CONSTITUTIONAL CONFESSIONS: IN FAVOR OF A “LOEWY PLUS” APPROACH

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> “[I]f we wish to preserve a free society, it is essential that we recognize that the desirability of a particular object is not sufficient justification for the use of coercion.”
> -Friedrich August von Hayek[1]

Confessions, and the phenomenon of false confessions in particular, have been hot topics in recent years in the legal academy and among psychologists, sociologists, and policymakers. Indeed, as modern research has revealed that confessions are much less reliable than once thought, and that false confessions are far more common than we might think, we have been forced to grapple with the implications of that research on any number of other facets of the criminal justice system: interrogation techniques, the value and long-term viability of the Supreme Court’s decision in *Miranda v. Arizona*, the need for habeas corpus reform, and quite frankly, the reliability of our criminal justice system as a whole.[2] As I tell students in my criminal law reform seminar, once you start tugging on one of those strings, you realize that it is connected to all of the others. This Symposium is a great

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1. Friedrich A. Hayek, *The Constitution of Liberty*, *in* JUSTICE: A READER 75 (Michael J. Sandel ed., 2007).

2. *See* Lindsay C. Malloy, Elizabeth P. Shulman & Elizabeth Cauffman, *Interrogations, Confessions, and Guilty Pleas Among Serious Adolescent Offenders*, 10 LAW & HUM. BEHAV. 181 (2013); *see also* Miranda v. Arizona, 384 U.S. 436, 471 (1966) (implementing pre-interrogation *Miranda* warnings).

opportunity to think about that tangled web and about someone who has written a great deal about it: Professor Arnold Loewy.

Commentators have asked me to reflect on Professor Loewy's writings about confessions in the American criminal justice system. While I am a fan of Professor Loewy's work and agree with virtually everything he has written about confessions and the Constitution, in this Article, I examine whether Professor Loewy's scholarship goes far enough. In Part I, I explore the role of confessions in the American criminal justice system and the constitutional protections currently offered to suspects subject to custodial interrogation.[3] In Part II, I provide a brief overview of Professor Loewy's views on confessions and the Constitution.[4] In Part III, I argue that, while Professor Loewy's confession scholarship and major ideas are wise, they do not go nearly far enough in protecting suspects.[5] I then propose a series of additional measures that are needed to minimize coercion during custodial interrogations and to protect the constitutional rights of suspects.[6]

I. CONFESSIONS: A BRIEF OVERVIEW

A confession is "a detailed written or oral statement in which a person admits to having committed some transgression, often acknowledging guilt for a crime."[7] While, as Saul Kassin observes, confessions play an important role in both religion and psychotherapy,[8] they also play a vital role in the American criminal justice system and other criminal justice systems throughout the world:

> Many legal scholars and researchers consider confession evidence to be the most potent form of evidence that exists, and research indicates that a confession is a very damning piece of evidence. Furthermore, obtaining confessions from guilty persons is both a desirable and oftentimes a necessary step in the apprehension and conviction of lawbreakers, as true

3. *See infra* Part I (acknowledging that confessions play a vital role in the American criminal justice system but can have devastating consequences for suspects).

4. *See infra* Part II (discussing Professor Loewy's contention that the Sixth Amendment right to counsel should attach at custodial interrogation and that the Fifth Amendment does not go far enough in protecting suspects).

5. *See infra* Part III (adding three additional requirements to Professor Loewy's proposal including: (1) implementing a heightened standard of waiver to the right to counsel; (2) requiring recorded interrogations; and (3) banning particularly coercive interrogation techniques).

6. *See infra* Part III (discussing how those three measures will minimize coercion).

7. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. IN THE PUB. INT., no. 2, 2004, at 33, 35.

8. *Id.*

> confessions alleviate the pressures on an overburdened criminal justice system by encouraging guilty pleas and speeding the process of justice.[9]

Confessions are thus a crucial shortcut for virtually all major authority figures in the criminal justice system—police, prosecutors, defense attorneys, and judges—who might otherwise find themselves overwhelmed by the number of criminal investigations and cases pending on their dockets.[10]

However, confessions can have devastating consequences for suspects, both guilty and innocent alike:

> Admissions of guilt are powerful. People are so predisposed to believe confessions that their existence tends to interfere with potential jurors' and investigators' evaluation of other relevant evidence . . . . When individuals decide to plead guilty, they forego the right to a jury trial and several other legal protections . . . . Thus, the question of whether admissions of guilt (confessions and guilty pleas) are diagnostic of actual guilt is critical.[11]

Not surprisingly, therefore, confessions in the criminal justice system remain an ongoing source of controversy, raising important questions "about whether a statement is authentic, voluntary, reliable, the product of a competent waiver of rights, and in accord with the law."[12] Historically, in the United States, confessions also raised significant questions about whether the constitutional rights of confesses—their Fifth and Sixth Amendment rights, in particular—were protected before, during, and after their incriminatory statements.[13]

A. Confession Jurisprudence

The Supreme Court first took on confessions in the 1936 case, *Brown v. Mississippi*.[14] In that case, the police extracted confessions from three African-American men using horrific physical violence.[15] The police repeatedly whipped the men with a leather strap with metal buckles until their backs were "cut to pieces."[16] They were also "made by the [deputy sheriff] definitely to understand that the whipping would be continued unless and until they confessed."[17] The defendants, not surprisingly, "not only

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9. Melissa B. Russano, Christian A. Meissner, Fadia M. Narchet & Saul M. Kassin, *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 481 (2005) (citations omitted).

10. *See id.*

11. Malloy et al., *supra* note 2, at 1 (citations omitted).

12. Kassin & Gudjonsson, *supra* note 7, at 36.

13. *See infra* Part I.A (discussing Supreme Court confession jurisprudence).

14. Brown v. Mississippi, 297 U.S. 278 (1936).

15. *Id.* at 282.

16. *Id.*

17. *Id.*

confessed, but confessed in every matter of detail as demanded by those present . . . and, as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers."[18] The Supreme Court was appalled by this treatment and held that confessions extracted by police violence are inadmissible because they violate the Due Process Clause of the Fourteenth Amendment.[19] As a result, what we used to call "third-degree" tactics—those using physical force to coerce confessions from suspects—have largely disappeared in the United States.[20]

Police coercion was at issue again thirteen years later in *Watts v. Indiana*.[21] In *Watts*, a defendant was interrogated for over nine hours at a time for days on end, kept up all night, and held in solitary confinement.[22] The Court ruled that, even though the interrogators did not physically harm the suspect, the suspect's confession was involuntary:

> A statement to be voluntary of course need not be volunteered. But if it is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. We would have to shut our minds to the plain significance of what here transpired to deny that this was a calculated endeavor to secure a confession through the pressure of unrelenting interrogation. The very relentlessness of such interrogation implies that it is better for the prisoner to answer than to persist in the refusal of disclosure which is his constitutional right. To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.[23]

That decision is significant because of its holding that a coerced confession—of any sort—is an unconstitutionally-extracted confession.[24] It also set the stage for what has become one of the most significant confession cases in U.S. history.

By 1966, when the Supreme Court tackled *Miranda v. Arizona*, physically violent or impactful coercion was no longer at issue.[25] In *Miranda*, the Court tackled "the admissibility of statements obtained from an individual

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18. *Id.*
19. *Id.* at 285–87.
20. *See* Miranda v. Arizona, 384 U.S. 436, 445, 447–48 (1966).
21. Watts v. Indiana, 338 U.S. 49 (1949).
22. *Id.* at 52–53.
23. *Id.* at 53–54.
24. *See id.*
25. *See Miranda*, 384 U.S. at 448.

who is subjected to custodial police interrogation."[26] In particular, the Court was concerned with "incommunicado interrogation of individuals in a police-dominated atmosphere."[27] As I explain at length in an earlier article:

> Custodial interrogation, the Court worried, was likely to result in self-incriminating statements if the police did not fully warn suspects of their constitutional rights. Indeed, the Court noted, while police had almost entirely abandoned the violent "third degree" tactics they had used earlier in the century, they had moved to using psychological coercion to induce unwitting suspects to confess. The Court quoted at length from police manuals detailing psychological coercion tactics that were likely to be effective in convincing suspects to confess.[28]

The Court observed that, even though these psychological tactics did not run afoul of the Court's earlier confession jurisprudence, "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[29]

To protect the rights of suspects in these situations, the Court held, police must "adequately and effectively" inform them of their constitutional rights *and* honor their decision to exercise those rights.[30] The Court then detailed the rights of which suspects need to be informed prior to interrogation (what we now call the *Miranda* rights) and decreed that if a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[31] Additionally, the Court held that, when a suspect chooses to waive his *Miranda* rights and proceed with interrogation, the "burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[32]

B. Modern Interrogations

The interrogation tactics that concerned the Court in *Miranda* are still in common use today.[33] Part of an overall method of interrogation called the "Reid Technique," instructors still teach these tactics at virtually every police academy and law enforcement training facility in the country, using manuals

26. *Id.* at 439.
27. *Id.* at 445.
28. Tracy Hresko Pearl, *Fifty Years Later:* Miranda *& the Police*, 50 TEX. TECH L. REV. 63, 65 (2017) (footnotes omitted).
29. *Miranda*, 384 U.S. at 455 (footnote omitted).
30. *Id.* at 467.
31. *Id.* at 473–74 (footnote omitted).
32. *Id.* at 475.
33. *See* Tonja Jacobi, Miranda *2.0*, 50 U.C. DAVIS L. REV. 1, 64–65 (2016); Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1530–31 (2008).

that have been "virtually unchanged" since the Court first cited them in *Miranda*.[34] Those tactics include confronting suspects with "false evidence of guilt," using good cop/bad cop routines, deliberately trying to undermine suspects' "confidence in denial of guilt," and "[a]ppeal[ing] to the suspect[s'] self-interest" in confessing.[35] The only difference post-*Miranda* is that officers must now be careful to include rote recitations of rights or comments like "you are free to leave" sometime before or during interrogation.[36]

The Reid Technique remains popular with police because it is so effective at getting confessions.[37] It works. Richard Leo reports in his scholarship that Reid Technique tactics result in an incriminating statement, partial admission, or full confession in slightly over 64% of all cases.[38] This success rate is unsurprising given that department instructors teach police officers to use these tactics to both undermine the will of suspects to deny their own guilt and convince suspects that confessing is in their best interest.[39] Interrogators may say, for instance, that they have found the suspect's fingerprints at the scene of the crime when, in actuality, they have not.[40] They may outright ignore any explanations or alibis offered by the suspect and insist—repeatedly and emphatically—that the evidence is overwhelming that the suspect is guilty.[41] They may insinuate that if the suspect "cooperates" and confesses, they will receive more lenient treatment.[42] These techniques are extremely compelling.[43]

Unfortunately, while these tactics may be effective at inducing guilty people to confess, modern research has shown that they are also effective at inducing *innocent* people to confess as well; a problem that we are just beginning to grapple with in this country.[44]

C. False Confessions

The Innocence Project reports that more than 25% of people wrongfully convicted but subsequently exonerated by DNA evidence made a false

34. Tracy Lamar Wright, *Let's Take Another Look at That: False Confession, Interrogation, and the Case for Electronic Recording*, 44 IDAHO L. REV. 251, 261 (2007); *see also* Weisselberg, *supra* note 33, at 1530–31 (explaining that the Reid Technique is still widely used in several states with over 300,000 officers trained in it).

35. Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 278 (1996).

36. JAMES L. TRAINUM, HOW THE POLICE GENERATE FALSE CONFESSIONS: AN INSIDE LOOK AT THE INTERROGATION ROOM 29 (2016).

37. *See generally* Leo, *supra* note 35, at 281.

38. *Id.* at 280.

39. *See id.* at 277–79.

40. *See id.*at 279.

41. *See id.*

42. *See id.*

43. *See id.* at 280.

44. *See infra* Part I.C (explaining why innocent people confess).

confession or incriminating statement during interrogation,[45] though some scholars think that these known cases are likely only the "tip of the iceberg."[46] While this percentage may seem shocking, research studies in this area consistently demonstrate that it should come as little surprise. One study conducted by Pimentel, Arndorfer, and Malloy in 2015, for instance, showed that 59% of teens and 39% of adults falsely confessed to cheating on a research task.[47] When police interrogators use Reid Techniques, moreover, another study showed that rates of confessions—both true and false—increase significantly, inducing more than 70% of participants to incriminate themselves.[48]

Studies have also shown that when interrogators use Reid Technique tactics, innocent suspects are at risk not only of confessing, but also of actually internalizing beliefs that they have committed a crime, meaning that suspects may falsely confess and not realize that they have done so.[49] Saul Kassin observes:

> To be sure, a person under the influence of interrogation may internalize false beliefs about his or her culpability with more or less certainty and with more or less stability over time. Still, internalization was evident in several cases, as in that of Paul Ingram, a false confessor who was "brainwashed" over the course of 5 months of interrogations into thinking he had committed horrific acts of violence as part of a satanic cult.[50]

Young people are at particular risk of internalizing the false belief that they have committed a crime, with one study showing that 70% of young adult survey participants internalized and recounted false beliefs that they committed an assault or theft crime.[51]

Worse yet, police themselves have little ability to detect false confessions when they occur.[52] Kassin and Gudjonsson, for instance, observe that people trained in truth detection perform little better than chance in distinguishing between true and false statements:

> Despite popular conceptions, psychological research conducted throughout the Western world has failed to support the claim that groups of individuals can attain high average levels of accuracy in judging truth and deception.

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45. *DNA's Revolutionary Role in Freeing the Innocent*, INNOCENCE PROJECT (Apr. 18, 2018), https://www.innocenceproject.org/dna-revolutionary-role-freedom/.

46. Pamela S. Pimentel, Andrea Arndorfer & Lindsay C. Malloy, *Taking the Blame for Someone Else's Wrongdoing: The Effects of Age and Reciprocity*, 39 LAW & HUM. BEHAV. 219, 219 (2015).

47. *Id.* at 227.

48. Russano et al., *supra* note 9, at 484.

49. Kassin & Gudjonsson, *supra* note 7, at 50–51.

50. *Id.* at 51 (citations omitted).

51. Julia Shaw & Stephen Porter, *Constructing Rich False Memories of Committing Crime*, 26 PSYCHOL. SCI. 291, 296 (2015).

52. Kassin & Gudjonsson, *supra* note 7, at 58.

> Most experiments have shown that people perform at no better than chance levels; that training programs produce, at best, small and inconsistent improvements; and that police investigators, judges, psychiatrists, customs inspectors, polygraph examiners, and others with relevant job experience perform only slightly better than chance, if at all. In general, professional lie catchers exhibit accuracy rates in the range from 45% to 60%, with a mean of 54%.[53]

Additionally, a similar study shows that law enforcement training in how to detect lies does not increase accuracy in distinguishing between true and false statements, but does increase participants' confidence in the accuracy of their own judgments.[54] Those same training programs also have a tendency to make participants less likely to believe what suspects have to say.[55] As the researchers summarize, "[i]t is therefore apparent that training programmes may bias the participants' answers and increase their confidence without increasing their performance."[56]

In short, modern interrogation techniques—while no longer violent or physically coercive—exert a great deal of psychological pressure on suspects, greatly increasing the likelihood that they will confess, even if they are innocent.[57] Police, in turn, have very little ability to distinguish between true and false statements, although they may have great (but wholly misplaced) confidence in their ability to do so.[58] Under these circumstances, it is clear that *Miranda* has done little to protect the constitutional rights of suspects.[59]

II. PROFESSOR LOEWY'S CONFESSION SCHOLARSHIP

Professor Loewy's confession scholarship enters into this fray and offers a perspective that is, at once, both simple and wise.[60] Professor Loewy's most notable and well-known assertion in this space is that the *Sixth Amendment* right to counsel should begin at custodial interrogation rather than at the onset of formal proceedings where it currently resides.[61] This would mean that, consistent with the Supreme Court's opinion in *Massiah v.*

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53. *Id.* at 37 (citations omitted).

54. *Id.* at 38.

55. *Id.*

56. Jaume Masip, Hernán Alonso, Eugenio Garrido & Carmen Herrero, *Training to Detect What? The Biasing Effects of Training on Veracity Judgments*, 23 APPLIED COGNITIVE PSYCHOL. 1282, 1293 (2009).

57. *See id.*

58. *See* Kassin & Gudjonsson, *supra* note 7, at 50–51; Russano et al., *supra* note 9, at 484.

59. *See* Pearl, *supra* note 28, at 79–80.

60. Arnold H. Loewy, *Distinguishing Confessions Obtained in Violation of the Fifth Amendment from Those Obtained in Violation of the Sixth Amendment*, 50 TEX. TECH L. REV. 145 (2017) [hereinafter Loewy, *Distinguishing Confessions*]; Arnold H. Loewy, *The Supreme Court, Confessions, and Judicial Schizophrenia*, 44 SAN DIEGO L. REV. 427 (2007) [hereinafter Loewy, *Judicial Schizophrenia*].

61. Loewy, *Distinguishing Confessions*, *supra* note 60, at 147.

United States, once custodial interrogation starts, any efforts on the part of the government to "deliberately elicit[]" statements from a suspect in the absence of his or her attorney would violate the Sixth Amendment unless the government could show that the suspect knowingly and intelligently waived his or her rights.[62]

In Professor Loewy's view, the Fifth Amendment does not go far enough in protecting suspects. The Fifth Amendment, he observes, merely protects against coercion, "but [does] not . . . provide the arrestee with assistance in making wise decisions."[63] "[A]s far as the Fifth Amendment is concerned," he notes, "a voluntary, foolish confession—made because of police deception in failing to provide the suspect with important information in their possession—is just fine."[64] This should be of immense concern, he concludes, because "an uncoerced confession ignorantly made by a defendant who had no idea of his best course of action is not only not an unmitigated good, but is positively harmful to the system."[65] This view appears to put Professor Loewy at odds with the Court which he notes, "probably believes that if the suspect is given his warnings, and he confesses anyway, society wins and nobody loses."[66]

A. The Wisdom of Professor Loewy's Proposal

The wisdom of Professor Loewy's proposal to make the Sixth Amendment right to counsel attach at interrogation becomes clear upon any thoughtful reflection on the long-term success of *Miranda* in protecting suspects from coercive interrogation environments. I have explored the legacy of *Miranda* at greater length in earlier work and concluded that, while *Miranda* has made it easier for police officers to "sanitize confessions," it has done very little to correct the fundamental and deep power imbalance between suspects and law enforcement during interrogations.[67] A brief examination here will hopefully suffice to explain why.

If police officers honored the spirit of *Miranda* in every case prior to custodial interrogation, officers would slowly and clearly read suspects their rights.[68] Suspects, in turn, would listen closely, understand those rights perfectly, carefully contemplate their meaning and the options that they provide, and then, after a period of deep contemplation, choose the course of action that made the most sense (which in virtually all cases, would almost certainly be to remain silent and request the assistance of an attorney). Those

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62. *See* Massiah v. United States, 377 U.S. 201, 204 (1964).
63. Loewy, *Distinguishing Confessions*, *supra* note 60, at 147.
64. *Id.* at 146.
65. *Id.* at 152.
66. Loewy, *Judicial Schizophrenia*, *supra* note 60, at 430.
67. *See* Pearl, *supra* note 28, at 79–80.
68. *Id.* at 70.

that choose to proceed *without* an attorney, in turn, would do so with total confidence that they could stop their interrogation at any time if they begin to feel overwhelmed or outmanned, and thus proceed with a sense of empowerment and control.

This vision of *Miranda* is the ideal. The reality, however, is very different.[69]

First, a number of studies, most famously those conducted by Richard Leo and Saul Kassin, have shown that an overwhelming percentage of suspects—often upwards of 80%—waive their *Miranda* rights and are thus subject to the exact same kind of interrogation about which the Court worried in *Miranda*.[70] Innocent suspects, moreover, those we should be most concerned about, were more likely than guilty subjects to do so, presumably out of the misguided beliefs that, if they do not waive their rights, they will appear guilty and that police are sincerely interested in hearing them out fully.[71] *Miranda* only works to mitigate psychological coercion in interrogations if suspects avail themselves of their rights, but most of them do not.[72]

Second, the Court in *Miranda* assumes that suspects will understand the rights administered to them before interrogation, but a number of studies have now shown that many suspects, particularly juveniles and suspects with mental health issues, may have no idea what those rights actually mean.[73] For those populations, *Miranda*'s protections may offer very little protection.[74] Even adults with average or high intelligence levels, however, are often misinformed about the meaning of their *Miranda* rights.[75] One study, for instance, showed that 30% of adults in this category viewed "silence, by itself, as incriminating evidence."[76] With regard to the right to counsel, suspects were similarly confused:

> While most defendants recognize that their request for an attorney should stop police questioning, a critical issue involves its timing; 30.2% inaccurately believe that questioning can continue until their lawyers are physically present. In addition, a substantial minority do not believe they

69. *See supra* notes 45–59 and accompanying text (noting the statistical likelihood of wrongful confessions emanating from modern interrogation techniques).

70. Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their* Miranda *Rights: The Power of Innocence*, 28 LAW & HUM. BEHAV. 211, 215 (2004); Leo, *supra* note 35, at 276.

71. Kassin & Norwick, *supra* note 70, at 215.

72. *See* Pearl, *supra* note 28, at 64–65.

73. Andrew Guthrie Ferguson, *The Dialogue Approach to* Miranda *Warning and Waiver*, 49 AM. CRIM. L. REV. 1347, 1456 (2012).

74. *Id.* at 1458–59.

75. Richard Rogers et al., "*Everyone Knows Their* Miranda *Rights": Implicit Assumption and Countervailing Evidence*, 16 PSYCHOL., PUB. POL'Y, & L. 300, 312–13 (2010).

76. *Id.* at 307.

> will have the opportunity to confer with counsel in private, thereby vitiating a primary advantage of seeking counsel.[77]

The same study shows similar levels of confusion and misperception with regard to other *Miranda* rights.[78]

Third, a series of studies have shown that suspects with particular personality traits and individual characteristics may be far more likely not only to waive their *Miranda* rights, but also to confess, honestly or falsely.[79] Indeed, studies like those recently conducted by Larmour, Bergstrom, Gillen, and Forth, show that gender, ethnicity, and level of extroversion or introversion all impact how obligated a suspect feels to cooperate with police.[80] *Miranda* rights may *inform* suspects that they have a right to remain silent, but their cultural background and personality traits may push back much more strongly in the opposite direction and lead to waiver.[81]

Fourth, *Miranda* impacts suspects with criminal histories differently than it does the less criminally sophisticated.[82] A study by Richard Leo, for instance, found that 70% of suspects with a felony record waived their *Miranda* rights compared to a whopping 92% of suspects without any record at all.[83] *Miranda* may have, in fact, remedied the power imbalance between the police and suspects, but at most, it appears to have done so in cases involving hardened criminals, arguably the population that we should be least worried about in confession cases.[84] For everyone else, *Miranda* does very little.[85]

Lastly, *Miranda* warnings arguably offer little protection because police have become very good at using methods to elicit *Miranda* waivers from suspects.[86] One former police officer explains:

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77. *Id.* at 311.

78. *See id.*

79. *See* Gisli H. Gudjonsson, Jon Fridrik Sigurdsson, Olafur O. Bragason, Emil Einarsson & Eva B. Valdimarsdottir, *Confessions and Denials and the Relationship with Personality*, 9 LEGAL & CRIMINOLOGICAL PSYCHOL. 121, 128–31 (2004); Gisli H. Gudjonsson, Jon Fridrik Sigurdsson, Inga Dora Sigfusdottir & Susan Young, *False Confessions to Police and Their Relationship with Conduct Disorder, ADHD, and Life Adversity*, 42 PERSONALITY & INDIVIDUAL DIFFERENCES 696, 698–700 (2012); Malloy et al., *supra* note 2, at 6–8 (examining the influence of personality characteristics on the prevalence of guilty pleas); Stephen Moston, Geoffrey M. Stephenson & Thomas M. Williamson, *The Effects of Case Characteristics on Suspect Behaviour During Police Questioning*, 32 BRIT. J. CRIMINOLOGY 23, 23–25 (1992); John Pearse, Gisli H. Gudjonsson, Isabel C.H. Clare & Sue Rutter, *Police Interviewing and Psychological Vulnerabilities: Predicting the Likelihood of a Confession*, J. COMMUNITY & APPLIED SOC. PSYCHOL. 1, 9–12 (1998).

80. Simon R. Larmour, Henriette Bergstrom, T.A. Christopher & Adelle E. Forth, *Behind the Confession: Relating False Confession, Interrogative Compliance, Personality Traits, and Psychopathy*, 30 J. POLICE & CRIM. PSYCHOL. 94 (2015).

81. *See id.*

82. *See* Pearl, *supra* note 28, at 74.

83. Leo, *supra* note 35, at 286.

84. Pearl, *supra* note 28, at 79–80.

85. *Id.*

86. *See* TRAINUM, *supra* note 36, at 29.

> The reaction of law enforcement personnel and prosecutors to now having to advise suspects in custody of their rights to have an attorney was predictable. Once again, they said, the hands of law enforcement are being tied. No one will ever confess now. But as each time before, investigators adapted in response to the new regulations (just not the way we would hope). As interrogation manuals changed to address the *Miranda* "problem," investigators creatively developed ways to get around it.[87]

The Court overlooks this problem entirely in *Miranda*.[88] It assumes that there is no power imbalance prior to the start of interrogation.[89] The reality, however, is that a power imbalance exists from the moment an individual begins their interaction with the police.[90]

Professor Loewy's confession scholarship tacitly acknowledges all of these problems and the failure, thus far, of the Court's Fifth Amendment jurisprudence to correct them.[91] By moving the triggering moment for the Sixth Amendment right to counsel back to custodial interrogation, Professor Loewy's proposal achieves what the Court hoped—but ultimately failed—to achieve in *Miranda*: a leveling of the proverbial playing field during custodial interrogation.[92] By mandating that counsel be present during these interrogations, this measure will protect suspects from their own worst instincts and misunderstandings about how best to proceed in a manner that avoids unwittingly incriminating themselves.[93]

But does Professor Loewy's proposal go far enough? Does moving the moment the Sixth Amendment right to counsel attaches back to custodial interrogation do enough to protect suspects in our criminal justice system? I believe that it does not and that several additional levels of protection are warranted.

III. A "LOEWY PLUS" PROPOSAL

If law enforcement agencies in the United States continue to use the Reid Technique as their primary interrogation method, I believe that additional layers of protection for suspects are needed to mitigate the fundamental power imbalance between police and suspects, and to lessen the psychologically coercive nature of common interrogation tactics. In my view, a "Loewy Plus" model, adding several more requirements for interrogations to Professor Loewy's proposal, is the best way to do so. In particular, I

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87. *Id.*
88. *See* Miranda v. Arizona, 384 U.S. 436 (1966).
89. *See* Pearl, *supra* note 28, at 79–80.
90. *See id.*
91. *See generally* Loewy, *Distinguishing Confessions*, *supra* note 60, at 145–52; Loewy, *Judicial Schizophrenia*, *supra* note 60, at 427–38.
92. *See* Loewy, *Distinguishing Confessions*, *supra* note 60, at 147.
93. *See id.*

believe that three additional requirements should be met: (1) the standard for waiver of the right to counsel should be heightened; (2) police departments should be required to record all interrogations (and preserve those recordings for a mandated period of time); and (3) police departments should be forbidden from using particularly coercive interrogation techniques like lying to suspects about evidence. Given the limitations of this Symposium format, a brief explanation of each will have to suffice to explain why.

First, the nature of the power imbalance between suspects and law enforcement is the nature of the power imbalance inherent in any situation involving a trained expert and a novice.[94] Very few suspects, other than (presumably) those with extensive prior experience with the criminal justice system, likely understand the tradeoffs they are making when they waive *Miranda* rights and agree to proceed with a custodial interrogation without a defense attorney present.[95] They may be naïve enough to believe that if they are innocent, the truth will set them free.[96] They may be so poorly informed as to worry that if they do choose to avail themselves of their rights, a presumption of guilt would surround them.[97] The only realistic way to remedy this imbalance is to bring another expert onto the scene, such as a defense attorney who can assist the suspect in navigating all of the issues inherent in custodial interrogation. We cannot make experts of novices simply by reciting their constitutional rights to them. They need more protection.[98] We should thus make it substantially more difficult for suspects to waive their right to have an attorney present during interrogation and presume that they wish for one to be present, absent extremely clear evidence to the contrary.

Second, mandatory recordings of custodial interrogations—and preservation of those recordings—can greatly assist lawyers and courts by creating a record of the conditions of interrogation, so that the level of coercion, the confusion on the part of the suspect, and other similar issues can be assessed.[99] Such a requirement, moreover, would be consistent with a growing trend: "Since 2003, the number of states requiring law enforcement officers to electronically record some or all interviews conducted with suspects in their custody has grown from two to at least twenty-two."[100] In

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94. *See* Loewy, *Judicial Schizophrenia*, *supra* note 60, at 432.

95. *See supra* notes 70–72 and accompanying text (arguing that many suspects waive their *Miranda* rights because of misguided beliefs).

96. *See* Kassin & Norwick, *supra* note 70, at 215.

97. Rogers et al., *supra* note 75, at 307.

98. *See supra* note 63–65 and accompanying text (explaining how *Miranda* does not assist a suspect's decision making).

99. *See* Thomas P. Sullivan, Andrew W. Vail, & Howard W. Anderson III, *The Case for Recording Police Interrogations*, 34 LITIG. 30, 35 (2008).

100. Recent Administrative Policy, *Criminal Procedure—Custodial Interviews—Department of Justice Institutes Presumption that Agents Will Electronically Record Custodial Interviews—Dep't of Justice, New Department Policy Concerning Electronic Recording of Statements (2014)*, 128 HARV. L. REV. 1552, 1552 (2015).

2014, the Department of Justice followed suit and "announced a substantial change in its policy, creating a presumption that FBI, DEA, ATF, and United States Marshals Service (USMS) agents will electronically record custodial interviews."[101]

While recording interrogations "will not guarantee that innocent suspects who make false confessions will not be prosecuted or convicted," it will facilitate the determination of which confessions have been coerced and which are sincere.[102] Interrogation recordings can also assist *police* as well by protecting them from false claims of violence or other forms of abuse.[103] In fact, when one group of scholars interviewed officers from over 600 police and sheriff departments, they heard "with amazing consistency about the multiple benefits these recordings provide to law enforcement officers."[104] In fact, "[n]one of the officers who had experience with electronic recordings would voluntarily return to reliance on handwritten notes (often inaccurate and incomplete), and efforts at reconstructing through later testimony what occurred during the interviews."[105]

Third, police departments should be forbidden from using particularly coercive interrogation techniques. In particular, techniques that involve deception or trickery, such as lying about evidence, or (as has occurred in at least one case) giving "false statements to a mother that her ability to retain custody of her children . . . depended on her cooperation with the police," should be banned.[106] Such techniques are highly coercive and risk eliciting false confessions from innocent suspects.[107] As such, those techniques very much violate the *spirit* of the *Miranda* decision:

> Complying with the *spirit* of *Miranda* . . . arguably entails doing more than merely providing warnings and honoring the right of suspects to remain silent or to have counsel present. It *also* entails taking steps to reduce psychological coercion in custodial interrogations—the fundamental issue with which the Court was concerned in *Miranda*. Indeed . . . the Court cited [Reid Technique] police manuals at length and expressed grave concerns about the coerciveness of the techniques detailed within.[108]

It is time to take the step that the Court failed to take in *Miranda*: banning the psychologically coercive techniques with which it was concerned, rather than

101. *Id.* (footnotes omitted).
102. Sullivan et al., *supra* note 99, at 31.
103. *See id.* at 34.
104. *Id.* at 33.
105. *Id.* at 34.
106. *See id.* at 33 (citing Lynumn v. Illinois, 372 U.S. 528, 534 (1963)).
107. *See id.*
108. Pearl, *supra* note 28, at 70.

merely attempting to counterbalance them by informing suspects of their rights; an approach that has, as I have detailed above, largely failed.[109]

IV. CONCLUSION

In sum, while confessions are vitally important to the functioning of our criminal justice system, we must take steps to ensure that they are not extracted from suspects via coercion and that any confessions that are elicited are truthful. A substantial body of research, however, has shown that the current constitutional requirements surrounding custodial interrogation and confessions have not achieved those ends and that suspects need more protection.[110]

Professor Loewy has wisely suggested that, given the failings of Fifth Amendment jurisprudence, the Sixth Amendment right to counsel should attach at interrogation, rather than at the onset of adversarial proceedings.[111] His proposal is wise and should be adopted.[112] However, we should adopt his proposal in combination with a series of other reforms designed to achieve the balance that the Court sought out in *Miranda*.[113] Namely, we should make it much more difficult for suspects to waive their right to counsel, require the recording of all custodial interrogations, and ban interrogation techniques—like lying about evidence—that are particularly psychologically coercive.[114] While police should be able to use *some* level of psychological pressure to obtain truthful confessions, we should construct greater limitations on what they can do while simultaneously offering far more protection for suspects.[115]

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109. *See supra* Part II.A (acknowledging that *Miranda* has fallen short in providing adequate constitutional protections).

110. *See supra* Part II.A (discussing studies on custodial interrogation).

111. Loewy, *Distinguishing Confessions*, *supra* note 60, at 147.

112. *See supra* Part II.A (acknowledging Professor Loewy's scholarship and the need to adopt his proposals).

113. *See supra* Part III (detailing the "Loewy Plus" approach).

114. *See supra* Part III (discussing additional protections for suspects to fulfill *Miranda*'s purpose).

115. *See supra* Part III (arguing for greater protections for suspects in a custodial interrogation).