PERMITTING POST-*MIRANDA* QUESTIONING IN EXCHANGE FOR REGULATING INTERROGATION TACTICS

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I. INTRODUCTION

The enduring issue regarding interrogations of criminal suspects remains how to obtain truthful, reliable statements without inducing false confessions, while also abiding by other principles that themselves remain hotly contested, such as whether police may use deception and what circumstances of interrogation are minimally sufficient.[1] Put differently, the challenge is how to best achieve the instrumental goal of obtaining valuable information from a primary, sometimes unique, source while also honoring normative commitments respecting individual rights and limits on abusive government tactics.[2] Achieving these goals turns on the content of the law regulating police interrogation and the law's efficacy in regulating police interrogation practice.[3]

Behind the struggles over these goals—and in my view a barrier to achieving them—is a deeper issue: The U.S. law of confessions and interrogations is almost entirely federal constitutional law, crafted by courts from the Self-Incrimination, Due Process, and Right-to-Counsel Clauses.[4] Constitutional doctrine has not only constrained policy experimentation and

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1. *See* Susan R. Klein, *Transparency and Truth During Custodial Interrogations and Beyond*, 97 B.U. L. REV. 993, 997–98 (2017).

2. *See* Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops: A Review of Fifty Years of Empirical Evidence of* Miranda*'s Effects on Law Enforcement*, 97 B.U. L. REV. 685, 827–48 (2017).

3. *See, e.g.*, Jeaneé C. Miller et al., *Accusatorial and Information-Gathering Interview and Interrogation Methods: A Multi-Country Comparison*, 24 PSYCH., CRIME, & L. 935, 935–36 (2018).

4. *See* Miranda v. Arizona, 384 U.S. 436, 498–99 (1966) (holding that post-arrest police interrogation without advising suspect of right to silence and to assistance of counsel violates the Fifth Amendment Self-Incrimination Clause); Massiah v. United States, 377 U.S. 201, 205 (1964) (finding statements elicited by law enforcement officials in the absence of counsel after indictment, regardless of custodial status, violate the Sixth Amendment and are inadmissible at trial).

options for reform but has also proven insufficiently effective in achieving its core purposes.[5] A companion issue, then, is how to facilitate flexibility in interrogation law and practice that would enable policymakers to assess which models achieve the best balance of our competing goals regarding confessions and interrogations.[6]

Two criticisms dominate U.S. discussions about the law and policy of police interrogations. One targets the constitutional doctrine—especially the *Miranda* doctrine—that set some key parameters for interrogation practice.[7] Few commentators of any political stripe enthusiastically endorse the *Miranda* doctrine.[8] The second criticism follows from the first because its focus is on what *Miranda* and related constitutional doctrine do not regulate, which are many of the interrogation tactics that police devise and deploy, in the shadow of *Miranda*, to elicit confessions.[9] Deceit and other tactics of psychological manipulation—frequently labeled "accusatorial" methods of interrogation[10]—are wholly lawful,[11] and they remain widely used.[12] Scholars and some police officials (mostly outside the United States) condemn them on normative and instrumental grounds, arguing that such

5. *See* Albert W. Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. REV. 849, 849–50 (2017) (describing the empirical failure of *Miranda* to protect suspects from police abuse).

6. Miller et al., *supra* note 3, at 936–38.

7. Cassell & Fowles, *supra* note 2, at 827.

8. *See* Donald A. Dripps, Miranda *for the Next Fifty Years: Why the Fifth Amendment Should Go Fourth*, 97 B.U. L. REV. 893, 893–94 (2017) (noting criticisms of *Miranda*); Cassell & Fowles, *supra* note 2, at 827–48; Klein, *supra* note 1, at 1004–24 (describing "*Miranda*'s perversions"); 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, 147 (2017); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2634–35 (1996) (summarizing scholarship critical of *Miranda*).

9. *See* Paul Marcus, *It's Not Just About* Miranda*: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601, 612–13, 623 (2006) (describing cases that permitted police to lie during interrogation about, for example, eyewitness evidence, accomplice's cooperation with police, forensic evidence from crime scenes, and vague promises of lenient treatment in exchange for confessions).

10. Miller et al., *supra* note 3, at 936 ("The [accusatorial model of interrogation] is described as a guilt-presumptive model, which uses confrontational strategies and psychological manipulation to elicit confessions" and is typified by the Reid Technique.).

11. *See* Oregon v. Mathiason, 429 U.S. 492, 493 (1977) (per curiam) (affirming a conviction based on a confession obtained after police falsely told the defendant his fingerprints were found at the crime scene); Michigan v. Mosley, 423 U.S. 96, 98 n.3 (1975) (affirming a conviction based on a confession provided after police falsely told the defendant that another suspect identified him); Frazier v. Cupp, 394 U.S. 731, 737–38 (1969) (holding a confession admissible despite police falsely telling the defendant that another person confessed to the crime and suggesting to the defendant that the victim's homosexual advances provided the defendant an excuse for his fight with victim).

12. Klein, *supra* note 1, at 1033–34 ("Cops routinely lie to suspects about the evidence . . . and, for the most part, the Court has accepted this."); Marcus, *supra* note 9, at 612–13, 623.

tactics are both unnecessary to obtain truthful statements and more likely to elicit false confessions.[13]

Aside from bars on extreme tactics, such as torture, assault, and equivalent coercion, the constitutional doctrine governing interrogations has almost nothing to say about such tactics.[14] In other words, it permits them and thus leaves to law enforcement agencies the decision whether to employ tactics based in deceit, bullying, manipulation, and guilt-presumption or, as many scholars and some policing officials urge, instead adopt alternative investigative practices that emphasize rapport-building with suspects and non-deceitful, less aggressive "information-gathering" methods shaped by the accurate information known to police at that stage. [15] Methods of this sort increasingly characterize interrogation procedures in other countries.[16] Some local agencies in the United States have begun employing such styles of interrogation as well, but the shift so far is modest.[17] Several factors contribute to this inertia, including professional norms and traditions, practitioners' confidence in their own abilities, and established training sources.[18] But an important contributing factor is the *Miranda* doctrine.[19] Law enforcement agencies choose their interrogation tactics in light of what *Miranda*, and a modest amount of sub-constitutional law, prohibits and permits them to do.[20]

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13. *See generally* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV. 3 (2010); William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 989, 996 (2001).

14. *See* Kassin et al., *supra* note 13, at 6.

15. Eli Hager, *The Seismic Change in Police Interrogations: A Major Player in Law Enforcement Says It Will No Longer Use a Method Linked to False Confessions*, THE MARSHALL PROJECT (Mar. 7, 2017, 10:00 PM), https://www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations (reporting that Wicklander-Zulawski & Associates, a leading firm that trains U.S. police agencies in interrogation techniques, stopped teaching Reid-style accusatorial techniques in 2017); Kassin et al., *supra* note 13; Richard A. Leo & Richard Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 440–44 (1998).

16. *See* Miller et al., *supra* note 3 *passim* (finding U.S. interrogators use confrontational, deceit-based, accusatorial interrogation techniques more often than their counterparts elsewhere, while information-gathering methods, such as the PEACE method, have been widely adopted in England, Europe, Australia, and New Zealand).

17. Hager, *supra* note 15. Wicklander-Zulawski & Associates trains U.S. police agencies in interrogation techniques but no longer teaches Reid-style accusatorial methods. *Id.* For a list of police agencies trained by the firm, see the firm's client list. *Our Clients*, WICKLANDER-ZULAWSKI & ASSOC., INC., https://www.w-z.com/clients/ (last visited Aug. 31, 2021). *But see* Miller et al., *supra* note 3 (reporting recent survey results that found accusatorial methods still predominate among U.S. law enforcement).

18. Miller et al., *supra* note 3, at 950 (finding that, consistent with past research, U.S. law enforcement officials are comparatively more confident in their ability to detect lies but not actually more accurate at doing so).

19. Marcus, *supra* note 9, at 603–04 (discussing the importance of *Miranda* and its revolutionary impact).

20. *Id.*

Miranda does more than require that suspects be informed of, and allowed to exercise, their rights to silence and assistance of counsel.[21] Although it says nothing about police use of deception, psychological manipulation, or the duration and conditions of interrogations, *Miranda* does set some important limits on interrogation practice by taking some significant interrogation tools off the table.[22] Those restrictions, in turn, have reinforced the perception of U.S. law enforcement that accusatorial tactics, which long predated *Miranda*, are all the more necessary in its wake.[23] The *Miranda* doctrine creates strong incentives for the manipulative interrogation tactics that U.S. police favor.[24] At the same time, that doctrine has proven remarkably static, even by the standards of constitutional law.[25] Changes occur only as the Court defines details at the doctrinal margins.[26] The *Miranda* doctrine has demonstrated little capacity to evolve with new circumstances, of which there have been many since 1966, such as advances in recording technology, interrogation techniques, studies of their relative efficacy, and documentation of false confessions.[27]

The sclerotic natures of *Miranda* law and the predominant mode of U.S. police interrogation practices are related.[28] *Miranda* leaves little leeway for reform of interrogation law and policy.[29] In doing so, it diminishes the prospects that law enforcement agencies will voluntarily shift to less accusatorial, deceit-based interrogation methods because, in the view of many law enforcement officials, *Miranda*'s ground rules for interrogation heighten the risk, or reduce the efficacy, of questioning suspects with less aggressive, deceitful, or manipulative approaches.[30] In what follows, I want to suggest why that is probably true and how we can find out whether it is.

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21. *See* Miranda v. Arizona, 384 U.S. 436, 444, 472 (1966).

22. Kassin et al., *supra* note 13, at 10–13.

23. Dripps, *supra* note 8, at 917–21.

24. Alschuler, *supra* note 5, at 859–60.

25. *See* Dripps, *supra* note 8 (arguing that Fourth Amendment doctrine has proved more adaptable than *Miranda*, and urging that the latter draw lessons from the former); *See also* Dickerson v. United States, 530 U.S. 428, 432 (2000) (affirming *Miranda* and holding that 18 U.S.C. § 3501 is not an adequate substitute).

26. *See, e.g.*, Colorado v. Spring, 479 U.S. 564, 571 (1987) (holding that a *Miranda* waiver for interrogation on federal offense is valid for interrogation on separate state law offense); Moran v. Burbine, 475 U.S. 412, 430 (1986) (ruling that a defendant given *Miranda* warnings need not be informed of a lawyer available to assist him during interrogation); New York v. Quarles, 467 U.S. 649, 649–50 (1984) (public safety exception to *Miranda* warnings); Oregon v. Hass, 420 U.S. 714, 714 (1975) (holding that statements obtained in violation of *Miranda* are admissible at trial to impeach trial testimony); Michigan v. Tucker, 417 U.S. 433, 450 (1974) (ruling that evidentiary "fruits" of statements taken in violation of *Miranda* are still admissible).

27. *See* Dripps, *supra* note 8, at 921–24.

28. *See* Cassell & Fowles, *supra* note 2, at 712–13.

29. *Id.* at 827.

30. *See* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 431–50 (1999) (describing techniques ranging from manufacturing evidence to the "pretended friend" technique).

But to do so, the *Miranda* doctrine would have to change. Revising *Miranda* is essential to shift police interrogation procedures to methods that are more humane and effective.

II. INTERROGATION PRACTICE AND REFORM

To oversimplify a bit, discussions of interrogation methods tend to distinguish broadly between methods typically labeled "accusatorial" and "guilt-presumptive" tactics, which have long prevailed in the United States, and less confrontational methods generally described as "information-gathering" or "rapport and relationship building."[31] The Reid Method is the most well-known and influential version of the former; its core principles have dominated training of U.S. interrogators since it was formalized in the 1960s.[32] By contrast, the PEACE method is a prominent example of the latter.[33] Since the 1980s, PEACE and aligned approaches have been widely adopted among police agencies outside the United States, notably in England and Canada.[34] The closest American analog is the HIG method[35] which federal agencies developed in the 2010s as a reform in the wake of abusive interrogation tactics used against detainees in the years after the 9/11 attacks.

Law enforcement agencies in U.S. jurisdictions continue to favor more accusatorial approaches when interrogating suspects, reflecting the long dominance of training in the Reid Method or approaches that share some of the Reid Method's tactics, premises, and normative valence.[36] The accusatorial approach is fairly characterized as more aggressive than information-gathering, rapport-based approaches.[37] A key feature, and basis for criticism, is that it is built on a presumption of the suspect's guilt, a premise that justifies harsher tactics as a means to get suspects to confess

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31. *See* Miller et al., *supra* note 3, at 937, 939.

32. Fred Inbau et al., CRIMINAL INTERROGATION AND CONFESSIONS (5th ed. 2013). *See also* John E. Reid & Assoc., Inc., *Protecting the Innocent and Identifying the Guilty*, https://www.reid.com [https://perma.cc/WQ7Q-HWYR] (last visited Aug. 31, 2021) (explaining the Reid Technique program).

33. The acronym stands for "Preparation and Planning . . . Engage and Explain . . . Account . . . Closure . . . and Evaluation." Brent Snook et al., *The Next Stage in the Evolution of Interrogations: The PEACE Model*, 18 CAN. CRIM. L. REV. 219, 230 (2014).

34. *See generally* Miller et al., *supra* note 3.

35. The acronym stands for High-Value Detainee Interrogation Group, an inter-agency entity established to develop interrogation techniques for counter-terrorism as well as law enforcement contexts. *See* High-Value Detainee Interrogation Group, *Interrogation: A Review of the Science*, FBI (Sept. 2016), https://www.fbi.gov/file-repository/hig-report-interrogation-a-review-of-the-science-september-016.pdf/view; High-Value Detainee Interrogation Group, *Interrogation Best Practices*, FBI (Aug. 26, 2016), https://www.fbi.gov/file-repository/hig-report-august-2016.pdf/view.

36. Miller et al., *supra* note 3, at 936.

37. *Id.* at 936–37.

what interrogators presume to be the truth.[38] Among the tactics that critics condemn are police lying to suspects (e.g., about the existence of incriminating forensic evidence or a co-defendant's cooperation), aggressive interrogator tone and demeanor, and prolonged questioning over many hours accompanied by moderate physical discomfort.[39] Those tactics are condemned both on normative grounds and because they have been implicated in the production of false confessions.[40]

Again, the labels here somewhat oversimplify. Every method is comprised of a large set of techniques.[41] There are training variations within each and perhaps greater variation in how they are implemented across agencies and among individual officers.[42] Some of the lines defining manipulative or deceptive tactics are fuzzy, and no method aspires to be wholly free of "manipulation."[43] Nonetheless, there are meaningful differences in these models of interrogation—certainly in the eyes of policing officials who choose one over another.[44] Moreover, these divergent approaches have been integrated in three different procedural regimes that regulate suspect interrogations.[45] In all three, procedural rules mandate that detained or charged suspects be informed of their rights to silence and assistance of counsel prior to any official questioning.[46] Those rights now seem to be ubiquitous in western democracies' criminal procedure regimes, although, as detailed in the next Part, there are important differences in how those rights are implemented.

The first model is one familiar in U.S. jurisdictions.[47] Police can engage in affirmative fraud and deceit as interrogation tactics and often choose to operate on a presumption that the suspect is guilty.[48] They have no obligation to disclose evidence in their possession to suspects, regardless of whether it indicates guilt or innocence.[49] There are no precise limits on the circumstances, conditions, or time limits for the interrogation, as long as the

38. *See* Kassin et al., *supra* note 13, at 6–7.

39. *See generally id.*

40. *See, e.g.*, *id.* at 14; Leo & Ofshe, *supra* note 15, at 440.

41. Miller et al., *supra* note 3, at 938.

42. *Id.*

43. 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, 1161–62 (2017); Miller et al., *supra* note 3, at 944 (disaggregating discrete components of interrogation methods in survey of practitioners).

44. Miller et al., *supra* note 3, at 936–40.

45. *Id.*

46. Craig M. Bradley, *Interrogation and Silence: A Comparative Study*, 27 WIS. INT'L L. J. 271, 271 (2009).

47. Miller et al., *supra* note 3, at 936–37.

48. *Id.*

49. *See* Cassell & Fowles, *supra* note 2, at 702–03.

encounter does not include physical coercion or certain forms of extreme psychological coercion.[50]

The second model characterizes the procedural law, and frequently the interrogation practice, in England and Wales.[51] Police cannot use affirmative fraud or deceit during an interrogation.[52] That restriction alone compels English interrogators to depart from core tactics of the Reid Method approach.[53] As in the United States, they have no duty to share evidence in their possession with the suspect during interrogation, although they must inform suspects of reasons for their arrest.[54] Additionally, the circumstances surrounding interrogation are more regulated than in the United States: they are time-limited, must be recorded, and suspects are guaranteed such things as adequate rest, food, drink, comfortable temperatures, and seating.[55] Within this regulatory regime, English police agencies have opted to train interrogators in the less accusatory PEACE-style method of interrogation that emphasizes building rapport with suspects.[56]

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50. Beecher v. Alabama, 389 U.S. 35, 38 (1967) (concluding that the police holding a gun to the head of a wounded suspect in order to extract a confession was coercive); Davis v. North Carolina, 384 U.S. 737, 752 (1966) (holding that sixteen days of incommunicado interrogation in a jail cell without windows, limited food, and coercive tactics were coercive); Reck v. Pate, 367 U.S. 433, 441–42 (1961) (holding that confession after the suspect was held for four days without sufficient food and medical care was coercive); Culombe v. Connecticut, 367 U.S. 568, 631–35 (1961) (ruling that confession from a defendant held for five days of police questioning using harsh tactics was coercive); Rogers v. Richmond, 365 U.S. 534, 540 (1961) (ruling that confessions are involuntary under the Due Process Clause when "the product of coercion, either physical or psychological").

51. *See* Miller et al., *supra* note 3, at 938.

52. *See generally* R v. Imran [1997] Crim. L.R. 754 (U.K.) (holding that police have an obligation not to actively mislead a suspect).

53. *See* Miller et al., *supra* note 3, at 936–38.

54. Police and Criminal Evidence Act 1984 (PACE Act) § 28(3) (U.K.) https://www.legislation.gov.uk/ukpga/1984/60/contents; *PACE Act, Code C, Code of Practice for the Detention, Treatment and Questioning by Police Officers*, U.K. HOME OFF. § 10.3, at 33 (U.K.) [hereinafter *Code of Practice C*], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/592547/pace-code-c-2017.pdf (last visited Aug. 31, 2021) (noting that suspects must be informed "of the grounds and reasons for their arrest.").

55. *Compare Code of Practice C*, *supra* note 54, §§ 8.2–8.6, at 34 (standards for detention in cells), 12.2–12.8, at 46-47 (standards during questioning, including adequate heat, light and ventilation; eight hour rest periods every twenty-four hours; adequate seating), *and PACE Act, Code H, Code of Practice for the Detention, Treatment and Questioning by Police Officers of Persons in Police Detention Under Section 41 of, and Schedule 8 to, the Terrorism Act 2000*, U.K. HOME OFF. §§ 8.2–8.6, at 29 (standards for conditions of detention), 12.2–12.8, at 40 (same standards during questioning; meal or refreshment breaks every two hours), 12.2, at 46 (eight hours of rest every twenty-four hours), 12.4, at 47 (adequate heat, light, ventilation), 12.6, at 47 (not required to stand), 12.8, at 47 (refreshment breaks every two hours during questioning) (U.K.), [hereinafter, *Code of Practice H*], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903475/pace-code-h-2019.pdf (last visited Aug. 31, 2021) *with* Ashcraft v. Tennessee, 322 U.S. 143, 153 (1944) (holding a confession obtained after a suspect was questioned continuously for thirty-six hours without sleep was involuntary and therefore unconstitutional).

56. *See* Miller et al., *supra* note 3, at 937–38.

The third model is further afield from U.S. criminal procedure but is nonetheless worth noting. It describes law and practice in some European civil law countries.[57] As in England, police cannot employ affirmative fraud or deceit, and the circumstances of interrogation are more closely regulated.[58] A key difference is that interrogation officials must share most of their evidentiary case file with the suspect—subject to a few exceptions for witness security or other public interests—and the suspect's lawyer.[59] That makes much deception infeasible and it has prompted development of less adversarial interrogation methods.[60] But the tradition of the civil law system is a different context in other important ways. For one, judicial officers conduct some interrogations.[61] Defense lawyers tend to take a less adversarial approach in part for that reason and because the State has the predominant responsibility for all evidence gathering.[62] In general, the defense contributes to the record not by independently gathering evidence but by requesting prosecutors or magistrates to interview witnesses, conduct forensic analysis, or search specific sources.[63]

The question is whether less accusatorial interrogation practices than those U.S. officials have long favored can be as effective within the distinctive procedural constraints imposed by U.S. constitutional law. Broadly speaking, critics of U.S. interrogation practices urge reforms that would supplant the traditional Reid-style accusatorial, guilt-presumptive interrogations with something closer to the PEACE or HIG methods.[64] Even those who defend the traditional U.S. methods likely could embrace such a

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57. *See* Mariska Dekker & Neal R. Feigenson, *Visual Presentations in Dutch Police Interrogations: An Analysis and Lessons for the United States*, 37 ARIZ. J. INT'L & COMPAR. L. 169, 177 n.28 (2020).

58. This model roughly tracks the Dutch Criminal Code, pursuant to which suspects have a right to remain silent and must be informed of this right prior to police questioning. *See id.* But in some circumstances the court may draw adverse inferences from a suspect's refusal to answer. *See id.*; WETBOEK VAN STRAFVORDERING [SV] [CODE OF CRIMINAL PROCEDURE] § 29 ¶¶ 1–2 (Neth.) ("In all cases where a person is being questioned as a suspect or defendant, the . . . suspect or the defendant shall not be obliged to answer any questions. . . . Before the suspect or the defendant is questioned, he shall be informed that he is not obliged to answer any questions."), *translated at Code of Criminal Procedure*, LEGIS. ONLINE (Aug. 10, 2012), https://www.legislationline.org/download/id/6416/file/Netherlands_CPC_am2012_en.pdf.

59. SV §§ 23, at 8 (describing the right to counsel), 30–32, at 11 (explaining the access to the dossier), 149, at 85 (explaining that the dossier must include all relevant evidence); Dekker & Feigenson, *supra* note 57, at 175 (describing defense attorneys' access to evidence). The right to counsel applies during questioning by judicial authorities but not necessarily in initial interrogations by police. Chrisje Brants, *Wrongful Convictions and Inquisitorial Process: The Case of the Netherlands*, 80 U. CIN. L. REV. 1069, 1086 (2012); Dekker & Feigenson, *supra* note 57, at 193, 215 (noting the differences in the roles of U.S. and Dutch defense attorneys in light of the different adversarial and inquisitorial procedures).

60. *See* Dekker & Feigenson, *supra* note 57, at 172–73 (describing the use of visual evidence presentations in interrogations).

61. SV § 203, at 105.

62. *See* Brants, *supra* note 59, at 1076–77.

63. Dekker & Feigenson, *supra* note 57, at 175; Brants, *supra* note 59, at 1076.

64. Dekker & Feigenson, *supra* note 57, at 214–16.

shift if they were convinced that the rapport-based alternative methods were equally effective at getting suspects to talk. Whether they are is a somewhat open question. Views differ, but Chris Slobogin, who has examined the available empirical evidence, concludes that it remains uncertain whether PEACE-style methods have equivalent "'diagnosticity'—that is, a similar or higher true confession rate combined with a lower false confession rate."[65] The next Part takes up the question of whether less accusatorial, guilt-presumptive methods can achieve that kind of success without reforming *Miranda*. Put differently, the issue is whether the *Miranda* doctrine undermines the efficacy of interrogation methods with greater normative, and perhaps instrumental, appeal.

III. MODELS OF RIGHTS DURING POLICE QUESTIONING

Although the rights to silence and to counsel during questioning are established in the United Kingdom, European Union, and Canada, as well as the United States, there are crucial differences in their definition and implementation. To focus on those distinctions, it is worth disaggregating *Miranda*'s several familiar components. To the standard list, I add a couple of established points that clarify rules for police questioning in the *Miranda* regime:

- Police must inform suspects that they have the right to remain silent.[66]
- Police must inform suspects of their right to have an attorney present during questioning; however, the right to appointed counsel extends only to the indigent.[67]
- The right to silence means not only that a suspect does not have to speak to police or answer their questions[68] but also that police must stop questioning—but only if the suspect clearly asserts his right to silence or to counsel.[69]
- Police must tell suspects that their statements can be used against them by the prosecution in court.[70] Their silence, however, cannot be used against them; that is, prosecutors cannot urge jurors to draw a negative inference from a defendant's choice not to answer questions.[71]

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65. Slobogin, *supra* note 43, at 1163.
66. Miranda v. Arizona, 384 U.S. 444, 467–68 (1966).
67. *Id.* at 473.
68. *Id.* at 473–74.
69. *Id.* at 444–45, 474.
70. *Id.* at 444.
71. *Id.* at 468 n.37 (citing Griffin v. California, 380 U.S. 609, 615 (1965), which held the Fifth Amendment "forbids either comment by the prosecution on the accused's silence [at trial] or instructions by the court that such silence is evidence of guilt"); Mitchell v. United States, 526 U.S. 314, 331–32 (1999) (prohibiting comment on defendant's decision not to testify).

- This collection of rights applies only when suspects are in custody or after the police have formally charged them, not when police question people without significantly depriving them of their liberty.[72] Thus, statements to police, or silence in response to questions, outside of custody may be used at trial.[73]
- There is no right to be informed that, during a police encounter, one is not detained or in custody and, thus, that one is free to not speak and to end the encounter.[74]
- During questioning, police may lie to suspects and use a wide range of other deception or manipulation techniques, they can impose moderate physical discomforts and prolonged interrogation sessions, and they need not disclose any evidence in their possession to the suspect.[75]
- Although police do not inform suspects of this remedy, statements elicited by police in violation of these *Miranda* rules are inadmissible in court against a defendant.[76]

In other advanced democracies—notably in England—the rights to silence and to assistance of counsel, including the right to be informed of these rights prior to questioning, do not include all of these components of the *Miranda* doctrine. [77] No other country, to my knowledge, has adopted precisely this combination of rights and duties. Might alternative models also provide a normatively acceptable formulation of these entitlements, with a better

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72. *Miranda*, 384 U.S. at 477 (explaining that *Miranda* warnings are required only once a suspect is "in custody at the station or otherwise deprived of his freedom of action in any significant way").

73. Post-*Miranda* decisions allowed prosecutors to impeach the trial testimony of defendants by showing their pretrial failures to speak outside the context of post-custody questioning. *See* Salinas v. Texas, 570 U.S. 178, 186 (2013) (holding that evidence of suspect's pre-custody, pre-*Miranda* silence in response to police questions may be offered by prosecution as evidence of guilt); Fletcher v. Weir, 455 U.S. 603, 607 (1982) (concluding that post-arrest silence can be used to impeach the defendant on cross-examination); Jenkins v. Anderson, 447 U.S. 231, 240 (1980) (ruling that pre-arrest silence can be used to impeach on cross-examination). *But see* Doyle v. Ohio, 426 U.S. 610, 617–18 (1976) (holding that suspect's silence following *Miranda* warnings may not be used to impeach him because the warnings themselves might have caused him to remain silent); *cf.* Harris v. New York, 401 U.S. 222, 226 (1971) (concluding that statements obtained in violation of *Miranda* during interrogation are not admissible substantively against the defendant but may be used to impeach the defendant's testimony).

74. *See Miranda*, 384 U.S. at 444; *cf.* Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (explaining that coercive environments which implicate the need for *Miranda* warnings are judged by a totality of the circumstances).

75. Klein, *supra* note 1, at 1014–17.

76. *Miranda*, 384 U.S. at 444; *Doyle*, 426 U.S. at 618 (explaining that a suspect's silence following *Miranda* warnings may not be used to impeach him because the warnings themselves might have caused him to remain silent).

77. The right is also a feature of international treaty obligations under European Union law and the European Convention on Human Rights. *See* Charles D. Weisselberg, *Exporting and Importing* Miranda, 97 B.U. L. REV. 1235, 1252–58 (2017) (describing both); Murray v. United Kingdom [1996], 22 Eur. Ct. H.R. 29 (explaining that the right to silence and privilege against self-incrimination are implicit in E.C.H.R. Article 6 right to fair trial, but "the accused's silence, in situations which clearly call for an explanation from him, [can] be taken into account" at trial).

combination of benefits and costs, that could plausibly accord with U.S. constitutional law?

Consider the equivalent body of law adopted in England and Wales.[78] Unlike European civil law jurisdictions, the English and Welsh legal systems share a common law history and legal tradition with the United States that informs U.S. constitutional law.[79] Procedural entitlements, like the rights to silence and counsel, operate in very similar institutional frameworks.[80] Prosecutors and defense lawyers are adversarial; parties, rather than courts, control evidence production; police conduct most interrogations, rather than judicial officials; policing agencies operate with little or no prosecutorial oversight; and trials by jury are avoided for most cases by guilty pleas.[81]

While English law, like U.S. law, provides a right to remain silent and to the assistance of counsel during interrogation, the details of how these rights are defined differ markedly from the U.S. model.[82] Two features are especially significant. First, exercising the right to silence can carry a cost: silence can be used against defendants later at trial in some circumstances.[83] Specifically, juries are allowed to draw a negative inference from a defendant's failure to mention something during police questioning that he subsequently offers in his defense at trial if the judge concludes that "in the circumstances existing at the time the accused could reasonably have been expected to mention" it.[84] Second, the right to silence does not include halting

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78. *See* Criminal Justice and Public Order Act 1994 (CJPOA), ch. 33, §§ 34(1)–(2A) (U.K.) http://www.legislation.gov.uk/ukpga/1994/33 (last visited Aug. 31, 2021) (defining when it is permissible to draw inferences from a suspect's failure to mention facts when questioned or charged); *see generally Code of Practice C*, *supra* note 54; *Code of Practice H*, *supra* note 55.

79. *See generally* David J. Feldman, *England and Wales*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 149, 149–200 (Craig Bradley ed., 1st ed. 1999).

80. *See Miranda*, 384 U.S. at 442. *But see* Dekker & Feigenson, *supra* note 57, at 173–77 (describing procedural safeguards in interrogating suspects).

81. For a brief comparison of prosecutorial and plea-bargaining practices in the United States and England, see DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE 30–38, 105–11 (2016). For a brief description of a procedural system in the European civil law, "inquisitorial" tradition, see Dekker & Feigenson, *supra* note 57, at 173–77 (describing Dutch procedure including defense counsel's role). *Cf. Miranda*, 384 U.S. at 460 (praising accusatorial procedure).

82. PACE Act, *supra* note 54, § 58 (detailing suspects' rights to legal advice and consultation of solicitors). As in the United States, suspects must be informed of both rights once they are arrested or criminally charged. *Id.* § 56.

83. A standard form of the caution is: "You do not have to say anything. But it may harm your defen[s]e if you do not mention now something which you later rely on in court. Anything you do say may be given in evidence." *See Code of Practice C*, *supra* note 54, § 16.2, at 62. But no inference may be drawn from a suspect's silence between the time he called for a lawyer's assistance and time the lawyer arrives. *See* CJPOA, *supra* note 78, ch. 33, §§ 34(2A), 36(4A); *Code of Practice C*, *supra* note 54, Annex C(a), at 77; *cf. id.* § 6.6, at 28 (requiring that, subject to exceptions, a suspect who wants legal advice may not be interviewed until counsel arrives).

84. CJPOA, *supra* note 78, ch. 33, § 34(1). Thus, an inference may neither be drawn from silence alone nor if a defendant offers no positive defense at trial. *Id.* Other circumstances bar inferences from silence as well, notably when a detainee is waiting for counsel to arrive, and who, after charging, "has had brought to their notice a written statement made by another person or the content of an interview with

or avoiding interrogation.[85] Suspects still must sit through a period of police questioning; they are simply free not to respond or speak.[86] But interrogations are time-limited and must be recorded.[87]

On those two points, the English right to silence can be characterized as weaker than *Miranda*.[88] But in other respects, English law is somewhat more protective. As noted above, conditions during questioning and detention are regulated to prohibit tactics such as sleep deprivation, dehydration, prolonged standing, and cold temperatures.[89] English courts have excluded confessions obtained in violation of some of those requirements.[90] Unlike U.S. interrogators, English police may not actively mislead suspects during questioning.[91] Additionally, the rights to silence and counsel have a broader scope. Under English law, the right to silence attaches earlier, perhaps before a person is arrested or charged.[92] The police must give a warning—or caution, in British parlance—when they identify a person as a suspect, that is, whenever "there are grounds to suspect [a person] of an offence."[93] The distinction can be significant: police are not allowed to avoid cautioning a suspect about his rights by engaging him in conversation or asking him to voluntarily provide information without notifying him that he is the target of the investigation.[94] Moreover, "[w]hen the officer in charge of the investigation reasonably believes there is sufficient evidence to provide a realistic prospect of conviction for the offence . . . they shall without delay" alert the official who is responsible for charging the suspect.[95] Subject to a few exceptions, detainees "may not be interviewed about an offence after they have been charged with, or informed they may be prosecuted for it."[96]

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another person which relates to that offen[s]e." *See Code of Practice C*, *supra* note 54, Annex C § (a)(1)(b)(i), at 67–68.

85. *See Code of Practice C*, *supra* note 54, Annex C, at 67.

86. *Id.*

87. PACE Act, *supra* note 54, § 60.

88. *Id.*; *cf.* Miranda v. Arizona, 384 U.S. 436, 460 (1966) (finding that the Fifth Amendment privilege is fulfilled when the right to silence is guaranteed).

89. *See supra* note 55 (see sources cited).

90. *See* R v. Kirk [2000] 1 W.L.R. 567 (U.K.) (holding that statements from a suspect who was cautioned on his right to silence about one crime may be excluded if they relate to a separate crime of which police suspect him and the suspect was not cautioned with regard to the second crime); David Feldman, *Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal Evidence Act 1984*, 1990 CRIM. L. REV. 452, 463.

91. Mike Redmayne, *English Warnings*, 30 CARDOZO L. REV. 1047, 1062 (2008) (citing R v. Imran [1997] Crim. L.R. 754 (U.K.)).

92. *See Code of Practice C*, *supra* note 54, § 10.1, at 39.

93. *See id.* § 10, at 39; Feldman, *supra* note 79, at 91, 109 (In England, suspects must be given cautions when police "have reasonable grounds to suspect that the interviewee has committed an offen[s]e.").

94. *See Code of Practice C*, *supra* note 54, § 10.1, at 39.

95. *Id.* § 16.1, at 62.

96. *See id.* §§ 16.2, 16.5, at 62–63.

It is fair to say that the right to counsel during interrogation is more meaningful than in most U.S. jurisdictions. Evidence for this lies partly in modest, but significant, legal rules. English police are barred from doing or saying "anything with the intention of dissuading any person who is entitled to legal advice . . . , whether or not they have been arrested and are detained."[97] They must encourage the use of counsel, even if a suspect initially declines it: "If the detainee has the right to speak to a solicitor in person but declines to exercise the right the officer should point out that the right includes the right to speak with a solicitor on the telephone."[98] If a lawyer arrives mid-interrogation, police must inform the suspect, stop the questioning, and allow the lawyer and the suspect to meet privately.[99] In sharp contrast to U.S. law,[100] if a lawyer arrives at the stationhouse to see a particular suspect, the police must tell the suspect of the lawyer's presence, even if the suspect has already declined the assistance of counsel.[101] Beyond these rules, the English and Welsh defense counsel systems are designed to provide realistic access to counsel at an early stage. To be sure, England underfunds indigent defense on par with many U.S. jurisdictions.[102] But because police may proceed with questioning even if a defendant exercises his right to silence, "duty solicitors" are on call twenty-four hours a day to provide legal counsel at police stations.[103] Duty solicitors will assist all suspects regardless of income,[104] although those who can afford it may privately retain a lawyer.

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97. *Id.* § 6.4, at 27.

98. *Id.* § 6.5, at 27.

99. *Id.* § 6.6(d)(v), at 29.

100. In *Moran v. Burbine*, the Supreme Court found no constitutional violation when, during interrogation, the police did not inform the defendant that a lawyer retained by his family had arrived at the station to assist him nor when police lied to the lawyer about when defendant would be questioned, reasoning that the Constitution does not "require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." Moran v. Burbine, 475 U.S. 412, 415, 422 (1986) (citations omitted).

101. *Code of Practice C*, *supra* note 54, § 6.15, at 31.

102. Andy Gregory, *'British Justice is in Jeopardy': Legal Aid System is Doomed Without More Criminal Defence Lawyers, Solicitors Warn*, THE INDEP. (Feb. 28, 2020, 8:47 PM), https://www.independent.co.uk/news/uk/home-news/criminal-justice-system-legal-aid-moj-law-society-solicitors-funding-a9365621.html; Owen Bowcott, *Legal Aid Services are on Brink of Collapse, Lawyers Tell MPs*, THE GUARDIAN (Oct. 30, 2020, 12:37 AM), https://www.theguardian.com/law/2020/oct/29/legal-aid-services-brink-collapse-lawyers-tell-mps-justice; Mike McConville & Luke Marsh, *England's Criminal Justice System Was on Its Knees Long before Coronavirus*, THE GUARDIAN (Sept. 7, 2020, 5:15 AM), https://www.theguardian.com/commentisfree/2020/sep/06/england-criminal-justice-system-coronavirus-covid-19-cuts-2010; Owen Bowcott & Amelia Hill, *'I Couldn't Fight to Get My Children Back': The Impact of Legal Aid Cuts*, THE GUARDIAN (Dec. 27, 2018, 2:50 PM), https://www.theguardian.com/law/2018/dec/27/i-couldnt-fight-to-get-my-children-back-the-impact-of-legal-aid-cuts.

103. Redmayne, *supra* note 91, at 1053.

104. *Code of Practice C*, *supra* note 54, *Notes for Guidance* 6B, at 31–32; Feldman, *supra* note 79. However, one study found that two-thirds of English suspects waive counsel. Bradley, *supra* note 46, at 289–90.

Consider the effect of the English regulatory scheme surrounding the right to silence. Requiring defendants, with the assistance of counsel, to face—but not respond to—police questioning, combined with permitting an inference from silence in some circumstances dramatically changes incentives of the police, the suspect, and the defense counsel.[105] English police have more alternatives to harsh, accusatorial U.S.-style tactics for convincing reluctant suspects to talk.[106] Even if police are met with a suspect's silence, they can narrow a suspect's possible defenses at trial by posing questions on various circumstances and potential defenses.[107] A homicide defendant who raises an alibi or self-defense claim at trial, but who failed to mention that defense during police questioning, would face a negative inference on that point at trial.[108] The suspect's incentive to exercise his right to silence changes accordingly.[109]

Likewise, defense counsel should rarely advise a client to say nothing. English law is designed to make defense lawyers cautious about advising silence.[110] It permits a judge to allow a negative inference from the "failure to state a fact in circumstances in which that fact naturally would have been asserted,"[111] even if that silence were based on counsel's advice, but depending on the circumstances and information that prompted the advice.[112] That policy has proven problematic and faced trenchant criticism.[113] The competing goals of discouraging defense lawyers, from invariably advising silence and at the same time enabling suspects to trust and follow their counsel's advice, may be irreconcilable.[114]

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105. *See* Redmayne, *supra* note 91, at 1051–52, 1056 (discussing incentives from English laws surrounding the right to silence in interrogations); *id.* at 1082–83 (discussing evidence of incentive effects from the negative inferences in prompting suspects to talk).

106. *See generally id.* at 1062; *cf.* Bradley, *supra* note 46, at 286–89 (outlining the procedural limits in England and the UK that allow more flexibility in interrogations).

107. *See* Redmayne, *supra* note 91, at 1056–58.

108. *Id.*

109. *See id.*

110. *Id.* at 1067–68 (discussing treatment of this issue in English courts and noting that one risk of invoking counsel's advice to explain silence is that a defendant may inadvertently waive attorney-client privilege).

111. This phrase is from the Supreme Court analyzing common law tradition. Jenkins v. Anderson, 447 U.S. 231, 239 (1980) (holding that pre-arrest silence can be used to impeach on cross-examination) (citing 3A JOHN WIGMORE, EVIDENCE § 1042, p. 1056 (Chadbourn rev. 1970)). In a series of decisions, the Court has addressed an analogous problem of when negative inferences may be drawn from a suspect's silence prior to receiving *Miranda* warnings. *See* Salinas v. Texas, 570 U.S. 178, 178 (2013) (ruling that evidence of suspect's pre-custody, pre-*Miranda* silence in response to police questions may be offered by prosecution as evidence of guilt); Fletcher v. Weir, 455 U.S. 603, 607 (1982) (concluding that post-arrest silence can be used to impeach on cross-examination).

112. *See* Redmayne, *supra* note 91, at 1068–71 (summarizing and criticizing English case law on this issue).

113. *See id.*

114. *See id.* at 1066–70.

The challenge of this particular policy component aside, the broader point is that the English regime changes the incentives and dynamics around interrogations. These changes, in turn, play a part in English police agencies' voluntary shift to the PEACE interrogation model.[115] The ability to ask questions to counseled suspects, backed by the possibility of a negative inference for failing to mention something earlier rather than later, provides police with tools to encourage responses from suspects without resorting to bullying, deception, or more aggressive tactics that are staples of many U.S. interrogators' toolkits.[116]

Moreover, English interrogation practices may do more than provide alternatives to deception; they may encourage truthful disclosure by police.[117] Recall that during interrogations, English police, like their U.S. counterparts, are under no obligation to share evidence in their possession that suggests the suspect's guilt.[118] But in some circumstances, the power to question suspects with the prospect of a negative inference for silence makes disclosing inculpatory evidence to suspects a useful interrogation tactic.[119] No negative inference would be permitted, for example, from a defendant's failure to explain some fact—such as a suspect's appearance in surveillance near the time and place of the crime—that the suspect did not know about.[120] But if police disclose evidence to a suspect, it may call for a response and the suspect's failure to offer one may conflict with his defense theory later at trial, justifying a negative inference.[121]

In various ways, then, a different regulatory scheme defining the post-arrest right to silence can facilitate the transition to less accusatorial interrogation methods.[122] An alternative model holds out the prospect of better diagnosticity—greater success at extracting truthful information —without relying on, and perhaps because of not relying on, harsh practices that have prompted the innocent to falsely confess.[123]

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115. *See supra* notes 78–109 and accompanying text (detailing the English regulatory scheme surrounding interrogations and how it differs from the U.S. model in substance and application).

116. *See supra* notes 114–19 and accompanying text (explaining the right to silence and when negative inferences may be used against a suspect).

117. *See* Redmayne, *supra* note 91, at 1062–64.

118. *Id.* at 1062.

119. *Cf. id.* at 1062–66 (discussing the relationship between police disclosures and suspects' silence).

120. *Compare* R v. Nickolson [1999] Crim LR 61, 62 (U.K.) (finding that a defendant who was not informed his semen was found on his stepdaughter's clothing could not have been expected to offer an innocent explanation for it), *with* R v. Barnes [2003] EWCA (Crim) 2138 (U.K.) (holding that suspects are expected to mention a defense which, if true, would be an obvious way to respond to the allegations at interview, even if not prompted by police questioning or disclosure).

121. *See* Redmayne, *supra* note 91, at 1062–66.

122. *See supra* pp. 5–11 (discussing the efficacy of—and the potential of the United States' transition to—the PEACE model and similar interrogation methods).

123. Snook et al., *supra* note 33, at 233–34.

Some of the rules surrounding interrogations in England could be adopted in U.S. jurisdictions without a change in constitutional law. Time limits on questioning, audio recording, presence of counsel, and standards for humane detention conditions are all compatible with *Miranda*.[124] Those would help prevent the most abusive versions of accusatorial interrogations.[125] But those regulations are largely in service of normative human rights standards—minimum standards of humane treatment.[126] They do little or nothing to make interrogations more effective at eliciting accurate information from suspects.[127] They provide no tactical substitutes for the bullying, deception, and result-oriented manipulation that Reid-inspired interrogators in the United States rely on to elicit self-incriminating statements.[128]

It is other components of English interrogation law that create those alternatives—specifically, the authority of police to ask questions to arrested and charged suspects after informing them of their rights to silence and counsel, and the possibility that suspects will face a negative inference at trial for failing to offer relevant information at the stationhouse.[129] In the United States, adopting those rules is barred by *Miranda*.[130] Or is it? The Supreme Court famously suggested in *Miranda* that policymakers could supplant the prophylactic rules that the *Miranda* majority devised, if legislative alternatives were equally effective at protecting suspects' constitutional rights during custodial interrogation.[131] No legislature ever meaningfully attempted that project, but that possibility remains open even after the Court's affirmance of *Miranda* in *Dickerson v. United States*.[132]

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124. *Compare Code of Practice C*, *supra* note 54, §§ 3.2(a)–(b), at 12–13, 8.2–8.6, at 29, 12.2, at 41, *with* Miranda v. Arizona, 384 U.S. 436, 457–58 (1966) (finding interrogation tactics that are destructive to human dignity violate the Fifth Amendment).

125. *Code of Practice C*, *supra* note 54, §§ 3.2(a)–(b), at 12–13, 8.2–8.6, at 29, 12.2, at 41 (outlining the relevant provisions for the additional restraints imposed by English law).

126. *Id.*

127. Snook et al., *supra* note 33, at 220.

128. *Id.* at 221–24.

129. Redmayne, *supra* note 91, at 1048–49.

130. Miranda v. Arizona, 384 U.S. 436, 444, 467–68 (1966).

131. *See id.* at 467.

> It is impossible for us to foresee the potential alternatives for protecting the privilege [against self-incrimination] which might be devised by Congress or the States . . . . Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform . . . . We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. *Id.*

132. Dickerson v. United States, 530 U.S. 428, 443–44 (2000) (emphasizing *stare decisis* as a rationale for not overruling *Miranda*).

The English rules for interrogations are not a prerequisite for interrogators to switch to interrogation methods that replace the Reid Method with PEACE or HIG tactics.[133] HIG approaches have been adopted by some U.S. law enforcement agencies.[134] It remains an open question whether the English rules make PEACE-style interrogations more effective at getting suspects to talk than the same approach under U.S. constitutional law.[135] These questions are hard to answer empirically. But it is certainly the case that English police interrogators believe that the English rules provide them with meaningful advantages in questioning suspects.[136] And likewise, despite some sound evidence to the contrary, many trained U.S. police interrogators firmly believe that they would be less successful at extracting confessions without the full toolkit of the Reid Method.[137] *Miranda* critics note that the decision leaves—or seems to leave—police with few tools other than unsavory manipulation tactics to question suspects, much less elicit meaningful responses.[138] In this way, *Miranda* has helped rationalize the case for accusatorial tactics[139] and bolstered the case made by U.S. law enforcement agencies and some scholars[140] for Reid-style tactics over PEACE-style methods.

In my view, the English regulatory system has enough to recommend it to justify judicial approval of it under the *Miranda* doctrine if U.S. policymakers adopted something close to that approach.[141] Without empirical evidence of the efficacy of interrogation systems, theoretical predictions about how a system works in practice, combined with the anecdotal evidence of real-world applications, are all we have. But even without clear evidence that the English approach improves diagnosticity, a pragmatic argument supports permitting U.S. jurisdictions to experiment with the English model.[142] For policymaking to occur in Executive and Legislative branches rather than the Judiciary, stakeholders with competing views and interests

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133. *See generally* Snook et al., *supra* note 33.

134. *See* Dekker & Feigenson, *supra* note 57, at 197 n.104.

135. *See generally* Slobogin, *supra* note 43.

136. *See* Wyatt Kozinski, *The Reid Interrogation Technique and False Confessions: A Time for Change*, 16 SEATTLE J. FOR SOC. JUST. 301, 334 (2018) (stating success rates of the English-made PEACE interrogation styles are on par with Reid Method interrogations but do not have the risk of coerced false confessions).

137. *See id.* at 302 (noting widespread agreement among nearly every U.S. law enforcement agency).

138. *See id.* at 314–15 (mentioning that *Miranda* intended to protect from abusive interrogation methods but failed to do so).

139. *See* Stuntz, *supra* note 13, at 976 (stating that *Miranda* does not provide suspects protection from abusive police tactics).

140. *See* Slobogin, *supra* note 43, at 1163 n.34 (outlining a collection of studies and reports relative to various interrogation tactics and methods).

141. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966)*; see also* Redmayne, *supra* note 91, at 1048 (discussing the merit of adopting the English approach).

142. *See generally* Slobogin, *supra* note 43.

need to compromise and make tradeoffs.[143] Permitting police to question suspects who invoke their right to silence and permitting negative inferences from silence in some circumstances—two practices *Miranda* forbids—are huge bargaining chips.[144] Granting those concessions to law enforcement agencies seems like a fair, and politically realistic, price in exchange for U.S. police agencies to accept stricter regulation of the interrogation setting and replace Reid-style tactics with something like PEACE or HIG approaches.[145] Police—and policymakers sympathetic to the police perspective—would gain new forms of leverage to encourage suspects to talk.[146] In exchange, they face greater oversight and accountability, especially via recording.[147] Suspects and the public likely would benefit from a shift to interrogation practices that produce more frequent truthful statements and fewer false ones.[148] At a minimum, they achieve the unambiguous, normative gain of eschewing aggressive, guilt-presumptive interrogation tactics that disrespect individual dignity and autonomy.[149]

IV. CONCLUSION

Miranda explicitly embraced the promise, supposedly inherent in American Federalism, of decentralized policy experimentation.[150] But the default interrogation protocol the Court put in place in *Miranda*, and the body of constitutional doctrine surrounding interrogations, has foreclosed innovation.[151] Police resistance gradually dissipated as police practice adapted and officers learned how to extract confessions in spite of *Miranda*'s restraints.[152] Police adaptation exploited *Miranda*'s weaknesses and left policymakers with little will or incentive to try anything different.[153] But it seems plausible, one can imagine, that the English model could inspire an ironic twist in U.S. law reform: law enforcement agencies taking the lead in pushing for a new regulatory scheme for interrogations that simultaneously

143. *See, e.g.*, *id.* at 1196 (mentioning that police departments will hopefully, one day, move to interrogation methods that do not necessitate aggressive manipulation tactics).

144. *See Miranda*, 384 U.S. at 444–45 (noting the two practices not permitted).

145. *See* Slobogin, *supra* note 43, at 1196.

146. *See generally id.*

147. *See supra* notes 80–93 and accompanying text (discussing a weaker right to silence with greater regulation of police activity via recordings).

148. *See* Kozinski, *supra* note 136, at 330–36.

149. *See id*.

150. Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).

151. *See supra* notes 25–30 and accompanying text (discussing how *Miranda* has left little leeway for reform in interrogation law and politics).

152. *See* Leo & White, *supra* note 30, at 407–09; Dripps, *supra* note 8, at 895 (observing "[p]olice and gangsters responded strategically to the *Miranda* rules" and lamenting the failure of the *Miranda* doctrine to respond to changed circumstances).

153. *See* Dripps, *supra* note 8, at 895–96.

grants them greater authority and binds them to practices that a minority of U.S. agencies—but a greater share in the U.K. and elsewhere—already employ.[154] If some U.S. jurisdictions attempt such an experiment, U.S. courts should reaffirm the original promise of *Miranda* and not place constitutional barriers on well-designed protocols that attempt to balance the competing interests at stake in interrogation practice—more so than the Supreme Court's now-classic protocol.[155] The Court has never been an ideal institution for policy innovation. But *Miranda*'s legacy suggests that the Court's policymaking, even plausible attempts like *Miranda*, can also unintentionally forestall legislative innovation, even when the Court explicitly embraces such efforts.[156] Some of the blame lies with state courts and both state and federal legislators who have failed to act in better faith than Congress did when it enacted the *Miranda*-substitute provision that the Court struck down in *Dickerson*.[157] But attributions of fault aside, both scholars and—perhaps more convincingly—lawmakers and law enforcement in England and elsewhere have provided U.S. policymakers and courts with well-conceived alternatives for a much-maligned *Miranda* doctrine.[158]

154. *See supra* notes 143–47 and accompanying text (discussing U.S. law enforcement adopting English interrogation practices).

155. *See supra* note 131 and accompanying text (discussing *Miranda*'s original promise to not handicap efforts to reform interrogation practices).

156. *See supra* notes 25–30 and accompanying text (discussing how *Miranda* has left little leeway for reform in interrogation law and politics).

157. Dickerson v. United States, 530 U.S. 428, 441–44 (2000) (affirming *Miranda* and holding that 18 U.S.C. § 3501 is not an adequate substitute).

158. *See supra* notes 51–56 and accompanying text (discussing alternative procedural law and interrogation practices in England and Wales).