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Miranda's Truth: The Importance of Adversarial Testing and Dignity in Confession Law

Meghan J. Ryan
Southern Methodist University, Dedman School of Law

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I. INTRODUCTION

In 1966, the Supreme Court decided the landmark case of *Miranda v. Arizona*.[1] The case involved the consolidation of four cases—*State v. Miranda*,[2] *People v. Vignera*,[3] *Westover v. United States*,[4] and *People v. Stewart*[5]—in which the defendants signed written confessions during police interrogations but were not informed of their rights not to incriminate themselves and to retain lawyers.[6] Each of the defendants was convicted after the written confession was entered into evidence at trial.[7] In a 5–4 decision, the Supreme Court reversed these convictions,[8] determining that the confession of an accused that was obtained during custodial interrogation must be excluded from trial unless sufficient procedural safeguards were taken to protect the accused's right against self-incrimination.[9] In particular, a defendant should be apprised "that he has a right to remain silent, that any statement

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1. Miranda v. Arizona, 384 U.S. 436 (1966).
2. State v. Miranda, 401 P.2d 721 (Ariz. 1965).
3. People v. Vignera, 207 N.E.2d 527 (N.Y. 1965).
4. Westover v. United States, 342 F.2d 684 (9th Cir. 1965).
5. People v. Stewart, 400 P.2d 97 (Cal. 1965).
6. *See Miranda*, 384 U.S. at 491–99. In the *Stewart* case, the record was actually silent about whether the defendant had been apprised of his rights. *See id.* at 497–99. As the Supreme Court explained:

> Nothing in the record specifically indicates whether Stewart was or was not advised of his right to remain silent or his right to counsel. In a number of instances, however, the interrogating officers were asked to recount everything that was said during the interrogations. None indicated that Stewart was ever advised of his rights.

Id. at 497–98. The Court concluded that, on such a silent record, it would "not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded." *Id.* at 498.

7. *See id.* at 491–99.
8. *See id.* (reversing the Arizona Supreme Court in *Miranda v. Arizona*, reversing the New York Court of Appeals in *Vignera v. New York*, reversing the U.S. Court of Appeals for the Ninth Circuit in *Westover v. United States*, and affirming the California Supreme Court's reversal of conviction in *California v. Stewart*).
9. *See id.* at 444.

he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[10]

The *Miranda* opinion is explicitly based on the Fifth Amendment right that one cannot be compelled to be a witness against oneself in a criminal case.[11] But *Miranda* is really rooted in a constellation of constitutional rights that includes not only the right not to incriminate oneself but also the rights to the assistance of counsel and due process.[12] In fact, assistance of counsel is central to *Miranda*, and, as the Court has defined the boundaries of *Miranda* in subsequent cases, its analysis seems to hew quite closely to its due process coercion analysis that predated *Miranda*.[13]

The Court has interpreted this constellation of constitutional rights in a number of ways. And much of the Court's reasoning related to these decisions revolve around at least four constitutional values: truth-finding, adversarial testing, human dignity, and equality. The *Miranda* decision highlights the importance of adversarial testing and dignity. The Court stated that the then-existing custodial interrogation environment was "destructive of human dignity"[14] and that "the privilege against self-incrimination [is the] essential mainstay of our adversary system."[15] "To maintain a 'fair state-individual balance,'"[16] the Court explained, and to preserve the privilege against self-incrimination, certain warnings ought to be given to the defendant undergoing custodial interrogation.

Despite *Miranda*'s focus on the values of adversarial testing and human dignity, many modern discussions of confession law focus instead on the value of truth-finding. The concern is that modern interrogation methods—which still make use of questionable psychological techniques—do not further this important goal. Indeed, false confessions are one of the leading causes of wrongful conviction.[17] This focus

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10. *Id.* The Court suggested that other procedural safeguards could be taken instead, but these warnings specifically articulated in the *Miranda* opinion have become the standard way by which to protect the right against self-incrimination. *See id.* (stating that the above-articulated warnings should be given "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it").

11. *See id.* at 439, 457–58 ("The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself."); *see also* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

12. *See Miranda*, 384 U.S. at 442, 465–66, 469–95 ("[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today."); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defence.").

13. *See Miranda*, 384 U.S. at 442, 444–45, 469; George C. Thomas III, *Separated at Birth but Siblings Nonetheless:* Miranda *and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1083 (2001) ("Courts have transformed *Miranda* from a case about the Fifth Amendment privilege against self incrimination to one about due process.").

14. *Miranda*, 384 U.S. at 457.

15. *Id.* at 460.

16. *Id.*

17. *See* Meghan J. Ryan & John Adams, *Cultivating Judgment on the Tools of Wrongful Conviction*, 68 SMU L. REV. 1073, 1075 (2015); UNIV. OF MICH., *The National Registry of*

on truth is important, but it is also important that the truth-finding goal is not overstated and does not eclipse other important constitutional values like adversarial testing and human dignity, which take center stage in *Miranda*.

II. THE EBB AND FLOW OF *MIRANDA*

Before *Miranda* was decided in 1966, the admissibility of confessions was generally governed by the Due Process Clauses of the Fifth and Fourteenth Amendments.[18] Ordinarily, a confession was admissible so long as, under the totality of the circumstances, it was not coerced—it was voluntarily given.[19] For example, in the 1936 case of *Brown v. Mississippi*,[20] the Court stated that using physical force to obtain a confession—such as by severely whipping the defendant—was coercive and thus violated the Due Process Clause.[21] In 1944, in *Ashcraft v. Tennessee*,[22] the Court found that, even if the police did not use physical force to obtain the confession, but instead used otherwise coercive methods like depriving the suspect of sleep, there was a Due Process Clause violation and the confession had to be excluded.[23] In *Escobedo v. Illinois*[24] in 1964, the Court moved a step closer to the *Miranda* ruling by invoking the Sixth Amendment's Assistance-of-Counsel provision in the confession context and holding that, when a defendant asked for his lawyer and the police did not abide by this request, the suspect's subsequent confession was inadmissible in court.[25]

Exonerations, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Dec. 9, 2016).

18. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."); Oregon v. Elstad, 470 U.S. 298, 304 (1985) ("Prior to *Miranda*, the admissibility of an accused's in-custody statements was judged solely by whether they were 'voluntary' within the meaning of the Due Process Clause.").

19. *See* Haynes v. Washington, 373 U.S. 503, 515–17 (1963); *see also Miranda*, 384 U.S. at 506–08 (Harlan, J., dissenting) (summarizing the Court's due process jurisprudence in the context of confessions before *Miranda* was decided).

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

21. *See id.* at 286 ("It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.").

22. Ashcraft v. Tennessee, 322 U.S. 143 (1944).

23. *See id.* at 154 (stating that the Court cannot, "consistently with Constitutional due process of law, hold voluntary a confession where" the suspect was continuously interrogated "for thirty-six hours without rest or sleep in an effort to extract a 'voluntary' confession").

24. Escobedo v. Illinois, 378 U.S. 478 (1964).

25. *See id.* at 490–91 (holding that the accused was denied his Sixth Amendment right to counsel because the investigation had begun focusing on the defendant as a suspect—the defendant "ha[d] been taken into police custody, the police [had] carr[ied] out a process of interrogations that len[t] itself to eliciting incriminating statements," the defendant "ha[d] requested and been denied an opportunity to consult with his lawyer, and the police ha[d] not effectively warned him of his absolute constitutional right to remain silent"); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."); Miranda v. Arizona, 384 U.S. 436, 440 (1966) (citing *Escobedo*).

The Court's decision in *Miranda* was groundbreaking. After *Miranda*, police departments across the country were forced to begin warning suspects who were interrogated while in custody that they had the right to remain silent and the right to an attorney.[26] There has been significant debate about the full effects of *Miranda*, such as whether the decision has impaired police officers' and prosecutors' abilities to find and convict offenders and whether any such drawbacks are worth the values espoused in *Miranda*.[27] Regardless, this right to a *Miranda* warning has become perhaps the most well-known constitutional right.[28] Most American adults can easily recite the *Miranda* warnings, probably because of their constant repetition on police procedural television shows.[29]

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26. Of course, because *Miranda* is a rule enforced at the admissibility stage of trial, some police officers still neglect to mirandize suspects and instead just forgo admission of any resulting confessions at trial. *See* Steven D. Clymer, *Are Police Free to Disregard* Miranda, 112 YALE L.J. 447, 448 (2002) (observing that "one can find passages in both *Miranda* and its progeny that appear to command police compliance with the *Miranda* rules and conflicting passages that describe those rules in terms of their effect on admissibility" but stating that "[o]nly the latter passages cohere with the language of the privilege, immunity doctrine, the penalty cases, the Court's explicit descriptions of the privilege as a 'trial right,' the steps that the Court took to travel from the privilege to the *Miranda* rules, and the lower courts' § 1983 decisions"); Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. L. REV. 1121, 1122 (2001) (stating that Supreme Court decisions that followed in *Miranda*'s wake have led to a "'new vision' of *Miranda*" that the seminal case "sets forth a nonconstitutional rule of evidence that need only be followed when officers seek a statement to introduce in the prosecution's case-in-chief at trial"); *see also Custodial Interrogations*, 34 GEO. L.J. ANN. REV. CRIM. PROC. 158, 166 (2005) ("The Court has limited the remedy for a *Miranda* violation to the exclusion of testimonial evidence obtained in violation of *Miranda*."); *supra* note 10 (noting that the *Miranda* Court left room for other procedural safeguards to be taken instead of what has become known as "mirandizing" the defendant).

27. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1060, 1107–32 (arguing that "*Miranda* has in fact handcuffed the cops and that society should begin to explore other, less costly ways of regulating police interrogation"); Stephen J. Schulhofer, Miranda, Dickerson, *and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941, 943 (2001) ("*Miranda* probably prevents some confessions, but it also helps the police obtain others. The great weight of the evidence suggests that the *Miranda* system, as currently administered, causes no net reduction in confession rates, clearance rates, or conviction rates."); George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona*: "Embedded" in Our National Culture?*, 29 CRIME & JUST. 203, 207–08, 254–56 (2002) ("[A]s it now exists, the *Miranda* rule does not seriously obstruct law enforcement interests. Indeed, in operation *Miranda* might further law enforcement interests more than it does the interests of suspects.").

28. *See* Dickerson v. United States, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."); Clymer, *supra* note 26, at 449 ("*Miranda v. Arizona* is the Supreme Court's best-known criminal justice decision."); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 627 (1996) (stating that *Miranda* is "possibly the most famous court case in American history"); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 110 (1998) ("*Miranda v. Arizona* may be the United States Supreme Court's best-known decision."). *But see infra* text accompanying notes 50–56 (explaining that there have been real questions about whether *Miranda* warnings are actually a constitutional right).

29. *See* Clymer, *supra* note 26, at 449 (suggesting that most Americans' understandings of *Miranda* are derived from "police television programs, movies, or books"); Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1000 (2001) ("The *Miranda* warnings themselves have become so well-known through the media of

Even though the Court took a substantial leap forward in *Miranda*, it tried to downplay the case's groundbreaking nature. The Court argued that the decision was "not an innovation in [the Court's] jurisprudence, but [was instead] an application of principles long recognized and applied in other settings."[30] Although this seems like a mischaracterization of the decision, one can understand why the majority painted the decision as no constitutional innovation: Many believe that the Court should strive to be consistent in its jurisprudence; it ought to apply the law and not legislate from the bench. As Chief Justice Roberts famously explained in his senate confirmation hearings: "Judges are like umpires. Umpires don't make the rules; they apply them."[31] The *Miranda* decision arguably went far beyond calling balls and strikes, so the Court sought to deemphasize the revolutionary nature of the decision.[32] Characterizing the

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television that most people recognize them immediately."); Frederick Schauer, *The* Miranda *Warning*, 88 WASH. L. REV. 155, 155 (2013) ("Largely as a consequence of American television and movies, *Miranda v. Arizona* may well be the most famous appellate case in the world.").

30. *Miranda*, 384 U.S. at 442.

31. Judge John Roberts, *Transcript: Day One of the Roberts Hearings*, WASH. POST, Sept. 13, 2005,http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300693.html. Roberts elaborated:

> Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them.
>
> The role of an umpire and a judge is critical. They make sure everybody plays by the rules.
>
> But it is a limited role. Nobody ever went to a ball game to see the umpire.
>
> Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath.
>
> And judges have to have the modesty to be open in the decisional process to the considered views of their colleagues on the bench.

Id. Justice Roberts has been roundly criticized for oversimplifying the role of a judge. *See, e.g.*, *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before Comm. on the Judiciary of the U.S. Senate*, 111th Cong. 202–03 (2010) (statement of Elena Kagan, Solicitor General of the United States) (suggesting that the umpire metaphor is oversimplified); CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 21 (Princeton Univ. Press 2007) ("Judges cannot apply the [law] in the way that umpires apply the definition of a strike zone."); Anthony R. Reeves, *Do Judges Have an Obligation to Enforce the Law?: Moral Responsibility and Judicial-Reasoning*, 29 LAW & PHIL. 159, 161 (2009) ("The 'umpire model' grossly oversimplifies the nature of responsible judicial reasoning and distorts the moral position of the judge, particularly in cases where a polity is at risk of committing a serious moral wrong."); *cf.* Bruce Weber, *Umpires v. Judges* , N.Y. TIMES, July 11, 2009, http://www.nytimes.com/2009/07/12/weekinreview/12weber.html?_r=0 ("It is likely that in invoking the umpire metaphor, Chief Justice Roberts was consciously oversimplifying his judicial philosophy.").

32. Of course Justice Roberts's view of the judge as simply calling balls and strikes is an oversimplification of judges' roles. *See supra* note 31. Arguably, the *Miranda* decision could be categorized as judicial activism, though. *See, e.g.*, John H. Blume et. al., *Education and Interrogation: Comparing* Brown *and* Miranda, 90 CORNELL L. REV. 321, 337 (2005) (suggesting

decision as no innovation in the Court's jurisprudence was important to maintaining the Court's legitimacy.

Despite the effort the Court took to justify the decision, the Court has been chipping away at *Miranda* in recent decades. For example, in *Berkemer v. McCarty*,[33] the Court cut back on the custody requirement of *Miranda* by finding that a drunk driver was not in custody when he was pulled over and questioned by a state highway patrol officer.[34] The Court has also suggested that *Terry* stops are not custodial and thus *Miranda* does not apply in those instances.[35] The Court has further narrowed *Miranda* through the scope of the interrogation requirement. In *Pennsylvania v. Muniz*,[36] for example, a plurality of the Court explained that certain questions—those related to "routine booking information" like name, address, height, weight, and eye color, which are used for identification purposes—fall outside of *Miranda*'s scope.[37]

The Court has continued to narrow *Miranda* in other ways as well. For example, in *Harris v. New York*,[38] the Court held that un-mirandized statements may be used for impeachment purposes:[39] "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense . . . ."[40] In *New York v. Quarles*,[41] the Court held that there is a public safety exception to

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that *Miranda* is a "prime example[] of judicial activism"); Edwin Meese III, *Challenges Facing Our System of Justice*, 3 AVE MARIA L. REV. 303, 312 (2005) (stating that *Miranda* "changed entirely the requirements imposed on states to conform to a federal standard of criminal procedure that was not at the time required by the Constitution" and referring to this as a result of "judicial activism").

33. Berkemer v. McCarty, 468 U.S. 420 (1984).

34. *See id.* at 441 ("[W]e find nothing in the record that indicates that respondent should have been given *Miranda* warnings at any point prior to the time Trooper Williams placed him under arrest. . . . [W]e reject the contention that the initial stop of respondent's car, by itself, rendered him 'in custody.'").

35. *See* Maryland v. Shatzer, 559 U.S. 98, 113 (2010) ("[T]he temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop does not constitute *Miranda* custody."); *Berkemer*, 468 U.S. at 440 (stating that the "nonthreatening character of detentions of this sort explains the absence of any suggestion in [the Court's] opinions that *Terry* stops are subject to the dictates of *Miranda*"). A "*Terry* stop," also known as a "stop and frisk," is "[a] police officer's brief detention, questioning, and search of a person for a concealed weapon when the officer reasonably suspects that the person has committed or is about to commit a crime." *Stop-and-Frisk*, BLACK'S LAW DICTIONARY (10th ed. 2014).

36. Pennsylvania v. Muniz, 496 U.S. 582 (1990).

37. *See id.* at 601 (noting a "'routine booking question' exception which exempts from *Miranda*'s coverage questions to secure the 'biographical data necessary to complete booking or pretrial services'").

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

39. *See id.* at 226 ("The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.").

40. *Id.*

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

Miranda:[42] When the objective purpose of law enforcement is to obtain information to safeguard the public rather than to elicit an incriminating statement from the suspect, *Miranda* does not apply;[43] instead, "a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[44] In *Oregon v. Elstad*,[45] the Court determined that the "fruits" of un-mirandized statements are admissible.[46] The Court explained that failure to provide *Miranda* warnings creates a *presumption* of due process compulsion, but, although this presumption is irrebuttable, mere failure to provide such warnings does not taint certain fruits of the confession—here a subsequent voluntary statement.[47] Otherwise, this would stretch the fabric of *Miranda* too far.[48] "[T]he primary criterion of admissibility" in this context, the Court elucidated, "remains the old due process voluntariness test."[49]

The limitations on *Miranda* have become so significant that in 2000, in the case of *Dickerson v. United States*,[50] there was a real question of whether *Miranda* is actually a rule of constitutional import.[51] Indeed, the Court has stated over the years that "[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself,"[52] that it is "prophylactic" in nature,[53] that a violation of *Miranda* does not involve "actual infringement of the suspect's constitutional rights,"[54] that "errors . . .

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42. *See id.* at 655–56 ("We hold that on these facts there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved.").

43. *See id.* at 657 ("We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.").

44. *Id.*

45. Oregon v. Elstad, 470 U.S. 298 (1985).

46. *See id.* at 307–09 ("[T]he Miranda presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted.").

47. *See id.*

48. *See id.* at 308–09.

49. *Id.* at 307–08 (internal quotations and alterations omitted).

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

51. *See generally id.* (examining whether *Miranda* constitutes "a constitutional decision of [the] Court"). After *Dickerson*, the Court continued to cut back on *Miranda*. *See, e.g.*, Howes v. Fields, 132 S. Ct. 1181, 1188–89 (2012) (suggesting in an opinion reversing a grant of habeas corpus that the Court's "decisions do not clearly establish that a prisoner is always in custody for purposes of *Miranda* whenever a prisoner is isolated from the general prison population and questioned about conduct outside the prison"); Chavez v. Martinez, 538 U.S. 760, 768–73 (2003) (holding that a suspect's confession elicited in violation of *Miranda* did not provide a basis for a civil action under 42 U.S.C. § 1983).

52. Oregon v. Elstad, 470 U.S. 298, 306 (1985).

53. New York v. Quarles, 467 U.S. 649, 654 (1984).

54. *Elstad*, 470 U.S. at 308 (stating that a *Miranda* violation is not an "actual infringement of . . . constitutional rights" in light of the Court's holding and reasoning in *Michigan v. Tucker*).

made by law enforcement officers in administering the prophylactic *Miranda* procedures . . . should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself,"[55] and that *Miranda*'s "procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected"—that they "were not intended to 'create a constitutional straightjacket' . . . but rather to provide practical reinforcement for the right."[56]

Considering all of these statements playing down the importance of *Miranda*, the breadth of the landmark decision seems to have narrowed. Indeed, as the Court has continued sketching the boundaries of *Miranda* over the years, it has arguably returned to something closer to a Due Process Clause coercion and voluntariness analysis.[57]

III. AN ARRAY OF CONSTITUTIONAL VALUES

Miranda is ordinarily considered a case premised on the Fifth Amendment right not to incriminate oneself.[58] Indeed, the *Miranda* Court stated that the case dealt with "the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment of the Constitution not to be compelled to incriminate himself."[59] Yet *Miranda* and its progeny, as well as an array of constitutional criminal procedure cases, rely on a *constellation* of constitutional provisions. *Miranda*, for example, relied not only on the Self-Incrimination Clause, but it was also built on the Due Process and Assistance-of-Counsel Clauses.[60] Its analysis was based on an earlier case—*Escobedo v. Illinois*[61]—which explicitly relied on both the Self-Incrimination Clause and the Assistance-of-Counsel Clause of the Sixth Amendment.[62] Further,

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55. *Id.* at 308–09.

56. Michigan v. Tucker, 417 U.S. 433, 444 (1974).

57. *See generally* Thomas, *supra* note 13, at 1083 (arguing that, "[w]hatever the *Miranda* majority contemplated, courts deciding *Miranda* issues after the Supreme Court's seminal case were "somewhat hostile" to *Miranda* and "have transformed *Miranda* from a case about the Fifth Amendment privilege against self incrimination to one about due process"); *see also* Susan R. Klein, Miranda*'s Exceptions in a Post-*Dickerson *World*, 91 J. CRIM. L. & CRIMINOLOGY 567, 568 (2001) (noting Professor Thomas's "key insight" that "*Miranda* has been effectively transformed . . . from a case that all but mandated defense attorney participation in custodial interrogations to dispel inherent compulsion, to a case about providing the minimal amount of notice to a defendant about his privilege against self-incrimination such that a court can uphold his confession as voluntary"); *supra* text accompanying notes 18–25 (summarizing the Court's due process test).

58. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

59. Miranda v. Arizona, 384 U.S. 436, 439 (1966).

60. *See id.* at 442, 469.

61. Escobedo v. Illinois, 378 U.S. 478 (1964).

62. *See Miranda*, 384 U.S. at 442 (explaining the basis for the Court's holding in *Escobedo*); *Escobedo*, 378 U.S. at 479, 488 (stating that the "critical question" in the case was whether there was a violation of the Sixth Amendment right to counsel and stating that "[o]ur Constitution . . .

the *Miranda* Court explained that, because "[t]he circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators"—a due process concern—"the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege."[63] The Court's general concerns about the police interrogation methods at play in *Miranda* mirror the Court's coercion concerns expressed in its due process cases.[64] As the dissenting Justices in *Miranda* pointed out, though, the methods were less extreme in *Miranda* than in cases in which the Court had previously found due process violations.[65] Still, the *Miranda* Court relied on both the Due Process and Assistance-of-Counsel Clauses in addition to the Self-Incrimination Clause. And the case is not unique in relying on an array of constitutional provisions. Beyond the constitutional provisions themselves, though, the Court regularly relies on at least four important constitutional criminal procedural values. These are the values of adversarial testing, truth-finding, dignity, and equality.

In many cases, including *Miranda*, the Court has discussed the importance of the adversarial system under this constellation of constitutional clauses. Adversarial testing is essential to ensuring a constitutionally fair trial, and pitting the government against the defendant is also thought to strengthen the reliability of the outcome at trial.[66] Perhaps the best examples of the Court relying on this adversarial-testing value are in the landmark right-to-counsel cases of *Gideon v. Wainwright*[67] and *Strickland v. Washington*.[68] In these cases, the Court referred to the fundamental fairness goal of providing a defendant with effective assistance of counsel. In *Gideon*, the Court found that the constitutional requirement of fairness entitles indigent defendants to have counsel appointed for them.[69] The Court explained: It is "an obvious truth" that, "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a

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strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination").

63. *Miranda*, 384 U.S. at 469; *see also supra* text accompanying notes 18–25 (laying out the Court's Due Process analysis).

64. *See Miranda*, 384 U.S. at 469; *see also supra* text accompanying notes 18–25 (laying out the Court's Due Process analysis).

65. *See Miranda*, 384 U.S. at 524–25 (Harlan, J., dissenting); *id.* at 535 (White, J., dissenting) ("If the rule announced today were truly based on a conclusion that all confessions resulting from custodial interrogation are coerced, then it would simply have no rational foundation.").

66. *See* Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964) (referring to "our fundamental values and most noble aspirations," which include "our sense of fair play which dictates a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load" (internal quotations omitted)). There is, however, some debate about whether the adversarial system is better at finding truth than an inquisitorial system. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 44 (5th ed. 2009).

67. Gideon v. Wainwright, 372 U.S. 335 (1963).

68. Strickland v. Washington, 466 U.S. 668 (1984).

69. *See Gideon*, 372 U.S. at 344–45.

lawyer, cannot be assured a fair trial unless counsel is provided for him."[70] In *Strickland*, the Court stated that the Sixth Amendment right to the assistance of counsel means a "right to the *effective* assistance of counsel."[71] The Court explained that the Due Process Clause guarantees the right to a fair trial and that the Assistance of Counsel Clause specifies some of the rights essential to such a fair trial.[72] This fairness guarantee includes subjecting evidence "to adversarial testing[,] . . . [and] [t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled."[73] Accordingly, if a criminal defendant's attorney provides ineffective assistance of counsel, and there is a reasonable probability that the result would have otherwise been different—that confidence in the verdict has been undermined—the defendant is entitled to a new trial.[74]

The Court similarly highlighted the importance of adversarial testing in *Crane v. Kentucky*,[75] in which a unanimous Court examined whether the defendant's evidence about the "physical and psychological environment in which [his] confession was obtained" was admissible at trial.[76] The Court stated that, "[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, . . . the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."[77] Continuing on, the Court explained that excluding the type of evidence at issue would "deprive[] a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing."[78] To preserve this value of adversarial testing, the Court ruled that the evidence should have been admitted at trial.[79]

When assessing an issue under the constellation of criminal constitutional rights at play in *Miranda*, the Court has also focused on the value of truth-finding, indicating that proper outcomes in the criminal justice system—the conviction of the guilty and the acquittal of the innocent—is important. For

70. *Id.* at 344.
71. *Strickland*, 466 U.S. at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)).
72. *See id.* at 684–85 (emphasis added) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause . . . .").
73. *Id.* at 685.
74. *See id.* at 691–96.
75. Crane v. Kentucky, 476 U.S. 683 (1986).
76. *Id.* at 684.
77. *Id.* at 690.
78. *Id.* at 690–91.
79. *See id.* at 692.

example, in *Brady v. Maryland*,[80] the Court suggested that requiring the prosecution to turn over material exculpatory information to the defendant serves the truth-finding goal of the Due Process Clause. Through the lens of fairness, the Court explained that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair,"[81] and it is the prosecutor's job to achieve justice, not necessarily win the case.[82] The right outcome of trial—truth of guilt and innocence—is the goal rather than just convicting the defendant regardless of the evidence.[83] This value of truth-finding seemed to outweigh the adversarial-testing aspect of fairness here.

The Court was more explicit about the truth-finding goal of due process in its 1970 case of *Williams v. Florida*.[84] There, the Court rejected the defendant's argument that he should not have to comply with a state rule requiring him to provide pretrial notice of his alibi defense because it would deprive him of constitutional due process or a fair trial.[85] Responding to the allegation that the state rule was at odds with the game-like nature of the adversary system, the Court stated that "[t]he adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played."[86] Instead, the Court explained, the rule was "designed to enhance the search for truth in the criminal trial," and, "[g]iven the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate."[87] Although the Court found truth-finding to trump adversarial testing, this is not always the case,[88] and other values remain similarly important.

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80. Brady v. Maryland, 373 U.S. 83 (1963).

81. *Id.* at 87.

82. *See id.* at 87–88 & n.2.

83. LaFave et al. have distinguished truth-finding from "[m]inimizing [e]rroneous [c]onvictions." *See* LAFAVE ET AL., *supra* note 66, at 42–43, 46. They explained that, "[i]n its emphasis on reliable factfinding, the truthfinding goal seeks to ensure equally the accuracy of both guilty verdicts and acquittals." *Id.* at 46. In contrast, the value of "minimizing erroneous convictions" places a premium on "the accuracy of the guilty verdict," "reflect[ing] a desire to minimize the chance of convicting an innocent person even at the price of increasing the chance that a guilty person may escape conviction." *Id.*

84. Williams v. Florida, 399 U.S. 78 (1970).

85. *See id.* at 81. The state rule "require[d] a defendant, on written demand of the prosecuting attorney, to give notice in advance of trial if the defendant intend[ed] to claim an alibi, and to furnish the prosecuting attorney with information as to the place where he claim[ed] to have been and with the names and addresses of the alibi witnesses he intend[ed] to use." *Id.* at 79.

86. *Id.* at 82.

87. *Id.* at 81.

88. For example, although they would arguably serve the value of truth-finding, open-file discovery rules are not constitutionally mandated, and prudential limits on litigating claims alleging proof of actual innocence are routinely upheld. *See* Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2126 (2010) ("Open-file discovery clearly goes beyond what is required by either the constitution or ethical rules."); Don J. Degabrielle & Eliot F. Turner, *Ethics, Justice, and Prosecution*, 32 REV. LITIG. 279, 293 (2013) (asserting that "the Court has made clear that open-file discovery is not constitutionally required under *Brady*"); Ryan & Adams, *supra* note 17, at 1106–09 (noting limitations on collateral attacks).

The Court has also relied on the value of dignity in deciding important constitutional criminal procedure questions. In addition to the Court's reference to dignity in *Miranda*, the Court has discussed this value in several other cases. For example, the Court has said that the Sixth Amendment "right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense."[89] Expounding on this idea in *Indiana v. Edwards*,[90] the Court referred to a defendant's dignity in approving a higher competency standard for a defendant to represent himself.[91] It explained that a state may require a higher competency standard to represent oneself than simply the competency to stand trial because "a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel."[92] The Court was concerned that a defendant's self-representation could result in a humiliating spectacle rather than positively serve the defendant.[93] Further, it could result in an unfair trial.[94] Although the Court's conception of dignity may vary somewhat from case to case, it remains a significant factor in the determination of cases under this constellation of constitutional provisions.

Finally, the Court has looked at the value of equality. Equal treatment among various defendants is a value less frequently cited by the Court under these constitutional provisions, but the Court does occasionally invoke this consideration as well. The *Gideon* case, for example, emphasized the importance of "every defendant stand[ing] equal before the law."[95] This essential component of fairness, the Court explained, "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him" while a rich man is competently assisted by counsel.[96] Being treated equally under the law is essential and has a foothold alongside the values of adversarial testing, truth-finding, and dignity in the Court's analysis under the constellation of rights embodied in the Self-Incrimination, Assistance-of-Counsel, and Due Process Clauses of the Constitution.

89. McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984).

90. Indiana v. Edwards, 554 U.S. 164 (2008).

91. *See id.* at 176–77.

92. *Id.* at 176.

93. *See id.* (concluding that, "given the defendant's uncertain mental state," self-representation at trial could result in a "spectacle" that is "at least as likely to prove humiliating as ennobling"). The *Edwards* Court's conception of dignity is arguably at odds with the autonomy-based conception of dignity, which could have supported allowing the defendant to represent himself without meeting this higher state threshold of competence.

94. *See id.* at 176–77.

95. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

96. *Id.*

IV. ADVERSARIAL TESTING AND DIGNITY IN *MIRANDA*

The *Miranda* Court heavily relied on two of the four values generally invoked in criminal procedure cases relying on a constellation of constitutional provisions like the Self-Incrimination, Assistance-of-Counsel, and Due Process Clauses. More specifically, the Court focused on the two interrelated concepts of adversarial testing and human dignity. The Self-Incrimination Clause on which *Miranda* explicitly relied provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[97] The *Miranda* Court explained that "the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens."[98] This entails two distinct values. First, the Court stated that the privilege requiring the government, "by its own independent labors," to produce evidence against the defendant exists "[t]o maintain a 'fair-state-individual balance,' to require the government 'to shoulder the entire load.'"[99] This highlights the value of adversarial testing.[100] Second, the Court explained that the privilege requires the state "to respect the inviolability of the human personality"[101] and noted that the interrogation techniques then employed by the police were "destructive of human dignity."[102] This latter focus on dignity, as well as the Court's emphasis on adversarial testing, was central to the Court's analysis.

Miranda did not really focus on the values of equality or truth-finding, though. Perhaps it should not be surprising that the Court neglected to discuss equality. The Court's appeal to this worthy goal seems to be much less frequent in the Court's analysis of this constellation of rights. Despite the Court's inattention to equality, the *Miranda* decision probably does further this important value by ensuring, at least in theory, that even the uninformed learn about their constitutional right to the assistance of counsel and their right not to incriminate themselves.[103] This puts these at-risk defendants on a more equal playing field.

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97. U.S. CONST. amend. V.

98. Miranda v. Arizona, 384 U.S. 436, 460 (1966).

99. *Id.*

100. Professor Wayne LaFave et al. have disaggregated "adversarial" and "accusatorial" objectives. *See* LAFAVE ET AL., *supra* note 66, at 43–46. According to them, "[t]he adversarial element assigns to the participants the responsibility for developing the legal and factual issues of the case, while the accusatorial element allocates burdens as between the parties with respect to the adjudication of guilt." *Id.* at 46. However, as LaFave et al. noted, some courts consider these accusatorial aspects to be part of adversarial testing. *See id.* at 43. Following this latter approach, this article treats the two as an aggregated whole—as the value of adversarial testing.

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

102. *Id.* at 457.

103. This is certainly debatable, as many defendants do not understand their *Miranda* rights even once they are given a *Miranda* warning. *See* I. Bruce Frumkin & Alfredo Garcia, *Psychological Evaluations and the Competency to Waive Miranda Rights*, CHAMPION, Nov. 2003, at 12 ("Individuals under the age of 15, and older suspects with lower than average intelligence, are generally not able to fully understand and waive their *Miranda* rights.").

It is more striking that *Miranda* did not focus on truth-finding. As Justice Harlan suggested in his dissent, there is a real risk that the rule the majority set forth in the case could cut against this important value.[104] Justice Harlan explained that, while defense counsel's role at trial is crucial because an understanding of technical points of law and evidence are essential at trial, in the station house a defense lawyer "may become an obstacle to truth-finding."[105] According to Justice Harlan, there could "be little doubt that the Court's new code would markedly decrease the number of confessions."[106] Without these confessions, the criminal justice system would be hamstrung in finding the truth of what happened in a case.[107] Moreover, the remedy the Court applied in *Miranda*—the exclusion of un-mirandized confessions—keeps evidence from the jury that could very well be reliable—at least in some cases.[108]

In contrast to the *Miranda* majority's neglect of the truth-finding goal, today, probably the most well-publicized concern with respect to confessions is their truthfulness—their reliability. In recent years, it has come to light that many criminal defendants falsely confess.[109] According to the National Registry of Exonerations, which reports known exonerations beginning in 1989, of the 1,940 exonerations that have been recorded, 234—or about 12%—involved a false confession.[110] These statistics and further research as to why individuals confess have led to resonant calls for courts to guard against blind reliance on these tools of wrongful conviction by, for example, conducting pretrial hearings on the reliability of confessions[111] and admitting expert testimony about the possibility of wrongful confessions.[112]

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104. *See Miranda*, 384 U.S. at 514–16 (Harlan, J., dissenting). There is a rich literature debating whether the *Miranda* decision actually furthers or hinders truth-finding. *See supra* note 27 and accompanying text.

105. *Miranda*, 384 U.S. at 514 (Harlan, J., dissenting).

106. *Id.* at 516.

107. *See id.* at 514–16.

108. *See* Jeffrey Standen, *The Politics of* Miranda, 12 CORNELL J.L. & PUB. POL'Y 555, 566 (2003) ("*Miranda* occasionally excludes from evidence confessions that are reliable, relevant, and voluntary because the *Miranda* warnings, presumably already known by the suspect by heart, were not provided in full or in a timely fashion."). It is important to note that *Miranda* might actually further truth-finding, as it excludes unreliable confessions. *See* Ryan & Adams, *supra* note 17, at 1091–93 (discussing the possibility of false confessions).

109. *See The National Registry of Exonerations*, *supra* note 17.

110. *See id.*

111. *See* Richard A. Leo et al., *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 59, 764–65, 801–08 (2013) ("Upon a motion by the defense, courts in criminal cases should evaluate the reliability of confession evidence, which could be undertaken at the same pretrial hearing in which they assess voluntariness.").

112. *See, e.g.*, Danielle E. Chojnacki et al., *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1, 2–4, 39–45 (2008) (arguing that expert testimony on the reliability of confessions should be admitted into evidence); *see also* Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 415–33 (2015) (suggesting that scientific research inform a multi-pronged effort to improve the reliability of confessions used to convict defendants).

This focus on truth has permeated criminal law and procedure, morphing into something of an obsession. From the discovery that the FBI has given erroneous testimony on hair analysis in over 95% of their re-examined cases in which that evidence was involved,[113] to the breakout true-crime documentaries *Serial*[114] and *Making a Murderer*,[115] which told the dramatic stories of possible real-life wrongful convictions and were followed by millions, the media has pummeled us with numerous stories of innocent people likely being wrongfully convicted. Beyond this general theme of truth-finding, a whole host of particular criminal law and procedure issues have begun to revolve around this seductive value. Recent research on the reliability of eyewitness testimony, confidential informant testimony, arson evidence, shaken baby syndrome diagnoses, and even fingerprint evidence has led to cries for reform in an overwhelming number of criminal law and procedure areas. And some courts and legislatures are slowly heeding these calls by, for example, requiring new procedures for eyewitness identifications,[116] corroboration for snitch testimony,[117] and re-examination of evidence used at trial.[118]

Why this focus on truth? During the course of the last few decades, we have been faced with evidence of a shocking number of wrongful convictions. The National Registry of Exonerations places the current number of wrongful convictions at 1,940.[119] A substantial portion of these exonerations (436, or 22%)

113. *See* Ryan & Adams, *supra* note 17, at 1084 (noting "the recent revelation that FBI forensic experts gave flawed testimony in over 95% of re-examined cases in which the experts provided hair analysis testimony"); Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, WASH. POST, Apr. 18, 2015, https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfabc310_story.html.

114. *See* Jonah Bromwich, *After 'Serial,' What Podcasts to Listen To*, N.Y. TIMES, Oct. 2, 2015, http://www.nytimes.com/2015/10/01/business/media/after-serial-what-podcasts-to-listen-to.html (explaining that *Serial*, which "told the story of a crime committed in Baltimore in 1999[,] . . . quickly became the most popular podcast in the history of the form[, having] been downloaded more than 90 million times").

115. *See* Mekado Murphy, *Behind 'Making a Murderer,' a New Documentary Series on Netflix*, N.Y. TIMES, Dec. 20, 2015, http://www.nytimes.com/2015/12/21/arts/television/behind-making-a-murderer-a-new-documentary-series-on-netflix.html?_r=0 (reporting the background of *Making a Murderer*, a serialized true-crime documentary that tells the story of Steven Avery, who served eighteen years in prison for sexual assault, was exonerated for that offense, and then was later arrested, convicted, and sentenced to life in prison for the crime of murder).

116. *See, e.g.*, N.C. GEN. STAT. § 15A-284.52(b) (2013) (setting forth new procedures to improve the reliability of eyewitness identifications).

117. *See, e.g.*, TEX. CRIM. PROC. CODE ANN. § art. 38.075(a) (2009) ("A defendant may not be convicted of an offense on the testimony of a person to whom the defendant made a statement against the defendant's interest during a time when the person was imprisoned or confined in the same correctional facility as the defendant unless the testimony is corroborated by other evidence tending to connect the defendant with the offense committed.").

118. *See, e.g., generally Ex parte* Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996) (superseded by statute on other grounds) (granting the petitioner a writ of habeas corpus based on his claim of actual innocence that was grounded in new evidence—the recantation of victim testimony).

119. *See The National Registry of Exonerations*, *supra* note 17.

was identified through the use of DNA evidence.[120] Indeed, DNA evidence has been heavily relied upon in criminal cases since it was first introduced in criminal courts in 1986.[121] DNA evidence is thought to be incredibly reliable, due in part to its development from the research culture of universities[122] and in part to the low probabilities that two samples of DNA would match if not sourced from the same individual.[123] In 2009, the National Academy of Sciences issued a report entitled *Strengthening Forensic Science in the United States: A Path Forward*, which explained that DNA evidence is the "gold standard" of forensic evidence; unlike bite-mark evidence, tool-mark evidence, and hair analysis (to name a few), DNA evidence has the potential to get us to the truth of what happened in a case.[124]

Although our focus on truth may have been triggered by the overwhelming numbers of exonerations, it is really tools like DNA analysis that have catalyzed this focus on truth. Recent advances in science and technology have imbued us with considerable confidence in assessing the truth—whether that be the discovery that Einstein's theory of relativity is correct,[125] that Higgs-boson particles really do exist (well, at least probably),[126] or that Mr. Smith murdered Mr. Jones.[127] We are, at least in some jurisdictions, making progress toward truth by, for example, improving eyewitness testimony through more careful line-

120. *See id.*

121. *See* Lisa Calandro et al., *Evolution of DNA Evidence for Crime Solving: A Judicial and Legislative History*, FORENSIC MAGAZINE, Jan. 6, 2005. DNA evidence was first used in American courts in 1987. *See id.*; Randy James, *A Brief History of DNA Testing*, TIME, June 19, 2009.

122. *See* NAT'L ACADEMY OF SCI., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 130 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf. This is in contrast to the other forensic science disciplines that were generally birthed in police stations and forensic science laboratories. These arenas do not have the same type of research cultures that can be found in research universities. *See id.*

123. *See id.*

124. Ryan & Adams, *supra* note 17, at 1080; *see* NAT'L ACADEMY OF SCI., *supra* note 122, at 130 ("DNA typing is now universally recognized as the standard against which many other forensic individualization techniques are judged. DNA enjoys this preeminent position because of its reliability and the fact that, absent fraud or an error in labeling or handling, the probabilities of false positive are quantifiable and often miniscule."). Of course DNA evidence is subject to error as well. *See infra* text accompanying notes 133–135.

125. *See* Dennis Overbye, *Gravitational Waves Detected, Confirming Einstein's Theory*, N.Y. TIMES, Feb. 11, 2016 ("A team of scientists announced on Thursday that they had heard and recorded the sound of two black holes colliding a billion light-years away, a fleeting chirp that fulfilled the last prediction of Einstein's general theory of relativity."). Still, DNA can often get us to the truth of a case.

126. *See* The ATLAS Collaboration, *A Particle Consistent with the Higgs Boson Observed with the ATLAS Detector at the Large Hadron Collider*, 338 SCI. 1576, 1581–82 (2012).

127. *Cf.* Meghan J. Ryan, *Finality and Rehabilitation*, 4 WAKE FOREST J.L. & POL'Y 121, 141 (2014) ("Along with our confidence in the power of DNA evidence that has revealed the wrongfulness of hundreds of convictions, we seem to be confident that we are not as blinded by fear and vengeance as our predecessors and can instead make better determinations of proportionate and just punishment.").

ups,[128] improving our knowledge on the reliability of forensic sciences like arson science and bite mark evidence,[129] and opening up case files to criminal defendants.[130] Even the long-standing practice of sentencing is being overhauled by inserting data into sentencing determinations—a system referred to as evidence-based sentencing.[131] As our scientific and technological tools like DNA analysis have improved, our confidence in finding the truth has swelled.

But *Miranda* is not about truth-finding. It is instead about adversarial testing and human dignity. Our recent focus on truth-finding risks overshadowing these other important criminal justice values.[132] But why do we care about these goals aside from truth-finding? Isn't truth the most important goal of our criminal justice system?

Despite our advances in science and technology, truth may be difficult to come by. And *certainty* of truth is generally impossible. We recognize the impossibility of the certainty of truth by our burden of proof in criminal cases—

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128. *See, e.g.*, GA. CODE ANN. § 17-20-2 (2016) (setting forth new guidelines for "[l]ive lineups, photo lineups, or showups" to improve the reliability of eyewitness identification).

129. *See Ex Parte* Robbins, 478 S.W.3d 678, 696 (Tex. Crim. App. 2014) (stating that "concern over 'bad' arson science" contributed to the Texas legislature "creat[ing] the Texas Forensics Commission in 2005 to strengthen the use of 'good' science in criminal proceedings and to investigate 'allegations of negligence or misconduct' in forensic sciences"); TEX. FORENSIC SCI. COMM'N, FORENSIC BITEMARK COMPARISON COMPLAINT FILED BY NATIONAL INNOCENCE PROJECT ON BEHALF OF STEVEN MARK CHANEY—Final Report (2016), http://www.fsc.texas.gov/sites/default/files/FinalBiteMarkReport.pdf (recommending "that bitemark comparison not be admitted in criminal cases in Texas unless and until" more research is conducted to establish the reliability of the practice); TEX. FORENSIC SCI. COMM'N, REPORT OF THE TEXAS FORENSIC SCIENCE COMMISSION: WILLINGHAM/WILLIS INVESTIGATION (2011), http://www.fsc.state.tx.us/documents/FINAL.pdf (urging that arson investigations be improved in Texas).

130. *See, e.g.*, N.C. GEN. STAT. § 15A-903(a) (2013) ("Upon motion of the defendant, the court must order . . . [t]he State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant."). *See generally* Ryan & Adams, *supra* note 17, at 1110–19 (laying out a number of "steps in the right direction" toward cutting back on questionable tools used to convict potentially innocent defendants).

131. *See* Roger K. Warren, *Evidence-Based Sentencing: Are We Up to the Task?*, 23 FED. SENT'G REP. 153, 153 (2010) ("The concept of EBS dates back to adoption by the Conference of Chief Justices and the Conference of State Court Administrators in August 2007 of a formal resolution in support of 'state efforts to adopt sentencing and corrections policies and programs based on the best research evidence of practices shown to be effective in reducing recidivism.'").

132. *Cf.* Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J. L. & SOC. CHANGE 315, 324–25 (2010) ("Factual, DNA-proven innocence poses a threat to the fundamental legal principles underlying our system of justice, in particular to the *presumption of innocence*."); Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 615–16 (2005) ("[W]e are worried that the current focus on innocence may implicitly concede the lesser power of other systemic critiques."). *But see generally* Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549 (2008) (summarizing criticisms of the innocence movement but concluding that "innocentrism, while far from a panacea to the criminal justice system's many ills, is a positive bipartisan occurrence and one that ultimately can complement, rather than replace, the emphasis on substantive and procedural rights that for good reason rest at the core of American criminal law").

proof beyond a reasonable doubt.[133] We do not require certainty of guilt—not because certainty of guilt is undesirable but because certainty of guilt is exceedingly difficult to come by. Even DNA analysis, in which we place so much faith, is not infallible. Not only is there some small probability that an unknown blood sample found at the crime scene will have the same DNA profile as a known blood sample in the database even though the samples are not from the same source, but there are also numerous errors that can occur in taking and analyzing those samples that could taint the results. For example, there can be cross-contamination in the laboratory, the forensic scientist may err in running the samples or interpreting the results, or the forensic scientist may lie about the results.[134] Furthermore, just because an individual's DNA is found at a crime scene does not mean that the individual committed the crime at issue.[135]

Just as in the past, we cannot necessarily know the truth. The adversarial system is one way that we have attempted to uncover the truth, though. The thought is that pitting the prosecution against the defense will cause the truth to come out because each side will voraciously tear away at the other's case. Indeed, circumstances often guarantee that the parties will be starkly opposed. The defendant, with a lot at stake, has a strong incentive to uncover exculpatory evidence—of course with the assistance of counsel.[136] The defendant might also have the greatest knowledge about the facts of the case. The prosecutor, on the other hand, has incentive to develop facts that inculpate the defendant. His or her career success could very well be affected by the case's outcome.[137] But the prosecutor is also charged with seeking justice; he or she is not to pursue a conviction not supported by at least probable cause.[138] Still, these circumstances generally set the stage for a rigorous contest.

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133. *See In re* Winship, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

134. *See* NAT'L ACADEMY OF SCI., *supra* note 122, at 130; Ryan & Adams, *supra* note 17, at 1083.

135. *See* Ryan & Adams, *supra* note 17, at 1083; Meghan J. Ryan, *Remedying Wrongful Execution*, 45 U. MICH. J.L. REFORM 261, 274 n.89 (2012) ("While DNA evidence can be 'uniquely probative' of a defendant's innocence, it is not conclusive. For example, the defendant may not have left behind any of his DNA, and the trace DNA evidence examined could belong to his partner or an innocent individual." (internal citations omitted)).

136. Of course the effectiveness of this defendant-defense counsel team could in reality be hampered by limited resources for defense counsel and the defendant's possible pretrial confinement.

137. *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 134–35 (2004).

138. *See* U.S. DEP'T OF JUST., U.S. ATTORNEYS' MANUAL § 9-27.200.B (1997) ("[F]ailure to meet the minimal requirement of probable cause is an absolute bar to initiating a Federal prosecution . . . ."); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION §3-3.9(a) (AM. BAR ASS'N 1992).

To the extent that the truth cannot be determined by pitting the prosecution against the defense, the result of this adversarial-testing approach favors the defendant.[139] In these circumstances, it is appropriate to adopt prophylactic rules that protect innocent persons as well as those who are guilty. This sentiment is reflected in our criminal justice system's strict proof-beyond-a-reasonable-doubt standard that must be met by the prosecution.[140] Indeed, as William Blackstone stated, it is "better that ten guilty persons escape, than that one innocent suffer."[141] Of course the effectiveness of this prophylactic measure is limited by the resources available to the defendant. The sorry state of funding for public defense in this country certainly undermines the effectiveness of this strategy.[142] The effectiveness of the prophylaxis may also be limited by outside influences like the reverse CSI-effect—where the jury might be more likely to convict because of the heightened value it places on forensic evidence—which could give the prosecution an edge.[143] Despite these limitations, the strategy of adversarial testing recognizes the significant limitation of focusing solely on the truth: certainty of truth is ordinarily unobtainable. This is so even though many of our scientific and technological tools aimed at truth are more powerful than ever before and even though many of our substantive and procedural rules are more accommodating of truth-finding than in the past.

In addition to highlighting the value of adversarial testing, *Miranda* touted the value of human dignity. But what is this protection of dignity all about? Although the concept of dignity has been criticized for being vague or meaningless,[144] the Court has referred to dignity across different constitutional

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139. Note that LaFave et al. have considered this to be an aspect of "accusatorial burdens" rather than "adversary adjudication." LAFAVE ET AL., *supra* note 66, at 43–46; *supra* note 100. It is also worth noting that this idea that the adversarial-testing approach favors the defendant is dependent on the defendant having adequate counsel and sufficient investigatory resources—an assumption that very will may not hold in the milieu of today's criminal justice system. *See infra* text accompanying note 142.

140. *See In re* Winship, 397 U.S. 358, 364 (1970); *supra* text accompanying note 133. According to LaFave et al., this is considered to be an aspect of "accusatorial burdens" rather than "adversary adjudication." LAFAVE ET AL., *supra* note 66, at 43–46; *supra* notes 100 & 139.

141. 4 WILLIAM BLACKSTONE, COMMENTARIES *352; *see also* Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 208 (1997).

142. *See generally* NAT'L ASS'N OF CRIM. DEFENSE LAWYERS, *Rationing Justice: The Underfunding of Assigned Counsel Systems*, *in* GIDEON AT 50: A THREE-PART EXAMINATION OF INDIGENT DEFENSE IN AMERICA (2013), file:///C:/Users/34006470/Downloads/Gideon%20at%2050%20-%20Part%201%20Rationing%20Justice.pdf (examining state funding for public defense counsel).

143. *See* Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1084 (2006) (defining "a reverse CSI effect" as "raising the perceived probative value of the evidence and increasing the likelihood of conviction").

144. *See* Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 ILL. L. REV. 2129, 2139 (2016); *see also* Helga Kuhse, *Is There a Tension Between Autonomy and Dignity?*, *in* 2 BIOETHICS AND BIOLAW 61, 72 (Peter Kemp et al. eds. 2000) (asserting that dignity is "nothing more than a short-hand expression for people's moral intuitions and feelings"); Ruth Macklin, *Dignity is a Useless Concept*, 327 BRITISH MED. J. 1419, 1419 (2003) ("[A]ppeals to dignity are either vague restatements of other, more precise, notions or mere slogans

clauses. For example, the Court has repeatedly stated that the Eighth Amendment prohibition on cruel and unusual punishments is premised on preserving the dignity of man.[145] While it is not entirely clear what the Court is referring to here, it seems that the Court is suggesting that it is important to take into account the individual offender in determining punishment, not take a merely utilitarian approach to punishment.[146] The Court's conception of dignity seems to vary across constitutional disciplines and among individual cases. In *Miranda*, the Court refers to dignity in the context of examining the coercive techniques employed by police officers in attempting to obtain confessions.[147] The *Miranda* Court seemed concerned about more than the physical inviolability and autonomy of the suspect, though, as previously existing due process protections already prohibited obtaining confessions through physical force and other coercive methods like sleep deprivation.[148] Invoking the Self-Incrimination Clause, the Court also seemed troubled by police officers' reliance on psychological techniques in obtaining confessions.[149] The Court thus seemed committed to protecting the dignity of one's mind rather than just physical inviolability and autonomy. Indeed, one's mind holds a special place in criminal law. Just as the home has a special status in the law—often individuals engaging in self-defense are not required to retreat from the home,[150] and there is generally greater Fourth Amendment protection in the home[151]—an individual's mind also

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that add nothing to an understanding of the topic."); Steven Pinker, *The Stupidity of Dignity*, THE NEW REPUBLIC, May 28, 2008, https://newrepublic.com/article/64674/the-stupidity-dignity (stating that "the concept of dignity remains a mess"—"a phenomenon of human perception").

145. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 738 (2002) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."); Atkins v. Virginia, 536 U.S. 304, 311 (2002) (same); Trop v. Dulles, 356 U.S. 86, 99–100 (1958) (plurality opinion) (same).

146. *See* Ryan, *supra* note 144.

147. *See* Miranda v. Arizona, 384 U.S. 436, 445–58 (1966) (discussing the "widespread" use of "physical brutality" and psychological manipulation employed in police interrogation and stating that "[a]n understanding of the nature and setting of this in-custody interrogation is essential to [the *Miranda*] decision[]").

148. *See supra* text accompanying notes 18–23. As the *Miranda* Court noted, however, the effectiveness of these due process protections was somewhat questionable at the time the case was decided. *See Miranda*, 384 U.S. at 445–47. Although due process jurisprudence at the time prohibited the use of force to elicit confessions, "[t]he use of physical brutality and violence [was] not, unfortunately relegated to the past or to any part of the country." *Id.* at 446. A then-recent example of this was from "Kings County, New York, [where] the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party." *Id.* Further, the remedy for a due process violation is the same as a remedy for a *Miranda* violation—exclusion of the evidence. *See* Scott A. McCreight, Colorado v. Connelly*: Due Process Challenges to Confessions and Evidentiary Reliability Interests*, 73 IOWA L. REV. 207, 222 (1987) ("Exclusion of the evidence is the only available remedy to enforce the due process right."); *supra* note 26.

149. *See Miranda*, 384 U.S. at 448–58.

150. *See* Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653, 665–66 (2003) ("[C]ourts agree that there is no duty to retreat when claiming the defense of one's habitation.").

151. *See* WAYNE R. LAFAVE, 1 SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.3(b) (5th ed.) ("The home 'is accorded the full range of Fourth Amendment protections,' for it is

holds a special status. For example, one ordinarily cannot be convicted for just having evil thoughts; *actus reus* is generally required for conviction.[152] Similarly, as the Fifth Amendment states, one cannot be forced to testify against oneself.[153] Respecting the dignity of the offender's mind could even have real implications for the police practices of today that employ deception and trickery. Perhaps engaging in such practices results in invading the interstices of the suspect's mind and in this way violates his dignity. Regardless of the full meaning of this concept of dignity, there are values beyond just truth-finding that should not be forgotten. Just like we sacrifice truth for the sake of privacy when a judge excludes probative evidence that was found in violation of the Fourth Amendment,[154] values such as dignity remain important even aside from their relationship to truth.

V. CONCLUSION

In a criminal justice world that increasingly focuses on science and technology in the hope of ascertaining truth, there is a risk that other important criminal justice values will be pushed aside. The *Miranda* case, which was decided during a time less focused on truth-finding, laid out the still relevant values of adversarial testing and human dignity. In recent years, though, the Court has chipped away at the power of *Miranda*, and the criminal justice system has often set aside these essential values as it has honed in on the importance of truth-finding. But adversarial testing and dignity—whatever exactly it means—continue to be important. Despite our confidence in new science and technology, truth—and especially certainty of truth—remains elusive. Adversarial testing aims at seeking the truth while simultaneously acknowledging the difficulties associated with this. It also serves as a prophylactic to lessen the chance that an innocent person may suffer.[155] This approach is far from perfect, and it has the cost of possibly freeing some guilty offenders, but, as a society, we have found this to be an important value of the criminal justice system. Respecting dignity is at the core of our criminal justice system and the individual rights enumerated in our Constitution. We care not only about punishing the guilty and freeing the

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quite clearly a place as to which there exists a justified expectation of privacy against unreasonable intrusion." (quoting Lewis v. United States, 385 U.S. 206, 211 (1966))).

152. *See* WAYNE R. LAFAVE, CRIMINAL LAW 320–21 (5th ed. 2010) ("Bad thoughts alone cannot constitute a crime; there must be an act, or an omission to act where there is a legal duty to act.").

153. *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

154. *See* Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("The exclusionary rule generates 'substantial social costs,' which sometimes include setting the guilty free and the dangerous at large." (quoting United States v. Leon, 468 U.S. 897, 907 (1984))); Pa. Prob. & Parole v. Scott, 524 U.S. 357, 364 (1998) (stating that the exclusionary rule "undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions").

155. *But cf. supra* notes 100, 139–140 and accompanying text (noting that this is sometimes labeled as a component of "accusatorial burdens" rather than adversarial testing).

innocent, but we also care about respecting each individual, regardless of that person's guilt. This is for the sake of the individual but also for the sake of society as a whole. It is essential that these important values not be sacrificed for the sake of today's alluring truth-finding goal.