to the extent that it can be reasonably interpreted as a promise of leniency.

5. Deception That Contradicts or Distorts the Meaning of the *Miranda* Warnings

One place where the courts draw the line is at deception that directly contradicts or distorts the meaning of the *Miranda* warnings. As the U.S. Court of Appeals for the Fifth Circuit put it: "An officer cannot read the defendant his *Miranda* warnings and then turn around and tell him that despite those warnings, what the defendant tells the officer will be confidential and still use the resultant confession against the defendant."[110] In a number of cases, courts have deemed coerced statements that followed

104 840 P.2d 300, 301, 303 (Ariz. Ct. App. 1992).

105 *See infra* subsection I.B.6.

106 485 S.E.2d 492, 493–94 (Ga. 1997).

107 *Id.* at 495.

108 *Id.*

109 813 N.E.2d 516, 526, 528 (Mass. 2004).

110 Hopkins v. Cockrell, 325 F.3d 579, 585 (5th Cir. 2003). The court there held the confession was coerced but that the error in admitting it was harmless. *Id.* at 584–85.

police assurances that their conversation was "off the record"[111] or "confidential."[112]

In a slightly different vein are cases involving the "now or never" ploy, in which police falsely tell the suspect that the interrogation is her last and only opportunity for her to make her side of the story known. For example, in *Commonwealth v. Novo*, police repeatedly told the suspect that if he did not give his version of events, the jury would never hear it.[113] The court held the resulting confession to have been coerced on the ground that the "now or never" tactic mischaracterized the suspect's constitutional right to defend himself at trial.[114] One might quibble that *Novo* suggests that a misrepresentation of any of the suspect's rights, even those not covered by *Miranda*, might render a resulting confession coerced. Looked at more closely, however, a distortion of the *Miranda* rights was precisely what was going on in *Novo*. By telling Novo that the interrogation was his only opportunity to get his defense to the jury, police were essentially telling him that by invoking his right to silence or to end the interrogation altogether, he would be destroying any chance he had to make out a defense. And presumably this would be true even if he sought independent legal advice only on the narrow issue of whether the police representations regarding his ability to put on a defense were valid. Thus, the "now or never" technique falsely conveyed to the suspect that exercising or invoking his *Miranda* rights would doom whatever chances he had at trial.

6. False Promises or Suggestions of Leniency in Exchange for Confession

Another ploy courts regularly hold impermissible is making false promises of leniency, nonprosecution, immunity, or the like in exchange for a confession. Sometimes this takes the form of an explicit promise of leniency. For example, in *Smith v. State*, the suspect confessed only after the state trooper assured him "that he was 'not interested in prosecuting anyone for drunk driving;' he only wanted to find out who had been driving."[115] The Alaska Court of Appeals held the confession "plainly induced by the promise

111 *See* United States v. Conley, 859 F. Supp. 830, 837 (W.D. Pa. 1994) (mem.) (finding coercion where agent told suspect that their conversation was "off the record"); Jones v. State, 65 P.3d 903, 905, 909 (Alaska Ct. App. 2003) (holding confession coerced where officer told suspect their conversation was "[o]ff the record between you and I [sic]").

112 Cole v. State, 923 P.2d 820, 826, 832 (Alaska Ct. App. 1996) (holding a confession coerced where, among other instances of deception, police falsely assured suspect that the tape of the interrogation "would [not] be played publicly, in 'a public courtroom'" and that conversation would be "very confidential"); State v. McConkie, 2000 ME 158, ¶¶ 1–10, 755 A.2d 1075, 1077–78 (finding coercion where officer told suspect his answers would remain "confidential"); State v. Stanga, 2000 S.D. 129, ¶¶ 1–5, 617 N.W.2d 486, 487 (holding that promise by officer that statements would be kept "between you and me" constituted coercion); *see also* Linares v. State, 471 S.E.2d 208, 211–12 (Ga. 1996) (finding coercion where officer told suspect that nothing he said would be used against him).

113 812 N.E.2d 1169, 1171–72, 1172 n.2 (Mass. 2004).

114 *Id.* at 1174–75.

115 787 P.2d 1038, 1039 (Alaska Ct. App. 1990).

of leniency and must consequently be deemed involuntary."[116] Likewise, the U.S. Court of Appeals for the Sixth Circuit in *Williams v. Withrow* held a confession coerced when it was induced by the officers' promise that if he told the truth, he would "walk."[117] In *People v. Esqueda*, the police repeatedly and strongly suggested that the only way the suspect could avoid prison was if he admitted to the shooting.[118] The California Court of Appeal held the confession to be coerced.[119]

Sometimes, police will tell the suspect that if he makes a statement, they will not arrest him, or that he will "go home." For example, in *People v. Thomas*, among other tactics, police assured the suspect that once he disclosed how his son had been hurt, "he would not be arrested, but would be permitted to return home."[120] The New York Court of Appeals held that "[i]t is plain that [Thomas] was cajoled into his inculpatory [statements] by these assurances."[121] Sometimes, police will tell the suspect that the point of the interrogation is to get the suspect mental health or other assistance. For example, in *Cole v. State*, the Alaska Court of Appeals held it was impermissibly coercive for an officer to couch his request for information as a way of getting "help" for the suspect, to such an extent that he effectively told the suspect "that the psychological help [the suspect] had requested would be withheld unless and until [he] confessed."[122]

While courts generally agree that false promises of leniency will vitiate the voluntariness of a confession, there is widespread litigation of what amounts to a promise.[123] Thus, in *Mason v. State*, the defendant claimed his confession was coerced because officers told him that "things would 'go bet-

116 *Id.*

117 944 F.2d 284, 286, 289 (6th Cir. 1991), *aff'd in part and rev'd in part*, 507 U.S. 680 (1993).

118 22 Cal. Rptr. 2d 126, 136–43 (Ct. App. 1993).

119 *Id.* at 147–48; *see also* United States v. Young, 964 F.3d 938, 943–44 (10th Cir. 2020) (finding coercion where federal agent told suspect that he could "physically buy down the amount of time [he would spend] in a federal prison" and that "every time [the suspect answered] a question truthfully, it ticks time off that record"); Albritton v. State, 769 So. 2d 438, 440, 442 (Fla. Dist. Ct. App. 2000) (finding confession coerced when it was induced by a detective's representation "that if [she] confessed that she committed the offense [abuse of a dead body] as part of a religious ritual, she would be constitutionally protected and could not be prosecuted").

120 8 N.E.3d 308, 316 (N.Y. 2014).

121 *Id.* The court added that "[h]ad there been only a few such deceptive assurances," they might be insufficient to render his statements coerced, but Thomas was told that he would not be arrested and that he would be going home fourteen and eight times, respectively. *Id.* Moreover, *Thomas* is of limited usefulness because the court hinged its decision on the combination of this ploy, along with a minimization ploy, a threat to arrest his wife, and the medical ruse described below in the text accompanying notes 149–153. *Thomas*, 8 N.E.3d at 316.

122 923 P.2d 820, 831 (Alaska Ct. App. 1996).

123 *See* United States v. Burgess, 33 F. App'x 386, 389 (10th Cir. 2002) (no coercion where officers "were vague and non-committal").

ter' for [him] if he cooperated."[124] The Court of Appeals of Texas disagreed, writing: "A 'prediction about future events' is not the same as a 'promise.'"[125] On the other hand, a promise by an officer "that he would 'help [the suspect] in every way in the world'" was held to be coercive by the Arkansas Supreme Court in *Pyles v. State*.[126]

It is true that a small number of courts have rejected the notion that a false promise of leniency in exchange for a confession will invalidate the confession. But they have done so only by conflating false promises of leniency with true promises of leniency—that is, those that are ultimately kept. For example, in *State v. Marini*, police induced a confession by telling the suspect "that a confession would render him generally 'better off' and by informing him that by confessing, 'he could get some help and could even get [away with] probation.'"[127] Defendant was convicted of first-degree arson and sentenced to twenty years in prison.[128] The Rhode Island Supreme Court held the tactic permissible: "A confession is not rendered involuntary . . . by law enforcement officials promising a defendant, in exchange for a confession, that they would reduce the charges; or that the defendant would receive more lenient treatment."[129] Yet the two cases cited for these propositions involved not false promises of leniency, but promises of leniency that the state ultimately followed through on.[130]

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124 116 S.W.3d 248, 260 (Tex. Ct. App. 2003).

125 *Id.* (quoting United States v. Fraction, 795 F.2d 12, 15 (3d Cir. 1986)); *see also* State v. Bays, 716 N.E.2d 1126, 1137 (Ohio 1999) (merely informing suspect "of the penalties for various degrees of homicide" was not a "promise of leniency"); State v. Galli, 967 P.2d 930, 936 (Utah 1998) (finding "no express promise that [suspect's] punishment would be reduced if he confessed" where detective told him "[h]ow much time [you serve], is up to you" (second and third alterations in original)); State v. Simmons, 944 S.W.2d 165, 175 (Mo. 1997) (en banc) (rejecting claim of coercion by capital defendant where detectives told suspect he faced the death penalty "and that it would be better for him if he told the truth"); State v. Thaggard, 527 N.W.2d 804, 811–12 (Minn. 1995) (rejecting claim that defendant was duped into thinking he would receive drug treatment instead of, rather than in addition to, being prosecuted); Kennedy v. State, 641 So. 2d 135, 137 (Fla. Dist. Ct. App. 1994) (officer did not promise immunity merely by mentioning it, and then clarified that he was not authorized to grant immunity); State v. Sanford, 569 So. 2d 147, 152 (La. Ct. App. 1990) ("[A] promise by a police officer to communicate to the district attorney's office a defendant's cooperation is not a sufficient inducement to render a subsequent confession inadmissible.").

126 947 S.W.2d 754, 755–57 (Ark. 1997); *see also* United States v. Lopez, 437 F.3d 1059, 1064–65 (10th Cir. 2006) (agent's writing down numbers on sheets of paper indicating the respective number of years of imprisonment suspect would receive if shooting was an accident rather than murder, along with statement about previous suspects receiving leniency for confessing to accidental killings, constituted false promise of leniency).

127 638 A.2d 507, 512 (R.I. 1994) (alteration in original).

128 *Id.* at 518.

129 *Id.* at 513 (citations omitted).

130 *See* United States v. Harris, 914 F.2d 927, 933 (7th Cir. 1990) ("[T]he state marijuana charges stemming from [Harris's] arrest were dropped, indicating that the government lived up to the terms of any alleged deal to which Harris now objects."); United

A divided en banc U.S. Court of Appeals for the Eighth Circuit committed the same error in *United States v. LeBrun*.[131] There, one interrogating officer told the defendant that if the killing had been "spontaneous" rather than premeditated "you will not be prosecuted," to which the other officer declared: "That's absolutely right."[132] The court found the resulting confession noncoerced on the ground that "a promise made by law enforcement 'does not render a confession involuntary per se.'"[133] Yet the two cases the court relied upon involved promises of leniency that were later kept.[134]

7. Deception About Matters Extrinsic to the Case

A final category encompasses deceptive interrogation practices regarding facts extrinsic to the potential case against the suspect.[135] *Lynumn v. Illinois*,[136] *Rogers v. Richmond*,[137] and *Spano v. New York*[138] might all fall into this category. *Lynumn* involved a threat to have the suspect's children taken away.[139] *Rogers* involved a threat to arrest the suspect's wife.[140] And *Spano* involved a ruse that the suspect's failure to talk would result in negative consequences for Bruno, his childhood friend, and Bruno's family.[141] But, as discussed, *Lynumn* and *Rogers* are of limited usefulness because it is unclear whether they even involved deception,[142] and *Spano*'s utility is limited for other reasons.[143]

States v. Guarno, 819 F.2d 28, 31 (2d Cir. 1987) ("[A] confession made pursuant to a cooperation agreement is not the product of coercion.").

131 363 F.3d 715 (8th Cir. 2004) (en banc).

132 *Id.* at 725.

133 *Id.* (quoting Simmons v. Bowersox, 235 F.3d 1134, 1133 (8th Cir. 2001)).

134 *See* United States v. Larry, 126 F.3d 1077, 1079 (8th Cir. 1997) (per curiam) ("[P]olice . . . told Larry he would be released from jail and not prosecuted for the drive-by shooting if he told them what he knew about the shooting. . . . As promised, Larry was then released and was not prosecuted on the felony charges."); Tippitt v. Lockhart, 859 F.2d 595, 598 (8th Cir. 1988) ("[P]etitioner's statement was given in exchange for a promise by the officers not to charge him with capital felony murder . . . . This promise was fulfilled.").

135 *See* State v. Kelekolio, 849 P.2d 58, 73 (Haw. 1993) (determining in dicta that "employment by the police of deliberate falsehoods *intrinsic* to the facts of the alleged offense" are subject to the usual "totality of circumstances" test, while "deliberate falsehoods *extrinsic* to the facts of the alleged offense, which are of a type reasonably likely to procure an untrue statement . . . will be regarded as coercive *per se*"); *see also* United States v. Beaver, No. 08-CR-016, 2008 WL 2510014, at *8 (E.D. Okla. June 18, 2008) (expressing agreement with *Kelekolio*); Sheriff, Washoe Cty. v. Bessey, 914 P.2d 618, 620–21 (Nev. 1996) (same).

136 372 U.S. 528, 531–34 (1963).

137 365 U.S. 534, 535 (1961).

138 360 U.S. 315, 323 (1959).

139 *See supra* text accompanying note 24.

140 *See supra* text accompanying notes 22–23.

141 *See supra* text accompanying notes 9–12.

142 *See supra* text accompanying notes 27–32.

143 *See supra* text accompanying notes 13–14.

A recent New York case provides a good example of limits on police deception about matters extrinsic to the interrogation room. In *People v. Thomas*, the suspect confessed to slamming his infant son violently into a mattress, mortally wounding him, after police used four arguably deceptive tactics.[144] First, the police employed minimization by assuring him "67 times that what [he had] done to his son was an accident."[145] Second, they implied leniency by telling him "14 times that he would not be arrested, and eight times that he would be going home."[146] Third, the police threatened falsely to arrest Thomas's wife.[147] Finally, the police convinced Thomas that they needed to know exactly how he injured his child in order for the doctors to save his life, when they knew that the child was already brain dead.[148]

The court held that this combination of techniques rendered his confession coerced,[149] but it did not disentangle the different strands of coercion and deception. Based on prevailing caselaw, the minimization technique did not render his confession coerced, while the deceptive suggestions that Thomas would not be arrested arguably were promises of leniency that rendered his confession invalid. And although the court deemed the threat to arrest Thomas's wife a "deception," its reasoning shows that the court would have determined this ploy to be coercive even if it had been true. It relied on *Garrity v. New Jersey*[150] for the proposition that "interrogators may not threaten that the assertion of Fifth Amendment rights will result in harm to the interrogee's vital interests."[151] But in *Garrity*, the threat, that those asserting their Fifth Amendment privilege would lose their jobs, was all too real. Thus, the coerciveness *vel non* of this type of threat does not depend on whether it is idle or real.

The distinctive deception that appears in *Thomas* was the medical ruse: the false statement that Thomas's confession was needed to save his son's life, even though police knew the son was already brain dead. What is distinctive here is that the supposed consequence of Thomas's failure to talk was outside the control of the State; it was not that state actors would do or fail to do something if Thomas refused to speak, but that adverse consequences would result in some way independent of the State. The court wrote that these deceptions were "representations of a sort that would prompt any ordinarily caring parent to provide whatever information they thought might be helpful, even if it was incriminating."[152] It concluded that the "falsehoods were

144 8 N.E.3d 308, 309, 311, 314–16 (N.Y. 2014).

145 *Id.* at 316.

146 *Id.*

147 *Id.* at 311.

148 *Id.* at 311, 314–15.

149 *Id.* at 316.

150 385 U.S. 493, 497–98 (1967).

151 *Thomas*, 8 N.E.3d at 314 (citing *Garrity*, 385 U.S. at 493).

152 *Id.* at 315.

coercive by making defendant's constitutionally protected option to remain silent seem valueless."[153]

8. Summary

In sum, courts take a largely permissive approach to the use of police deception to induce confessions. Although some have drawn the line at fabricated evidence, this is a minority position, and all seem to agree that verbal deception about the existence of independent evidence of guilt is acceptable. Courts seem to agree on only three types of deception that will render a resulting confession coerced: promises of leniency, distortion or contradiction of the *Miranda* warnings, and, sometimes, as in the *Thomas* case, deception about matters outside the interrogation room about which the suspect has a strong interest. Absent from the cases, however, is any explanatory theory as to why some deception is forbidden while most is permitted. Rather, the cases typically articulate something like this unhelpful dictum from the New Mexico Supreme Court: "There is certainly a point at which police threats, promises, or deception, would cross the line into coercion, but that line has not been crossed here."[154] This lack of any explanatory theory is replicated by the scholarship on the subject, which is generally long on proposals to either limit or permit police deception during interrogation but short on any attempt to understand the status quo.

II. Scholarly Critiques of Deceptive Interrogation Practices

While some scholarly commentary on the constitutional standards governing police deception during interrogation defends the status quo, most recommends a more extensive, or even complete, ban on police deception.[155] With a few exceptions, the scholarship on both sides tends to suffer from several drawbacks. First, it typically fails to offer any explanatory

153 *Id.*

154 State v. Evans, 210 P.3d 216, 226 (N.M. 2009); *see also* Martin v. State, 107 So.3d 281, 298 (Fla. 2012) (rejecting defendant's claim that his confession was coerced, pointing to six very different types of pressure and deception, but "not[ing] that this case presents the very outer limit as to what tactics law enforcement may employ when performing a custodial interrogation"); State v. Thaggard, 527 N.W.2d 804, 810–11 (Minn. 1995) (holding confession not coerced but "caution[ing] police that they proceed on thin ice and at their own risk when they use deception of the sort used in this case").

155 I put to one side the scholarship that has made prescriptions explicitly on policy grounds rather than on constitutional grounds. *See* Jacobi, *supra* note 6, at 73 (calling for a "comprehensive review of police practices" through "legislative or administrative oversight"); Khasin, *supra* note 6, at 1032 (advocating "the creation of a new legislative framework" for regulating police deception during interrogations); Paris, *supra* note 6, at 7–8 (focusing on the "advisability" of rules restricting police deception rather than any constitutional basis for such rules); Roppé, *supra* note 6, at 768–69 (calling upon Congress to constrain police deception during interrogation). This Article attempts to distill and justify a constitutional rule on police use of deception during interrogation. Whether and to what extent such deception should be forbidden as a matter of policy is beyond the scope of this Article.

account of the law as it has developed. While prescriptive scholarship is obviously useful, the first step in the scholarly endeavor ought to be an attempt to understand why the law is what it is. Only then can the law be helpfully critiqued. Second, much of the scholarship focuses on the problem of false confessions and consequent false convictions, and the use of constitutional rules and standards to minimize conviction of the innocent. Laudable a goal as this is, it imputes to the constitutional provisions governing this area, the Self-Incrimination Clause and the Fourteenth Amendment's Due Process Clause, an overriding concern about the reliability of confessions induced by police interrogation. But this focus is sharply at odds with the Supreme Court precedent in this area, which relegates reliability of confessions to secondary importance, at best. Finally, calls for bans or extensive constraints on police deception generally are stated fairly amorphously and fail to come to terms with serious problems of administrability of their proposed rules or standards.

A. Proposals for a More Extensive Ban on Police Deception

Calls for a more extensive ban on police deception generally do not make any attempt to understand current doctrine but instead skip directly toward prescriptive efforts. More problematically, many such calls misattribute the rationale for constraints on interrogation tactics to the prevention of false confessions, which is at best an ancillary concern of constitutional doctrine as it has developed. In addition, more extensive bans on police deception would encounter serious administrability problems, given that all interrogations involve some form of deception, whether express or implicit, subtle or profound, affirmative or by omission.

Some advocates of a more extensive constitutional ban on police deception place a heavy, sometimes exclusive, reliance on a reliability rationale for constitutional constraints on interrogation practices. One commentator, for example, broadly advocated a rule prohibiting "intentionally false representations by law enforcement about such matters as the presence or strength of forensic evidence, incriminating statements by eyewitnesses or alleged accomplices, and whether the defendant was led to believe that he was being questioned merely as a witness rather than as a suspect."[156] The primary rationale behind this recommendation is that "law enforcement trickery produce[s] false confessions."[157] Another commentator likewise recommended "a bright line rule prohibiting all police lying,"[158] driven largely by the concern that police lying induces false confessions.[159] And some more surgical approaches, advocating greater constraints on certain types of police decep-

156 Gohara, *supra* note 6, at 838.

157 *Id.* at 834.

158 Young, *supra* note 6, at 477 (footnote omitted).

159 *Id.* at 461–63; *see also* Hritz, *supra* note 6, at 502, 505 (mentioning that "police lies are likely to encourage an innocent person to confess" as a reason for a blanket ban on police deception but relying primarily on the harm that deception does to the suspect's ability to accurately gauge his interests).

tion without calling for a total ban, also rely on the premise that avoidance of false confessions drives the doctrine.[160]

But the Supreme Court has said just the opposite on many occasions. As early as 1941, for example, in *Lisenba v. California*, the Court said that "[t]he aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[161] The question is not whether the statements are reliable but rather whether they were made as "the result of the deprivation of [the suspect's] free choice to admit, to deny, or to refuse to answer."[162] Soon enough, the Court began asking in every case whether the suspect's "will was overborne."[163] In *Rogers v. Richmond*, it sharply refuted the notion that reliability drives due process constraints on interrogation practices: "To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration."[164] Indeed, the *Rogers* Court ordered the granting of habeas corpus relief, not because it found the confession to have been coerced but because the state courts had addressed the coercion issue only by reference to whether the resulting confession was reliable, and therefore never truly answered the only constitutional question that mattered: whether Rogers's will had been overborne.[165]

The post-*Miranda* Court has continued to posit that reliability enhancement is not the primary goal of the due process constraint on interrogation tactics. In *Colorado v. Connelly*, relying upon the language from *Lisebna* quoted above, the Court wrote that a statement made by a suspect suffering from a mental illness "might be proved to be quite unreliable, but this is a

160 *See, e.g.*, Alschuler, *supra* note 6, at 974 (advocating bar on "falsifying incriminating evidence and misrepresenting the strength of the evidence against a suspect," largely because such falsehoods are "likely to generate false confessions"); Kitai-Sangero, *supra* note 6, at 630–43 (advocating ban on police use of false evidence, in part because of the risk of false confessions); Reed, *supra* note 6, at 756–57 (advocating that use of falsified DNA evidence be banned because it is particularly likely to induce false confessions); Thomas, *supra* note 6, at 1168–69 (advocating a complete ban on police use of false evidence because such "trickery has its harshest effect upon innocent persons"); White, Miranda*'s Failure*, *supra* note 6, at 1235 (positing that the "underlying purpose" of constraints on interrogation is to ban tactics "that are substantially likely to produce untrustworthy confessions"); Wynbrandt, *supra* note 6, at 552–53, 558–59 (advocating for limits on police use of false evidence based on the danger of false confessions).

161 314 U.S. 219, 236 (1941). This it contrasted with subconstitutional rules of evidence that required that statements be voluntary, which are motivated by reliability concerns. *See id.* ("The aim of the rule that a confession is inadmissible unless it was voluntarily made is to exclude false evidence.").

162 *Id.* at 241.

163 *See, e.g.*, Reck v. Pate, 367 U.S. 433, 440 (1961).

164 365 U.S. 534, 540–41 (1961).

165 *Id.* at 544–45; *see also supra* text accompanying notes 29–32.

matter to be governed by the evidentiary laws of the forum, and not by the Due Process Clause of the Fourteenth Amendment."[166]

Nor does the reliability-enhancing rationale do much work if the focus is not on the Due Process Clause but on the Self-Incrimination Clause. Once again, here the Court has spoken quite plainly that reliability is not the only, or even the primary, rationale underlying the Clause. It famously set out a laundry list of such rationales in *Murphy v. Waterfront Commission of New York Harbor*:

> The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load"; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."[167]

Thus, in laying out seven different rationales underlying the Clause, the Court did not even mention reliability until number six—a "distrust of self-deprecatory statements." While the argument can be made that reliability ought to be considered the touchstone of the Self-Incrimination Clause,[168]

166 Colorado v. Connelly, 479 U.S. 157, 167 (1986) (citation omitted); *see also* Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 919–20 (1979) (arguing that trustworthiness of evidence is not the primary underlying concern of coerced-confessions jurisprudence); Heyl, *supra* note 6, at 938 ("*Connelly* held that the unreliability of the confession was not a matter of constitutional concern . . . ."); Yale Kamisar, Response, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 938 (1995) ("Untrustworthiness is no longer the sole, or even the principal, reason for excluding coerced or involuntary confessions."); Charles J. Ogletree, Jr., Comment, Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 168–70 (1991) (arguing that reliability is of secondary importance to more deeply-rooted notions of justice embodied by rule against coerced confessions); Roppé, *supra* note 6, at 757 ("Although the unreliability of coerced confessions constitutes an important concern of the justice system, the constitutional principle which dictates exclusion of such confessions is rooted in fairness, which stems from the due process clauses . . . ."); White, *Police Trickery*, *supra* note 6, at 583 ("[T]he Court's voluntariness standard does not focus solely on the reliability of a particular confession . . . .").

167 378 U.S. 52, 55 (1964) (citations omitted).

168 *See, e.g.*, Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 895 (1995).

many—and, most importantly, the Supreme Court—have not been convinced.[169]

That the Self-Incrimination Clause prevents even reliable evidence of guilt being forcibly disclosed from the lips of the suspect shows that the Clause primarily protects the guilty, not the innocent. As Professor William Stuntz wrote, "the privilege against self-incrimination . . . cannot be characterized as a device for protecting the innocent. On the contrary, the privilege's clear purpose is to protect people who are guilty from having to disclose their guilt."[170]

People v. Thomas provides solid evidence that constitutional constraints on confessions are not there to protect the innocent. The ruse there, falsely telling the suspect that his information was needed to save his infant son's life, would not have created any unfair pressure on an innocent person to confess. Police were not looking merely for a bare admission of guilt but for detailed evidence on how the crime was committed. An innocent person faced with this imperative could have not provided helpful information and likely would have believed that any false information he provided would do more harm than good. He thus would not have experienced the dilemma felt by Thomas: condemn himself to prison and save his son's life, or stand by his rights and let his son die. Indeed, the State defended the ploy in the New York Court of Appeals on the ground that it occasioned "no substantial risk [it] would elicit a false confession."[171] The *Thomas* court rejected this argument, not because it was not true, but because, based on *Rogers v. Richmond*, it was beside the point.[172] The court's ruling that the medical ruse was impermissible helps only the guilty.[173]

Some commentators have posited other reasons for barring all or nearly all police deception during interrogation. They assert that lying by police harms the integrity of the criminal justice system.[174] Some go further and claim that police deception breeds distrust of the police, leading to reticence on the part of citizenry to cooperate in investigations, and ultimately result-

169 *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 692 (1993) (reproducing the passage from *Murphy*); *see also* Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CALIF. L. REV. 465, 484 (2005) ("The historical data simply does not support the notion of the self-incrimination clause as a gatekeeping mechanism to further the truth-seeking function of criminal trials by banning all unreliable statements regardless of how or by whom the statements were induced.").

170 Stuntz, *supra* note 6, at 766; *accord* Mosteller, *supra* note 41, at 835–36 ("It is exceedingly difficult to argue that the benefits of the procedurally-oriented Fifth Amendment right against compulsory incrimination . . . were intended to be generally restricted to the innocent.").

171 People v. Thomas, 8 N.E.3d 308, 315 (N.Y. 2014).

172 *Id.* at 315–16.

173 *See* Heyl, *supra* note 6, at 949 (observing that whether "a medical ruse could lead to the truth . . . is irrelevant under the Due Process Clause").

174 Alschuler, *supra* note 6, at 974–75; Gohara, *supra* note 6, at 831; Hamblet, *supra* note 6, at 145–46; Kitai-Sangero, *supra* note 6, at 624–28; Young, *supra* note 6, at 468–71.

ing in a net reduction in evidence collection.[175] Finally, some warn, as the Florida and New Jersey courts have,[176] that deception in the interrogation room could lead to deception in other fora, such as the courtroom.[177]

Granted, these are all legitimate policy concerns. But none is the goal of constitutional constraints on interrogation. Again, the primary goal of the due process constraint is to ensure that any resulting statement is the product of the suspect's free will. And the goals of the Self-Incrimination Clause, according to *Murphy*,[178] are manifold, but the Clause is still not capacious enough to accommodate general system integrity, avoidance of police perjury, or concerns about loss of valuable evidence.[179] There may or may not be good policy reasons to limit or even prohibit police deception during interrogations. But good policy is not the same as constitutional mandate.

Other advocates of more extensive bans on police deception avoid these flaws. However, their proposals tend to suffer from serious deficits of administrability. Virtually all police interrogation involves some modicum of deceit.[180] It is almost never in the suspect's best interest to provide the police with self-incriminating evidence unless he is providing it for a price. By providing the police with information for "free,"[181] he is almost necessarily acting irrationally and against his interest. But then virtually all interrogation, premised as it is on the implicit assumption that confession can help the suspect in some way, is deceptive.[182] For example, Professor Welsh White suggested that it should be impermissible for the police to "verbally impress upon the suspect that it is really in his own best interest for him to talk" because it "indirectly distort[s] the *Miranda* warnings" that speaking is decidedly not in the suspect's own best interest.[183] But if that implicit distortion is recognized as improper, so too would even conducting the interrogation at all, which implicitly sends the same signal.

Even beyond that, some proposals of extensive bans on police deception create intractable line-drawing problems.[184] If only "certain false evidence

175 Reed, *supra* note 6, at 760; Young, *supra* note 6, at 457–61.

176 *See supra* text accompanying notes 84–88.

177 Reed, *supra* note 6, at 760; Young, *supra* note 6, 463–66.

178 Murphy v. Waterfront Comm'n of N.Y. Harbor, 378 U.S. 52, 55 (1964); *see* text accompanying note 167.

179 Indeed, if legislators or police officials determine that police deception leads to a net reduction in evidence, and therefore fewer convictions, they have every motivation to curtail the practice, and so no constitutional bar is necessary. *See* Stuntz, *supra* note 6, at 825.

180 Leo, *supra* note 3, at 43 ("Deceit is inherent in every question asked to the suspect, and in every statement made by the interrogator." (quoting FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 96 (1st ed. 1962))).

181 Stuntz, *supra* note 6, at 776–77.

182 Magid, *supra* note 6, at 1168 ("At the very least, the successful interrogator deceives the suspect by allowing the suspect to believe that it somehow will be in the suspect's best interest to undertake the almost always self-defeating course of confessing.").

183 White, *Police Trickery*, *supra* note 6, at 610.

184 George C. Thomas III, *Regulating Police Deception During Interrogation*, 39 TEX. TECH L. REV. 1293, 1296 (2007) ("[T]he deception line is difficult to draw.").

ploys tip the scales too strongly," courts are left attempting to draw the line between "more and less coercive forms of lies."[185] Professor White proposed limits on the false evidence ploy based on a malleable, multifactor test that looks at "the type of evidence misrepresented, the nature and quality of the misrepresentation, the extent to which the misrepresented evidence seems to establish the suspect's guilt, and the suspect's apparent vulnerability."[186] As Professor White himself conceded, such a test could "prove difficult to apply."[187]

One might go further and forbid any statement or conduct by the police that expresses empathy toward the suspect,[188] with an eye toward the most profound forms of this tactic: say, the police assuming the role of "father figure" or "religious counsellor."[189] But what about simple and fleeting kind words by the officer about the suspect's plight? What about a gratuitous offer of food and drink? Indeed, what about a sympathetic look?[190] And if these line-drawing concerns are implicated even by Professor White's broad but more surgical approach to police lying,[191] it is necessarily true with regard to blunter attacks on police deception.[192]

B. Defense of the Status Quo

By now, advocates of the status quo might be cheering. Not so fast. Many defenses of the status quo suffer some of the same flaws identified in their adversaries' position.

Only a handful of scholars have defended the current, mostly hands-off approach to deceptive interrogation practices. Most notably, Laurie Magid has advanced this position.[193] Magid's premise was that ensuring the reliability of confessions is the strongest rationale for the proscription against coer-

185 Wynbrandt, *supra* note 6, at 557, 559.

186 White, Miranda*'s Failure*, *supra* note 6, at 1243.

187 *Id.* at 1245.

188 *See, e.g.*, Hamblet, *supra* note 6, at 125 ("The use of the feigned empathy technique should be considered constitutionally suspect . . . ."); Sasaki, *supra* note 6, at 1595, 1600 (advocating a ban on any "technique that takes unfair advantage of the defendant's emotions"); White, *Police Trickery*, *supra* note 6, at 617 ("[T]he device of seeking to elicit incriminating information through the assumption of a non-adversarial role should be barred." (footnote omitted)).

189 White, *Police Trickery*, *supra* note 6, at 615 (citing cases).

190 Kitai-Sangero, *supra* note 6, at 616 ("[I]t is difficult to prohibit a lie that is reflected in a smile and gestures of friendship toward the suspect, such as offering a cup of coffee or a cigarette . . . .").

191 White, *Police Trickery*, *supra* note 6, at 601–28 (discussing seven specific types of police deception that should be barred).

192 *See, e.g.*, Hritz, *supra* note 6, at 502 ("[P]olice must never lie unless no truthful, noncoercive alternatives are available.").

193 *See generally* Magid, *supra* note 6. To the same effect, see generally Shealy, *supra* note 6.

cive tactics in the interrogation room.[194] Given this rationale, the best standard governing interrogation tactics is "whether the procedure used to obtain a confession creates an unreasonable risk that an innocent person would falsely confess."[195] She acknowledged that deceptive techniques might sometimes result in false confessions and, consequently, false convictions.[196] But she identified several flaws in the research on whether and to what extent this occurs, concluding that it is entirely unknown whether false confessions occur in substantial enough numbers to warrant reform of interrogation practices.[197] At the same time, she argued that deceptive tactics are very useful to the police in obtaining true confessions.[198] She concluded that no one has yet shown that the costs of deceptive interrogation practices outweigh their benefits.[199]

Magid's challenge to researchers on false confessions is well taken. If the role of coerced-confessions jurisprudence is to optimize the number of reliable confessions, one would need to have not only reliable evidence on the causal relationship between deception and false confessions; one would also need a good sense of the relative numbers of both true and false confessions induced by deception. After all, the goal of optimizing the number of true confessions is not the same goal as minimizing the number of false ones, any more than optimizing the number of guilty people convicted is the same as minimizing the number of innocent people convicted. The latter might be achieved by implementing a "beyond all doubt" standard at criminal trials, but no one would argue that such a standard is constitutionally required or even a good idea. Just as the "beyond a reasonable doubt standard" all but ensures that *some* innocents will be convicted, a laissez-faire attitude toward police deception all but ensures that *some* false confessions will be elicited. But, as Magid wisely points out, there is no way of knowing without better evidence whether the optimal number of true confessions is reached under the status quo.

The main flaw in Magid's analysis occurs much earlier: in her premise that the primary goal of our coerced-confessions jurisprudence is to ensure the reliability of confessions. But, as already demonstrated, constitutional

194 Magid, *supra* note 6, at 1177–78 ("[T]he reliability concern provides the most consistent, and appropriate, explanation for the Court's voluntariness decisions."); *accord* FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS 486 (4th ed. 2001) ("The trickery or deceit must not be of such a nature as to . . . induce a false confession.").

195 Magid, *supra* note 6, at 1187.

196 *Id.* at 1192 ("At best, the existing research has shown . . . that certain interrogation techniques are more likely than other techniques to result in false confession . . . .").

197 *Id.* at 1187–98.

198 *Id.* at 1197–1200; *see also* Jacobi, *supra* note 6, at 72 ("Deception is an essential interrogation tool for playing on consciousness of guilt of guilty suspects." (footnote omitted)).

199 Magid, *supra* note 6, at 1206–07; *see also* Jacobi, *supra* note 6, at 72 ("The psychological studies raise important and very concerning results regarding false confessions, but simply concluding that all police deception should be prohibited ignores countervailing considerations.").

constraints on interrogation are not driven solely or even primarily by the goal of preventing false confessions.[200]

A second flaw in defenses of the status quo is that they fail to explain why courts deem some deception off limits. Taken to its logical extreme, the position that deception should be permitted because no one has yet shown that its costs outweigh its benefits would seem to permit all police deception during interrogations. Yet, as discussed above, courts agree that some types of deception do cross the line.

Magid would allow that some deception, such as impersonation of a member of the clergy by a police officer, would "shock the conscience" and "should be barred because it intrudes on society's fundamental value in religion."[201] The "shocks the conscience" standard is a notoriously flabby one,[202] as is any that focuses on society's "fundamental value[s]" (why, one might ask, is our trust in the police not a "fundamental value?"). But more importantly, this single caveat does not explain the jurisprudence, which generally does not use a "shocks the conscience" standard to determine when police deception goes too far.[203] She also does not claim that false promises of leniency and distortions of the *Miranda* warnings, which courts have held off limits, are conscience-shocking. Regardless of whether it is a valid normative claim that only (and all) "conscience-shocking" deception should be outlawed, it does not have much descriptive value.[204]

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200 *See supra* text accompanying notes 166–77; *see also* White, Miranda*'s Failure*, supra note 6, at 1222 ("In view of *Miranda*'s holding that the Fifth Amendment privilege applies to custodial interrogation, Magid's claim that the prevention of unreliable confessions is the sole (or primary) basis for prohibiting interrogation practices cannot be correct." (footnote omitted)).

201 Magid, *supra* note 6, at 1208; *accord* INBAU ET AL., *supra* note 194, at 486–87 (conceding that these tactics "shock the conscience of the . . . community" and therefore are impermissible); Brian C. Jayne & Joseph P. Buckley, *Criminal Interrogation Techniques on Trial*, PROSECUTOR J. NAT'L DIST. ATT'YS ASS'N, Fall 1991, at 23, 23 (same).

202 County of Sacramento v. Lewis, 523 U.S. 833, 861 (1998) (Scalia, J., concurring in the judgment) (citing COLE PORTER, *You're the Top*, *on* ANYTHING GOES (Victor Records 1934)) (deriding the "shocks-the-conscience" test as "the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity" (footnote omitted)).

203 That standard was endorsed by a majority of the Supreme Court in only one coerced confession case, *Chavez* v. *Martinez*, 538 U.S. 760 (2003), which involved a claim of true coercion, not deception, *id.* at 764, 774–75 (plurality opinion of Thomas, J., joined by Rehnquist, C.J., & Scalia, J.) (addressing claim that emergency room interrogation of arrestee suffering grievous physical injuries violated due process on the ground that it shocked the conscience); *id.* at 779 (Souter, J., joined by Breyer, J., concurring in the judgment) (appearing to agree with applicability of the "shocks the conscience" standard); *id.* at 787 (Stevens, J., concurring in part and dissenting in part) (same). Moreover, in that case, the Court was confronted with an unusual procedural posture: the interrogee there had never been prosecuted; instead, he sued the police for coercively interrogating him. *Id.* at 764–65 (plurality opinion). It may be that the "shocks the conscience" standard applies only in such a case, while the "overborne will" standard applies when putatively coerced statements are actually used against their maker.

204 Likewise, Shealy, *supra* note 6, at 46, acknowledges, and appears to agree with, caselaw that holds that "extreme deceit designed to trick one into giving up one's constitu-

Professor Christopher Slobogin, by contrast, has attempted to explain and justify current doctrine,[205] and he has come close to doing so. He correctly recognizes that neither the Due Process voluntariness analysis nor the Self-Incrimination concept of compulsion are driven by the reliability *vel non* of the resulting confession.[206] Given this, he explains current doctrine via what he calls the "equivalency rule": "[O]nce the warnings are given and acknowledged as understood, police deception during interrogation amounts to Fifth Amendment coercion when, but only when, the deceptive statements would be coercive if true."[207] Under this principle, Professor Slobogin argues, police deception that amounts to "negotiation"—promising or strongly suggesting leniency in exchange for a confession—is impermissibly coercive.[208] However, "impersonation" (deception about whether an official interrogation is even occurring), "rationalization" (including minimization and expressions of sympathy), and fabrication of evidence are noncoercive under the equivalency rule.[209]

Professor Slobogin's "equivalency rule" gets it mostly right. This is because coercion is viewed from the point of view of the suspect.[210] Thus, a statement is equally coercive or noncoercive, irrespective of its truth, so long as the suspect believes it to be true. To take an obvious example, a gun held to the suspect's head is equally coercive irrespective of whether it is loaded or empty, and irrespective of whether the officer holding it really intends to pull the trigger if no confession is forthcoming or is merely bluffing.[211] This is perhaps why the Court in *Lynumn* and *Rogers*, involving threats to take the suspect's children away and to have the suspect's wife brought in for questioning, respectively, did not stop to consider whether the threats were idle[212]: either way, they were coercive. Accordingly, the "equivalency rule" is

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tional right not to speak" is impermissible. However, he makes no attempt to explain what makes some deceit "extreme," or why lies about incriminating evidence are not extreme while falsely telling the suspect that information is needed to save his infant son's life is. As it turns out, Magid's instincts on the police-as-chaplain stratagem are correct, but not for the reason she provided. *See infra* text accompanying notes 193–200.

205 Slobogin, *supra* note 6, at 1164 (explaining that his "goal . . . is to make sense of current doctrine, not change it").

206 *Id.* at 1177–80.

207 *Id.* at 1167; *see also* Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1276 (2007). Professor Slobogin also would deem impermissible "lies aimed at convincing suspects that they do not have a right to remain silent or a right to counsel." *Id.* This constraint is fairly noncontroversial.

208 Slobogin, *supra* note 6, at 1168–71.

209 *Id.* at 1171–73.

210 Stuntz, *supra* note 6, at 807 ("[T]he key to a descriptive theory of the privilege is how the choice appears to the suspect, not how it appears from some omniscient perspective."); *see also* Sasaki, *supra* note 6, at 1606 ("When voluntariness is made the fulcrum of analysis of a suspect's rights, then police misconduct of which the suspect is not aware is not subject to regulation.").

211 Slobogin, *supra* note 207, at 1287 ("A threat to beat a suspect who is not talking . . . is impermissibly coercive, whether the threat is real or not.").

212 *See supra* text accompanying notes 22–32.

an appealing way of describing and justifying some existing caselaw and is a good starting point.

However, the equivalency rule does not explain certain aspects of current law. For example, it does not explain *Thomas*. Imagine that the information provided to Thomas was actually true, that doctors really did need to know how his infant son was injured in order to save his life. Assuming Thomas was guilty, he had a difficult choice to make: forgo his privilege against self-incrimination and face many years in prison in order to save his son's life, or stand by the privilege and let his son die. But the Constitution typically does not forbid the State from presenting people with the difficult choice between exercising a constitutional right and suffering adverse consequences from its exercise, on the one hand, and forgoing the right in order to avoid those consequences, on the other.[213] It merely prevents the State from creating those adverse consequences—altering the "suspect's status quo to her detriment"[214]—in a way that specifically targets the exercise of a constitutional right. As Professor Kent Greenawalt has written: "[T]he moral right to silence should not be viewed as a right to be released from all the normal influences to respond to accusations. Rather, it should be viewed as a right to be free of the especially powerful compulsions that the state can bring to bear on witnesses."[215] Thomas's son's dire condition, had it actually existed, would have been one of "the normal influences" on Thomas to speak, part of his "status quo."

Thus, truthfully informing Thomas that only he could provide life-saving information for his son would not have been coercive. The State would not have been creating a penalty for the exercise of Thomas's constitutional rights by altering his status quo, as it arguably did when the police threatened to arrest his wife. Because police nearly always have discretion whether to arrest, such a threat might have been, in effect, the creation of a penalty that did not otherwise exist.[216] Not so if they had simply relayed truthful informa-

213 *See* McGautha v. California, 402 U.S. 183, 213 (1971) ("Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.").

214 Godsey, *supra* note 169, at 525 ("The relevant question for the Court to ask is whether . . . a reasonable person would objectively conclude that the interrogating officer acted in such a way as to punish silence or provoke speech by changing the suspect's status quo to her detriment.").

215 R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 40 (1981).

216 This is a contestable proposition. *See* Dix, *supra* note 21, at 251 ("Perhaps the greatest uncertainty in this area concerns the effect of a showing that the defendant's belief that failure to waive would result in an unfavorable exercise of official discretion influenced his decision, especially if the behavior of government agents created or reinforced that belief."). But the question there has nothing to do with deception; it is whether the threat was coercive irrespective of whether it was a true threat or an idle one. *See* Godsey, *supra* note 169, at 532 (asserting that the question is whether "a reasonable [police] officer, based on reasonable law enforcement practices, norms, and customs and societal expectations, would probably [have made the arrest] were it not for his desire to obtain a confession").

tion that might have affected his decision whether to speak. Indeed, the *Thomas* court suggested as much, opining: "Perhaps speaking in such a circumstance would amount to a valid waiver of the Fifth Amendment privilege if the underlying representations were true . . . ."[217] The decision in *Thomas* turns on the fact that the information was false.[218]

The "equivalency rule" also does not explain the general judicial disapproval of a more common tactic: false promises of leniency. Again, assume that a promise of leniency is true. That is, assume that the police have both the power to determine what charges will be brought against the suspect[219] and the intention of following through on a promise, say, to charge a defendant with manslaughter rather than murder, or to charge only one rather than multiple counts of narcotics distribution. Assume further that the suspect confesses in reliance on the promise. Finally, assume that the promise of leniency is then kept.

This process looks very much like plea bargaining, which the Supreme Court has deemed noncoercive[220] and which is both commonplace and a virtual necessity in our criminal justice systems.[221] Professor Slobogin anticipated this potential criticism of deeming interrogation-room negotiation coercive[222] and responded in two ways. First, he argued, "the legality of plea bargaining is dependent on the participation of counsel."[223] For support, he

217 People v. Thomas, 8 N.E.3d 308, 315 (N.Y. 2014).

218 *See* Heyl, *supra* note 6, at 948 ("[T]he deception [in *Thomas*] is the key difference . . . .").

219 *But see* Godsey, *supra* note 169, at 535 ("[I]t is a fairly universal practice in the United States that law enforcement officers do not have the authority to plea bargain with suspects regarding charging and sentencing issues during interrogations.").

220 Santobello v. New York, 404 U.S. 257, 260 (1971).

221 Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

222 Slobogin, *supra* note 6, at 1170 (citing Albert W. Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. REV. 849, 863 (2017) (equating, for constitutional purposes, bona fide promises of leniency for purposes of plea bargaining and the same tactic in the interrogation room); Lawrence Rosenthal, *Against Orthodoxy:* Miranda *Is Not Prophylactic and the Constitution Is Not Perfect*, 10 CHAP. L. REV. 579, 600–01 (2007) (similar)); *see also* Slobogin, *supra* note 207, at 1287 (conceding that "false promises of leniency" are "[m]ore difficult to analyze under the equivalency rule").

223 Slobogin, *supra* note 6, at 1171. As Professor White put it: "Since a defendant who enters a guilty plea is entitled to be represented by counsel, the police arguably should be prohibited from engaging in negotiations at an earlier stage of the proceedings to induce what is tantamount to a guilty plea from an unrepresented suspect." Welsh S. White, *Confessions Induced by Broken Government Promises*, 43 DUKE L.J. 947, 954 (1994). The flaw in this argument is that the suspect subjected to custodial interrogation also "is entitled to be represented by counsel" and has been explicitly told of this entitlement. One potential response would be a prophylactic rule making the *Miranda* "right [to] counsel nonwaivable if confession bargaining is carried out." Dix, *supra* note 7, at 354 (emphasis omitted). But, for the reasons stated in the text, such a "prophylaxis built upon prophylaxis," Minnick v. Mississippi, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting), is probably unwarranted.

quoted from *Bordenkircher v. Hayes*, where the court wrote that "[d]efendants *advised by competent counsel* and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation."[224] But the Court there was stating only a sufficient condition, not a necessary one, for the legality of a plea bargain. Professor Slobogin's broader reading of this language is unjustified for at least two reasons. First, the constitutional right to counsel does not apply to minor offenses; it would be surprising to learn that pleas of guilty to such offenses by uncounseled defendants violate the Constitution.[225] Second, even where there is a right to counsel, a defendant need not avail himself of that right, for he also has a constitutional right to go it alone.[226] Though the matter is not beyond dispute,[227] it would also be surprising to learn that a defendant has a constitutional right to make his way alone through the labyrinthine process of trial—for which he must know the rules of evidence, be reasonably adept at examining witnesses, make comprehensible arguments before the jury, and have a minimal understanding of complex jury instructions—but, no matter how good a negotiator he fancies himself, for that he must have counsel.[228]

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224 Slobogin, *supra* note 6, at 1171 (alteration in original) (emphasis added) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)).

225 True, innocent defendants often plead guilty to minor offenses. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1122 (2008). But this does not contradict the assertion that pleas to minor offenses when uncounseled are not necessarily coercive. There does not appear to be any evidence that uncounseled innocent defendants are more likely to plead guilty than counseled innocent defendants to minor offenses. Indeed, given the pressures that defense counsel often exert on their clients to plead guilty, *see* F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 207–15 (2002), one might suspect that the reverse is true.

226 Faretta v. California, 422 U.S. 806, 812 (1975).

227 *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 21.3(a), at 1030 (5th ed. 2009) ("[T]he Supreme Court's recognition in *Faretta* v. *California* of a constitutional right to proceed pro se . . . presumably is applicable in the guilty plea context as well . . . ."); Stuntz, *supra* note 6, at 826–27 (assuming that *Faretta* applies in the guilty plea context (footnote omitted)); *see also* Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 448–49 (2007) (documenting instances of pro se felony defendants who pled guilty).

228 Professor White similarly argued that even kept "[p]romises made in the context of custodial interrogation are likely to prove illusory because an unaided suspect lacks the capacity to evaluate the actual value of any express or implied commitment made by the police." White, *Police Trickery*, *supra* note 6, at 621 n.210. But the suspect has the right to demand legal counsel to advise her about the price she should ask for her information, and she has been explicitly informed about that right. Her decision to forge ahead unaided is probably a foolish one but it is hers to make. *Cf.* George E. Dix, *Promises, Confessions, and Wayne LaFave's Bright Line Rule Analysis*, 1993 U. ILL. L. REV. 207, 253, 259 (suggesting, but ultimately rejecting, the idea that "a general prophylactic prohibition against promises during station house bargaining is inappropriate if the suspect is either represented or has been fairly offered representation and has refused it").

Moreover, Professor Erica Hashimoto's empirical work suggests that pro se defendants, at least those charged with misdemeanors, are at least as effective, perhaps even more so, at extracting favorable plea deals as attorneys are.[229] Of course, it is unfair to equate a negotiation that takes place in the relatively hurried and harried atmosphere of the interrogation room to one that takes place over the course of the weeks and months leading up to a trial date. Moreover, Professor Hashimoto's conclusions on the relative efficacy of uncounseled defendants vis-à-vis lawyers might not hold up when it comes to the more serious crimes that, our common sense tells us, would more likely precipitate a deceptive police interrogation. But the claim here is a much more modest one: the absence or presence of an attorney in plea negotiations, by itself, does not mark the boundary between coercion and noncoercion. Uncounseled interrogation-room bargains are not per se coercive.[230]

The second way in which Professor Slobogin distinguished interrogation-room negotiation from plea bargaining was to assert that, with respect to the former, "the implicit or explicit message [is] that if counsel is consulted, the deal is off the table," and that "that message directly undercuts both the right to silence and the right to counsel."[231] If all interrogation-room negotiation implicated a "no lawyers allowed" rule, then this would be true. It remains to be seen that this is so, however, and Professor Slobogin offers no evidence that it is. Granted that this might often, or even usually, be the case.[232] However, if bona fide interrogation-room negotiations could conceivably occur without the implied threat that consultation with an attorney is a nonstarter, and of course it could, then such negotiations are not coercive per se but must be examined on a case-by-case basis.[233] Courts have thus

229 Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 489–96 (2007).

230 *Accord* Rosenthal, *supra* note 4, at 937–38.

231 Slobogin, *supra* note 6, at 1171; *accord* Dix, *supra* note 228, at 247 ("[O]fficers may be willing to 'deal' with a suspect only if the suspect is willing to deal immediately . . . without consulting counsel . . . ."); Johnson, *supra* note 6, at 310 ("Promises of leniency from the police during interrogation are . . . too likely to give [the] suspect the impression that confession is the only way to escape conviction or mitigate the punishment."); *see also* Slobogin, *supra* note 207, at 1289 (asserting that a promise of leniency in the interrogation room implies "that calling in an attorney to help with the decision will shut the door on any possibility of a deal").

232 *Cf.* United States v. Guarno, 819 F.2d 28, 31 (2d Cir. 1987) (holding confession induced by cooperation agreement between government and uncounseled suspect not coerced, even though government threatened to withdraw offer if suspect consulted with counsel, reasoning that "law enforcement officials have legitimate reasons for protecting the secrecy of ongoing investigations").

233 *See* Pontow v. State, 205 N.W.2d 775, 778–79 (Wis. 1973) ("[W]e think it inappropriate to lay down a rule that forbids the prosecutor from discussing the disposition of charges with a defendant who manifestly prefers to negotiate on his own behalf.").

distinguished between impermissible false promises of leniency and permissible inducement to confess by a promise of leniency that is later kept.[234]

Professor Stuntz also defended the status quo but on different grounds. He reasoned that police interrogation raised two main concerns. One was that it "risk[s] confronting suspects with the dilemma of confession or perjury,"[235] and that avoiding this dilemma is the Self-Incrimination Clause's primary concern.[236] Second, "forcible [interrogation] tactics may result in physical or emotional abuse that is either (1) inherently cruel or (2) the functional equivalent of [extrajudicial] punishment."[237] Deception does not raise these concerns. "It avoids the confession-or-perjury dilemma either by convincing the suspect that truthful statements will not have incriminating consequences, or by making him forget temporarily that they will."[238] And it is difficult to characterize deception that convinces suspects that their words will not come back to haunt them as "unacceptably cruel" or as "punishment."[239]

Professor Stuntz is correct on the second point: it is difficult to conceive of deception as abusive except where the statements of police would amount to "abuse" even if the statements were true. This approximates Professor Slobogin's equivalency rule. But Professor Stuntz's first point is underprotective vis-à-vis current doctrine. Suppose, for example, police deceive a suspect in a way that directly contradicts the *Miranda* warnings, as by telling her that, despite what she has just been told, her statements are inadmissible in court unless the police record them. Such a suspect would feel no pressure from the confession-or-perjury dilemma, just as if the police officer were masquerading as a jailhouse confidante. But only the latter is acceptable; the former is not.

Professor Stuntz would likely say that there is an implicit exception for deception that directly contradicts the *Miranda* warnings. After all, he relies upon the warnings to "take care of the central fifth amendment problem," allowing the police to engage in deception.[240] It would be anomalous if permissible deception included tricking the suspects in a way that is inconsistent with the warnings themselves.

But his view is also inconsistent with current law in a way that cannot be so easily explained. Where police falsely offer a suspect leniency in exchange for a confession, the suspect is no longer exposed to the confession-or-perjury dilemma. In the most drastic case, where the police falsely promise the suspect full immunity, that is no different from the example in the preceding

234 *See, e.g.*, Conner v. State, 982 S.W.2d 655, 661–62 (Ark. 1998). *But see* People v. Vasila, 38 Cal. App. 4th 865, 874–76 (1995) (rejecting this distinction); *cf.* State v. Marini, 638 A.2d 507, 512–13 (R.I. 1994) (failing to recognize this distinction).

235 Stuntz, *supra* note 6, at 823.

236 *Id.* at 803.

237 *Id.* at 823.

238 *Id.*

239 *Id.*

240 *Id.* at 818.

paragraph: assuring that the suspect's words will never be used against her, directly contradicting the *Miranda* warnings themselves. But even where police falsely offer, say, a lighter sentence than might otherwise be warranted, the suspect still will not feel the pressure to either confess or commit perjury. The properly warned suspect will instead feel that she has been confronted with a fair choice: confess and receive a lighter sentence, continue negotiating (or, better yet, consult with counsel) to try to get a better deal, or roll the dice at trial. A perjurious claim of innocence is not a danger here.[241] Yet courts agree that an outright false promise of leniency is an impermissible way of inducing a confession.

An approach that tries to explain current doctrine should attempt to avoid all of these flaws. It should accept the Supreme Court's stated rationales for the constraints on interrogation practices. It should try to capture as much of existing doctrine as possible within its formulation. And it should be articulated with sufficient clarity so as to be administrable and capable of predicting the outcomes of cases, thereby giving much needed guidance to police, lawyers, and judges. The first step is to recognize that even the most egregiously deceptive practices used by police are not coercive at all in the true sense of the word. They are, instead, fraudulent.

III. Deceptive Interrogation Practices as Fraud, Not Coercion

Deceptive interrogation practices are generally noncoercive, but they are potentially fraudulent. Once one accepts this recharacterization, one can examine the law of fraud, and home in on its requirement of materiality in order to both explain and justify current law. Police deception during interrogation is impermissible only when the deception relates to a material fact: one that causes the suspect to forgo the right to remain silent and that would cause a reasonable person in the suspect's position to do the same.

A. Changing the Vocabulary of Deceptive Interrogation Practices

The first step in explaining and defending current law is to recognize that deception is very different from coercion, and so courts should not continue to examine police deception within the framework of coercion. What police do when they deceive a suspect into speaking is not to coercively limit the suspect's choices to some uncertain normatively unacceptable level. Police deception instead skews the suspect's perception of the relative costs and benefits of exercising, forgoing, and invoking the right to remain silent.

241 A perjurious confession (i.e., a false confession by an innocent suspect) is, of course, a danger. But, again, the danger of false confessions is not what drives the doctrine, *see supra* text accompanying notes 166–78, as Professor Stuntz recognizes. *See* Stuntz, *supra* note 6, at 802 ("The privilege against self-incrimination . . . by definition applies chiefly to the factually guilty.").

1. Coercion vs. Fraud

The Supreme Court's voluntariness cases mainly address instances of putative coercion. The use of the "overborne will" standard tells us that the touchstone is whether the suspect has been subjected to external pressures, overt or subtle, that wear down his will to resist self-incrimination to the point where he has been deprived "of his free choice to admit, to deny, or to refuse to answer."[242] Early on, the cases dealt with either actual[243] or threatened[244] physical violence, or psychological pressures created by incessant, incommunicado, round-the-clock questioning, often involving sleep deprivation, in which the suspect had no ability to end the interrogation or even to predict how much longer it would last.[245] It makes some sense to conclude that a suspect being whipped with a belt or who has not slept in over thirty-six hours has been deprived of any meaningful choice not to speak.[246] And although the concept of coercion or duress is defined in slightly different ways in different areas of the law,[247] the touchstone is always the loss of free will to choose an alternative course of action.[248]

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242 Lisenba v. California, 314 U.S. 219, 241 (1941).

243 Brown v. Mississippi, 297 U.S. 278, 281–82 (1936).

244 Beecher v. Alabama, 389 U.S. 35, 36 (1967) (per curiam) (police threatened to kill suspect, then fired rifle next to suspect's ear); Payne v. Arkansas, 356 U.S. 560, 564–65 (1958) (police threatened to turn suspect over to angry mob).

245 *See, e.g.*, Darwin v. Connecticut, 391 U.S. 346, 349 (1968) (per curiam); Greenwald v. Wisconsin, 390 U.S. 519, 520–21 (1968) (per curiam); Clewis v. Texas, 386 U.S. 707, 709, 711–12 (1967); Davis v. North Carolina, 384 U.S. 737, 739, 746–47, 752 (1966); Haynes v. Washington, 373 U.S. 503, 504 (1963); Gallegos v. Colorado, 370 U.S. 49, 52, 55 (1962); Culombe v. Connecticut, 367 U.S. 568, 622 (1961) (plurality); Stein v. New York, 346 U.S. 156, 185 (1953); Watts v. Indiana, 338 U.S. 49, 53 (1949) (plurality); Ashcraft v. Tennessee, 322 U.S. 143, 153 (1944); *see* Michael J. Zydney Mannheimer, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57, 66 (2002).

246 *See* Slobogin, *supra* note 6, at 1165 ("The physical abuse or prolonged (multi-day) detention of suspects associated with first-generation practices is clearly coercive under the Constitution.").

247 *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (AM. L. INST. 1981) (duress occurs when "manifestation of assent is induced by an improper threat . . . that leaves the victim no reasonable alternative"); MODEL PENAL CODE § 2.09(1) (AM. L. INST. 1985) ("It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.").

248 Hinging the constitutionality of police conduct on a concept as slippery as "free will," which has eluded mankind for several thousand years, is obviously problematic. *See* Slobogin, *supra* note 6, at 1165 ("The Court's interrogation caselaw has always been vague about the precise meaning of coercion, understandably so given how that concept has perplexed moral philosophers."). But this Article takes the caselaw on coerced confessions as it finds it. Whatever "free will" means, it would be difficult to argue that someone who makes a seemingly rational decision to act to her detriment on the basis of misrepresentation has been deprived of free will.

But "deception is not coercion."[249] While both deception and coercion are antithetical to autonomy, they operate in different ways. There is both a noncoercive and an informational dimension to autonomy.[250] When police misrepresent or omit a fact during interrogation, they are potentially engaging in an infringement of a suspect's autonomy only in the informational sense. In the interrogation context, though the Supreme Court has sometimes conflated the two,[251] it recognized a difference between coercion and deception when it wrote in *Illinois v. Perkins* that "*Miranda* forbids coercion, not mere strategic deception."[252] As one commentator elaborated: "Perkins's will was not impaired. Perkins talked because he was fooled . . . and not because he somehow could no longer resist the pressure or promises of a relentless police officer."[253] The law generally disfavors both coercion and deception, but it does so in different ways and for different reasons.

Generally, legally cognizable deception—fraud—has occurred when a person is tricked into taking some action based on a misrepresentation or omission of fact by another person.[254] Free will has not been lost. To the contrary, the person deceived exercises free will to make a decision based on inaccurate information intentionally supplied by another. If I wire a supposed Nigerian prince $10,000 because he has promised me a payout of $2 million, I have made a seemingly rational decision of my own free will based on the handsome return on investment promised. When the payout is not forthcoming, one would say I was deceived, tricked, duped. No one conversant in the English language would say I was coerced.

This better describes the confession induced by deceptive interrogation tactics.[255] The premise underlying *Miranda*, and the law governing interrogation more generally, is that "a suspect's will about whether to confess is the

249 Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1411 (2013); *see* JOSEPH D. GRANO, CONFESSIONS, TRUTH AND THE LAW 109 (1993) (noting that at least some "trickery does not seem to involve a question of coercion"). *But see* Alschuler, *supra* note 6, at 968 (observing with approval that "traditional law" on confessions "collapses . . . the distinction between duress and fraud").

250 Luis E. Chiesa, *Solving the Riddle of Rape-by-Deception*, 35 YALE L. & POL'Y REV. 407, 422–23 (2017); *cf.* Hritz, *supra* note 6, at 498 (observing that lies "invade[ ] the targets' autonomy"); Young, *supra* note 6, at 470 (observing that lies used to induce waiver or consent "encroach on an individual's autonomy").

251 *See* Frazier v. Cupp, 394 U.S. 731, 739 (1969) (examining deception about incriminating evidence as a claim of coercion).

252 496 U.S. 292, 297 (1990); *see also* Magid, *supra* note 6, at 1210 ("Deceptive but nonthreatening interrogation will generally be no more unpleasant than the other intrusions deemed reasonable after a showing of probable cause . . . .").

253 Fred Cohen, Miranda *and Police Deception in Interrogation: A Comment on* Illinois v. Perkins, 26 CRIM. L. BULL. 534, 540 (1990).

254 Hritz, *supra* note 6, at 498 ("[L]ies can vary targets' estimates of the costs and benefits of a course of action."); Kitai-Sangero, *supra* note 6, at 644 ("Lies in general might hurt a person's ability to choose and make decisions based on relevant information.").

255 Sasaki, *supra* note 6, at 1595 ("Police trickery should be viewed as a type of fraud . . . ."); White, *supra* note 223, at 950 (observing that it "seem[s] counterintuitive" to conclude that a suspect's "will was overborne" when his confession was induced by a false

product of a rational balancing of benefit versus potential harm."[256] Deceptive practices potentially skew the suspect's decision whether to confess by artificially altering her perception of the relative benefits of speaking and of remaining silent.[257]

One element generally required to make out a case of fraud is materiality. As the Supreme Court has written: "The well-settled meaning of 'fraud' required a misrepresentation or concealment of material fact. Indeed . . . the common law could not have conceived of 'fraud' without proof of materiality."[258] For example, the *Restatement (Second) of Torts* provides that the misrepresented or omitted information must be material for even an intentional misrepresentation or omission to constitute fraud.[259] State and federal statutes criminalizing or providing a civil action for fraud generally require that materiality be proven.[260]

In the context of police deception during interrogations, the Supreme Court has, in essence though not in words, adopted a materiality requirement. Recall *Moran v. Burbine*, in which the Court held that failure to inform

promise of leniency, given that he was not "unable to make a rational choice" but rather "chose to confess in order to receive the benefits . . . promised").

256 George C. Thomas III, Miranda*'s Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1103 (2003) (reviewing WELSH S. WHITE, *MIRANDA*'S WARNING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER *DICKERSON* (2001)). For a more elaborate enumeration of the various costs and benefits of speaking, see Janda, *supra* note 6, at 85–86.

257 Hritz, *supra* note 6, at 502 ("[L]ies distort the suspect's estimates of the costs and benefits of confessing."); Kitai-Sangero, *supra* note 6, at 644 ("[L]ies during interrogation harm a suspect's ability to make decisions by distorting the information at their disposal and changing their cost-benefit evaluation of confessing.").

258 Neder v. United States, 527 U.S. 1, 22 (1999) (emphasis omitted).

259 RESTATEMENT (SECOND) OF TORTS § 538(1) (AM. L. INST. 1977) ("Reliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material.").

260 *See, e.g.*, Universal Health Servs., Inc. v. United States, 136 S. Ct. 1989, 1996 (2016) ("A misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be material to the Government's payment decision in order to be actionable under the False Claims Act."); *Neder*, 527 U.S. at 25 (holding that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes"); *cf.* Alschuler, *supra* note 6, at 975 ("Material fraud vitiates most of life's choices . . . ."); Paris, *supra* note 6, at 64 (suggesting that policymakers limit police deception by using "the materiality standard found in federal securities regulations").

This is not to say that the law of fraud can be applied in the interrogation context lock, stock, and barrel. While deception occurs only sometimes, one hopes rarely, in ordinary human interactions, deception is inherent in interrogation itself. *See supra* text accompanying notes 180 to 192. It is only to say that deceptive interrogation tactics are better characterized as (potentially) a form of fraud than as a form of coercion. After all, the law guards against coercion in many different contexts and, one again hopes, it occurs rarely, but coercion, like deception, is also inherent in interrogations. *See* Miranda v. Arizona, 384 U.S. 436, 458 (1966). Coercion and fraud are simply broad characterizations of two very different sorts of incursions on autonomy; how they are defined in particular contexts will necessarily vary.

the suspect that a lawyer had been retained on his behalf and sought to represent him during the interrogation did not vitiate the suspect's waiver of his *Miranda* rights.[261] The Court rejected the notion from contract law that intentionality of the omission, by itself, could render it fraudulent,[262] stating that it did not "believe that the level of the police's culpability in failing to inform" the suspect about the attorney "has any bearing on the validity of the waivers."[263] Instead, the Court seemed to adopt the materiality requirement from tort law when it conceded that "the additional information would have been useful to [the suspect and] perhaps even it might have affected his decision to confess,"[264] but the omission nevertheless did not vitiate Burbine's waiver.

In *Colorado v. Spring*,[265] the Court confirmed this understanding. There, recall, in reading the suspect his *Miranda* rights, the police failed to inform him that they would be questioning him on a more serious crime, murder, than the gun charge for which he was ostensibly arrested.[266] Relying on *Burbine*, the Court concluded that the omission did not invalidate the waiver.[267] Again, the Court conceded that the omitted information might have had an effect on Spring's decision to waive, observing that "any number of factors could affect a suspect's decision to waive his *Miranda* rights."[268] But the Court held as a matter of law that the omission here did not affect Spring's decision "in a constitutionally significant manner."[269]

But if the Court admitted in both cases that provision of the omitted information might have prevented Burbine and Spring from waiving their rights, why does that not affect the validity of the waivers? What makes information "constitutionally significant" to the decision to waive?

The answer is materiality. To say that the omitted information, had it been provided, might have caused Burbine or Spring not to waive is to say only that it might have mattered to them. But that is different from saying that the information was material, which is to say that it would have mattered to a reasonable person in making the decision whether to waive.[270] Burbine,

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261 475 U.S. 412, 416–18, 421–24 (1986); *see supra* text accompanying notes 54–57.

262 RESTATEMENT (SECOND) OF CONTRACTS § 162(1) (AM. LAW INST. 1981) ("A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker (a) knows or believes that the assertion is not in accord with the facts, or (b) does not have the confidence that he states or implies in the truth of the assertion, or (c) knows that he does not have the basis that he states or implies for the assertion.").

263 *Burbine*, 475 U.S. at 423.

264 *Id.* at 422.

265 479 U.S. 564 (1987); *see supra* text accompanying notes 54 & 56.

266 *Spring*, 479 U.S. at 575 n.7.

267 *Id.* at 576–77.

268 *See id.* at 577 & n.9.

269 *Id.* at 577.

270 RESTATEMENT (SECOND) OF CONTRACTS § 162(2) (AM. L. INST. 1981) ("A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent . . . ."); RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (AM. L. INST. 1977) ("The matter is material if . . . a reasonable man would attach importance to its existence or

for example, had to decide whether he needed a lawyer to help him undergo police interrogation. Having been told of his right to counsel, he either needed a lawyer or he didn't.[271] The fact that his family had retained a lawyer for him was irrelevant to that determination. So while that fact, if made known to him, might have made him change his mind, that line of reasoning on his part would be unreasonable. As Professor Stuntz put it: "[I]rrational waivers . . . do not implicate the concerns of the privilege against self-incrimination."[272]

Take an example from the law of securities fraud. If my broker persuades me to buy a certain stock by misrepresenting her own education, experience, and expertise in the stock market, that would be considered fraud. Because I am led to believe that my broker has a particular level of expertise in deciding what stocks to buy, the misrepresentation induced me to buy the stock and it would have had the same effect on the reasonable person. Her education, experience, and expertise are material facts.[273] But now imagine that I am a huge fan of Lady Gaga,[274] and my broker persuades me to buy the stock by falsely telling me that Lady Gaga owns a thousand shares. Again, I have been induced to act by the misrepresentation. But

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nonexistence in determining his choice of action in the transaction in question . . . ."); *see* Sasaki, *supra* note 6, at 1600 (advocating "a materiality-based definition for police trickery").

Both the contract and the tort versions of materiality also would classify as material those facts that might not be important to a reasonable person in making a decision but that the maker knows to be important to the particular victim of the misrepresentation. *See* RESTATEMENT (SECOND) OF CONTRACTS § 162(2) (AM. L. INST. 1981); RESTATEMENT (SECOND) OF TORTS § 538(2)(b) (AM. L. INST. 1977). This important caveat is consistent with Supreme Court caselaw in the interrogation context that, while establishing otherwise objective standards, also looks to whether the police intentionally exploited idiosyncrasies of the particular suspect. Thus, in *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980), the Court held that interrogation includes "words or actions on the part of [the police] that they *should have known* were reasonably likely to elicit an incriminating response [from the suspect]," a seemingly objective standard. However, the Court also noted that courts should also take into account any police "knowledge . . . concerning the unusual susceptibility of a defendant to a particular form of persuasion." *Id.* at 302 n.8.

271 Stuntz, *supra* note 6, at 817–18 (asserting that Burbine's knowledge of his right to end questioning by requesting a lawyer was all he needed to make a valid decision).

272 *Id.* at 816. One student commentator correctly articulated a standard for identifying a material police misrepresentation during interrogation: "A material fact is one that a reasonable suspect would attach importance to in determining whether or not to confess. An omitted fact is material if there is a substantial likelihood that a reasonable suspect would consider it important in deciding whether or not to confess." Sasaki, *supra* note 6, at 1601 (citation omitted). However, he did not go on to examine with particularity how this standard would apply to the vast array of deceptive interrogation tactics, advocating only that all "police trickery"—a term that presumably incorporates the materiality standard—be barred. *Id.* at 1612–14. Moreover, he also advocated barring any "technique that takes unfair advantage of the defendant's emotions or scruples" without attempting to define "unfair" or to explain how this is consistent with a materiality standard. *Id.* at 1614.

273 *See* SEC v. Constantin, 939 F. Supp. 2d 288, 306–08 (S.D.N.Y. 2013) (mem.).

274 I am not.

here, there was no misrepresentation of a material fact. Lady Gaga (so far as I know) is not an expert on the stock market, so whether she owns a particular stock should be irrelevant, and would be irrelevant to a reasonable person. That I would have refrained from the transaction absent the information is not enough to make the information material.

One might argue that positing Burbine's decision as a binary one—either he needed a lawyer or he did not—is a simplistic approach to human decisionmaking.[275] Not all decisions we make necessarily are of the either/or variety. "[M]ost preferences are not relatively fixed [and] are, instead, radically contingent and shifting."[276] When a dinner party host asks me if I would like some wine, I might answer that I will take a glass if a bottle is already open, but not to bother otherwise. In such a case, I would say that I have decided that I would like some wine but this desire might be mitigated by exogenous factors, so that I could also say that the desire is not so strong as to overcome my hesitance to cause inconvenience to my host. In this sense, it is a false dichotomy to say that I either want wine or I do not.

But a police interrogation is not a dinner party, and a lawyer is not a glass of wine. The suspect in custody has just been informed that this is serious business: that if he chooses to speak, his words will be used to send him to prison or the death chamber. And he has been informed that, to better help him make the decision whether to speak, he is entitled to have an attorney present. If the warnings have had their intended effect,[277] we are entitled to assume that exogenous considerations have fallen away, overwhelmed by the suspect's awareness of the gravity and solemnity of his plight. Under such circumstances, we are entitled to assume that the suspect means what he says: that he does not need an attorney.

In both *Burbine* and *Spring*, of course, the claim was that deception induced the *Miranda* waiver, not that deception induced the confession. That is to say, both cases presented a Self-Incrimination Clause, not a due process, issue. Yet, because deception is not coercion, it makes more sense to recast deception not as a due process issue but as a Self-Incrimination Clause issue. The due process voluntariness analysis was developed with true coercion—physical and psychological torture—in mind. Deception is better thought of as implicating the Fifth Amendment and its associated *Miranda* rights: At what point does deception vitiate a suspect's otherwise free choice to forgo those rights and speak against her own interests?[278]

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275 *See* Thomas, *supra* note 6, at 1108 (arguing that viewing choice as "dichotomous" "perhaps manifests a mistaken understanding of human action").

276 *Id.* at 1095.

277 Whether they have or not is, of course, contestable, but that controversy is beyond the scope of this Article, which assumes that *Miranda* warnings are sufficient to inform the suspect of the gravity of his situation.

278 *Cf.* Slobogin, *supra* note 6, at 1179 ("[F]or all practical purposes, the protection afforded by the Due Process Clause and the protection guaranteed by the Fifth Amendment after the warnings are given and putatively understood are co-extensive.").

Although the Fifth Amendment bars compulsion to speak, the Supreme Court has recognized that a Fifth Amendment violation can occur even without compulsion, as where the government manipulates one's choice whether to assert the privilege. Thus, in *Griffin v. California*, the Court held that prosecutorial comment on a defendant's failure to testify violated the Fifth Amendment not by literally compelling the defendant to testify—indeed, *Griffin* applies only when the defendant has *not* testified—but by making the assertion of the privilege too costly.[279] If prosecutorial comment "cuts down on the privilege by making its assertion costly,"[280] then police deception can cut down on the privilege by seeming to make its assertion worthless.

Thinking about police deception during interrogation as inducing waiver of the Fifth Amendment privilege is supported by recent developments in the law of *Miranda* waiver, which suggest that there really is no difference between deception as vitiating a *Miranda* waiver and deception as inducing a confession.[281] Inducing a confession is, in effect, inducing a waiver of the Fifth Amendment and its associated *Miranda* rights.

279 380 U.S. 609, 613–14 (1965). *Griffin* itself may have been wrongly decided. *See* Salinas v. Texas, 570 U.S. 178, 192 (2013) (Thomas, J., concurring in the judgment) (arguing that *Griffin* should be overruled because "[a] defendant is not 'compelled . . . to be a witness against himself' simply because a jury has been told that it may draw an adverse inference from his silence" (alteration in original)). As discussed above, *see supra* text accompanying notes 213–14, the Constitution generally does not forbid the State from exacting a price for the exercise of a constitutional right, but merely forbids the State from manipulating that choice by "creating those adverse consequences . . . in a way that specifically targets the exercise of a constitutional right." The outcome of *Griffin* is questionable because prosecutorial comment on a defendant's silence is consistent with the prerogative of any litigant, civil or criminal, to point out to the jury the absence of relevant evidence. By contrast, police deception is designed to result in forfeiture of the privilege by creating the impression that its assertion has no value.

280 *Griffin*, 380 U.S. at 614.

281 *Cf.* Thomas, *supra* note 6, at 1185 (noting that after *Miranda*, "[i]t seemed quite logical to conclude that since a trickery-induced waiver would be deemed involuntary, a trickery-induced confession should be equally involuntary"). Indeed, even the Court in *Colorado v. Spring* no doubt inadvertently, elided the two when it wrote that the Court had previously "found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege." 479 U.S. 564, 576 n.8 (1987) (first citing Lynumn v. Illinois, 372 U.S. 528 (1963); and then citing Spano v. New York, 360 U.S. 315 (1959)). Of course, the Courts in *Lynumn* and *Spano* did no such thing, given that both were decided before the Court held in *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 79 (1964), that the Self-Incrimination Clause applied to the States. *Lynumn* and *Spano* (arguably) found such misrepresentations sufficient to render a confession coerced in violation of the Fourteenth Amendment's Due Process Clause. But, as this and the next subsection show, the Court in *Spring* accidentally got the right answer: police deception during interrogation ought to be seen as affecting the validity of the suspect's implicit waiver of the Fifth Amendment privilege, not the voluntariness of the confession.

2. Police Deception During Interrogation as Fraudulent Inducement of a *Miranda* Waiver

For many years after *Miranda*, it was generally assumed that the warnings-and-waiver protocol contemplated discrete, sequential events: first warnings, then waiver, then interrogation. To put it another way, *Miranda* was seen as creating a right to avoid interrogation altogether, and thus waiver naturally had to precede interrogation, because interrogation without waiver violated the right to avoid interrogation. Indeed, the right to avoid interrogation is still a big part of *Miranda* jurisprudence,[282] as it is the premise of the invocation cases, which hold that a suspect has the right to end interrogation by invoking the right to silence[283] or the right to counsel.[284]

That view was shattered in *Berghuis v. Thompkins*,[285] at least in the waiver context.[286] There, the Court held that waiver need not precede interrogation in order for a resulting statement to be valid. The police in that case read Thompkins the *Miranda* warnings and then, without first obtaining a waiver, interrogated Thompkins for some two hours and forty-five minutes.[287] He initially provided short (presumably noninculpatory) verbal and nonverbal responses to some questions by the detective, Helgert.[288] Then, as the Court related it: "Helgert asked Thompkins, 'Do you believe in God?' Thompkins . . . said 'Yes.' . . . . Helgert asked, 'Do you pray to God?' Thompkins said 'Yes.' Helgert asked, 'Do you pray to God to forgive you for shooting that boy down?' Thompkins answered 'Yes . . . .'"[289] The Court held that Thompkins's responses were admissible because the one-word state-

282 *See* Sacharoff, *supra* note 35, at 583–88.

283 Michigan v. Mosley, 423 U.S. 96, 104–05 (1975).

284 Edwards v. Arizona, 451 U.S. 477, 484–85 (1981). Invocation of the right to silence ends interrogation only temporarily, as police may attempt to interrogate at a later time. *Mosley*, 423 U.S. at 104–05. Invocation of the right to counsel, by contrast, is more robust: police may attempt to reinterrogate only if the suspect himself reinitiates a conversation about the crime, *see* Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983) ("[B]efore a suspect in custody can be subjected to further interrogation after he requests an attorney there must be a showing that the 'suspect himself initiates dialogue with the authorities.'" (quoting Wyrick v. Fields, 459 U.S. 42, 46 (1982))), or the suspect has been out of custody for at least fourteen days, *see* Maryland v. Shatzer, 559 U.S. 98, 117 (2010), or counsel is actually present for the interrogation, *see* Minnick v. Mississippi, 498 U.S. 146, 153 (1990).

285 560 U.S. 370, 387–88 (2010); *see* Meghan Morris, *The Decision Zone: The New Stage of Interrogation Created by* Berghuis v. Thompkins, 39 AM. J. CRIM. L. 271, 273 (2012) ("*Thompkins* is the first decision to explicitly allow police to interrogate a suspect before obtaining any waiver, whether implied or explicit, of a suspect's constitutional rights." (emphasis omitted)).

286 "[T]here is considerable tension between how the Court has addressed invocation and how it addressed waiver in *Thompkins*." Michael J. Zydney Mannheimer, *The Two* Miranda*s*, 43 N. KY. L. REV. 317, 356 (2016).

287 *Thompkins*, 560 U.S. at 374–76.

288 *Id.* at 375–76.

289 *Id.* at 376 (alterations in original) (citations omitted).

ments themselves constituted waiver of the *Miranda* rights.[290] That is, the waiver of the right not to speak and testimonial evidence resulting from that waiver were one and the same: the word "yes."

After *Thompkins*, the warnings-waiver-interrogation process must be viewed as holistic rather than purely sequential. Though warnings must still come first, the waiver/interrogation dynamic is organic rather than rigidly formal. If waiver can come about in the form of a response to a question, then, in effect, every response to interrogation is an instance of waiver. That is to say, every question provides the suspect the opportunity to either invoke his rights, thereby ending the interrogation, to waive them by speaking, or to exercise his rights by remaining silent, as Thompkins did for over two hours. To invoke, he must do so expressly and unambiguously.[291] To waive, he need only answer. The suspect has this decision to make on a question-by-question basis.

Language from *Thompkins* confirms this organic understanding of the interrogation process, contemplating a rational actor calibrating his self-interest to the progress of the interrogation, and continually evaluating and reevaluating whether to waive, invoke, or do nothing:

> Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that *Miranda* rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests.[292]

The *Thompkins* Court confirmed the understanding that waiver occurs on a question-by-question basis when it wrote that the *Miranda* requirements are satisfied "if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving *any answers or admissions*."[293] Thus, every question presents a new opportunity to waive or invoke (or remain silent), and any answer can be viewed as a waiver.

This view of *Miranda* waiver accords with treatment of the Fifth Amendment privilege in more formal settings. The rights that *Miranda* provides the suspect in custodial interrogation track the rights of, say, the grand jury witness but for three additional rights that *Miranda* provides: the right to be advised of the rights, the right to the presence of counsel, and the right to

290 *Id.* at 388. This result was prefigured in an early Third Circuit case, *Collins v. Brierly*, 492 F.2d 735, 739 (3d Cir. 1974) (en banc). The *Collins* court reasoned that, because the suspect can cut off questioning at any time by invoking her rights, any pre-interrogation "waiver" is revocable at will. *See id.* Thus, "a 'waiver' in its usual sense does not occur until a [suspect] actually answers a question." *Id.* It follows that, because the suspect continues to enjoy the right to cut off questioning even after answering questions, every answer is a separate waiver.

291 *See* Davis v. United States, 512 U.S. 452, 459 (1994).

292 *Thompkins*, 560 U.S. at 388.

293 *Id.* at 387 (emphasis added).

cut off questioning.[294] It is well settled that the grand jury witness must invoke the privilege expressly on a question-by-question basis or it will be deemed waived as to that question[295] and to any other addressing the same subject matter.[296] Thus, the grand jury witness must assess her position vis-à-vis potential self-incrimination on a question-by-question basis, and make a decision to either forgo the privilege and speak or invoke the privilege and remain silent.[297] *Thompkins* simply recognizes that this same dynamic exists in the interrogation room, without upsetting the interrogee's most potent weapon, not shared by the grand jury witness: the right to cut off questioning.

This detour into the intricacies of *Miranda* waiver and the view of waiver augured by *Thompkins* now lets us reevaluate the jurisprudence on deceptive interrogation practices in light of *Miranda*'s caution that police may not "threaten[ ], trick[ ], or cajole[ ]" the suspect into waiving her rights.[298] If suspects may not be "tricked" into waiving their *Miranda* rights, and if waiver of *Miranda* rights is most accurately viewed as a continuing series of question-by-question decisions to speak rather than exercise or invoke the privilege, then deceptive interrogation practices are directly subject to *Miranda*'s proscription against trickery, no matter when during the interrogation that deception occurs. That is, if each question during the interrogation presents the suspect with a new opportunity to waive, exercise, or invoke, then a new decision, a new assessment of the costs and benefits of speaking, must be made each time. Any deception during the interrogation is covered by the "trickery" language of *Miranda*.[299]

But that is not to say that all such trickery is forbidden by *Miranda*. *Miranda* forbids only police conduct that tricks the suspect "into a waiver," suggesting a causal nexus between the trickery and the waiver.[300] To be "tricked . . . into a waiver," the deception must have both induced the waiver and—this is critical—it must be such as would have the same effect on a

294 *See* United States v. Mandujano, 425 U.S. 564, 579–81 (1976) (plurality opinion) (observing that there is no right to either warnings or counsel in the grand jury room, and that "even when the grand jury witness asserts the privilege, questioning need not cease, except as to the particular subject to which the privilege has been addressed.").

295 United States v. Murdock, 284 U.S. 141, 148 (1931) ("The privilege of silence . . . is deemed waived unless invoked.").

296 Rogers v. United States, 340 U.S. 367, 373 (1951) ("Disclosure of a fact waives the privilege as to details.").

297 The third option to the suspect in custody—exercise the right to remain silent without invoking it—is not available to the grand jury witness. If she neither waives the privilege by speaking nor expressly invokes it, she is guilty of contempt.

298 Miranda v. Arizona, 384 U.S. 436, 476 (1966).

299 *Id.* at 453–55.

300 *Id.* at 476.

reasonable person. This is the materiality requirement implicit in *Burbine*[301] and *Spring*.[302]

According to these principles, one can finally articulate a useable standard for determining when deceptive interrogation tactics by the police go too far. Putting to one side Professor Slobogin's "equivalency rule"—that deception is coercive when the information would have resulted in coercion even if true[303]—police deception during interrogation is intolerable if, but only if (1) it causes the suspect to falsely believe that the benefits of speaking outweigh the benefits of remaining silent, and (2) a reasonable person in the suspect's position would have the same belief.[304] Not only does this standard accord with the Supreme Court's jurisprudence on *Miranda* waiver, it also provides the best explanation for the jurisprudence on deceptive interrogation practices as it has developed in the lower courts.

B. A Fresh Look at Fraudulently Induced Confessions

The jurisprudence on deceptive interrogation practices can be reexamined under a new rubric. Such practices are correctly characterized as potentially fraudulent rather than coercive, with materiality as the key difference between permissible and impermissible deception. The question for all types of deceptive interrogation is this: Would a reasonable person, aware of her rights,[305] be induced by the deception to believe falsely that the benefits of speaking to the police outweigh the benefits of remaining silent? If so, then the particular tactic is constitutionally impermissible. Using this standard, the cases actually make a lot of sense.

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301 Moran v. Burbine, 475 U.S. 412, 422–23 (1986); *see supra* text accompanying notes 55–58.

302 Colorado v. Spring, 479 U.S. 564, 577 (1987); *see supra* text accompanying notes 265–69.

303 *See supra* text accompanying notes 210–13.

304 The phrase "in the subject's position" is capacious enough here, as it is in other areas of the law, to include some idiosyncratic characteristics of the actual suspect that bear on her particular susceptibility to certain deceptive techniques. In particular, there is wide agreement that juveniles and those with intellectual disabilities, and perhaps others, are more vulnerable to such practices. *See* Slobogin, *supra* note 207, at 1291. This is likely because they tend to defer more strongly to those in authority and therefore will tend to over-value the benefits of speaking to the police. The analysis that follows assumes a more typical suspect, not a member of a vulnerable population. *Cf. Ex parte* Hill, 557 So.2d 838, 842 (Ala. 1989) (disapproving of false evidence ploy in light of suspect's "borderline mental retardation, his schizophrenic personality or schizoid personality disorder, the evidence of possible brain damage, and [his] emotional state at the time of the interrogation"); Young, *supra* note 6, at 453 (observing that courts have approved of deceit of suspects "as young as sixteen" and those "with below-average intelligence").

305 Although some interrogation takes place in a noncustodial setting, and therefore is not necessarily preceded by *Miranda* warnings, the law presumes that suspects in such settings are aware of their rights. *Miranda*, 384 U.S. at 498–99.

1. Impermissible Deception

The most obvious category of impermissible deception under this standard is deception that contradicts or distorts the meaning of the *Miranda* warnings. The suspect's primary weapons against manipulative police tactics are the *Miranda* warnings themselves. Rather than ban these tactics outright, the *Miranda* Court's central aim was to arm the suspect with the knowledge that he need not speak to the police, that his words can be used against him in a later criminal case, and that he can consult with legal counsel about his predicament.[306] The doctrine assumes that the suspect will have the wherewithal to employ this knowledge of his rights to his benefit. But this assumption is shattered if the police say or do something that contradicts or distorts the meaning of the warnings.[307]

Thus, for example, police assurance that their conversation is "off the record" or confidential directly contradicts the warning that the suspect's inculpatory words will invariably come back to haunt him at trial. So, too, falsely conveying the impression that exercising the right to counsel will harm him distorts the meaning of the *Miranda* right to counsel by making it appear to the suspect that he has that right only as a formal or technical matter and that any attempt to actually exercise it will occasion adverse consequences. Furthermore, any deceit that conveys the message that his silence can be used against him by the jury again contradicts *Miranda* by falsely portraying that right as having far less value to the suspect than it actually has. This constraint also explains *Missouri v. Seibert*,[308] where police intentionally

306 Magid, *supra* note 6, at 1175 ("Instead of forbidding [deceptive] techniques . . . the Court protected suspects by requiring that police inform suspects of their rights to remain silent and to be provided with an attorney . . . .").

307 GRANO, *supra* note 249, at 114 ("Police may not deceive defendants about the nature or scope of their legal rights."); LAFAVE ET AL., *supra* note 227, § 6.9(c), at 396 ("[T]here is an absolute prohibition upon any trickery which misleads the suspect as to the existence or dimensions of any of the applicable rights . . . ."); WHITEBREAD & SLOBOGIN, *supra* note 55, at 404 ("[I]t may be useful to make a distinction between trickery as to the contents of the warnings and trickery as to other aspects of the case."); Alschuler, *supra* note 6, at 976 n.91 ("Misrepresenting a suspect's legal rights . . . merits unqualified condemnation. If legal rights are to be meaningful, they must be known and understood. Law enforcement officers should not be able effectively to repeal these rights at random by persuading people that they do not exist."); Mosteller, *supra* note 6, at 1265 ("[L]ies that directly undercut the statements in the *Miranda* warnings will render the warnings and waiver ineffective."); Roppé, *supra* note 6, at 767 ("When an interrogator misrepresents the significance of the *Miranda* warning, the protective purpose of the warning is not achieved; it is as if the suspect were not warned at all."); Slobogin, *supra* note 6, at 1168 (calling deceptive techniques that contradict the *Miranda* warnings "[t]he most obviously coercive deceptive practices"); White, *Police Trickery*, *supra* note 6, at 590 ("If the *Miranda* warnings are to serve th[eir] necessary prophylactic function effectively, police trickery that distorts their meaning or vitiates their effect should render a resulting confession inadmissible."); Young, *supra* note 6, at 428 n.14 ("Because *Miranda* affirmatively requires police to tell suspects their rights in interrogation, the natural counterpart is that police may not lie about a suspect's right to counsel or right to refuse to respond to questions.").

308 542 U.S. 600 (2004); *see supra* text accompanying notes 58–65.

failed to give warnings before eliciting initial, inadmissible statements, and then went on to elicit virtually identical statements after having given the warnings.[309] Without expressly dispelling a suspect's reasonable inference that her initial statements could be used against her, police in effect falsely conveyed the notion that remaining silent at that point had zero value. This kind of deception operates on the "benefits of remaining silent" side of the equation. It gives the suspect the false impression that the benefits of asserting his rights are far less than they really are, or even that there is no such benefit at all. Thus, any perceived benefit of speaking to the police, even some minimal psychic benefit of coming clean, will likely win out.

False promises of leniency, also impermissible, operate on the other side of the equation. They deceive the suspect into forgoing the benefits of remaining silent because the benefits of speaking are so great. Where the suspect is offered leniency in exchange for information, she is, in essence, engaging in plea negotiations. And plea negotiations are so ubiquitous because they actually do offer great benefits to defendants that, in the minds of the overwhelming majority of them, outweigh the benefits of asserting their constitutional rights. Thus, it is easy to see why false promises of leniency constitute impermissible deception. Most defendants would gladly sacrifice their privilege against self-incrimination in exchange for the benefit of less prison time. They do so all the time and are entirely rational in doing so. When the promise of leniency is illusory, the suspect has been duped into making a tradeoff that would be entirely reasonable if the bargain were a real one.[310]

The difficulty is in determining when a mere suggestion of leniency becomes, in effect, a promise. It may be that most suspects do not "distinguish clearly between explicit . . . promises and more ambiguous language."[311] Thus, it may be that courts have been too stingy in some cases in interpreting references to possible leniency as nothing but abstract suggestions. Again, a reasonableness standard should be used: How would a reasonable suspect under the circumstances have interpreted the police officer's

309 *See* Morris, *supra* note 285, at 281–82 (explaining *Seibert* as a case in which the "police . . . purposefully undermine[d] the effectiveness of *Miranda* warnings").

310 Professor White suggested quite sensibly that broken government promises of leniency to induce a confession would also violate due process under *Santobello v. New York*, 404 U.S. 257 (1971). White, *Police Trickery*, *supra* note 6, at 956, 974 n.160; *see also* Rosenthal, *supra* note 4, at 955 n.341.

311 Gohara, *supra* note 6, at 825; *see also* Johnson, *supra* note 6, at 310–11 ("[T]he difference between expressions of compassionate understanding on the one hand, and implied promises of leniency on the other, is at the margin sometimes a matter of emphasis and nuance."); Slobogin, *supra* note 6, at 1168–69 (recognizing this difficulty); White, *supra* note 223, at 955 (asserting that "[t]he more common police practice . . . is to suggest to the suspect, without making an explicit commitment, that he will be rewarded for his statement").

language?[312] That is the standard we generally use in determining what particular language means during police-citizen encounters.[313]

Thus, juxtaposing the truthful statement that the suspect faced the death penalty with a statement that "it would be better for him if he told the truth" would likely cause a reasonable person to conclude that he is being offered leniency in exchange for a statement.[314] Likewise, telling a suspect that "[h]ow much time" he serves "is up to [him]" sounds very like telling the suspect that the length of his sentence will be calibrated to how much he tells the police.[315] And telling a suspect that that "things would 'go better' for [him] if he cooperated," sounds much more like a promise than "[a] 'prediction about future events.'"[316] On the other hand, an interrogator's promise "that he would 'help [the suspect] in every way in the world'" is vague enough that a reasonable person would not infer that the officer was promising anything more than to put in a good word to the prosecutor.[317] And telling a suspect that the prosecutor will be informed about the suspect's cooperation properly conveys to the reasonable person that the decision whether to extend leniency is in the hands of the prosecutor, not the police.[318]

Finally, one can understand why some lies about matters extrinsic to the interrogation room—even those falling outside the confines of the equivalency rule[319]—are impermissible. Take the *Thomas* case. Thomas was

312 *See* White, *supra* note 223, at 976 ("[T]he determination whether a government promise has been made and breached should be made on the basis of the suspect's reasonable expectations."); White, Miranda*'s Failure*, *supra* note 6, at 1236–37 ("If the interrogator should be aware that either the suspect or a reasonable person in the suspect's position would perceive that the interrogator's statements indicate that the suspect would be likely to receive significant leniency if he did confess . . . then the interrogator's statements should be viewed as improper.").

313 *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 431 (1991) (observing that touchstone of whether a Fourth Amendment seizure has occurred is whether "a reasonable person would understand that he or she could refuse to cooperate"); Florida v. Jimeno, 500 U.S. 248, 251 (1991) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?").

314 *But see* State v. Simmons, 944 S.W.2d 165, 175 (Mo. 1997) (en banc) (rejecting claim of coercion).

315 *But see* State v. Galli, 967 P.2d 930, 936 (Utah 1998) (alteration in original) (finding no coercion).

316 Mason v. State, 116 S.W.3d 248, 260 (Tex. App. 2003) (quoting United States v. Fraction, 795 F.2d 12, 15 (3d Cir. 1986)).

317 *But see* Pyles v. State, 947 S.W.2d 754, 755–56 (Ark. 1997) (finding coercion).

318 *See* State v. Sanford, 569 So.2d 147, 152 (La. Ct. App. 1990).

319 That is to say, some lies about matters extrinsic to the interrogation are impermissible only if the statement, if it were true, would be coercive. Again, threats to have one's children taken away, as in *Lynumn v. Illinois*, 372 U.S. 528, 531–34 (1963), or to have a family member arrested, as in *Rogers v. Richmond*, 365 U.S. 534, 535 (1961), provide the best examples. *See supra* text accompanying notes 22–24. But such statements are coercive or not irrespective of whether they are deceptive. For a nuanced analysis of whether such statements should be deemed coercive, *see* Godsey, *supra* note 169, at 530–32.

presented with the choice between the benefits of the privilege against self-incrimination, at the cost of his son's life, and the benefit of saving his son's life at the cost of self-accusation and the resultant certain conviction at trial. That Thomas was willing to sacrifice his Fifth Amendment privilege to save his son should not be surprising: the deception made his "constitutionally protected option to remain silent seem valueless" when placed on the other side of the ledger from saving his son's life.[320] Though perhaps not every father would do the same, it is safe to assume that the reasonable father in Thomas's shoes would have.

Once again, close cases will arise. Imagine it was not Thomas's son whose life was supposedly on the line, but a friend, or a coworker, or a complete stranger. As we go further out in concentric circles around Thomas himself, it becomes less and less likely that a reasonable person in his position would have sacrificed his privilege. But the pre-*Miranda* case of *Spano v. New York*—involving deception about the specter of economic harm to Spano's childhood friend and his wife and young children[321]—still might provide some guidance.[322] As in all places in the law, the concept of reasonableness must take on some normative component; courts must ask to what extent we would hope and expect that people would sacrifice their Fifth Amendment rights for the well-being of others.

2. Permissible Deception

Deception about the adversarial role of the police cuts against but does not contradict or distort the meaning of the *Miranda* warnings. Police empathy or friendliness toward the subject might "mak[e] him forget temporarily that" he is speaking to an adversary.[323] But having been told at the outset that he is, and that his words can and will come back to bite him, a reasonable person should be expected not to be swayed by the seeming friendliness of the police. For this reason, mere expressions of sympathy or friendliness on the part of the police do not "negate the effect of the second *Miranda* warning," contrary to Professor White's claim.[324] It is not too much to ask that the suspect embrace both concepts in his head simultaneously: the

320 People v. Thomas, 8 N.E.3d 308, 315 (N.Y. 2014); *see* White, *supra* note 223, at 963 n.106 ("Government inducements relating to a third party who is very close to the suspect are likely to exert great pressure on the suspect because the suspect, especially if he is experiencing a sense of shame, may be inclined to place the welfare of the third party above his own."); White, Miranda *'s Failure*, *supra* note 6, at 1241 ("[A] suspect might easily be led to feel that protecting his friend or loved one from imminent harm is more important than the future consequences of confessing.").

321 360 U.S. 315, 323 (1959); *see supra* text accompanying notes 9–14.

322 White, Miranda *'s Failure*, *supra* note 6, at 1241 ("Based on an appropriate reading of *Spano*, interrogators should . . . be prohibited from informing a suspect that his failure to confess will lead to serious adverse consequences for a friend or loved one.").

323 Stuntz, *supra* note 6, at 823.

324 White, *Police Trickery*, *supra* note 6, at 617.

police are acting nicely toward me now but they have just told me to watch what I say.[325]

The same is true for police minimization of the crime, which is closely related. Suggestions that the crime was not as serious as it actually was are also not inconsistent with the warning that the suspect's self-incriminating words are fair game at trial. Unless the suspect is actually in the process of negotiating a deal, the benefit of supplying the police with information approaches zero. Of course, the suspect might hope that by supplying information, he will be treated to the quid pro quo of leniency; clearly, that explains why so many suspects speak when they should not. But that is akin to a shopkeeper allowing patrons to walk out of the shop with goods in the hopes that the customers will eventually pay for them. Unless a quid pro quo is in the offing, the suspect is simply giving away valuable information for free. That is not something a reasonable person would do.[326]

Perhaps the most controversial types of deception that police use during interrogation, and the ones that have been the targets of much scholarly criticism, are the false (and, more controversially, fabricated) evidence ploys. But here, too, a reasonable person would not be swayed to forgo the privilege simply because she has been presented with putative evidence of guilt. Granted, where the police falsely present such evidence to the suspect, the value of the privilege in her mind goes way down. Since the police already supposedly have rock solid evidence of guilt, a confession would simply be the cherry atop the prosecutor's case. At the same time, the putative benefit of speaking goes up, because the suspect will be hoping to cut her losses and make a deal.[327] This is true even (and most problematically, to be sure) of an innocent suspect, who might either feel that further resistance is futile because she is being framed or internalize the accusations and become convinced of her own guilt.[328]

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325 Again, this is true of noncustodial interrogation as well, except that there the suspect is presumed to know to watch what she says, though she has not been so advised.

326 Stuntz, *supra* note 6, at 763 ("[A] rational, factually guilty defendant who understands his rights and the consequences of relinquishing them would almost never waive them except as part of a bargain . . . ."); *see also* Cohen, *supra* note 253, at 545 ("[A]n accused either can donate the information needed to convict him, or he can exchange information for the best deal he and counsel are able to negotiate."); Mosteller, *supra* note 6, at 1248 ("Cooperation may be the appropriate outcome, but suspects should not make incriminating statements for nothing . . . .").

327 Gohara, *supra* note 6, at 818; Hamblet, *supra* note 6, at 130; Jacobi, *supra* note 6, at 68; Kitai-Sangero, *supra* note 6, at 633; Thomas, *supra* note 6, at 1192.

328 *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 997–1000 (1997) (distinguishing between compliant false confessions, which the innocent suspect gives knowing himself to be innocent, and persuaded false confessions, which the innocent suspect gives having been persuaded that he is guilty); *see also* Jacobi, *supra* note 6, at 65; Khasin, *supra* note 6, at 1033; Kitai-Sangero, *supra* note 6, at 630; Thomas, *supra* note 6, at 1118; Wynbrandt, *supra* note 6, at 552.

But even here, a reasonable person in the situation would determine that the benefits of holding onto the privilege outweigh the benefits of speaking. The value of the privilege has been reduced but it is still worth something. There are few pieces of evidence as compelling as a defendant's own admission. And more evidence is always more powerful than less; even if the prosecutor has a solid case against the suspect, there is no need to add to it with a confession.[329] Meanwhile, the value of speaking is the same as it is whenever there is no deal on the table: zero. It simply is not true that there are "relatively high benefits" of speaking under these circumstances just because "the suspect *may* be spared a harsh penalty."[330] That the suspect has valuable information to provide and seeks leniency in return should signal to her that the time has come to consult with counsel—which the suspect in custody has just been told she has a right to do—to get the best deal possible, not give away the store in hopes of future payment.[331] And what is true of verbal misrepresentations of incriminating evidence is no less true of fabricated evidence, notwithstanding the handful of courts that have held that the latter crosses the line into a constitutional violation.

One type of deception that does not fit into the analysis in quite the same way is deception about whether an official interrogation is even taking place. That is because, pursuant to *Illinois v. Perkins*,[332] *Miranda* warnings are unnecessary, and therefore will never be issued, when police question a suspect without revealing their identity. But the reason that the warnings are not required in that context is that surreptitious police interrogation does not create the compelling atmosphere that *Miranda* found inherent in most other custodial interrogation. Absent that compulsion, as with overt but noncustodial interrogation, every person is presumed to know and be able to assert their rights. Thus, the calculation of whether the benefits of remaining silent outweigh the benefits of speaking can and should still be made, even if the incriminating statements would be made to, ostensibly, a nonstate agent. A reasonable person aware of her legal rights would know that anything she says to (almost) anyone can later be repeated in a courtroom. Of course, the fact that the addressee is, unbeknownst to the speaker, a police officer raises that probability considerably. But a prudent speaker with self-incriminating information should know that there is virtually no benefit in gratuitously revealing that information to anyone. Thus, she should still

329 *See* Thomas, *supra* note 184, at 1299 ("[W]hy make matters worse by offering a confession?").

330 Gohara, *supra* note 6, at 818 (emphasis added).

331 Stuntz, *supra* note 6, at 775 ("Access to counsel creates an easy and natural mechanism to guarantee rational, self-interested waiver decisions by ensuring that defendants waive their rights only after consultation with a lawyer."); *see also* Rosenthal, *supra* note 4, at 954 ("Suspects may be foolish to think that interrogators will speak only the truth or disclose all material facts, but those who want unvarnished legal advice have a right to counsel . . . .").

332 496 U.S. 292, 294–95 (1991); *see supra* text accompanying notes 48–50.

make the determination that it is in her best interests to remain silent, absent any countervailing benefit of speaking.[333]

This also explains why, as even advocates of the status quo acknowledge,[334] it would be impermissible for a police officer to impersonate a lawyer or member of the clergy. It is not because of any sentimental notion that such a tactic would "shock the conscience." It is for the very commonsense reason that societal knowledge of the existence of the attorney-client and clergy-communicant privileges is presumably widespread.[335] When the suspect believes she is speaking to someone with an obligation not to reveal information, the risks of speaking are reduced to the vanishing point, because an altogether different privilege prevents disclosure of the information. On the other hand, everyone knows or at least should know that there is no "friend privilege" or even honor among thieves. Thus, impersonation of an attorney or member of the clergy by a police officer skews the perceived relative benefits of speaking and remaining silent in a way that impersonating a mere friend or associate does not.[336] Whether one's conscience is shocked is entirely beside the point.

CONCLUSION

The law on coerced confessions is notoriously messy, with its totality-of-the-circumstances test by which no factor is dispositive but all are relevant. There is no need to complicate matters further by adding deception to the mix. Coercion and deception are simply different, and confusing the two is entirely unhelpful. Indeed, it can be downright dangerous, as where courts conclude that because true promises of leniency are not coercive per se, false promises of leniency are fair game. Courts should disaggregate coercion and deception, subjecting the former to the traditional due process test and treating the latter as potentially vitiating a suspect's waiver of her right to silence based on the materiality test proposed above.

That test not only helps explain much of current law but also reflects our understanding of deception in other contexts across the legal spectrum, and of the Court's evolving jurisprudence on *Miranda*. And it is easier to apply than mixing deception into the totality-of-the-circumstances batter. Pursuant to that test, employment of the false sympathy, false evidence, fabricated evi-

333 It is thus inaccurate to say that "the trickery of the 'jail plant' ploy affords the suspect no opportunity to apply his powers of resistance because the peril of speaking is hidden from him." White, *Police Trickery*, *supra* note 6, at 606. Unless one is speaking to someone with a legal obligation not to disclose the contents of the conversation, there is always a peril to speaking.

334 *See supra* note 201 and accompanying text.

335 *Cf.* GRANO, *supra* note 249, at 110 ("If police cannot require lawyers and members of the clergy to disclose confessions, they should not be able to obtain confessions directly from defendants by exploiting such relationships of trust.").

336 *Cf. id.* at 112 ("Nothing in our tradition would equate the suspect-acquaintance relationship, or the prisoner-cellmate relationship, to relationships that individuals have with lawyers, doctors, and members of the clergy.").

dence, and minimization ploys is permissible, while distortion or contradiction of the *Miranda* warnings and false promises of leniency in exchange for a confession are off limits. Of course, litigation will arise over deception relating to extrinsic matters, and close cases over how to interpret and categorize the deception at hand are inevitable. But a test grounded in materiality provides a sturdy guidepost for courts to follow.