SILENCE, CONFESSIONS, AND THE NEW ACCURACY IMPERATIVE

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ABSTRACT

Silence is both overpriced and underrated. This Article assesses the status of silence in light of renewed attention to reliability in criminal procedure. First, it considers the meaning of silence, both outside of the criminal justice process and within it. The Article then describes how silence can safeguard the context of confessions by making space for suspects to choose or reject engagement while shielding the content of statements from government manipulation. This account seeks to advance the discussion about protecting silence beyond the debate as to whether it advantages the innocent or the guilty. Empirical developments concerning wrongful convictions establish that factually innocent defendants do make false confessions, that the government often co-authors those statements, and that errors occur because the cost to defendants of staying silent is too high. The Article concludes by evaluating both exclusionary rules and law enforcement regulation that could better protect silence and, in doing so, enhance accuracy.

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INTRODUCTION

The "right to silence" figures prominently in both criminal procedure and popular culture about the criminal justice system, but neither silence itself nor any such right actually exists.[1] This Article explores the content of attempted silence, its function in interrogations, and the emerging connection between making space for silence and improving accuracy. It argues that the failure to understand and defend silence allows law enforcement to insert material into suspects' statements and, in doing so, to introduce error into criminal adjudication.

Many representations of silence outside of the criminal justice process illuminate two important aspects of the failure to protect it in interrogations. Silence is both unattainable and interactive. Its complexities begin to emerge from consideration of the silent symphonies and blank canvases of postmodern art,[2] which expose silence as so dynamic that it can never be perfected. There is always substance to silence, including information and engagement for the listener confronted with it. As performances of silence in the arts demonstrate, the audience adds content to silence both deliberately and inadvertently, and can later mistake those contributions for original statements by the performer.

Legal rules have not accounted for either the distinction between silence and emptiness or the inaccuracies that can flow from the moment that silence is breached. As the privilege against self-incrimination continues to contract, its diminished protections can be traced in part to misperceptions about what silence communicates,

1. *See* Salinas v. Texas, 133 S. Ct. 2174, 2182–83 (2013) (stating that "misconceptions notwithstanding, the Fifth Amendment . . . does not establish an unqualified 'right to remain silent'").

2. *See* John Cage, *4'33"* (1952).

and about the response that it can provoke from law enforcement. Silence currently counts, for example, as an affirmative admission of guilt if a suspect remains silent instead of proffering anticipated denials.[3] Moreover, although a suspect cannot achieve a romantic conception of pure silence,[4] when stillness fails, the broken silence itself constitutes waiver of the privilege against self-incrimination.[5] Police leverage this perceived acquiescence while disregarding the signaled desire to separate from interrogators.[6]

Overriding attempted silence can lead, however, to jeopardizing reliability. Suspects rarely succeed in imposing silence on interrogators engaged in aggressive questioning, and prolonged questioning is a strategy that can turn a suspect's noncompliance into a false confession. When law enforcement breaches silence at critical junctures in interrogations, co-authored confessions—containing known and anticipated elements that investigators themselves generate—often result. And statements with substantial content provided by the government can indicate both involuntariness and inaccuracy.[7]

Recent data attributing wrongful convictions to false confessions sheds new light on the way in which silence itself can protect innocence.[8] Growing evidence from DNA exonerations has established that the problem of wrongful convictions is substantial, and that a significant number of those errors can be traced to government participation in the production of a suspect's statement.[9] The new empirical moment in criminal procedure scholarship thus creates an opportunity to revisit the rules surrounding silence and the way in which they connect to reliability. With the occurrence of error

3. *Salinas*, 133 S. Ct at 2182.

4. *See, e.g.*, HENRY DAVID THOREAU, A WEEK ON THE CONCORD AND MERRIMACK RIVERS 392 (Carl F. Hovde, William L. Howarth & Elizabeth Hall Witherell eds., 1980) (describing silence as the "universal refuge").

5. Berghuis v. Thompkins, 560 U.S. 370, 388–89 (2010).

6. The facts of *Thompkins*, *id.* at 374–77, illustrate this approach.

7. *See, e.g.*, United States v. Preston, 751 F.3d 1008, 1028 (9th Cir. 2014) (en banc) (recognizing that a defendant's willingness to adopt responses suggested by the government constitutes evidence of involuntariness).

8. *See* Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 396 (2015) (stating that many recent cases of DNA-based exonerations have been "dominated by false confessions").

9. *See id.* (explaining that "recently exposed false confessions were seemingly detailed—containing information that police had said only the true culprits could have known").

in criminal adjudication no longer a theoretical issue, the real gains and low costs of making more space for silence are easier to calculate.

This closer look at what silence consists of, how it communicates, and what occurs when it is breached suggests a reconceptualization of the measures that protect it. Part I of the Article describes artistic representations of silence to begin to give it some content and make it possible to "listen" to the signals that silence sends. It then assesses the legal meaning of silence in investigations in light of this broader cultural context. In Part II, the Article links silence and accuracy in order to move the debate about the scope of the right to remain silent beyond speculation on whether it benefits innocent or guilty defendants. Empirical developments on false confessions establish that there are "known innocents" who attempted silence, and their cases raise the possibility that a more robust right to silence could decrease wrongful convictions. Part III addresses potential reforms to both legal standards and law enforcement methods that would raise the status of silence in investigations and better protect against error.

I. ATTEMPTED SILENCE

A. No Such Thing as Silence

Silence is not simple. Reevaluating its constitutional status first requires a fuller theory of what it means. Reflections on silence in other contexts help illuminate its distinction from blankness, its communicative function, and the way in which failed attempts at silence conflate speaker and listener.

Performers and visual artists have long explored the impossibility of pure silence. Consider, for example, composer John Cage's work *4'33"*. When it was first presented in 1952, it consisted of a virtuoso pianist, David Tudor, sitting at the piano for four minutes and thirty-three seconds without striking a note.[10] Commonly known as the "silent" piece, Cage's composition includes three movements.[11] Tudor raised and lowered the piano lid at the beginning and end of each movement, measured the passing time with a stopwatch, and turned

10. *See* JOHN CAGE, *4'33"* 1960 TYPED "TACET" VERSION (1960), *reprinted in 4'33"*: JOHN CAGE CENTENNIAL EDITION 2 (2012).

11. Alex Ross, *Searching for Silence: John Cage's Art of Noise*, THE NEW YORKER, Oct. 4, 2010, at 52, 52.

several pages of the score during the performance.[12] Each time the piece is presented, the performer or performers—the score is written for a single instrument, an ensemble, or an orchestra—receive instructions to produce no intentional sounds at all.[13] But of course, though the orchestra appears silent, members of the audience are not. The inevitable murmurs and rustles from the listeners, as well as incidental sounds in the concert hall, form part of the composition.[14] In Cage's words, the project sought to demonstrate that there is "no such thing as silence."[15]

There is no such thing as silence because the performer cannot maintain it, and the audience cannot avoid filling it. Government-created evidence in criminal cases similarly arises both from supplementing suspects' own words and from imputing facts to suspects that do not originate with them. Documented false confessions suggest that when the government presses past attempted silence, it has not so much overcome it as replaced it with evidence of the government's own making.[16] Preventing that inaccuracy begins with understanding what silence is and does, and work like Cage's aids comprehension. The primary substance of any performance of *4'33"* comes from the audience's search for patterns in the background noise and from the experience of adding its own ambient sounds. Cage demonstrated how intentional and unintentional sound merge in a composition and can change a work each time it is performed.

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12. *See* Andrew Kania, *Silent Music*, 68 J. AESTHETICS & ART CRITICISM 343, 344 (2010) (detailing a reconstruction of the piano score used at the premiere, which consists of "treble- and bass-clef staves that contain no notes or rests," bar lines, and graphic measurement of time).

13. Cage also provided that *4'33"* could be "performed by any instrumentalist or combination of instrumentalists and last any length of time." CAGE, *supra* note 10; *see also* WILLIAM FETTERMAN, JOHN CAGE'S THEATRE PIECES: NOTATIONS AND PERFORMANCES 79–80 (1996) (noting that, whatever the length, the piece is still called *4'33"*).

14. For extended discussions of *4'33"*, see generally KYLE GANN, NO SUCH THING AS SILENCE: JOHN CAGE'S *4'33"* (2010), and LYDIA GOEHR, THE IMAGINARY MUSEUM OF MUSICAL WORKS: AN ESSAY IN THE PHILOSOPHY OF MUSIC (2007).

15. Ross, *supra* note 11, at 52. According to Cage, the earliest inspiration for the piece was his experience in an anechoic chamber, where he determined that silence was more than the absence of sound. John Cage, *Autobiographical Statement* (1990), http://www.johncage.org/autobiographical_statement.html [http://perma.cc/2554-DN97].

16. *See* Corley v. United States, 556 U.S. 303, 321 (2009) ("[T]here is mounting empirical evidence that [interrogation tactics] can induce a frighteningly high percentage of people to confess to crimes they never committed."); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 18 (2011) ("In a coerced-compliant confession, the pressure police apply during the interrogation may not be illegal, and it may come from tactics that judges have approved.").

Recent revivals of Yves Klein's more elaborate *Monotone-Silence Symphony* again underscore the co-authorship of listener and performer.[17] Swiss composer Roland Dahinden recently conducted the piece with seventy performers—cellists, violinists, bassists, flutists, oboists, French horn players, and singers—all filling the air for twenty minutes with a single note played without vibrato or variation, followed by twenty minutes of silence. In the silence, Dahinden explains, "[y]ou sit in the audience and you start to hear some melodies and some fragments of melodies, and yet nobody is playing them."[18]

Silent music is but one example of the impossibility of creating and preserving silence, and other media similarly experiment with the way silence can shift attention from the performer to the surroundings and the audience. *4'33"* reversed the conventional direction of music, and was both highly controversial and hugely influential.[19] Postmodern visual art owes a particular debt to the silent symphony, and its reconstructed score was the centerpiece of a recent exhibit at the Museum of Modern Art.[20] The exhibit, entitled *There Will Never Be Silence*, explores chance operations like ambient and involuntary noises in music, and the indeterminacy of monochrome

17. YVES KLEIN, *Monotone-Silence Symphony* (1949).

18. Randy Kennedy, *A Sound, Then Silence (Try Not to Breathe): Yves Klein's 'Monotone-Silence' Symphony Comes to Manhattan*, N.Y. TIMES, Sept. 18, 2013, at C1; *see also id.* ("'You get into the deepness of a silence and you realize that silence is not a nothing,' [Daniel Moquay, director of the Klein archive and estate] said.").

19. Ross, *supra* note 11, at 53 (noting that "Cage's radicalism was lifelong and unrelenting" and that "he took the path of most resistance"). *4'33"*, as Kyle Gann describes, was viewed by many as a step too far and affected Cage's reputation as a "serious composer." GANN, *supra* note 14, at 121. More recently, *4'33"* has even inspired digital silence. The entire piece was "broadcast" on BBC radio in 2004, and various silent tracks are now available for download on iTunes. Cage's publishers also engaged in a playful copyright dispute with British composer Mike Batt, who included "A One Minute Silence" as a blank track on the album "Classical Graffiti" by the rock band The Planets. *See* Mike Batt, *Postman Batt Breaks Silence on Silence,* MADHOUSE RAG (Dec. 11, 2010), http://madhouserag.com/postmanbatt/postman-batt-breaks-silence-on-silence [http://perma.cc/JG2J-9FMW]. Batt issued a statement claiming that his silence was superior because it "said in one minute" what it took Cage four minutes and thirty-three seconds to say. *See Composer Pays for Piece of Silence*, CNN (Sept. 23, 2002, 12:21 PM), http://edition.cnn.com/2002/SHOWBIZ/Music/09/23/uk.silence [http://perma.cc/LWF8-ZNDX].

20. *See* Corinna da Fonseca-Wollheim, *Visual Portents of a Silent Bolt of Thunder: MoMA's 'There Will Never Be Silence,' About John Cage*, N.Y. TIMES, Jan. 4, 2014, at C1 (describing the exhibit). Visual artists including Marcel Duchamp, Kurt Schwitters, Robert Morris, Lawrence Weiner, Yoko Ono, and Andy Warhol reference Cage's work. *Id.* As Walter De Maria, a sculptor who completed a stainless-steel work entitled *Cage II* wrote, "I never did like his music actually. But the ideas were always well stated." *Id.*

canvases and found objects as well.[21] Cage himself was influenced by Marcel Duchamp's "ready-made" art and his inversion of content and context[22] as well as the smooth, unarticulated white canvases of another frequent collaborator, Robert Rauschenberg.[23] Rauschenberg stripped out the anticipated elements of "art" to show the interaction between the "silent" paintings and "the light and dust particles in the air."[24]

Filmmakers have further investigated the texture of silence and complicated its meaning. A 1964 film by Nam June Paik—*Zen for Film*—consists of a projection of a roll of clear film, punctuated by the sound of the projector and the dust on the film itself.[25] Samuel Beckett wrote and directed *Film*, which runs twenty-four minutes without dialogue or background music.[26] Modernist writers from Virginia Woolf to Harold Pinter also exposed the inevitable expressive functions of silence between people and within conversations.[27] Performance artists have not only given silence concrete form but also commodified it. For Yves Klein's 1958 exhibition *Le Vide* (The Void), he purged a small Parisian gallery of every object within it, scrubbed it clean, and painted it pure white.[28] He declared the "invisible pictorial state" to be "endowed with autonomous life" and proceeded to sell several copies of a work he

21. *Id.*

22. *See* DAVID TOOP, SINISTER RESONANCE: THE MEDIUMSHIP OF THE LISTENER 69 (2010) (quoting a fragment attributed to Marcel Duchamp stating that "[o]ne can look at seeing; one can't hear hearing").

23. Robert Rauschenberg, *White Paintings* (1951).

24. *See* da Fonseca-Wollheim, *supra* note 20; *see also* JOHN CAGE, SILENCE: LECTURES AND WRITINGS 102 (1961) (describing the paintings, which appear to be blank, white canvases, as "reflective surfaces changing what is seen by means of what is happening" and "airports for the lights, shadows, and particles").

25. Nam June Paik, *Zen for Film* (1964).

26. Samuel Beckett, *Film* (1965). Beckett intended the film to demonstrate that the act of "being" necessarily includes "being perceived." *See id.* On the impossibility of silence, see also AD REINHARDT, *Twelve Rules for a New Academy*, *in* ART-AS-ART: THE SELECTED WRITINGS OF AD REINHARDT 104 (Barbara Rose ed., 1975) ("No such thing as emptiness / or invisibility, silence . . . .").

27. *See, e.g.*, SAMUEL BECKETT, THE UNNAMABLE (1953); HAROLD PINTER, SILENCE (1969); *see also* BERNARD P. DAUENHAUER, SILENCE: THE PHENOMENON AND ITS ONTOLOGICAL SIGNIFICANCE 4–5 (1980) (describing, in the context of Pinter plays, negative silence that punctuates speech and positive silence that states and shifts themes); TOOP, *supra* note 22, at 200 (discussing silence in the work of William Faulkner and Virginia Woolf).

28. Rebecca Solnit, *Yves Klein and the Blue of Distance*, 26 NEW ENG. REV., no. 2, 2005, at 176, 178.

called the *Zone of Immaterial Pictorial Sensibility*.[29] Though patrons paid (in gold) for their copy of the piece, they received nothing tangible in exchange.[30]

Theorizing the content and function of silence itself gives rise to new thinking about suspects and defendants who try but fail to remain silent. If there is no such thing as silence, then a privilege extended only to those who remain perfectly silent is a hollow one. Moreover, the performances of silence in other realms, as demonstrated by the work of John Cage and his contemporaries, reveal that it is never inert, and that when silence attempts but does not achieve separation, then the listener inevitably begins to construct meaning. That constructed meaning links the low status of attempted silence with the danger of unreliable statements. Law enforcement's interaction with silence is a key source of inaccuracy and wrongful convictions. Cage's work elucidates why that occurs. As he explained, "[T]ry as we may to make a silence, we cannot."[31] A more ample theory of silence also illuminates how deceptive the sounds around it can be, and thus how overriding attempted silence can enlarge the problem of government-created evidence.

B. Silence and Separation

Although the connection between silence and autonomy has long been recognized, understanding that it is impossible to sustain pure silence, and that much is lost when the attempt goes unrecognized, puts a new gloss on the significance of silence. Silence indicates the need for a space within which to make choices.[32] It protects "freedom to choose what to say to whom and when to say it,"[33] and it leaves room for individuals to form their own plans.[34] Silence preserves an

29. *Id.* at 178–79.

30. *Id.*

31. CAGE, *supra* note 24, at 8.

32. *See, e.g.*, LOUIS MICHAEL SEIDMAN, SILENCE AND FREEDOM 24 (2007) (stating that it is ultimately "deep and terrifying silence that constitutes our declaration of independence from the will of others").

33. Austin Sarat, *Introduction: Situating Speech and Silence*, *in* SPEECH AND SILENCE IN AMERICAN LAW 1, 3 (Austin Sarat ed., 2010). *But see* PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE 82 (2000) (calling into question the existence of a "choosing subject" in the context of a police interrogation).

34. *See* SEIDMAN, *supra* note 32, at 3 (stating that "silence protects the freedom to choose between public obligation and private commitment"); *cf.* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (describing the "right to be let alone" as "the most comprehensive of rights and the right most valued by civilized men").

interior realm, mental privacy, and introspection. Allowing silence to separate thus gives effect to the autonomy rationales that partly animate the Fifth Amendment privilege. The Supreme Court has stated that an individual should have the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will."[35] Indeed, the majority opinion in *Miranda v. Arizona*[36] references the concept of free choice nine times.[37]

Attempted silence signifies this desire to create a boundary; it is a statement at least about the choice to remain separate. Silence per se may not exist, but the effort to maintain it creates a border between the self and interrogators.[38] That same border often separates accurate and inaccurate statements and thus merits stronger protection. The autonomy and reliability principles behind Fifth Amendment protections converge in the space that silence creates between a suspect's own words and confessions co-authored by the government.

Yet common interrogation tactics and narrowing constitutional constructions of the right to claim silence both operate to close that gap. Questioners crowd the suspect's space and override the appeal for separation. The interrogation room itself imposes physical limits: It is small and enclosed, and one can sit there for an extended period of time.[39] As the Supreme Court described in *Miranda*, the environment of a typical interrogation is "compelling," "secret," "isolated," "menacing," and "police-dominated."[40] A longstanding approach to breaking silence is to establish a sense that questioner

35. Miranda v. Arizona, 384 U.S. 436, 460 (1966) (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

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

37. *Id.* at 457–58, 465, 474; *see also* William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 976 (2001) ("*Miranda* left it for suspects to decide, by either agreeing to talk or by calling a halt to questioning and/or calling for the help of a lawyer, whether the police were behaving too coercively.").

38. *See, e.g.*, SUSAN SONTAG, *The Aesthetics of Silence*, *in* A SUSAN SONTAG READER 181, 187–88 (1983) ("One recognizes the imperative of silence, but goes on speaking anyway. Discovering that one has nothing to say, one seeks a way to say *that*.").

39. *See* DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 134 (2012) [hereinafter SIMON, IN DOUBT] ("Interrogations are conducted in specially designed rooms that are small, windowless, and secluded."); DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 210 (1991) [hereinafter SIMON, HOMICIDE] (describing the interrogation room as "four yellow cinderblock walls, a dirty tin ashtray on a plain table, a small mirrored window and a series of stained acoustic tiles on the ceiling").

40. *Miranda*, 384 U.S. at 445, 457, 461 & 470.

and suspect are alone together.[41] The "quiet room" is a related paradigm in interrogation techniques, designed to convey intimacy.[42] In writer David Simon's iconic descriptive work on the Baltimore Homicide Department's tactics, he reports that this illusion of privacy distorts "the natural hostility between hunter and hunted, transforming it until it resembles a relationship more symbiotic than adversarial."[43] Conflating the speakers in a distorted exchange often yields unreliable evidence.

This occurs in part because, given interrogators' expectations and experiences, sustained silence can surprise them. In a culture where data increases exponentially,[44] interrupting the anticipated flow of information requires careful, affirmative steps.[45] That resistance is a procedural move, however—an insistence on differentiating oneself.[46] It "expresses concern—shared and presented by law itself—that the legal process may not be able to do justice to, or in terms of, the

41. *See* FRED E. INBAU, LIE DETECTION AND CRIMINAL INTERROGATION 71 (1942) ("The principal psychological factor contributing to a successful interrogation is privacy.").

42. BROOKS, *supra* note 33, at 41.

43. SIMON, HOMICIDE, *supra* note 39, at 206.

44. To "live in Modern America," as Michael Seidman notes, "is to be surrounded by noise." SEIDMAN, *supra* note 32, at 205; *cf.* SUSAN CAIN, QUIET: THE POWER OF INTROVERTS IN A WORLD THAT CAN'T STOP TALKING 4 (2012) ("Introversion—along with its cousins sensitivity, seriousness, and shyness—is now a second-class personality trait, somewhere between a disappointment and a pathology. . . . Extroversion is an enormously appealing personality style, but we've turned it into an oppressive standard to which most of us feel we must conform.").

45. Steven I. Friedland, *Post*-Miranda *Silence in the Wired Era: Reconstructing Real Time Silence in the Face of Police Questioning*, 80 MISS. L.J. 1339, 1344 (2011) (suggesting that, given the rapid increase in communication in the digital era, when "individualized, directed questions go unanswered" the suspect is intentionally avoiding participation).

46. *See* Mike Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 27 OXFORD J. LEGAL STUD. 209, 209 (2007) ("[T]he most compelling rationale for the privilege is that it serves as a distancing mechanism, allowing defendants to disassociate themselves from prosecutions."); *see also* Dennis Kurzon, *When Silence May Mean Power*, 18 J. PRAGMATICS 92, 93–94 (1992) ("[A]t times it is the silent person who uses his or her silence to gain control of the situation—to attain power."). An intriguing example of silence as resistance comes from the Dutch dramatic film *A Question of Silence*. The three defendants portrayed—women who have in various ways felt unheard and unseen throughout their lives—are heard for the first time when they silently defy the psychiatrist assessing their sanity. She declares them sane despite the bizarre and brutal murder they had committed because she listens to the effortful, silent protest underlying their failure to cooperate with the examination. A QUESTION OF SILENCE (Sigma Film Productions, 1982); *see also* I'VE LOVED YOU SO LONG (UGC YM, 2008) (depicting a woman convicted of a serious crime who maintains silence throughout the investigation, the trial, and her years in prison).

accused's own speech."[47] Michael Seidman also highlights the connection between silence and the authenticity and integrity of narrative. "Whereas speech ensnares us in a web of other people," he writes, "silence demonstrates the ineradicable and exhilarating loneliness of pure choice."[48] The discernible content of silence lies primarily in this refusal to take part. Although difficult to maintain over time, silence should have more procedural force when it is attempted. The current law of interrogations, however, gives attempted silence no effect.

Nor has legal theory accounted for the complicated co-authorship of statements produced in the wake of attempted silence.[49] Silence in performance illustrates why preserving that space matters. It otherwise fills with sound from the audience. What creates interesting compositions in the arts leaves dangerous ambiguity in the criminal justice system. When law enforcement attributes substantive meaning to silence, that imputed meaning often misleads.[50] Negative inferences flow from opting out of questioning, even though greeting law enforcement with silence or signs of anxiety may have nothing to do with consciousness of guilt. And when interrogators then add their own sounds to the silence and thus shape a statement to conform to expectations, even deeper inaccuracies can result.

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47. Marianne Constable, *Our Word is Our Bond*, *in* SPEECH AND SILENCE IN AMERICAN LAW, *supra* note 33, at 18, 36; *see also* MARIANNE CONSTABLE, JUST SILENCES 150 (2005) ("The silence of an accused following a felicitous warning . . . must be taken as accepting the law's acknowledgment that conditions during in-custody interrogation may not be conducive to speech."). Kent Greenawalt also explored the obligations of the accused in his classic defense of the right to silence. R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 34–43 (1981).

48. SEIDMAN, *supra* note 32, at 16; *see also* ERWIN N. GRISWOLD, THE FIFTH AMENDMENT TODAY 7 (1955) ("[T]he privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized.").

49. *See* Garrett, *supra* note 8, at 403 (quoting defendant Ted Bradford, who falsely confessed and later stated that he got the details "from the detectives" and "did not supply any information at all") (citation omitted)).

50. For an intriguing example of silence misconstrued as assent outside the law enforcement context, see Carl Bernstein and Bob Woodward's account of their effort to get a confirmation of White House aide H. R. Haldeman's role in Watergate. Bernstein called a Justice Department lawyer, asked about Haldeman's role, and told him that they would run the story unless the lawyer hung up before Bernstein finished counting to ten. The lawyer stayed on the line, but apparently because he misunderstood; his silence was taken as a confirmation although his intention was to warn them against running the story. *See* CARL BERNSTEIN & BOB WOODWARD, ALL THE PRESIDENT'S MEN 178–94 (1974).

C. The Legal Meaning of Silence

In contemporary criminal investigations, however, silence rarely succeeds in separating defendants' own thoughts and plans from investigators' intentions. Conversely, silence is often taken as incriminating speech. Law enforcement can accuse someone of a crime and then introduce silence in the face of that accusation as substantive evidence of guilt.[51] Silence can also impeach a defendant's excuse, explanation, or alibi at trial.[52] Relatedly, silence in response to a statement by someone else can qualify as a defendant's adoption of that statement for purposes of the exemption of a party's own admissions from the hearsay prohibition.[53] It is treated as evidence of the truth of the unrefuted accusation and admissible as such, so long as "it would have been natural, under the circumstances, to assert [or deny] the fact."[54] But the circumstances of both law enforcement encounters and criminal accusations upset the balance of natural conversation.[55] Withdrawal when confronted with law enforcement questioning constitutes the most ordinary reaction. Choosing to stay silent, however, does not suffice to invoke a defendant's right to *have* silence and end questioning.[56] Thus, while silence has evidentiary worth, it cannot by itself assert a defendant's rights.[57]

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51. *See* Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013); *see also* United States v. Frazier, 408 F.3d 1102, 1110–11 (8th Cir. 2005) (permitting an inference of guilt from pre-*Miranda* silence).

52. *See, e.g.*, Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (impeachment with pre-custody silence "follows the defendant's own decision to cast aside his cloak of silence and advances the truthfinding function of the criminal trial"); United States v. Love, 767 F.2d 1052, 1063 (4th Cir. 1985) (testimony that defendants "made no effort to explain their presence at [a location connected to drug smuggling] on the night of their arrest" was properly admitted because their silence came before any *Miranda* warnings); *cf.* United States v. Velarde-Gomez, 269 F.3d 1023, 1031 (9th Cir. 2001) ("The non-reaction the government seeks to introduce as 'demeanor' evidence is not an action or a physical response, but a failure to speak.").

53. *See* FED. R. EVID. 801(d)(2)(B) ("A statement . . . is not hearsay [if] . . . [t]he statement is offered against an opposing party and[] is one the party manifested that it adopted or believed to be true . . . ."); *cf. Salinas*, 133 S. Ct. at 2183 ("Statements against interest are regularly admitted into evidence at criminal trials, and there is no good reason to approach a defendant's silence any differently." (citation omitted)).

54. *Jenkins*, 447 U.S. at 249 (Marshall, J., dissenting); *see* FED. R. EVID. 801(d)(2)(B) advisory committee's note ("When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue.").

55. *See generally* Deborah Tannen, *Silence: Anything But*, *in* PERSPECTIVES ON SILENCE 93 (Deborah Tannen & Muriel Saville-Troike eds., 1985) (explaining the role and meaning of silence in conversation).

56. *See* Berghuis v. Thompkins, 560 U.S. 370, 383–84 (2010).

57. *See Salinas*, 133 S. Ct. at 2182 ("A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.").

This is so because, contrary to the popular gloss on "taking the Fifth," no robust right to be silent or to impose silence on law enforcement actually exists. The Fifth Amendment provides protection only against compelled, testimonial self-incrimination.[58] Disregard for the procedural significance of silent refusal has a long provenance. According to Albert Alschuler, for example, the Fifth Amendment privilege "in its inception was not intended to afford criminal defendants a right to refuse to respond to incriminating questions."[59] Instead, "as embodied in the United States Constitution," its goal was simply to prohibit "improper methods of interrogation."[60] One must affirmatively assert the right to stay silent, while under threat of judicially imposed punishment, before the right even attaches.

Until the 1966 *Miranda* decision, the "improper" questioning addressed by the Fifth Amendment did not generally contemplate extrajudicial interrogations like encounters with the police.[61] The Court's earlier oversight of police questioning references the Due Process Clause,[62] using a "totality of the circumstances" inquiry to evaluate whether a given interrogation technique overbore a suspect's will.[63] The nature of law enforcement's threats and promises, the conditions of the questioning, and the suspect's particular vulnerabilities are among the relevant circumstances.[64] That subjective test has proven unpredictable,[65] and the *Miranda* Court

58. U.S. CONST. amend. V (providing that "no person shall . . . be compelled in any criminal case to be a witness against himself").

59. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2638 (1995).

60. *Id.* at 2631.

61. *See* Miranda v. Arizona, 384 U.S. 436, 460–61 (1966). *But cf.* Bram v. United States, 168 U.S. 532, 563–65 (1897) (applying the privilege against self-incrimination to exclude an involuntary extrajudicial confession).

62. *See, e.g.*, Spano v. New York, 360 U.S. 315, 320 (1959).

63. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) ("In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."); *see also* Brown v. Mississippi, 297 U.S. 278, 286 (1936).

64. *See Brown*, 297 U.S. at 281–84.

65. *See* Culombe v. Connecticut, 367 U.S. 568, 568–637 (1961) (including an exegesis on the meaning of voluntariness (complete with 97 footnotes) that garnered only two votes); *see also, e.g.*, Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869–70 (1981) (stating that the pre-*Miranda* test was a "subtle mixture of factual and legal elements" that "virtually invited" judges to "give weight to their subjective preferences").

substituted a set of bright-line requirements in the form of warnings to suspects.[66]

The *Miranda* decision concluded that the privilege against self-incrimination is "fully applicable during a period of custodial interrogation" and required specific safeguards for the privilege in that setting.[67] But those safeguards are not additional protections so much as a hedge against the implications of the holding. *Miranda* established that all situations of custodial interrogation are, by definition, compulsion,[68] and the constitutional privilege is violated whenever there is compelled testimonial self-incrimination. As a result, all incriminating statements obtained through custodial interrogations were theoretically subject to exclusion. In other words, *Miranda* stands for a proposition it does not state. It does not grant a "right to remain silent" per se. Rather, it sets forth a procedure for permitting custodial interrogation despite the right to be free from compelled testimonial self-incrimination.[69]

The Court's establishment of the well-known warnings that suspects receive—and its pronouncement that those warnings would be sufficient to mitigate the inherent compulsion of interrogations—allowed the continued use of investigative interviews.[70] A person in custody and subject to questioning "must first be informed in clear and unequivocal terms that he has the right to remain silent."[71] That warning must also "be accompanied by the explanation that anything said can and will be used against the individual in court."[72] And the suspect must be further "informed that he has the right to consult

66. *Miranda*, 384 U.S. at 492; *see* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 628 (1996) (noting that the *Miranda* rule was intended to displace "the subjective, case-by-case due process voluntariness approach with an objective standard that applied equally to all cases").

67. *Miranda*, 384 U.S. at 460.

68. *See id.* at 444, 457–58; *see also* Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 447 (1987) (interpreting *Miranda* to hold that even "the briefest period of interrogation necessarily *will* involve compulsion").

69. *See, e.g.*, Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social* Costs, 90 NW. U. L. REV. 500, 561 (1996) ("[T]he Warren Court . . . explicitly structured *Miranda*'s warning and waiver requirements to ensure that confessions could continue to be elicited and used.").

70. *See, e.g.*, Anne M. Coughlin, *Interrogation Stories*, 95 VA. L. REV. 1599, 1616 n.47 (2009) ("[O]nce suspects have received and waived their Fifth Amendment rights, courts give interrogators a lot of leeway on the theory that the warnings educate and fortify suspects for the interrogation ordeal.").

71. *Miranda*, 384 U.S. at 467–68.

72. *Id.* at 469.

with a lawyer and to have the lawyer with him during interrogation," and that "if he is indigent a lawyer will be appointed to represent him."[73] Given those warnings, a suspect, in theory, no longer experiences compulsion, and subsequent statements are admissible. Many police interrogations, however, occur prior to formal custody and therefore in the absence of any warnings at all.[74]

Moreover, even though the Fifth Amendment privilege now extends beyond the courtroom to the stationhouse, silence in the courtroom receives substantially more protection than silence in interrogations.[75] In *Griffin v. California*,[76] the Supreme Court established that prosecutors may not comment on a defendant's silence at trial, as that argument raises the cost of asserting the Fifth Amendment privilege.[77] Conversely, defendants cannot escape comments equating silence with guilt when the silence occurred in conversation with law enforcement. A defendant's post-arrest silence, after receiving *Miranda* warnings, is sufficiently "ambiguous" to preclude admission.[78] Pre-*Miranda* silence, however, even when a defendant is under arrest, still constitutes impeachment material.[79]

The law thus treats silent responses during noncustodial questioning as substantively unambiguous. Pre-arrest silence signifies a telling failure to deny or consciousness of wrongdoing. On the other hand, silence is procedurally ambivalent throughout investigative encounters. Rather than serving as a clear refusal to engage or an effective invocation of rights, at best it delays questioning and "confession." Of course, silence can preface a truthful and accurate statement, but its breach often leads to the unreliable government-created evidence as well. Interrogation practices on the ground,

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73. *Id.* at 471, 473.

74. *See* Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1544 (2008) (noting police training materials that "tell[] officers that they may use the full toolkit of interrogation tactics . . . to question a non-custodial suspect at the stationhouse").

75. *Compare* Jenkins v. Anderson, 447 U.S. 231, 238 (1980) (holding that the state's use of pre-arrest silence for impeachment does not unduly burden the Fifth Amendment right), *with* Mitchell v. United States, 526 U.S. 314, 328–29 (1999) (concluding that no negative inferences may be drawn from the failure to testify at the sentencing phase), Chapman v. California, 386 U.S. 18, 25–26 (1967) (identifying reversible error where the prosecution repeatedly commented on defendant's failure to testify), *and* Griffin v. California, 380 U.S. 609, 615 (1965) (holding that the Fifth Amendment forbids remarks by either judge or prosecutor on defendant's failure to testify at trial).

76. Griffin v. California, 380 U.S. 609 (1965).

77. *See id.* at 613–15.

78. Doyle v. Ohio, 426 U.S. 610, 617 (1976).

79. Fletcher v. Weir, 455 U.S. 603, 607 (1982).

however, take no account of the connection between silence and the integrity of the investigation.

1. *Substantive Silence*. The Supreme Court's most recent decision concerning police interviews that occur prior to arrest further encroaches on the protection that silence can provide by way of separation. According to the reasoning in *Salinas v. Texas*,[80] silence constitutes a substantive admission of guilt if maintained in a noncustodial setting.[81] And even stationhouse interviews that are functionally official can be labeled noncustodial if they lack the formal indicia of arrests.[82] In *Salinas*, the defendant Genovevo Salinas voluntarily went to a Houston police station to answer questions about the 1992 murder of two brothers.[83] As he was not in custody during questioning, the case did not implicate *Miranda* but instead addressed the broader evidentiary significance and admissibility of pre-arrest silence under the Fifth Amendment. Over the course of an hour, Salinas answered all of the officers' questions save one. When asked if the shotgun casings found at the scene of the crime would match a shotgun retrieved from the home he shared with his parents, Salinas exhibited nervous behavior—reportedly looking down at the floor, shuffling his feet, biting his lip, clenching his hands, and "tighten[ing] up"[84]—but he gave no verbal response. After he stayed

80. Salinas v. Texas, 133 S. Ct. 2174 (2013).

81. *Id.* at 2178. Prior to the 2013 *Salinas* decision, the lower courts had diverged on the use of a defendant's silence, as both substantive evidence and impeachment, when the silence occurred pre-arrest and pre-*Miranda* warnings. *See* United States v. Ashley, 664 F.3d 602, 604 (5th Cir. 2011) (documenting the Fourth, Ninth, and Eleventh Circuits' difference with the First, Sixth, Seventh, and Tenth). *Compare* United States v. Quinn, 359 F.3d 666, 677–78 (4th Cir. 2004) (holding that both implicit and explicit advice to the defendant to remain silent precludes the use of silence against the defendant at trial, but only post-arrest); United States v. Oplinger, 150 F.3d 1061, 1066–67 (9th Cir. 1998), *overruled by* United States v. Contreras, 593 F.3d 1135 (9th Cir. 2010) (using pre-arrest silence as substantive evidence of guilt does not violate the Fifth Amendment); United States v. Rivera, 944 F.2d 1563, 1568 & n.12 (11th Cir. 1991) (custody does not preclude comment on silence in response to questioning if *Miranda* warnings have not been given), *with* Combs v. Coyle, 205 F.3d 269, 282 (6th Cir. 2000) (use of pre-arrest, pre-*Miranda* silence as substantive evidence violates constitutional rights); United States v. Burson, 952 F.2d 1196, 1200–01 (10th Cir. 1991) (plain error to admit silence in response to allegations); *and* United States *ex rel.* Savory v. Lane, 832 F.2d 1011, 1017–18 (7th Cir. 1987) (defendant has the constitutional right to say nothing in response to allegations, and this right to silence does not exist solely in the context of *Miranda* warnings).

82. *See, e.g.*, FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS 89 (5th ed. 2011) (advising the use of formal interrogations that remain technically extra-custodial to avoid giving *Miranda* warnings).

83. *Salinas*, 133 S. Ct. at 2178.

84. *Id.*

silent for a few moments, police changed the subject, and Salinas continued answering questions.[85] He was arrested immediately after questioning on outstanding traffic warrants but subsequently released because prosecutors did not believe they had sufficient evidence to charge him.[86] Salinas was later indicted for murder, convicted, and sentenced to twenty years in prison.[87] At trial, prosecutors cited his failure to respond to the ballistics question as evidence of his guilt. In closing argument, the prosecutor asserted that an innocent person asked about the shotgun shells would have said, "What are you talking about? I didn't do that. I wasn't there."[88]

The Court ruled 5-4 that this inference from Salinas's silence was a permissible argument because the Fifth Amendment privilege is not "self-executing."[89] Justice Alito's opinion for the plurality of the Court concluded that Salinas failed to invoke his Fifth Amendment right, and that invocation is required except when a criminal defendant has declined to take the stand at trial, or where there is government coercion rendering a statement involuntary.[90] Because Salinas was neither a nontestifying defendant protected by *Griffin* nor a suspect subjected to the inherently coercive environment of custodial interrogation, the silent response received no protection. To escape the evidentiary significance of pausing and remaining silent during questioning, the Court held that suspects—in some affirmative terms not specified in the opinion—must assert their rights.[91]

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85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 2185 (Breyer, J., dissenting) (citation omitted); *see also* Petition for A Writ of Certiorari at 5, *Salinas*, 133 S. Ct. 2174 (No. 12-246) (quoting the trial record).

89. *Salinas*, 133 S. Ct. at 2178 (quoting Minnesota v. Murphy, 485 U.S. 420, 425 (1984)).

90. *Id.* at 2179–80. Justice Alito's opinion announcing the decision was joined by Chief Justice Roberts and Justice Kennedy. Justice Thomas wrote a separate opinion concurring only in the judgment.

91. *Id.* at 2182. Justice Thomas, writing for himself and Justice Scalia, argued that whether or not Salinas had invoked the Fifth Amendment, his silence would still constitute admissible evidence against him because the prosecutor's comments did nothing to compel him within the meaning of the Fifth Amendment. *See id.* at 2184 (Thomas, J., concurring) (citing Mitchell v. United States, 526 U.S. 314, 331 (1999) (Scalia, J., dissenting) ("[T]he threat of an adverse inference does not 'compel' anyone to testify. . . . [I]in most instances, a guilty defendant would choose to remain silent *despite* the adverse inference, on the theory that it would do him less damage than his cross-examined testimony.")). Indeed, Justice Thomas indicated that he would overrule the 1965 *Griffin* decision and permit prosecutors to comment on defendants' silence. *See id.*

A more nuanced understanding of the expressive function of silence emerges from Justice Breyer's dissent. Commenting on silence does, in the dissent's view, compel a defendant to testify against himself.[92] As the *Miranda* Court concluded, no use should be made at trial of "the fact that [the defendant] stood mute or claimed his privilege in the face of accusation."[93] Even in precustodial encounters, because silence can communicate implied assertions of fact or belief, it can also be "testimonial" within the meaning of the Fifth Amendment.[94] Moreover, invocation of the Fifth Amendment privilege should be recognized, according to the dissent, even absent specific words or direct assertions.[95] The relevant question is whether one can "fairly infer from an individual's silence and surrounding circumstances an exercise of the Fifth Amendment privilege."[96] The majority's reasoning in *Salinas*, however, precludes consideration of silence for the one thing it seems well suited to communicate, which is a suspect's reluctance to engage.[97] Instead, the decision supports the use of silence as a confession, despite the substantive ambiguity of silence, and the opening that it leaves for participation and interpretation by the government.[98]

2. *Procedural Silence*. Even in cases that clearly animate *Miranda*'s protections, the Court has interpreted silence to the government's advantage. Not speaking to assert Fifth Amendment rights can be enough to establish waiver. Take the defendant in *Berghuis v. Thompkins*,[99] a shooting suspect who sat in a straight-backed chair for almost three hours, making few audible noises, and

92. *Id.* at 2185 (Breyer, J., dissenting).

93. Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966).

94. *Salinas*, 133 S. Ct. at 2186 (Breyer, J., dissenting) (citing Pennsylvania v. Muniz, 496 U.S. 582, 596–97 (1990)).

95. *Id.* ("[N]o ritualistic formula is necessary in order to invoke the privilege." (quoting Quinn v. United States, 349 U.S. 155, 164 (1955))).

96. *Id.* at 2191 (Breyer, J., dissenting).

97. The Second Circuit recently addressed a question left open in *Salinas*: whether the government can introduce in its case in chief the mere fact that a defendant invoked the privilege against self-incrimination during questioning. *See* United States v. Okatan, 728 F.3d 111 (2d Cir. 2013). In *Okatan*, the court concluded that allowing prosecutors to comment on the assertion of the Fifth Amendment would penalize the defendant's exercise of his constitutional right. *Id.* at 121.

98. For a discussion of the interpretive potential of silence, see *supra* notes 10–31 and accompanying text.

99. Berghuis v. Thompkins, 560 U.S. 370 (2010).

refusing to respond to law enforcement's questions.[100] Throughout a lengthy accusatory monologue by police, Thompkins sustained near-total silence—punctuated only by a few nods of his head, a moment when he rejected the offer of a peppermint, and a comment that his chair was uncomfortably hard.[101] Though Thompkins received his *Miranda* warnings and acknowledged that he understood them, he declined to sign the written waiver of his rights.[102] At the end of this interrogation, a detective asked if Thompkins believed in God, and he responded audibly with one word: "Yes." Thompkins was then asked if he prayed to God, and he again answered "yes." And finally, the detective said, "Do you pray to God to forgive you for shooting that boy down?" Thompkins once more said "yes," but thereafter refused to make a written confession.[103] The Michigan trial court admitted his three "yes" responses into evidence, and Thompkins was convicted of murder and sentenced to life imprisonment.[104]

When the case reached the Sixth Circuit on habeas review, the court held that Thompkins' "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights."[105] The Supreme Court reversed, in another 5-4 decision, reasoning that the silence itself was insignificant because the "yes" responses were uncoerced and established "an implied waiver of the right to remain silent."[106] The Court further concluded that allowing silence itself to serve as an invocation of the right to be silent would complicate law enforcement's ability to determine a suspect's intent.[107] Thus the ambiguity of silence operates only in law enforcement's favor. That analysis marks a clear departure from the *Miranda* decision itself,

100. *Id.* at 374–76.

101. *Id.* at 375–76.

102. *Id.* at 375.

103. *Id.* at 376.

104. Thompkins v. Berghuis, No. 05-CV-70188-DT, 2006 WL 2811303, at *4 (E.D. Mich. Sept. 28, 2006); *see Berghuis*, 560 U.S. at 378.

105. *Berghuis*, 560 U.S. at 379 (citation omitted).

106. *Id.* at 384, 388–89.

107. *Id.* at 382; *see also* Green v. Commonwealth, 500 S.E.2d 835, 839 (Va. Ct. App. 1998) (deciding that suspect who told police to "buckle up for the long ride," turned his chair away, closed his eyes, and sat silently for two hours was not invoking the right to silence).

which stated that neither silence nor a subsequent confession could amount to a valid waiver.[108]

For suspects, it has grown increasingly difficult to assert and maintain the right to stay silent. Only by verbally and explicitly invoking the Fifth Amendment privilege can one silence questions. Once the privilege is successfully invoked, interrogators in theory will "scrupulously honor[]" it by ceasing questioning, and will resume engagement only after time has passed and new warnings have been issued.[109] If a specific request for the assistance of an attorney has been made, questioning must stop altogether and cannot continue without counsel present, unless the defendant reinitiates the interview and waives her rights.[110] That request for legal assistance, however, must be not only specific but also sustained. The defendant in *Davis v. United States*,[111] for example, endured an hour and a half of questioning in silence, and then said, "Maybe I should talk to a lawyer."[112] The Court found that statement too equivocal to constitute a request for counsel.[113]

The high standards for invoking the right to stop questioning produce many failed attempts at silence. Invocation must be unmistakable,[114] and it must be out loud. Any ambivalence allows questioning to continue over time, and silence is always construed as ambivalent. As Justice Sotomayor noted in her *Berghuis* dissent, "[A] suspect who wishes to guard his right to remain silent against such a finding of 'waiver' must, counterintuitively, speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police."[115] Her opinion catalogues a variety of direct statements deemed too ambiguous to constitute invocation—including "I'm not going to talk about nothin[g]"; "I just don't think that I should say anything"; "I don't even want to, you

108. *Compare* Miranda v. Arizona, 384 U.S. 436, 475 (1966) (stating that demonstrating waiver places a "heavy burden" on the government and rejecting the possibility of waiver on a "silent record"), *with Berghuis*, 560 U.S. at 383 ("The course of decisions since *Miranda* . . . demonstrates that waivers can be established even absent formal or express statements . . . .").

109. Michigan v. Mosley, 423 U.S. 96, 104 (1975).

110. Edwards v. Arizona, 451 U.S. 477, 478–87 (1981); *see also* Oregon v. Bradshaw, 462 U.S. 1039, 1044–45 (1983) (noting that an inquiry into whether a waiver is valid includes determining whether the accused reopened dialogue with authorities).

111. Davis v. United States, 512 U.S. 452 (1994).

112. *Id.* at 455.

113. *Id.* at 459–62.

114. *See id.* at 459 (requiring that the request for counsel be unambiguous).

115. Berghuis v. Thompkins, 560 U.S. 370, 391 (2010) (Sotomayor, J., dissenting).

know what I'm saying, discuss no more about it"; "I wish to not say any more"; and "I'd like to be done with this."[116] It is no wonder that so few defendants can successfully invoke the right to silence when it is insufficient simply to state "I got nothin[g] more to say to you. I'm done. This is over."[117]

It is true that a suspect can, technically, neither waive nor invoke, and instead remain completely silent and wait out law enforcement's tactics. But precedents like *Berghuis* encourage law enforcement "to question a suspect at length—notwithstanding his persistent refusal to answer questions—in the hope of eventually obtaining a single inculpatory response which will suffice to prove waiver of rights."[118] The boundary that silence seeks to create is simply unsustainable in the face of prolonged interrogation.

As a result, attempted silence rarely serves any purpose helpful to the defendant. The negative space around it gets interpreted as assent, but it does not succeed as a positive assertion of rights or as an objection. And the real danger of encroaching on silence arises once these permissive rules encourage its breach and defendants do begin to speak.

3. *Broken Silence and the Problem of Co-Authorship*. When the significance of silence as an assertion goes unnoticed, and interrogators succeed in breaking silence, the resulting statements are only partly of a suspect's own making. Manipulating a subject into compliance often means that a confession contains intentional or unintentional distortions as well. The datasets recently generated by Innocence Projects reveal the leading role that false confessions play in wrongful convictions and a high incidence of government-created evidence within those false confessions.[119] Brandon Garrett's landmark study identifies forty false confessions to rape or murder among the first 250 cases involving DNA exonerations.[120] Ninety-

116. *Id.* at 411 n.9 (quoting United States v. Sherrod, 445 F.3d 980, 982 (7th Cir. 2006); Burket v. Angelone, 208 F.3d 172, 200 (4th Cir. 2000); State v. Jackson, 839 N.E.2d 362, 373 (Ohio 2006); State v. Deen, 953 So. 2d 1057, 1058–60 (La. Ct. App. 2007)).

117. State v. Saeger, No. 2009AP2133–CR, 2010 WL 3155264, at *1 (Wis. Ct. App. Aug. 11, 2010) (alteration in original).

118. *Berghuis*, 560 U.S. at 404 (Sotomayor, J., dissenting).

119. *See, e.g.*, GARRETT, *supra* note 16, at 18–19; SIMON, IN DOUBT, *supra* note 39, at 121 (concluding that the existence of false confessions is "indisputable" given exonerations based on DNA evidence).

120. Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1051 (2010). More than half of those false confessions were associated with dispositional

seven percent of those statements included specific, nonpublic details about how the crime occurred.[121] For example, defendant Jeffrey Deskovic, whose story Garrett recounts, drew accurate diagrams of three different crime scenes of which he had no actual knowledge. He was convicted and served sixteen years in prison before he was exonerated.[122]

Many criminal justice scholars have turned their attention to the puzzling mechanisms of contaminated confessions,[123] but the relationship between a suspect's initial silence and those statements is not well understood. Silence may constitute the only accurate contribution that a suspect can offer, and the statement least likely to deceive.[124] Yet investigators often undervalue it, and may even find it discomfiting. Forbearance in an interrogation can appear confrontational when law enforcement assumes guilty knowledge on the part of the suspect.[125] Police want to assert their authority,[126] enhance the efficiency of the investigation, and extract information they view as essential to solving the crime.[127]

Moreover, confessional speech, in Western culture, has a "prime mark of authenticity" and is "par excellence the kind of speech in

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characteristics such as youth, disability, or mental illness, *id.* at 1064, but many of them involved transmission of non-public facts to the defendant by law enforcement, *id.* at 1057. This contamination problem now appears "epidemic, not episodic" when it comes to false confessions. Laura H. Nirider, Joshua A. Tepfer & Steven A. Drizin, *Combating Contamination in Confession Cases*, 79 U. CHI. L. REV. 837, 846–49 (2012).

121. Garrett, *supra* note 120, at 1054.

122. GARRETT, *supra* note 16, at 15–17.

123. *See, e.g.*, Saul M. Kassin, *A Critical Appraisal of Modern Police Interrogations*, *in* INVESTIGATIVE INTERVIEWING: RIGHTS, RESEARCH AND REGULATION 207, 208 (Tom Williamson ed., 2006); Sara C. Appleby, Lisa E. Hasel & Saul M. Kassin, *Police-Induced Confessions: An Empirical Analysis of Their Content and Impact*, 19 PSYCH. CRIME & L. 111, 111 (2011).

124. *See*, *e.g.*, Peter Brooks, *Storytelling Without Fear? Confession in Law & Literature*, 8 YALE J.L. & HUMAN. 1, 27 (1996) ("[T]he speech act of confession is a dubious guide to the truth, which must rather be sought in the resistance to such speech.").

125. *See, e.g.*, Richard A. Leo, *Why Interrogation Contamination Occurs*, 11 OHIO ST. J. CRIM. L. 193, 197 (2013) (describing the American method of interrogation as "guilt-presumptive," "accusatory," and driven by "adversarial assumptions").

126. *See* Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1446 (2009) (discussing the state's motivation to charge "insubordinate individuals . . . solely because their acts constitute an affront to the formal dignity or authority of the state").

127. *Cf.* Garner v. United States, 424 U.S. 648, 655 (1976) (linking the express invocation requirement to the government's "right" to testimony); Kastigar v. United States, 406 U.S. 441, 443 (1972) (noting the "general common-law principle that 'the public has a right to every man's evidence,'" in the context of the government's power to compel testimony by granting immunity (footnote omitted)).

which the individual authenticates his inner truth."[128] Both investigators and fact-finders highly prize confessions because they appear to address the intractable intersubjectivity problem: an individual's own statement seems the best proof of her state of mind.[129] In many cases, what "really happened" is not otherwise accessible to investigators, and the prospects for identifying any actionable offense turn on overcoming a suspect's silence.[130]

It is true, of course, that most suspects talk, and some of them make the affirmative choice (albeit an ill-considered one) to do so. More than 80 percent of suspects waive their right to silence once advised of it, and the majority of interrogations yield some form of incriminating statement.[131] Factually innocent suspects often waive because they believe they have nothing to fear, while guilty ones often conclude that waiver will make them appear less culpable.[132] "[W]ith the right combination of alibi and excuse,"[133] they imagine they will parry questions successfully.

Another set of suspects makes a meaningful attempt at silence and still fails.[134] The focus here is on this group because the statements

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128. BROOKS, *supra* note 33, at 4.

129. Louis Michael Seidman, *Some Stories About Confessions and Confessions About Stories*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 162, 164 (Peter Brooks & Paul Gewirtz eds., 1996) ("[P]eople who confess offer a window into their true self."); *cf.* BROOKS, *supra* note 33, at 140 ("In a contemporary American culture characterized by confessional discourse and multifarious therapeutic practice, a high value has come to be placed on speaking confessionally . . . .").

130. *See* Coughlin, *supra* note 70, at 1609 ("[The felt] need for confessions" arises from "those crimes whose sole promise of solution rests on the interrogation and nothing but the interrogation [where] the interrogation story *is* what happened because it provides all and the only meaning we have."); *see also* CONSTABLE, *supra* note 47, at 164–65 (discussing the way in which confessions are both constative and performative).

131. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 260, 280 (1996) (reporting that 64 percent of interrogations yield incriminating statements, even after adequate *Miranda* warnings and waivers).

132. *See* Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their "Miranda" Rights: The Power of Innocence*, 28 LAW & HUM. BEHAV. 211, 217–18 (2004) (describing the results of an experiment where 36 percent of guilty suspects "waived their rights . . . so that the detective would not infer guilt from a lack of compliance" and 72 percent of innocent suspects who "waived their rights said they did so . . . because they were innocent and had nothing to fear"). As Peter Reilly, wrongfully convicted of murder after a false confession, explained, "'My state of mind was that I hadn't done anything wrong and I felt that only a criminal really needed an attorney, and this was all going to come out in the wash.'" *Id.* at 218 (citation omitted).

133. *See* SIMON, HOMICIDE, *supra* note 39, at 206.

134. Conversely, the criminal justice process *imposes* silence on defendants in the trial setting, where speaking might contribute the most useful information to fact-finders. There, as several commentators have noted, defendants are inhibited by the rules concerning

they ultimately give to investigators often include critical elements that the interrogators co-author. The resulting "government-created evidence" has in turn been revealed as a significant source of error that merits closer scrutiny.[135] Some measure of participation from an interrogator is inevitable, and most confessions are jointly produced to an extent. Likewise, cross-examination in court can yield useful and accurate testimony, even though it consists almost entirely of statements by the examining lawyer. Even confessions that do contribute to truth-seeking emerge through questioning and thus include language generated by the government. As Anne Coughlin writes, "shapely confessions"—statements that will advance the government's case in court, or strengthen its hand at plea bargaining—"rarely, if ever, spring full-blown from the mouths of criminal suspects."[136]

Though all evidence "comes" from the government in the sense that the government gathers it in the investigative process and presents it in order to meet the burden of proof,[137] evidence that is heavily influenced by the government yet purports to be from some independent source can cause error. That flaw seems to emerge more frequently when a suspect first chooses not to talk but then submits after a prolonged silence. Although 90 percent of all interrogations last no more than two hours,[138] 90 percent of the exonerees in Brandon Garrett's dataset of wrongful convictions endured interrogations that went on for more than three hours, and in some

impeachment, even though their testimony might have high value. *See* Barbara Allen Babcock, *Introduction: Taking the Stand*, 35 WM. & MARY L. REV. 1, 2 (1993) (advocating for broader protections for defendants who choose to take the stand in order to introduce their own stories into the trial); Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules That Encourage Defendants To Testify*, 76 U. CIN. L. REV. 851, 897 (2008) (arguing that the current legal framework with disincentives to defendant testimony "cavalierly squanders a rich testimonial resource [the defendant] at great cost to the search for truth and with little benefit"); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1451 (2005) (identifying "systemic implications for the integrity of the justice process" that stem from defendant silence).

135. Garrett, *supra* note 8, at 408 (noting that "[c]onfession contamination is overwhelmingly prevalent in false confessions among persons exonerated by DNA tests").

136. Coughlin, *supra* note 70, at 1602.

137. *See* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 415 (1966) ("[E]ven the guilty are not to be convicted unless the prosecution 'shoulder[s] the entire load.'"); *see also, e.g.*, Mitchell v. United States, 526 U.S. 314, 325 (1999) (citing "the long tradition and vital principle that criminal proceedings rely on accusations proved by the Government, not on inquisitions conducted to enhance its own prosecutorial power").

138. Leo, *supra* note 131, at 279.

cases took place over days.[139] In protracted encounters, law enforcement "maintains control of the storytelling, so that the suspect is put in a position of denying or affirming—often, affirming through denials that lead to entrapment—the unfolding narrative that . . . is largely of the interrogator's own making."[140]

Despite the assumption that the evidence in the accused's own words always represents "the most reliable evidence we can have,"[141] contaminated confessions contain few salient facts that are actually the accused's own statements. The extent to which interrogators participate in the construction of statements requires some calibration, and what happened when attempted silence failed is often quite telling with regard to the degree of government participation. The moment when silence is breached contains information not only about whether involuntary testimony was elicited from a defendant's "own mouth,"[142] but also about whether the government *put* words in the defendant's mouth. Recent assessments of unconfronted hearsay statements,[143] suggestive eyewitness identifications,[144] and statements of jailhouse informants[145] underscore this problem of government-created evidence. But false confessions may best illustrate the

139. GARRETT, *supra* note 16, at 38; *see also* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.–C.L. L. REV. 105, 145 (1997) ("[M]ore than five hours of continuous interrogation may create a substantial risk that the suspect will acquiesce to police suggestions . . . .").

140. BROOKS, *supra* note 33, at 40; *see also* Coughlin, *supra* note 70, at 1608–09 (describing the interrogator as "not merely finding but creating, not merely reconstructing but constructing, the solution to the crime").

141. BROOKS, *supra* note 33, at 15; *see also id.* (suggesting that the perceived reliability of confessions allows that "[w]hen someone confesses, his judges may proceed to condemn him with a good conscience").

142. *See* Miranda v. Arizona, 384 U.S. 436, 460 (1966) ("[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."); Watts v. Indiana, 338 U.S. 49, 54 (1949) (stating that "society carries the burden of proving its charge against the accused not out of his own mouth" but "by evidence independently secured through skillful investigation").

143. *See* Crawford v. Washington, 541 U.S. 36, 53 (2004) (emphasizing that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class").

144. *See* Perry v. New Hampshire, 132 S. Ct. 716, 726 (2012) ("A primary aim of excluding identification evidence obtained under unnecessarily suggestive circumstances . . . is to deter law enforcement use of improper lineups, showups, and photo arrays in the first place.").

145. *See* GARRETT, *supra* note 16, at 124 (describing how informants' statements in cases of wrongful convictions often appeared "made to order" and included "details designed to undermine the defendant's alibi, address weaknesses in the prosecution's case, or enhance prosecution evidence").

investigative interstices where government agents can knowingly or unknowingly manipulate inputs.[146]

Although interrogation regulation has been slow to change, the social science research demonstrating that "innocent individuals are surprisingly easily seduced to falsely confess a crime" has proliferated.[147] Researchers have demonstrated that subjects will not only succumb to the pressures of interrogation but will then internalize false memories of committing a crime. In a recent study, 70 percent of a group of Canadian undergraduate students reported episodic memories of committing crimes after exposure to misinformation in a controlled experimental setting.[148] Interrogation techniques can thus put words not only in suspects' mouths but in their memories. In a realm where complicating the very idea of authorship is part of the point, confounding the identity of the "performers" in *4'33"* expands the meaning of the piece. *4'33"* is "full of sound," Cage explained, that he "did not think of beforehand," but heard "for the first time the same time others hear[d]."[149] But blurring those lines is not desirable when law enforcement participates in creating evidence, and that evidence is then central to a finding of criminal liability.

II. THE NEW ACCURACY IMPERATIVE

Government-created evidence requires close scrutiny, but this sort of attention to substantive reliability has been labeled the

146. *Id.* at 8–9 (identifying false confessions and tainted eyewitness identifications as prominent causes of wrongful convictions); *see also* Samuel R. Gross, Kristen Jacoby, Daniel J. Matheson, Nicholas Montgomery & Sujata Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 543 (2005).

147. Eric Rassin & Han Israëls, *False Confession in the Lab: A Review*, 7 ERASMUS L. REV. 219, 222 (2014).

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

149. Letter from John Cage to Helen Wolff (1954), *in 4'33"*: JOHN CAGE CENTENNIAL EDITION, *supra* note 10, at 35. Cage wrote that the piece was never actually silent:

> What we hear is determined by our own emptiness, our own receptivity; we receive to the extent we are empty to do so. If one is full or in the course of its performance becomes full of an idea, for example, that this piece is a trick for shock and bewilderment then it is just that.

Id.; *see also* Kania, *supra* note 12, at 347 (concluding that even a member of the audience yelling "This is rubbish!" and storming out of the theater would plausibly count as part of the *4'33"* performance).

"largely forgotten purpose of the rules."[150] That is particularly the case when epistemic competence conflicts with other goals of criminal procedure.[151] According to William Stuntz, Warren Court criminal procedure often detracted from substantive accuracy.[152] The bureaucratic imperatives of the criminal justice system can further "sideline[] the accuracy of its somber endeavor in favor of a slew of other goals, interests, and constraints."[153] The Court, of course, has at times emphasized the "truth-seeking function of the trial process"[154] and has noted the "general goal of establishing 'procedures under which criminal defendants are acquitted or convicted on the basis of all the evidence which exposes the truth.'"[155] And in other contexts—including the due process right to material exculpatory information and the Sixth Amendment right to counsel—the Court continues to cite verdict accuracy as an important goal.[156]

Accuracy has rarely figured, however, in contemporary discussions of the Fifth Amendment privilege against self-incrimination. In nineteenth century cases extending the privilege from the courtroom to investigative confessions, the Court did cite reliability concerns alongside autonomy rationales.[157] Coercive

150. Richard A. Leo, Steven A. Drizin, Peter J. Neufeld, Bradley R. Hall & Amy Vatner, *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 486.

151. *See* Lisa Kern Griffin, *Narrative, Truth & Trial*, 101 GEO. L.J. 281, 289–90 (2013) (stating that the goals of trial are more complex than "finding facts"); *see also, e.g.*, Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 211 (2014) ("Constitutional rights to introduce evidence and confront state witnesses serve political norms that value individual autonomy and process participation, independent of whether they improve accuracy in trial judgments.").

152. *See* William J. Stuntz, *The Political Constitution of Criminal* Justice, 119 HARV. L. REV. 781, 818–19 (2006).

153. Dan Simon, *Criminal Law at the Crossroads: Turn to Accuracy*, 87 S. CAL. L. REV. 421, 440 (2014).

154. United States v. Agurs, 427 U.S. 97, 104 (1976).

155. Kyles v. Whitley, 514 U.S. 419, 440 (1995) (quoting United States v. Leon, 468 U.S. 897, 900–901 (1984)).

156. *See, e.g.*, *id.* (stating that *Brady* standards are driven by the "general goal of establishing procedures under which criminal defendants are acquitted or convicted on the basis of all the evidence which exposes the truth"); Strickland v. Washington, 466 U.S. 668, 688 (1984) (holding that effective counsel fulfills the "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process"); United States v. Wade, 388 U.S. 218, 227 (1967) (noting that the presence of defense counsel tests the government's case and thereby can produce a more accurate result).

157. Bram v. United States, 168 U.S. 532, 541–44 (1897); *cf.* Brown v. Mississippi, 297 U.S. 278, 285–87 (1936) (recognizing the fundamental unfairness of using an untrustworthy confession).

interrogation techniques were expressly disfavored because they overrode the presumption that "one who is innocent will not imperil his safety or prejudice his interests by an untrue statement."[158] But the 1966 *Miranda* decision itself makes only passing mention of accuracy,[159] and few subsequent cases discuss it at all.[160] In *Colorado v. Connelly*,[161] the Court flatly stated that reliability is solely the province of evidence law.[162] The purpose of the voluntariness requirement, according to the Court's reasoning, is to "prevent fundamental unfairness in the use of evidence, *whether true or false*."[163]

Yet concern with the reliable adjudication of guilt or innocence is on the rise in criminal procedure scholarship. As Daniel Medwed explains, both advocacy and commentary on criminal law have turned to "innocentrism," and factual integrity is newly central.[164] There is both heightened awareness of error in investigations and trials and greater understanding that the (often unwitting) participation of police and prosecutors in the creation of evidence can lead to incorrect results.[165] Greater attention to the significance and status of silence would correspond with this renewed focus on the quality of evidence and the accuracy of verdicts.

158. Hopt v. Utah, 110 U.S. 574, 585 (1884).

159. *See* Miranda v. Arizona, 384 U.S. 436, 455 n.24 (1966).

160. *See* Connecticut v. Barrett, 479 U.S. 523, 528 (1987) ("The fundamental purpose of this Court's decision in *Miranda*" is to safeguard the right to "choose between speech and silence." (emphasis omitted)). *But see* Withrow v. Williams, 507 U.S. 680, 692 (1993) (stating that *Miranda* can protect against unreliable statements).

161. Colorado v. Connelly, 479 U.S. 157 (1986).

162. *Id.* at 167 ("A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment.").

163. *Id.* (emphasis added) (quoting Lisenba v. California, 314 U.S. 219, 236 (1941)). *But see* Yale Kamisar, *What Is an "Involuntary" Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728, 742 (1963) ("[W]hatever the *current* meaning of the elusive terms 'voluntary' and 'involuntary' confessions, *originally* the terminology was a *substitute* for the 'trustworthiness' or 'reliability' test.").

164. *See generally* Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1558–64.

165. *See* Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 37 ("Over the past decade, DNA technology challenged the Court's assumption of guilt with the postconviction exoneration of mounting numbers of innocent people.").

A. Wrongful Convictions

Reclaiming the instrumental rationale for protecting silence finds its primary support in recent empirical developments. DNA testing has established the existence of "known innocents" in the criminal justice process, in significant numbers, and it suggests a wider population of unidentified innocents.[166] Innocence Projects are a relatively new phenomenon, but the exonerations of the past twenty years have begun to shift paradigms in criminal procedure. The empirical data has given rise to a new accuracy imperative.[167] Wrongful convictions were once more theoretical than real. They were debated in academic terms about the validity of Blackstone's ratio: "[B]etter that ten guilty persons escape, than that one innocent suffer."[168] But error in criminal adjudication is no longer a theoretical issue, and the wrongfully convicted defendant is more than a "ghost" that haunts the criminal justice process like an "unreal dream."[169] The debate about wrongful convictions has largely moved past skepticism about their occurrence.

Furthermore, as popular accounts of the incidence, causes, and impact of wrongful convictions have proliferated,[170] they have also

166. *See* Gross et al., *supra* note 146, at 531 ("Beneath the surface there are other undetected miscarriages of justice in rape cases without testable DNA, and a much larger group of undetected false convictions in robberies and other serious crimes of violence for which DNA identification is useless."); *see also* Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 937–40 (2008) (detailing the problem of exonerations as a "small and unrepresentative sample of all false convictions"); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 779–80 (2007) (calculating the rate of wrongful convictions in capital rape-murder cases in the 1980s to be 3.3–5%); Adam Liptak, *Consensus on Counting the Innocent: We Can't*, N.Y. TIMES (Mar. 25, 2008), http://www.nytimes.com/2008/03/25/us/25bar.html [http://perma.cc/D2J2-8HYJ] (explaining that, outside of the context of a small sample of murder and rape cases, "we know almost nothing about the number of innocent people in prison"). *But see* Kansas v. Marsh, 548 U.S. 163, 198 (2006) (Scalia, J., concurring) (extrapolating from editorial and empirical challenges to the existence of wrongful convictions to conclude that the error rate is actually 0.027 percent).

167. *See* Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH. L. REV. 133, 134, 146–47 (2008) (discussing the "Reliability Model" based on best practices that emerges from the "Innocence Movement.").

168. 4 WILLIAM BLACKSTONE, COMMENTARIES *358; *see also In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 173 (1997).

169. United States v. Garrison, 291 F. 646, 649 (S.D.N.Y. 1923) (Judge Learned Hand).

170. *See, e.g.*, MARGARET EDDS, AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON, JR. (2003); JOHN GRISHAM, THE INNOCENT MAN: MURDER AND INJUSTICE IN

raised broader awareness of the potential for error. Indeed, the "attention paid to actual innocence by litigators, academics, legislators, authors, and even television executives signals a new era in which fact-based arguments surrounding guilt or innocence may begin to trump or at least hold their own with the traditional rights-based arguments that have been the norm in criminal law for generations."[171] With that raised awareness comes an imperative to consider best practices with regard to the reliability of investigative techniques, including interrogations.

B. Silence and Innocence

Now that "constitutional error no longer appears as a procedural technicality asserted by a probably *guilty* [defendant],"[172] the heightened prospect of innocence requires new thinking about silence as well. Hundreds of demonstrably false confessions have contributed to wrongful convictions, and various studies document cases in which silence could have protected factual innocence.[173] Whether an

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A SMALL TOWN (2006); DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT (2012); DAVID PROTESS & ROB WARDEN, A PROMISE OF JUSTICE: THE EIGHTEEN-YEAR FIGHT TO SAVE FOUR INNOCENT MEN (1998); BARRY SCHECK, PETER NEUFELD & JAMES DWYER, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); JENNIFER THOMPSON-CANNINO, RONALD COTTON & ERIN TOMEO, PICKING COTTON: OUR MEMOIR OF INJUSTICE AND REDEMPTION (2009); TOM WELLS & RICHARD A. LEO, THE WRONG GUYS: MURDER, FALSE CONFESSIONS, AND THE NORFOLK FOUR (2008).

171. Medwed, *supra* note 164, at 1551; *see also* Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 786 (2014) ("The magnitude of our criminal justice system's accuracy problem is widely debated, but the notion that it is nontrivial and that greater attention to pretrial activities is an important part of the solution is widely accepted."). The enormous success of the "Serial" podcast—which attracted millions of listeners and raised awareness about potential inaccuracies—exemplifies the emerging concern with reliability. *See, e.g.*, Matt Schiavenza, Serial*'s Second Act*, THE ATLANTIC (Feb. 8, 2015), http://www.theatlantic.com/national/archive/2015/02/serials-second-act/385287 [http://perma.cc/7LT6-WBC7].

172. Garrett, *supra* note 165, at 38; *see also* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 71 (1997) ("[E]ven an innocent person may say seemingly inculpatory things under pressure and suspicion and when flustered by trained inquisitors."); GARRETT, *supra* note 16, at 18 ("While we do not know how often false confessions occur, there is a new awareness among scholars, legislators, judges, prosecutors, police departments, and the public that innocent people can falsely confess, often due to psychological pressure placed upon them during police interrogations.").

173. *E.g.*, Steven A, Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004); *cf.* David K. Shipler, *Why Do Innocent People Confess?*, N.Y. TIMES, Feb. 23, 2012, at SR6 (stating that false confessions have figured in a quarter of the wrongful convictions identified by the Innocence Project and that because "DNA

interrogator succeeds in overcoming a suspect's silent resistance and eliciting an incriminating statement appears "only loosely related to the suspect's actual guilt."[174] Moreover, because most cases involving disputed confessions are "unreported by the media, unacknowledged by police and prosecutors, and unrecognized by researchers, the documented cases of interrogation-induced false confessions almost certainly understate the true extent of the phenomenon."[175]

Early encounters with suspects and witnesses in which police produce rather than discover evidence are significant sources of epistemic incompetence at trial. That is true of witness interviews and eyewitness identifications,[176] and it is a particularly acute problem when it comes to interrogations. Often inadvertently, law enforcement can create and then misattribute evidence.[177] According to Dan Simon, "almost all of the DNA exonerees who falsely confessed provided detailed accounts of their purported criminal act" including "details that were not publicly known" and were "somehow communicated to the ignorant innocent confessors."[178] Simon's analysis also underscores why criminal adjudication can be a poor audit mechanism for invalid co-authored confessions. The very factors that make a false confession unreliable contribute to the rich narratives that make them *appear* credible. One of *Miranda*'s fiercest critics, Ronald Allen, has asked why it would "be a better world if some randomly chosen set of individuals, who otherwise would confess, did not?"[179] The empirical and social science insights of the

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is available in just a fraction of all crimes, a much larger universe of erroneous convictions—and false confessions—surely exists").

174. MEDWED, *supra* note 170 (focusing on prosecutorial decision making and biased processing of evidence such as false confessions); SIMON, IN DOUBT, *supra* note 39, at 139.

175. Richard A. Leo, *False Confessions and the Constitution: Problems, Possibilities, and Solutions*, *in* THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA 171 (John T. Parry & L. Song Richardson eds., 2013); *see also* Gross & O'Brien, *supra* note 166, at 937–40 (noting that we "have inadequate information about the underlying investigations" in cases of false convictions "and we cannot compare them to correct convictions because we know even less about the investigations that lead to criminal convictions in general").

176. *See supra* text accompanying notes 143–46; *see also* GARRETT, *supra* note 16, at 8–9 (identifying tainted eyewitness identifications as another prominent cause of wrongful convictions).

177. *See* Leo, *supra* note 125, at 198 ("American police interrogation has no internal corrective mechanism to catch or reverse investigators' pre-interrogation classification errors or their confirmatory, information-conveying interrogation techniques.").

178. SIMON, IN DOUBT, *supra* note 39, at 136.

179. Ronald J. Allen, *The Misguided Defenses of* Miranda v. Arizona, 5 OHIO ST. J. CRIM. L. 205, 212 (2007).

new reliability scholarship provide the answer: because some of those "lost" confessions would have been inaccurate.

Recognizing the connection between silence and reliability helps to move the discussion about regulating interrogations beyond the question of whether silence protects the innocent as well as the guilty. Jeremy Bentham long ago advanced the idea that only guilty suspects choose silence, and that any false evidence against innocent suspects who talk will be detected and rejected in the marketplace of adjudication. A well-known passage from his 1825 treatise states that if "all the criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking, as guilt invokes the privilege of silence."[180]

Scholars have been debating whether silence weighs in favor of the innocent or the guilty ever since, using various social science and theoretical lenses.[181] Daniel Seidmann and Alex Stein, for example, constructed a game theory model to counter Bentham's utilitarian approach.[182] In their account, the right to silence lowers the conviction rate for innocents by making their exculpatory accounts believable. Guilty criminals stay silent rather than offer dishonest exculpatory accounts, and because their stories do not "pool" with those of innocents, true exonerating accounts emerge as more credible.[183] In contrast, Larry Laudan and Erik Lillquist recently made a claim echoing Bentham's, that protections around silence "seem to work primarily to the advantage of the guilty defendant and to do little if anything to protect the interests of innocent ones."[184]

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180. JEREMY BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 241 (1825).

181. *Compare* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Convictions from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 564–68 (1999) (suggesting that many cases treated as "wrongful convictions" do not involve factually innocent defendants), *with* Schulhofer, *supra* note 69, at 562 ("*Miranda* does not protect suspects from conviction but only from a particular method of conviction.").

182. Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 433 (2000) ("[T]he right to silence helps to distinguish the guilty from the innocent by inducing an anti-pooling effect that enhances the credibility of innocent suspects."); Alex Stein, *The Right to Silence Helps the Innocent: A Response to Critics*, 30 CARDOZO L. REV. 1115, 1116 (2008) ("The right to silence minimizes this pooling effect, thereby reducing the incidence of wrongful convictions, by providing guilty criminals a strong incentive to separate from the pool.").

183. Seidmann & Stein, *supra* note 182, at 433.

184. Larry Laudan & Erik Lillquist, *The Sounds of Silence* 4 (Univ. of Tex. Sch. of Law Public Law & Legal Theory Research Paper Series No. 215, 2012), http://papers.ssrn.

Although the Supreme Court has recognized that the Fifth Amendment privilege is not only a "shelter to the guilty" but also a "protection to the innocent,"[185] some Justices have expressed similar skepticism about the connection between silence and innocence. Justice Cardozo remarked that justice "would not perish if the accused were subject to a duty to respond to orderly inquiry."[186] And Justice Scalia declared—in an opinion referencing the anticoercion rationale for the privilege against self-incrimination—that while the guilty face the "cruel trilemma" of self-accusation, perjury, or contempt, the innocent "lack[] even a 'lemma.'"[187]

Versions of Justice Scalia's conception of the carefree innocent defendant surface in commentary on the Fifth Amendment as well. Ronald Allen and Kristen Mace agree that "an innocent person faces no trilemma."[188] Stephen Schulhofer, who otherwise supports the privilege, concludes that the innocent defendant "faces no trilemma, no dilemma, in fact no problem at all."[189] Relatedly, Judge Richard Posner has written that judges "who want jurors to take seriously the principle that guilt should not be inferred from a refusal to waive the privilege against self-incrimination will have to come up with a credible explanation for why an innocent person might fear the consequences of testifying" and has questioned whether there is any such "credible explanation."[190]

But of course there are many explanations for refusing to speak within the criminal justice process, including the realities of stress, fear, anger, and confusion in any law enforcement encounter. As the Tenth Circuit has observed, it is "common knowledge that most citizens . . . whether innocent or guilty, when confronted by a law enforcement officer who asks them potentially incriminating

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com/sol3/Delivery.cfm/SSRN_ID2037575_code515373.pdf?abstractid=2037575&mirid=1 [http://perma.cc/4CUV-58UK].

185. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)); Twining v. New Jersey, 211 U.S. 78, 91 (1908).

186. Palko v. Connecticut, 302 U.S. 319, 326 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

187. Brogan v. United States, 522 U.S. 398, 404 (1998) (quoting *Murphy*, 378 U.S. at 55).

188. Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 244 (2004).

189. Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 318 (1991).

190. Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1534–35 (1999).

questions are likely to exhibit some signs of nervousness."[191] Relatedly, Matthew Martoma, who was recently convicted of securities fraud, successfully moved to preclude from his trial any discussion of the fact that he fainted when first approached by FBI agents investigating the case.[192] "The mere accusation," the trial court agreed, "could well have an enormous impact on [the accused's] professional and personal life," and "it is just as likely that he fainted simply from shock, surprise, or alarm at being accused of such a serious crime."[193]

Moreover, the idea that innocents have nothing to fear from responding to police is flat wrong. Innocent defendants have good reason for distrusting authority and holding their peace. Silence may be not only a powerful instinct but also the best strategy, even for the factually innocent.[194] Factually innocent suspects confront quite weighty "lemmas" of their own. They choose speech or silence, and if they speak, they elect whether to tell partial truths to enhance their otherwise honest account of innocence. Any statements they give can cause tactical damage to their later positions at trial, by compromising an alibi or by creating impeachment material from small inconsistencies. As Justice Breyer recognized, dissenting in *Salinas*, a suspect who answers an accusatory question may reveal "prejudicial facts, disreputable associates, or suspicious circumstances—even if he is innocent."[195] Investigators approach suspects with a tendency to perceive them as guilty, and almost anything a suspect says will serve to confirm that suspicion.[196] To make matters worse, defensive dishonesty by an innocent defendant can give rise to liability for an entirely new offense, such as obstruction or a false statement.[197]

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191. United States v. Millan-Diaz, 975 F.2d 720, 722 (10th Cir. 1992).

192. Order at 1, 4, United States v. Martoma, 990 F. Supp. 2d 458 (S.D.N.Y. Jan. 6, 2014).

193. *Id.* at 3.

194. *See, e.g.*, Combs v. Coyle, 205 F.3d 269, 285 (6th Cir. 2000) ("[T]here are many reasons why a defendant may remain silent before arrest, such as a knowledge of his *Miranda* rights or a fear that his story may not be believed."); Commonwealth v. Molina, 104 A.3d 430, 450–51 (Pa. 2014) ("[A]llowing reference to a defendant's silence as substantive evidence endangers the truth-determining process given our recognition that individuals accused of a crime may remain silent for any number of reasons.").

195. Salinas v. Texas, 133 S. Ct. 2174, 2186 (2013) (Breyer, J., dissenting).

196. Christian A. Meissner & Saul M. Kassin, *"You're Guilty So Just Confess!" Cognitive and Behavioral Confirmation Biases in the Interrogation Room*, *in* INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT 85, 89 (G. Daniel Lassiter ed., 2004).

197. *See* Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515, 1522 (2009).

Innocents under interrogation also face the compound danger that they will be manipulated into an inculpatory falsehood, and that this "confession" will lead to their conviction. Innocence may even supply the requisite circumstances for a false confession. It can be a risk factor for wrongful convictions because of the misguided notion that innocence is its own defense. Innocent suspects tend to believe that the truth will eventually "set them free" and that they have little to lose from cooperating and engaging with law enforcement.[198] The game theory model also assumes that "innocent defendants have only one rational course of action," which is "revealing their true self-exonerating accounts."[199] That is not quite right either, however. The most rational course of action is to say nothing at all, and that is exactly what any competent lawyer would advise.[200]

In other words, the prosecutor in *Salinas* was simply incorrect that any innocent person questioned about the shotgun casings would have responded, "What are you talking about? I didn't do that. I wasn't there."[201] As the Supreme Court has previously stated—when concluding that a defendant's invocation of a Fifth Amendment privilege before a grand jury cannot be used to impeach his later trial testimony—silence in the face of questioning can be "wholly consistent with innocence."[202] There is "no basis for declaring a generalized probability" that the innocent are more likely than the guilty to profess their innocence.[203] Silence accurately responds as far as it goes, protects against untrue statements and untoward inferences, and preserves other rights surrounding the later decisions about whether to proceed to trial and whether to testify.

198. For an account of how innocence increases the risk of false confessions, see generally Saul M. Kassin, *On the Psychology of Confessions: Does* Innocence *Put* Innocents *at Risk?*, 60 AM. PSYCHOLOGIST 215 (2005).

199. Stein, *supra* note 182, at 1122–23. Seidmann and Stein's express concern is to model the positive effect of silent guilty defendants on testifying innocent ones, and as they acknowledge "[t]he existence of silent innocents does not enter" into their model. Seidmann & Stein, *supra* note 182, at 455 n.82.

200. As Justice Jackson plainly stated, "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances." Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., dissenting).

201. Salinas v. Texas, 133 S. Ct. 2174, 2185 (2013) (Breyer, J., dissenting).

202. Grunewald v. United States, 353 U.S. 391, 421 (1957).

203. United States v. Hale, 422 U.S. 171, 181 (1975) (Burger, J., concurring).

C. The Cost of Silence

Further argument against a robust right to silence focuses on the false negatives it would produce in order to prevent false positives.[204] Larry Laudan, for example, claims that victims of crime bear some of the costs of mitigating wrongful convictions (type I errors). In his view, lowering the false acquittal rate (thereby reducing type II errors) is equally if not more desirable.[205] According to Laudan and Lillquist's recent challenge to protections around silence, "[w]hile it is plausible that the frequency of false convictions would fall in the transition from weak to strong silence regimes, it is even more likely that the same transition will bring in its wake a larger rise in the frequency of false acquittals."[206] False acquittals, however, are an unquantifiable construct. Despite the fact that type II errors must occur, one cannot say with any confidence how many, or for what reason.

Logically, protecting silence will incentivize some guilty defendants to withhold information. But the cost in terms of lost convictions is theoretical. There is no population of "known guilties" who are wrongly acquitted[207] comparable to the growing dataset containing "known innocents."[208] The requirement of proof beyond a reasonable doubt makes attribution of acquittal to any particular source, like a suppressed confession, speculative.[209] Nor are there any

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204. *See* RICHARD A. POSNER, AN ECONOMIC ANALYSIS OF LAW 618 n.2 (6th ed. 2003) (assuming a trade-off between Type I and Type II errors as a result of exclusionary rules); ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 172 (2005) ("The legal system can . . . reduce the incidence of wrongful acquittals ('false negatives') by increasing the number of wrongful convictions ('false positives'), and vice versa.").

205. LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY 130 (2008).

206. Laudan & Lillquist, *supra* note 184, at 49; *see also, e.g.*, Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65, 84 (2008) ("Likewise, many of the remedies for reducing the number of false convictions increase the risk of false acquittals, and with it, the risk of rising crime vindication.").

207. *But see* Alex Kozinski, *Preface: Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., at iii, xvi (2015) (noting that wrongful convictions "often result in another injustice or series of injustices" because along with the conviction of an innocent man "a guilty man is left free and emboldened to victimize others").

208. *See Exoneration Detail List*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx [http://perma.cc/T3C9-QJPV] (documenting 1635 exonerations as of August 2015).

209. *Cf.* Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 188 (2008) (stating that there is "strong evidence that coercive techniques increase the odds of a false confession . . . but we do not know by how much . . . [and] [i]t is possible, for all we know, that the overwhelming majority of coerced confessions are true").

base rates of innocent and guilty suspects in police interrogations against which false confessions can be measured.[210]

Nonetheless, debate about the costs and benefits of the *Miranda* rule often coalesces around the lost information it may cause.[211] The specter of unstated confessions looms large because they are widely regarded as high value evidence,[212] even sometimes referred to as the "queen of proof."[213] The Supreme Court has at times reflected this idea that confessions are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law,"[214] and has declared that they are "like no other evidence."[215] But the Court has also stated that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."[216]

Confessions are treacherous not only because they are subject to abuses but also because they are convincing.[217] Many people assume

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210. Rassin & Israëls, *supra* note 147, at 221; *cf.* Commonwealth v. Hoose, 5 N.E.3d 843, 861–62 (Mass. 2014) (upholding the exclusion of testimony about factors present in 150–200 documented cases of false confessions because the expert could cite no studies comparing the prevalence of those factors among false confessions to their incidence in confessions as a whole).

211. *See, e.g.*, Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 860 (1996) ("[A] total of 18.6% of the suspects in our sample who were given *Miranda* rights invoked them before police succeeded in obtaining incriminating information."). On the empirical debate, see generally Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996), and Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084 (1996).

212. *See, e.g.*, People v. House, 566 N.E.2d 259, 282 (Ill. 1990) ("[A] system which relies not at all upon the confession will, in many instances where extrinsic evidence is lacking or inconclusive, be incapable of protecting society from perhaps the most cunning criminal elements which threaten it.").

213. *See* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 14 (1978) ("The maxim of the medieval Glossators, no longer applicable to European law, now aptly describes American law: *confessio est regina probationum*, confession is the queen of proof.").

214. Moran v. Burbine, 475 U.S. 412, 426 (1986).

215. Arizona v. Fulminante, 499 U.S. 279, 296 (1991) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." (quoting Bruton v. United States, 391 U.S. 123, 139 (White, J. dissenting))).

216. Escobedo v. Illinois, 378 U.S. 478, 488–89 (1964); *see also* Allen & Mace, *supra* note 188, at 264 ("There are strong policy reasons for not wanting to rely on evidence from someone who has an incentive to hide the truth.").

217. *See* Seidman, *supra* note 129, at 164 (explaining that confessions mislead because they "present the illusion of escape when there is no escape: confessions are always just another

that confessions, given their incriminating nature, must be true. Police, prosecutors, judges, and jurors all want to believe them because they offer unique access to the defendant's own thoughts. They seem self-authenticating, have false precision,[218] contain potent prejudice,[219] and potentially bias the perceptions and decision-making of criminal justice officials and fact-finders alike.[220] Indeed, the presence of a false confession can delay or derail an exoneration even after DNA testing conclusively establishes factual innocence.[221] Confessions have a persuasive force so enduring that they can actually outweigh scientific evidence.[222] They simply override powerful contradictory information like forensics because they further narrow the official tunnel vision that can keep the criminal justice system from self-correcting when error occurs.[223]

Even if it were the case that criminal justice reforms should be neutral with regard to the direction of the error corrected—that wrongful acquittals are as bad as wrongful convictions[224]—there is no

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mask"); *cf.* Peter Brooks, *Speech, Silence, the Body*, *in* SPEECH AND SILENCE IN AMERICAN LAW, *supra* note 33, 190, 211 (commenting that custodial interrogations are so "crude" and "weighted" that we may not "wish [suspects] to speak freely").

218. *See* Leo et al., *supra* note 150, at 485 ("Confessions are among the most powerful forms of evidence introduced in a court of law, even when they are contradicted by other case evidence and contain significant errors.").

219. Colorado v. Connelly, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) (noting that "[n]o other class of evidence is so profoundly prejudicial").

220. *See* Leo et al., *supra* note 150, at 520 n.273 ("Researchers have demonstrated that mock jurors find confession evidence more incriminating than any other type of evidence.").

221. *See, e.g.*, Andrew Martin, *The Prosecution's Case Against DNA*, N.Y. TIMES MAG. (Nov. 25, 2011), http://www.nytimes.com/2011/11/27/magazine/dna-evidence-lake-county.html [http://perma.cc/L3JX-QQAA] (discussing the case of Juan Rivera, who signed a false confession that was instrumental to his conviction at three successive trials, including one that occurred after DNA evidence excluded him as the perpetrator).

222. *See* Garrett, *supra* note 8, at 404–08 (discussing exoneration cases in which contaminated confessions trumped the DNA evidence pointing to innocence).

223. *See* Saul M. Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOL. 431, 441 (2012) ("[F]alse confessions, once taken, arouse a strong inference of guilt, thereby unleashing a chain of confirmation biases that make the consequences difficult to overcome despite innocence."); *see also* Erica Goode, *When DNA Evidence Suggests "Innocent," Some Prosecutors Cling to "Maybe,"* N.Y. TIMES (Nov. 15, 2011), http://www.nytimes.com/2011/11/16/us/dna-evidence-of-innocence-rejected-by-some-prosecutors.html [http://perma.cc/CLP4-5WJP]; Jon B. Gould, Julia Carrano, Richard A. Leo & Katie Hail-Jares, *Innocent Defendants: Divergent Case Outcomes and What They Teach Us*, *in* WRONGFUL CONVICTION AND CRIMINAL JUSTICE REFORM: MAKING JUSTICE 78 (Marvin Zalman & Julia Carrano eds., 2014).

224. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 216 (1990) ("[T]he only way to reduce the probability of convicting the innocent is to reduce the probability of convicting the guilty as well."); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1408 (1991) ("[A] guilt-innocence

empirical basis to conclude that silence fails to enhance net accuracy. Stronger protections could reduce the overall number of statements suspects make, but it is not clear that the lost statements include a significant number of accurate confessions. Compliance and correctness are not the same thing. Generating more incriminating evidence in the investigative process does not necessarily mean that police have received more reliable information. Moreover, the speculative value of missing confessions no longer weighs heavily against the real data and concrete details about false statements that have contributed to wrongful convictions.[225]

III. IMPLICATIONS FOR INTERROGATION REGULATION

If silence indeed communicates the desire to separate from law enforcement, and the failure to let it speak for itself hazards inaccuracy, how could courts fashion more silence-sensitive rules around interrogations? Even as the low costs and considerable gains of preventing government-created evidence grow clearer, the force of *Miranda*'s protections has diminished. The Court's inconsistent reasoning about waiver and invocation might be reconciled through new insights about silence. Reconsidering the connection between due process exclusion and reliability could also improve the courts' mechanisms for screening out government-created evidence. The most promising applications, however, may be changes to law enforcement practices on the ground. Reliability concerns have recently contributed to widespread recording of interrogations. That increased transparency could in turn encourage other reforms, including limiting the length of time silent suspects can be interrogated, and clarifying the notice they receive.

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neutral approach to error-allocation has the effect of removing error-allocation as a concern separate from error-avoidance." (emphasis omitted)); Larry Laudan, *Is It Finally Time to Put "Proof Beyond a Reasonable Doubt" Out to Pasture* 17–18 (Pub. Law & Legal Theory Research Paper Series Ser. No. 194, 2011), http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1815321_code515373.pdf?abstractid=1815321&mirid=1 [http://perma.cc/2PSW-59Z4] (arguing that recommendations for additional protections to prevent false convictions "fail to acknowledge the very serious costs associated with false acquittals").

225. *See False Confessions, Understand the Causes*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php [http://perma.cc/T7KE-9XD9] ("[M]ore than 1 out of 4 people wrongfully convicted but later exonerated . . . made a false confession or incriminating statement."); *% Exonerations by Contributing Factor*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [http://perma.cc/8S4B-4YDL] (attributing 13 percent of exonerations to date to false confessions).

A. Space for Silence

First, correcting the asymmetry between silent waiver and express invocation would form more protective space around silence, give the decision to stay silent some procedural consequence, and make it more likely that a suspect will maintain silence and avoid introducing inaccuracies.[226] To do so would also give effect to the *Miranda* Court's statements that the right to remain silent can be invoked "in any manner," and that there is a "heavy burden" for the government to establish waiver.[227] The practical realities of interrogations bear little resemblance to the balance the *Miranda* Court envisioned. Fully 80 percent of suspects who receive *Miranda* warnings waive their rights,[228] and almost none assert or reassert them once questioning has begun.[229] Moreover, when reviewing cases of disputed waiver and disputed invocation, courts construe ambiguity in favor of admitting suspects' statements. Indeed, some datasets indicate that courts are ten times as likely to find waiver as to conclude that the suspect retained Fifth Amendment protections.[230]

Police should, however, be as willing to recognize indirect assertions of silence as they are to proceed after implicit waivers. Or at least they should ask clarifying questions about ambiguous requests.[231] Whereas the willingness to submit to questioning is assumed from almost any response a suspect gives law enforcement—including no response at all—invoking the right to *have* silence and

226. *Compare* Davis v. United States, 512 U.S. 452, 462 (1994) (invocation of the right to counsel must be "unambiguous"), *with* North Carolina v. Butler, 441 U.S. 369, 373 (1979) (waiver need not be formal and can be inferred "from the actions and words of the person interrogated").

227. Miranda v. Arizona, 384 U.S. 436, 475–476 (1966).

228. Cassell & Hayman, *supra* note 211, at 859 (reporting that the waiver rate is 83.7 percent); *see also* Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 383 (2007). Most of those suspects have experience of the criminal justice system. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286–87 (1996). On the rate of, and reasons for, waiver, see also *supra* text accompanying notes 130–34.

229. *E.g.*, Stuntz, *supra* note 37, at 977 ("[O]nce suspects agree to talk to the police, they almost never call a halt to questioning or invoke their right to have the assistance of counsel.").

230. *See, e.g.*, George C. Thomas, III, *Stories About* Miranda, 102 MICH. L. REV. 1959, 1972–73 (2004).

231. *See* LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE 61 (2005) (describing how police procedures such as clarifying questions could solve evidence-related issues when suspects make ambiguous waiver requests).

cut off questioning requires a hyperliteral assertion.[232] But invocation is more request than offer, and one that many suspects will make indirectly.[233] Some groups of suspects, including women and minorities, may be even more likely to speak in a pattern that falls short of a clear assertion.[234] Although savvy suspects may use the requisite words and take the necessary tone, vulnerable and inexperienced ones rarely succeed in maintaining sufficient space for silence.[235]

Of course, nothing formally prevents a suspect from simply staying quiet, no matter how insistent the questioning. But revealing the incidence of false confessions has also demonstrated that the right to be silent often requires the corresponding protection of having silence. At the very least, a close look at the elements of false confessions suggests that invocation and waiver should be self-executing to the same extent.[236]

Recasting the function of silence as space for reflection and a protection against undue inference seems to support a more pragmatic approach to recognizing invocation. It is important to acknowledge, however, that any expanded interpretation of *Miranda*'s requirements seems unlikely. According to Richard Leo, "the *Miranda* ritual makes almost no practical difference in American police interrogation" because almost all suspects waive their rights, and with respect to the rest, police "have developed multiple strategies to avoid, circumvent, nullify, and sometimes violate *Miranda* and its invocation rules in their pursuit of confession evidence."[237] Moreover, there is an argument that *Miranda* makes matters worse for suspects by insulating subsequent coercive

232. *See* Peter M. Tiersma & Lawrence M. Solan, *Cops & Robbers: Selective Literalism in American Criminal Law*, 38 LAW & SOC'Y REV. 229, 256 (2004) (explaining that many judges require a suspect to explicitly invoke his or her right to cut-off questioning).

233. *Cf.* Davis v. United States, 512 U.S. 452, 460 (1994) ("We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present.").

234. Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259, 315–19 (1993).

235. Stuntz, *supra* note 37, at 977.

236. *See, e.g.*, Michael J. Zydney Mannheimer, *Toward a Unified Theory of Testimonial Evidence Under the Fifth and Sixth Amendments*, 80 TEMP. L. REV. 1135, 1190 (2007).

237. RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 124 (2008); *see also* Stuntz, *supra* note 37, at 976 (noting that the effects of *Miranda* have been "small, perhaps vanishingly so").

techniques from scrutiny.[238] The doctrine now serves "mostly as a weapon to negate claims of coercion."[239]

Nor would it be realistic to expect any doctrinal fortification of *Miranda*. In forty-one of the forty-eight Supreme Court terms since *Miranda* was decided, the Court has considered at least one case interpreting its requirements. Those decisions have significantly contracted and only rarely expanded its reach. For example, physical evidence obtained as a result of *Miranda* violations is not subject to suppression,[240] statements taken after infringing on *Miranda* can still be introduced for impeachment,[241] the definitions of custody and interrogation have constricted the circumstances under which the right applies,[242] and the public safety exception has limited its scope as well.[243] According to Barry Friedman, the Court has actually overruled *Miranda* by "stealth."[244] Charles Weisselberg, who wrote in the late 1990s about paths to "saving" the decision, resigned himself a decade later to pronouncing it dead and "mourning" it.[245]

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238. *See* Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 29 (2010) ("*Miranda* has been gutted as a legal matter, and as a factual matter its impact might very well be perverse."); *see also* BROOKS, *supra* note 33, at 11 ("A cynical interpretation of the Court's decision in *Miranda* would say that the Court cut the Gordian knot of the problem of voluntariness by saying to the police: if you follow these forms, we'll allow that the confession you obtained was voluntary."); SEIDMAN, *supra* note 32, at 102 ("Physical violence is still out of bounds, but the courts today regularly permit the kind of police threats, fabrication, and manipulation that might well have led to suppression of statements in the pre-*Miranda* era—so long, that is, as *Miranda*'s warning and waiving ritual is duly observed.").

239. SIMON, IN DOUBT, *supra* note 39, at 139; *see also id.* ("For all practical purposes, the voluntariness of the waiver seems to legitimize the questionable interrogative methods that follow in its wake and to absolve the interrogator of any responsibility for inducing the suspect to falsely incriminate himself."); Leo et al., *supra* note 150, at 498 ("[B]y focusing on the proper reading and waiver of the *Miranda* warnings, trial judges often appear to avoid the more difficult task of analyzing whether police pressures have overborne the suspect's decision-making capacity or whether the confession is, in fact, a reliable piece of evidence.").

240. United States v. Patane, 542 U.S. 630, 633–34 (2004).

241. Harris v. New York, 401 U.S. 222, 226 (1971).

242. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 440 (1984); Rhode Island v. Innis, 446 U.S. 291, 300–02 (1980).

243. New York v. Quarles, 467 U.S. 649, 651 (1984).

244. Friedman, *supra* note 238, at 16. On the extent to which *Miranda* has been functionally overruled, see also Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 20 (2004); Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 984 (2012); George C. Thomas III, Miranda*'s Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1092–95 (2003) (book review).

245. *Compare* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 177 (1998) (arguing that the "original vision" of *Miranda* "provides substantial protection to Fifth Amendment values, fits with our constitutional jurisprudence, provides necessary bright-line

Furthermore, thousands of pieces of scholarship discussing those decisions have not substantially altered the restrictive direction of the precedents.[246]

There is no meaningful, durable right to silence in interrogations, and there does not seem to be any momentum behind creating one through *Miranda* jurisprudence. The *Miranda* warnings "may be the most famous words ever written" by the Supreme Court.[247] Indeed, they have become so thoroughly engrained that the Court accounted for their status as "part of our national culture" in declining to overrule *Miranda* in *Dickerson v. United States*.[248] But the perception that warning suspects somehow inhibits law enforcement and precludes confessions is similarly entrenched.[249] *Miranda* may be not only the best-known criminal law decision,[250] but also the most vigorously critiqued.[251] The opinion is thus all but a dead letter, and it provides little scaffolding to construct significant protective space around silence.

B. Implementing Reliability

Accordingly, it might be more realistic to focus on extra-*Miranda* interventions that could address the ambiguity of silence, and in doing so interpose some barriers to interrogation-induced evidence. The

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rules for police and trial judges, and maintains public confidence in our courts and police"), *with* Weisselberg, *supra* note 74, at 1521, 1592 (concluding that the *Miranda* rule does not "afford many suspects a meaningful way to assert their Fifth Amendment rights" and is "largely dead" "[a]s a prophylactic device to protect suspects' privilege").

246. *Cf.* Ronald J. Allen, *The Gravitational Pull of* Miranda*'s Blackhole: The Curious Case of* J.D.B. V. North Carolina, 46 TEX. TECH L. REV. 143, 146 (2013) (noting the "vast and tedious" literature on *Miranda*).

247. Leo, *supra* note 66, at 671.

248. Dickerson v. United States, 530 U.S. 428, 443 (2000).

249. *See* Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It—And What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 163 (2007) (stating that *Miranda* is "one of the most praised, most maligned—and probably one of the most misunderstood—Supreme Court cases in American history"); *see also* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2479 (1996) ("Yet given the vociferous outcry against *Miranda*, which was clearly the most notorious (to detractors) of the Warren Court's criminal decisions, *Miranda*'s basic requirements . . . have remained largely, even surprisingly, unaltered.").

250. *See, e.g.*, Steven B. Duke, *Does* Miranda *Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 551 (2007) ("*Miranda v. Arizona* is probably the most widely recognized court decision ever rendered." (footnote omitted)).

251. *See, e.g.*, FRED GRAHAM, THE SELF-INFLICTED WOUND 6–7 (1970) (discussing the political backlash against *Miranda* and the decision's timing in the midst of escalating crime rates).

right to silence, to the extent there is one, is enforced as a matter of due process as well.[252] *Miranda* displaced but did not replace the totality of the circumstances inquiry to determine whether law enforcement coerced a suspect's statement.[253] That inquiry may have sufficient elasticity to incorporate the insights of the new reliability, and a renewed focus on silence itself might in turn produce a more workable due process test.

The question of whether police "overbore" a suspect's will bedeviled courts in the Due Process Clause cases that predated the *Miranda* decision. Identifying the incentives of law enforcement poses a stubborn problem, and it would be unworkable to simply substitute an inquiry into the state of mind of the interrogator for an assessment of the suspect's experience of coercion. Generally speaking, the Court has declined to consider the subjective motivations of law enforcement.[254] But focusing on a suspect's initial silence and then considering the circumstances surrounding its breach could clarify whether police engaged in an "improper practice."[255]

Moreover, one way of conceptualizing coercion is to ask whether suspects have been led to believe that they do not have the option to stay silent. And the actual words and actions surrounding silence include objective markers of the subjective experience of having no choice. Even if it is hard to say, absent physical abuse, whether a suspect was "forced" to implicate himself, information closer to the surface about the interrogation—including how long periods of silence lasted and how suggestive the questions and statements were in the interim—could expose whether the government applied undue pressure.[256]

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252. U.S. CONST. amend. XIV, § 1; Spano v. New York, 360 U.S. 315 (1959).

253. *See, e.g.*, George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 178–79 (2005).

254. *E.g.*, Stansbury v. California, 511 U.S. 318, 326 (1994) (per curiam) ("[O]fficers' subjective and undisclosed suspicions . . . do not bear upon the question whether [a suspect is] in custody, for purposes of *Miranda*, during the station house interview.").

255. *See* Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 957 (1997) ("Courts should define the term coerced confession to mean a confession caused by offensive governmental conduct, period."). *But see* Steven D. Clymer, *Are Police Free to Disregard* Miranda*?*, 112 YALE L.J. 447, 449–50, 536 (2002) (arguing that the Fifth Amendment protects only against the admission of compelled statements in court and does not regulate police conduct).

256. *See* SEIDMAN, *supra* note 32, at 97 (calling the "voluntariness/compulsion focus" "misguided" because "the question we should ask is whether police interrogation techniques invade a protected private sphere by abusing intimacy and illusions of intimacy and, if so, whether that invasion and abuse are justifiable"); Allen, *supra* note 179, at 213 ("The only thing

The empirical findings of the new reliability advocacy and scholarship, and the connection between failures in the system and co-authorship by the government, suggest that the due process analysis ought to reference accuracy concerns. The Supreme Court has displayed some ambivalence about including reliability determinations in the calculus of fair procedures. Although some Justices accept that the goal of ascertaining truth animates due process,[257] the Court has also stated that unreliability "is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment."[258] Recently, in *Perry v. New Hampshire*,[259] the Court ruled that the Constitution does not demand an inquiry into the reliability of eyewitness-identification evidence obtained under unreliable conditions.[260]

Fairness, voluntariness, and reliability overlap, however. While different values, they often move in the same direction. "Making" a suspect speak can violate autonomy principles, and the statements that follow an improper breach of silence also occur in infelicitous conditions—such as prolonged interrogations or threatening questions—that diminish the quality and reliability of a confession. The question is not merely whether law enforcement extracted a statement improperly, but also whether it *created* that statement in the process.[261] As Stephen Schulhofer has argued, if "officers were

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that can be done is precisely what the voluntariness test tried to do—array the forces brought to bear on an individual and work out the line separating the acceptable from the unacceptable inductively.").

257. *See, e.g.*, Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in the judgment) ("The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment.").

258. Colorado v. Connelly, 479 U.S. 157, 167 (1986) (citation omitted).

259. Perry v. New Hampshire, 132 S. Ct. 716 (2012).

260. *Id.* at 730 ("[W]e hold that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.").

261. *See, e.g.*, Ronald J. Allen, *Theorizing About Self-Incrimination*, 30 CARDOZO L. REV. 729, 739–41 (2008) (defining statements taken in violation of the privilege against self-incrimination as the 'compelled products of compelled cognition'); Allen & Mace, *supra* note 188, at 267 ("The government may not compel revelation of the incriminating substantive results of cognition *caused by the state*." (emphasis added)); Nita A. Farahany, *Incriminating Thoughts*, 64 STAN. L. REV. 351, 400 (2012) ("Evidence created without provocation by the government is not compelled . . . ."); *cf.* Robert P. Mosteller, *Revealing and Thereby Tempering the Abuses of Government-Created Evidence in Criminal Trials*, 75 BROOK. L. REV. 1277, 1277 (2010) (citing the "corrupting influence of the government's hand in the evidence development process").

told it was permissible (and perhaps therefore their duty) to use all pressures short of actually breaking the suspect's will," then "there can be little doubt that more abuses would occur, even though the worst abuses would still be theoretically prohibited by other rules."[262] Those abuses include co-authoring statements that seem to have the "epistemic authority" of the defendant[263] and thereby also resist market corrections in the adversarial process.[264]

At first glance, considerations of a confession's reliability appear to implicate the same unpredictability that references to coercion engender.[265] Although impossible to say with certainty whether a suspect spoke as an act of free will,[266] introducing the concept of sole authorship could help shape a sturdier test.[267] One of the key sources of wrongful convictions, according to the new reliability literature, is the set of situations in which suspects or witnesses have little choice but to say something, and law enforcement participates in what they say.[268] Indeed, several studies suggest that police-induced false confessions go hand in hand with psychological coercion.[269] Determining whether there has been government participation will not capture every situation of coercion, and adding that element

262. Schulhofer, *supra* note 189, at 326.

263. *See* Michael S. Pardo, *Self-Incrimination and the Epistemology of Testimony*, 30 CARDOZO L. REV. 1023, 1025 (2008) (defining testimony as "any evidence that requires reliance by the fact-finder on the epistemic authority of the defendant").

264. *See supra* text accompanying notes 217–23 (on the durability of false confessions).

265. *See* Yarborough v. Alvarado, 541 U.S. 652, 668 (2004) (reasoning that a multi-factored test runs afoul of *Miranda*'s status as "an objective rule designed to give clear guidance to the police"); Stuntz, *supra* note 37, at 981 (explaining that the voluntariness standard "could not separate good police tactics and good confessions from bad ones"); *see also* Miller v. Fenton, 474 U.S. 104, 116 (1985) (noting that the "hybrid quality of the voluntariness inquiry" includes "a 'complex of values'" (quoting Blackburn v. Alabama, 361 U.S. 199, 207 (1960))).

266. *See* SEIDMAN, *supra* note 32, at 79 (without the "natural law baselines" that previously distinguished freedom and coercion, "these distinctions, upon which the Fifth Amendment rests, become very difficult to maintain"); Ronald J. Allen, Miranda*'s Hollow Core*, 100 Nw. U. L. Rev. 71, 76 (2006) (criticizing *Miranda*'s conception of free will as unattainable because all choices are conditioned by reasons).

267. *Cf.* Peter Brooks, *The Future of Confession*, 1 LAW, CULTURE & THE HUMAN. 53, 60 (2005) ("Where psychology brings ambiguity and complexity and layering of motive, the Court wants certainty and bright lines.").

268. GARRETT, *supra* note 16, at 19–20 (discussing characteristics of contaminated confessions).

269. *See, e.g.*, Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L. POL. & SOC'Y 189, 191–92 (1997) (listing studies of psychologically induced false confessions).

makes the protection narrower,[270] but it also makes it stronger and more straightforward to apply.[271]

Reevaluating the significance of silence has the potential to move the debate about the privilege beyond the direction of possible error and also beyond the question whether the privilege requires protection via rule or standard.[272] Open-textured inquiries into the existence of ill-defined elements like coercion carry a high risk of error,[273] while rules allow law enforcement to adhere to a clear line, observing the letter but then violating the spirit of the Fifth Amendment in a way that would be prohibited in a more standard-like regime.[274] Moreover, *Miranda*'s prophylactic requirement, like many rules, is both under- and over-inclusive.[275] Reliability is a more dynamic consideration, but its boundaries can be better defined within the frame of the particular concern about government-creation.

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270. *See* Medwed, *supra* note 164, at 1556 (noting concern about declining attention to defense arguments based on constitutional violations and procedural unfairness because of the "overwhelming noise created by the innocence movement").

271. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 155 (1991) (concluding that there will be fewer rule-based errors if more factual predicates are added to a rule). By way of analogy, the Court's recent Confrontation Clause jurisprudence implements reliability but according to a narrow concern with the potential for government manipulation. *See* Lisa Kern Griffin, *The Content of Confrontation*, 7 DUKE J. CONST. L. & PUB. POL'Y 51, 67 (2011); *see also* Crawford v. Washington, 541 U.S. 36, 75 (2004) (Rehnquist, C.J., concurring in the judgment) (critiquing the majority's insistence on a bright line rule that "adds little to a trial's truth-finding function"). For an illustration of the Court's continuing dispute about the relationship between a substantive reliability standard and a procedural rule that turns on whether a statement is testimonial, compare Michigan v. Bryant, 562 U.S. 344, 358–59 (2011) ("In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."), with Bullcoming v. New Mexico, 131 S. Ct. 2705, 2715 (2011) ("[T]he comparative reliability of an analyst's testimonial report drawn from machine-produced data does not overcome the [Confrontation Clause's] bar.").

272. *See* Jeffrey L. Fisher, *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1495–96, 1535 (2006) (equating balancing tests with substantive reliability concerns and bright line rules with procedural guarantees); *cf.* Frederick Schauer, *The* Miranda *Warning*, 88 WASH. L. REV. 155, 157–58 (2013) (noting the way in which *Miranda* imposes a rule-like construct on the standard of voluntariness by prescribing law enforcement behavior).

273. *See, e.g.*, Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 387 (1985).

274. *See, e.g.*, Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 599 (1981).

275. *See, e.g.*, SCHAUER, *supra* note 271, at 31–34; Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992) ("A rule necessarily captures the background principle or policy incompletely and so produces errors of over- or under-inclusiveness.").

Put another way, looking for hallmarks of co-authorship could add more rule-like characteristics to the reliability calculus. Richard Leo, for example, has suggested ways to operationalize this concern with accuracy: courts could determine whether a confession leads to the discovery of evidence previously unknown to police, whether it includes identification of highly unusual non-public facts, and whether it accurately describes mundane details of the crime as well.[276] Courts could also look closely at indicia of a suspect's intent and effort to maintain silence, the duration of that silence, and the information and incentives that law enforcement provided in order to break it. By doing so, courts could begin to evaluate the interactions between police and interviewees through objectively observable phenomena beyond the issuance of *Miranda* warnings.[277]

Ultimately, refocusing courts on police practices at the intersection of waiver and invocation, or developing a due process test that combines elements of standards and rules to detect the danger of co-authorship, would face significant challenges. *Miranda*'s protections have been contracting for decades, and the Supreme Court has often declined to enforce alternative reliability guarantees.[278]

C. Law Enforcement Interventions

Even though the law of interrogations has both narrowed and hardened in a way that makes reform via the courts unlikely, that does not prevent police from implementing better practices. On-the-ground reforms to interrogations offer perhaps the best means to enlarge the space for silence.[279] And law enforcement has responded

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276. Richard A. Leo, Peter J. Neufeld, Steven A. Drizin & Andrew E. Taslitz, *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 792 (2013).

277. Richard Leo and others have further argued for pretrial reliability assessments of confession evidence using the exclusionary potential of Rule 403 as the legal mechanism instead of the voluntariness prong of the Due Process Clause. *Id.* at 793; *see* FED. R. EVID. 403 (giving trial courts discretion to exclude evidence where its probative value is substantially outweighed by its prejudicial effect).

278. *See, e.g.*, Perry v. New Hampshire, 132 S. Ct. 716, 728–30 (2012) (stating that the "potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair") .

279. *See* Jennifer E. Laurin, *Still Convicting the Innocent*, 90 TEX. L. REV. 1473, 1500 (2012) (book review) ("[A]djudication can serve only as a 'backstop' accompanying direct reform of the primarily investigative practices that generate error . . . ."); *see also* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 776 (2012) (arguing that judicially imposed constitutional restraints are inadequate to regulate law enforcement conduct); Schulhofer, *supra*

to some of the insights of recent innocentric scholarship and the social science on compulsion, memory, decisionmaking, and even the tunnel vision that investigators and prosecutors can experience. Several jurisdictions, for example, have established conviction integrity units in recent years to review potential wrongful convictions. [280] Those reviews have in turn informed investigative and prosecutorial tactics in current cases.[281]

As Dan Simon has explained, interrogations are "the most overtly adversarial part of the criminal investigation, and thus also the most inimical to the portrayal of the police's work as an impartial and objective search for truth."[282] Indeed, Richard Leo writes that the "entire interrogation process is carefully staged to hide the fact that police interrogators are the suspect's adversary."[283] Leo goes on to describe the process of police interrogation as "firmly rooted in fraud."[284] This Article suggests that there is a more subtle way in which interrogations relate to fraud, and that is in the production of inaccurate statements that do not originate with the suspect. False confessions produce compelling evidence but yield no information. The process of adjusting the adversarial orientation of police at critical junctures where inaccuracy arises is thus essential, but also most likely to come from within the executive branch rather than in response to judicial requirements.

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note 65, at 892 ("One can fairly question whether *anything* the Court might do in this area would change the underlying social and political realities very much."); Simon, *supra* note 153, at 453 ("Given the benefit of minimizing the incidence of error from the start, the criminal law debate has much to gain by shifting its attention from the courtroom to the police station, and by looking beyond constitutional protections and procedural rights toward the adequacy of the practices by which the evidence is produced."). *But see* Donald A. Dripps, *Constitutional Theory for Criminal Procedure:* Dickerson*,* Miranda*, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 45–46 (2001) ("[S]o long as the vast bulk of police and prosecutorial power targets the relatively powerless (and when will that ever be otherwise?), criminal procedure rules that limit public power will come from the courts or they will come from nowhere.").

280. *See, e.g.*, Spencer S. Hsu, *D.C. Prosecutors Create Unit to Find Wrongful Convictions*, WASH. POST (Sept. 11, 2014), http://www.washingtonpost.com/local/crime/dc-prosecutors-create-unit-to-find-wrongful-convictions/2014/09/11/91a3722c-39da-11e4-bdfb-de4104544a37_story.html [http://perma.cc/9EUJ-GE8W].

281. *See generally* CTR. FOR PROSECUTOR INTEGRITY, CONVICTION INTEGRITY UNITS: VANGUARD OF CRIMINAL JUSTICE REFORM (2014), http://www.prosecutorintegrity.org/wp-content/uploads/2014/12/Conviction-Integrity-Units.pdf [http://perma.cc/K8FX-TADA].

282. SIMON, IN DOUBT, *supra* note 39, at 132.

283. LEO, *supra* note 237, at 25.

284. *Id.*

1. *Observing Silence*. Perhaps the most frequently advocated reform to interrogations has been to record them.[285] In May 2014, the Justice Department changed its longstanding policy against recording and established a presumption that the Federal Bureau of Investigation, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and the United States Marshals Service will electronically record custodial interviews.[286] Even before the change in federal policy, many state and local jurisdictions had adopted mandatory recording.[287] One cannot hear silence, but in many cases it will now be visible. Increasing use of recorded interrogations permits evaluation of what took place between police and a suspect while silence was maintained and at the time it was broken.[288]

Ensuring a rich and accurate record of interrogations can both prevent coercive breaches of silence and expose them to more precise interpretation. Video evidence can support or refute the government's claim that a suspect reacted to a guilt-assuming question in a telling, albeit nonverbal, way. For instance, Genovevo Salinas's interrogation was not recorded, and consequently it is

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285. *See* Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1128–30 (2005). Police officers who have actual experience of using recorded interrogations "enthusiastically support this practice." *Id.* at 1128.

286. Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice to the Assoc. Att'y Gen, U.S. Dep't of Justice, on Policy Concerning Electronic Recording of Statements (May 12, 2014), http://s3.documentcloud.org/documents/1165406/recording-policy.pdf [http://perma.cc/PK9M-TPGC]; *see also* Michael S. Schmidt, *In Policy Change, Justice Dept. to Require Recording of Interrogations*, N.Y. TIMES, May 22, 2014, at A14 .

287. *Compare* State v. Barnett, 789 A.2d 629, 632 (N.H. 2001) ("The police need not tape the administration of a defendant's *Miranda* rights or the defendant's subsequent waiver of those rights."), *with* State v. Scales, 518 N.W. 2d 587, 592 (Minn. 1994) ("[A]ll custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."). Many police departments voluntarily record interrogations as well. *See, e.g.*, Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 26 (2010).

288. *See* Leo et al., *supra* note 150, at 530 ("Judges can determine whether the critical details of the crime contained in the confession originated in the mind of the suspect or were suggested to the suspect by the interrogators, either inadvertently or intentionally, only by seeing or hearing what happened during the interrogation."). Similar intuitions about the importance of seeing an exchange with law enforcement in order to increase accountability have inspired calls for increased use of police body cameras in the wake of the unrecorded encounter that caused the death of Michael Brown in Ferguson, Missouri. *See, e.g.*, *Require All State, County and Local Police to Wear a Camera*, THE WHITE HOUSE (Aug. 13, 2014), https://petitions.whitehouse.gov/petition/mike-brown-law-requires-all-state-county-and-local-police-wear-camera [http://perma.cc/J7UQ-D4VZ].

difficult to say whether he indeed appeared uncomfortable when asked about the shotgun. As the officer who took his statement testified at trial, "[I]t's been a long time ago and there's a lot of details about this case and many other cases in between that."[289] Video footage can also expose the subtle coercion that often leads vulnerable suspects to confess falsely. The 2011 dismissal of charges against Nga Truong—who had been imprisoned for three years awaiting trial for the murder of her infant son—came about only after a judge viewed the recorded interrogation that provided the sole evidence against her, an encounter in which she sobbed for two hours in the face of relentless accusatory questioning, threats, and promises before finally "admitting" to the killing.[290]

Recording also has the advantage of revealing what may be inadvertent confession contamination. In most of the false confessions linked to wrongful convictions to date, nonpublic details that validated the confessions were transmitted to the suspects by law enforcement.[291] Both what the suspect intended by her silence, and the external noise that intruded on it before she made any statement, become visible through recording. If recording is automatic rather than selective, a complete and continuous documentation of the events and sounds from the moment the suspect enters the interrogation room, and an account that includes the perspectives of both officer and suspect,[292] then it can be a valuable diagnostic tool for the problem of government-created evidence. It can show not just the content of the statement produced but also the context of its production.[293]

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289. Joint Appendix at 10, Salinas v. Texas, 133 S. Ct. 2174 (2013) (No. 12-246).

290. For the video itself and details on the case, see David Boeri, *How A Teen's Coerced Confession Set Her Free*, NPR (Dec. 30, 2011, 3:23 PM), http://www.npr.org /2012/01/02/144489360/how-a-teens-coerced-confession-set-her-free [http://perma.cc/P3AV-D8RE].

291. *See, e.g.*, Garrett, *supra* note 120, at 1068–74 (discussing five cases in which law enforcement either directly or inadvertently supplied non-public details in false confessions).

292. *See* Drizin & Leo, *supra* note 173, at 997 n.681 (reporting that only two of the 125 false confession cases in their study involved interrogations that had been recorded in their entirety); Kassin et al., *supra* note 287, at 25 ("[A]ll custodial interviews and interrogations of felony suspects should be videotaped in their entirety and with a camera angle that focuses equally on the suspect and interrogator." (emphasis omitted)); *see also* G. Daniel Lassiter, Andrew L. Geers, Ian M. Handley, Paul E. Weiland & Patrick J. Munhall, *Videotaped Interrogations and Confessions: A Simple Change in Camera Perspective Alters Verdicts in Simulated Trials*, 87 J. APPLIED PSYCHOL. 867, 867–69 (2002) (noting that videotaping alone is not a technological fix for contaminated confessions).

293. *See* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88

Other recent reform proposals similarly focus on ensuring that a suspect's words and law enforcement's contributions can be distinguished. Commentators have suggested, for example, interrogations involving questioners other than the investigating detectives to minimize "false or superimposed narratives,"[294] and formal application to courts for interviews conducted in the presence of magistrates.[295] Scholars have also drawn attention to potential structural changes in interrogations—including techniques like cognitive interviews, conversation management, and reverse-recall questioning—that are designed to preserve an investigative, information-seeking stance and prevent the contamination of confessions with nonpublic facts.[296]

2. *Timing Silence*. What might be the simplest approach to protecting silence, however, has received comparatively little attention: limiting the length of interrogations. Reconsidering timing might ensure that suspects who have silently expressed the desire to be left alone can achieve separation, and in turn prevent the placement of words in their mouths. Duration of confessions is one of the primary risk factors for a false confession, and another is the

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J. CRIM. L. & CRIMINOLOGY 429, 494 (1998) (stating that recordings can assist the determination of voluntariness by revealing when a confession is "internally inconsistent, is contradicted by some of the case facts, or was elicited by coercive methods or from highly suggestible individuals").

294. Coughlin, *supra* note 70, at 1660; *see* SIMON, IN DOUBT, *supra* note 39, at 137 (reporting that "simulated interrogators who were led to believe (fictitiously) that the suspect was guilty were more inclined to ask guilt-presumptive questions, to exert stronger pressure on the suspect, and to use a wider variety of techniques to induce a confession, including the presentation of false evidence and promises of leniency").

295. Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 898–900 (1995); *see also* SEIDMAN, *supra* note 32, at 116 ("Trading formal, carefully regulated contempt proceedings for largely unregulated, treacherous, and abusive station house interrogation is not an obvious loss for civil liberties."); Alschuler, *supra* note 59, at 2667–69 (agreeing that magistrate interrogation could be preferable, but only with unsworn suspects who do not face sanctions for failing to answer); *id.* at 2669 (noting that a list of endorsements for this "formalized" interrogation idea "reads like an honor role of the legal profession" (quoting Lakeside v. Oregon, 435 U.S. 333, 345 n.5 (1978) (Stevens, J., dissenting))).

296. *See, e.g.*, SIMON, IN DOUBT, *supra* note 39, at 140–41 (describing the "PEACE" method of interrogation currently used in the United Kingdom). "Cognitive Interviews," a protocol generally used with cooperative witnesses, are an attempt to develop detailed accounts from the witness's own memory untainted by inaccuracies contributed by the interviewer. *Id.* at 118. "Conversation Management," intended for uncooperative interviewees, also requires the investigator to play a "largely passive and facilitative role," encourage the suspect to talk, and collect information from the suspect herself. *Id.* at 141.

interrogator's conviction that the suspect is guilty.[297] Better understanding both the fragility and the interactive nature of silence exposes some of the reasons why. Moreover, a clearer focus on the passage of time in the interrogation room may be the reform proposal least likely to interfere with convictions of the guilty and most likely to reduce the risk of wrongful convictions. A suspect who first speaks after a prolonged interrogation may develop a desire to cooperate, or may just be ground down by the questioning technique, and law enforcement has not demonstrated the consistent ability to sort out which is which.

"Speech acts" like promises have significance once uttered because they do something as soon as the words are said.[298] Silence has sufficient content to "do" something as well. The communicative intent of silence merits interrogators' attention, and the action of staying silent in the face of prolonged questioning at some point should have the same force as the words used to invoke rights. Maintained over time, silence is "very, very powerful"[299] outside of interrogations, and should do similar work in interactions with law enforcement. Indeed, time matters a great deal to the meaning of silence.[300] Brief silence during questioning may amount to a conversational pause, but extended, effortful silence warrants some protective space. Staying silent guards against being made to "recall" something entirely new or state complex facts in a compelling but misleading narrative. There is more to this protection than the opportunity to keep quiet; it requires freedom from extended or persistent questioning as well.

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297. *See* GARRETT, *supra* note 16, at 137, 140 (listing the interrogator's "initial belief," the "scope and intensity" of interrogation techniques, and the '"duration of the interrogation" as factors increasing the likelihood of obtaining false statements). A recent study concerning the low threshold that police have for concluding that the suspects they encounter are guilty addressed the significance of officers' punitive preferences when it comes to applying a standard like probable cause. *See* Richard H. McAdams, Dhammika Dharmapala & Nuno Garoupa, *The Law of Police*, 82 U. CHI. L. REV. 135, 148 (2015). Similarly, in the interrogation room, questioners' assumptions about guilty narratives can distort truth-seeking.

298. *See generally* J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (1975) (introducing the concept of a performative utterance).

299. Kennedy, *supra* note 18, at C1 (quoting Daniel Moquay's comment on Yves Klein's silent symphony and its demonstration that silence communicates).

300. John Cage, for example, explained that duration was the most fundamental characteristic of music to him. "Silence," he wrote, "cannot be heard in terms of pitch or harmony: It is heard in terms of time length." KYLE GANN, *supra* note 14, at 80.

Suspects endure lengthy interrogations and then suffer wrongful convictions all too often.[301] This can occur either because wholly false confessions are made, or because partially true but incomplete and inaccurate statements sidetrack investigators. Even when a suspect stays silent in the face of questioning, law enforcement can fill the space with a guilt-presuming narrative, leading questions, and nonpublic details of the crime. If that approach then yields a false statement, it will in turn produce a wrongful conviction about 80 percent of the time.[302] One study concluded that the median length of interrogations that contributed to wrongful convictions is twelve hours.[303] The data now available on silent innocents and tainted confessions provides new support for proposals such as a six-hour upper limit.[304] Certainly, a suspect who remains silent for that length of time, or even less, has already made the most accurate contribution to the investigative process he is likely to offer. And in the event that a suspect later determines he would like to engage with law enforcement after all, the case law already contains a mechanism for reinitiating contact after time has passed free from questioning.[305] Suspects could also be advised, after maintaining silence for some period of time like three hours, that their continued silence will mandate an end to the encounter.

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301. *See* SIMON, IN DOUBT, *supra* note 39, at 134 (relating the experience of Byron Halsey, who was wrongfully convicted and served nineteen years in prison after confessing to killing his two children because he "just wanted the cops to leave [him] alone" after thirty hours of interrogation); Garrett, *supra* note 8, at 402 (reporting that twenty-five of the twenty-six DNA exonerations over the past five years involving false confessions had interrogations that lasted from three to twenty-seven hours).

302. Leo, *supra* note 125, at 211.

303. Drizin & Leo, *supra* note 173, at 948. Seventeen-year-old Terrill Swift, for example, was interrogated for twelve hours as a suspect in a 1994 Chicago rape and murder. His false statements were the primary—indeed, the only—evidence supporting his conviction, and he has explained that several hours into the questioning "terror and exhaustion" prompted him to repeat what he thought police wanted to hear. He has been exonerated by DNA evidence after spending seventeen years in jail. *See* Goode, *supra* note 223.

304. White, *supra* note 139, at 145 n.257; *see also* Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 37 (2015) ("In view of the desirability of drawing a line, it seems reasonable to say that confessions elicited after more than six hours of continuous interrogation should be deemed per se involuntary."). The Court's only upper limit to date comes from a case recognizing a 36-hour interrogation as coercive. Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944).

305. Michigan v. Mosley, 423 U.S. 96, 102–03 (1975) (concluding that the assertion of Fifth Amendment rights does not give rise to "a *per se* proscription of indefinite duration upon any further questioning").

3. *Silence and Notice*. Suspects might also receive more ample notice of what the law requires if they indeed intend to claim the right to silence. The standard *Miranda* warnings could include the information that interrogation will continue absent an affirmative request to be left alone.[306] The Supreme Court has stated that no particular script is required for the warnings,[307] and thus they could be modified without judicial action. Law enforcement agencies are free to craft a colloquy that ensures that suspects understand that they must verbally communicate their decision to exercise their rights in order to stop the questioning.[308] A corollary warning that choosing silence will not give rise to negative inferences would also comport with the case law on post-*Miranda* invocation of the privilege.[309] A recent study concluded that only 2 percent of police departments offer supplemental warnings along these lines.[310] But reframing silence as potentially reliability-enhancing could increase that number.

Furthermore, enhanced notice could respond to emerging concerns about our adversarial system of criminal justice taking an accusatorial turn too far upstream,[311] where investigators should better distinguish between fact-finding and advocacy. A focus on the discourse and timing of warnings could put law enforcement agents themselves on notice of the perils of participating in the production of

306. *See* Davis v. United States, 512 U.S. 452, 469 (1994) (Souter, J., concurring in the judgment) (discussing the role of warnings in ensuring the "*right to choose* between speech and silence" (quoting Connecticut v. Barrett, 479 U.S. 523, 528 (1987))).

307. Florida v. Powell, 559 U.S. 50, 62 (2010) (concluding that warnings that "reasonably convey[]" a suspect's rights satisfy *Miranda*).

308. *See* Richard Rogers, Kimberly S. Harrison, Daniel W. Shuman, Kenneth W. Sewell & Lisa L. Hazelwood, *An Analysis of* Miranda *Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177, 178 (2007) (arguing in favor of "allow[ing] individual jurisdictions to establish their specific wording so long as they convey the general requirements for warnings"); *see also* Laurent Sacharoff, Miranda*'s Hidden Right*, 63 ALA. L. REV. 535, 584 (2012) (discussing a proposed additional warning advising suspects that they have the right to terminate interrogation at any time by expressly invoking their rights).

309. *See* Hurd v. Terhune, 619 F.3d 1080, 1087 (9th Cir. 2010) (holding that suspects may elect to be silent with regard to particular questions during an interrogation without facing impeachment for that selective silence). On reforming the warnings to convey to suspects that they will not be penalized for staying silent, see Mark A. Godsey, *Reformulating the* Miranda *Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 783–84 (2006).

310. Rogers et al., *supra* note 308, at 186.

311. *Cf.* David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1704 (2009) (concluding that contrasting adversarial and inquisitorial processes "has not proven useful in American criminal procedure . . . because the 'inquisitorial system' is so ill-defined" and elements of both models coexist in the criminal justice system).

statements. If they adjusted the length and nature of questioning in the face of silence, they would get less material, but the material they did obtain would be worth more.[312]

The discussion here of potential reforms focuses on those that protect silence itself, and on reconceptualizing silence as something that can be beneficial to the criminal justice process. Greater respect for silence can prevent both coerced statements and false ones, and it can improve the information conveyed in an interview when a suspect does choose to speak by creating a boundary around the words that are her own. Awareness of the nature and function of silence thus could increase the signals and reduce the noise in interrogations.

CONCLUSION

Accuracy is, or ought to be, the overriding goal of the criminal justice process, and recent empirical developments demonstrate that error in interrogations decreases the reliability of outcomes. Renewed and reframed protections around silence could mitigate those errors. Interrogation regulation should leave space to observe suspects' attempts to separate from questioners, and should leverage that opportunity to avert co-authored confessions. Making space for silence could shield the context of confessions and guard against abusive interrogation techniques. Noticing where and how silence is breached could also improve the content of statements by revealing instances of government contamination and manipulation.

Theorizing what silence means, accomplishes, and defends against requires an understanding of its dynamic nature. John Cage's work and related meditations on silence call attention to the way in which the space around silence fills with sound from other sources—some intentional and some unintentional. Similarly, silence forms a necessary boundary between a suspect's own statements and information that instead stems from government sources in interrogations. Listening for silence, and scrutinizing the government speech surrounding silence, could thus be a mechanism for evaluating a statement's reliability.

This discussion of the current status and significance of silence suggests many further avenues of inquiry. It begins, however, to

312. Indeed, preliminary assessments of recent reforms to questioning practices in the United Kingdom indicate that one can eliminate many risk factors for false confessions without changing the rate at which confessions in general are obtained. *See, e.g.*, Kassin et al., *supra* note 287, at 27.

demonstrate that the link between silence and reliability is closer than previously thought, and a useful guidepost for future decisions about how to regard silence in interrogations. That the innocent profit from silence is no longer in any doubt, and it is time to move the debate beyond the costs and benefits of silence to better means of implementing its protections.