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ARTICLE

YOU HAVE THE RIGHT TO BETTER SAFEGUARDS: LOOKING BEYOND *MIRANDA* IN THE NEW MILLENNIUM

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INTRODUCTION

The Supreme Court's decision in *Miranda v. Arizona*[1] is one of the most widely known in American jurisprudence.[2] Lawyers and non-lawyers alike are familiar with the *Miranda* warnings,[3] which police must read to suspects prior to custodial questioning of any kind. Police dramas in movies and on television have further popularized the warnings by using them as a dramatic signal to the audience that the suspect in question is being arrested and booked, and that the detectives who found him are only one interrogation away from solving the crime.

The *Miranda* decision did more than supply a convenient

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1. 384 U.S. 436 (1965).

2. It was the most widely known case in criminal jurisprudence in 1974, when a survey of lawyers conducted by the American Bar Association found that *Miranda* was the third most notable Supreme Court decision of all time. The only two cases which received more votes than *Miranda* in the survey were *Marbury v. Madison* and *United States v. Nixon*. *Brown v. Board of Education* finished fourth. JETHRO K. LIEBERMAN, MILESTONES! 200 YEARS OF AMERICAN LAW: MILESTONES IN OUR LEGAL HISTORY vii (1976).

3. The *Miranda* warnings are as follows: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided for you free of charge." *See Miranda*, 384 U.S. at 467-473; Richard Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 628 (1996) (indicating that *Miranda* requires a knowing, voluntary and intelligent waiver of these rights for a confession obtained during custodial interrogation to be admissible in court). Police generally secure the knowing, voluntary and intelligent waiver of a suspect's *Miranda* rights by requiring suspects to sign a form to that effect, or by asking explicitly whether a suspect understands his rights. Leo, *supra* at 650.

plot-forwarding technique to producers of television police shows. *Miranda* changed the standard by which confessions were deemed voluntary and therefore admissible at trial as part of the prosecution's case in chief. Before *Miranda*, the standard by which courts would determine a confession's admissibility was the due process or "voluntariness" test. As applied by the Supreme Court, the due process or "voluntariness" standard was not meant to parse between those confessions which were truly voluntary and those which were not; such a standard would require an almost-impossible inquiry into the suspect's state of mind during the interrogation.[4] Instead, this standard used a number of factors as a proxy to determine whether a suspect's confession was voluntary as required by the Fourteenth Amendment. If the application of factors to the particular case indicated that the confession (or incriminating statement) was "voluntary" in the manner in which that term was used by the Court, then the statement was held to comport with the protections required by the Fifth and Fourteenth Amendments, and was therefore admissible.[5] After *Miranda*, however, the relevant question became whether the suspect was informed of and understood his rights to silence and counsel before he confessed to a crime or made an incriminating statement. Only if a suspect was informed of and understood these rights before custodial interrogation began is the resulting confession admissible as part of the prosecution's case in chief.

This Article will consider the current protections offered by the *Miranda* doctrine in the context of *Dickerson v. United States*,[6] the Supreme Court's most recent decision regarding the constitutionality of the thirty-five year old rule. At issue in *Dickerson* was the Fourth Circuit's decision that a Congressional statute, which was passed only two years after *Miranda* was decided, superseded the *Miranda* doctrine in federal court.[7] The statute, 18 U.S.C. § 3501, sought to reinstate the voluntariness test, derived from the Fifth Amendment Due Process Clause, as the standard governing the admissibility of confessions in federal

4. *See* YALE KAMISAR, *What is an Involuntary Confession?*, *in* POLICE INTERROGATION AND CONFESSIONS 1-25 (1980) (discussing the exclusivity of the "voluntariness" test).

5. Because "voluntariness" is very much a term of art used by the Court, rather than an actual determination of voluntariness as such, I use the terms "due process standard" and "voluntariness standard" interchangeably throughout this Article. Both terms refer to the standard articulated by the Court to determine whether a confession is admissible before *Miranda* was decided, or after a suspect's voluntary and intelligent waiver of his *Miranda* rights. My synonymous use of these terms to describe the same standard comports with their use in the literature and case law pertaining to this topic. *See, e.g., id.*

6. 120 S.Ct. 2326 (2000).

7. *Id.* at 2329-30.

trials. Citing the Court's decisions modifying the *Miranda* doctrine,[8] the Fourth Circuit decided that the *Miranda* warnings were not constitutional requirements, but were merely prophylactic procedural rules which Congress could override.[9] Thus, in *Dickerson*, the *Miranda* doctrine faced its most fundamental challenge since its inception: whether its rule is required by the Constitution itself.

On June 26, 2000, the Supreme Court reversed the Fourth Circuit by a 7-2 vote and held that the *Miranda* doctrine is a constitutionally required standard.[10] The decision explicitly approved the *Miranda* doctrine in its current form, as it has been modified through the three decades since it was originally announced.[11] The Court further held that the voluntariness standard which Congress had attempted to reinstate in § 3501 was not sufficiently protective of suspects' rights to comport with the basic requirements of the Fifth Amendment's Self-Incrimination Clause.[12] Thus, after *Dickerson*, *Miranda* in its current form remains the standard by which confessions are deemed admissible in all criminal trials in both state and federal courts throughout the United States.

Given the wide margin by which the doctrine was upheld, along with the decisive language of the opinion authored by Chief Justice Rehnquist, it seems clear that constitutional challenges to the *Miranda* doctrine are no longer viable. However, the fact that the *Miranda* rule is now a clearly constitutionally required safeguard asks, but fails to answer, the question of how effective a safeguard the doctrine actually is. Since *Miranda* was decided, the Supreme Court has established a number of exceptions to its seemingly bright-line standard.[13] Police officers have become increasingly sophisticated interrogators, who have access to training manuals and courses instructing them in persuasive psychological techniques with which they can convince almost any suspect to waive his *Miranda* rights and confess.[14] Recent empirical studies of the effects of *Miranda* on law enforcement show that as many as 84% of suspects choose to immediately waive their *Miranda* rights at the outset of a custodial

8. *See, e.g.*, cases discussed in Part III.B, *infra*.
9. United States v. Dickerson, 166 F.3d 667, 692 (4th Cir.1999).
10. *See Dickerson*, 120 S.Ct. at 2329.
11. *Id.* at 2329, 2336.
12. *Id.* at 2335.
13. *See, e.g.*, cases discussed in Part III.B, *infra*.
14. *See* Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 407 (1999) (finding that, in their studies of police interrogation techniques, police have numerous sophisticated strategies designed to convince suspects to waive their *Miranda* rights). *See also* discussion of empirical studies, Part II, *infra*.

interrogation.[15] In light of these facts, some questions about the current state of the *Miranda* doctrine are in order. Does the current *Miranda* doctrine achieve the goals it originally set out to achieve? What exactly are we striving to protect in the *Miranda* doctrine that was not protected under the due process standard? Should *Miranda* be vigorously defended, or even defended at all?

In attempting to answer these questions, this Article will proceed in five sections. To establish the context for these inquiries, the *Dickerson* case and the Congressional alternative to the *Miranda* doctrine will be discussed in Part I. In an attempt to assess the practical protections ensured by the *Miranda* doctrine, Part II will discuss the empirical effects of *Miranda* from the perspectives of both law enforcement and suspects. In the context of considering the due process standard as an alternative to the *Miranda* doctrine, an issue of distinct importance to the *Dickerson* case, Part III will examine the legal bases of both the due process standard and the *Miranda* doctrine as they exist today, and, in conclusion, will compare the two. Finally, in Part IV, other alternatives to *Miranda* will be considered in light of the conclusions of the previous sections; and in Part V, a new alternative will be proposed.

I. UNITED STATES V. DICKERSON: A CALL FOR THE REINSTITUTION OF THE DUE PROCESS STANDARD

The Supreme Court's decision in *Miranda* met with immediate criticism from the law enforcement community. Law enforcement officials predicted that the requirements *Miranda* imposed would seriously hamper police efforts to find, arrest, and convict criminals. These criticisms caused Congress to enact 18 U.S.C. § 3501 as part of the Omnibus Crime Control Act of 1968.[16] Section 3501 was designed to supersede the *Miranda* doctrine in

15. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839 (1996); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996) (charting interrogation subjects' responses to the *Miranda* warnings).

16. Section 3501 was also designed to limit the Supreme Court's rule that any confession obtained in the context of an unreasonable delay between a suspect's arrest and arraignment is inadmissible at trial. This rule against "unreasonable delay" is known as the *McNabb-Mallory* rule, after the two cases in which it was set forth. McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957). Section 3501(c) provides that, as long as there are no indications of involuntariness, a delay of six hours or less does not render a confession inadmissible, and a confession obtained after a delay of more than six hours does not render a confession inadmissible, if it is found to be reasonable in light of the time and distance required to take the defendant before the nearest available magistrate or court officer. 18 U.S.C. § 3501(c); CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 72 (West 3d ed. 1999).

federal prosecutions, and provides, in pertinent part, that:

> [i]n any criminal prosecution brought by the United States or the District of Columbia, a confession. . .shall be admissible in evidence if it is voluntarily given . . . . [I]n determining the issue of voluntariness, [the trial judge] shall take into consideration all the circumstances surrounding the giving of the confession [including a list of factors] . . . . The presence or absence of any of the above-mentioned factors. . .need not be conclusive on the issue of voluntariness of the confession.[17]

In listing the factors with which courts should determine voluntariness, Congress effectively combined the factors used to determine voluntariness in the pre-*Miranda* due process standard with some of the warnings articulated in *Miranda*. The five factors set forth in the statute are: (1) the amount of time between arrest and arraignment of the defendant,[18] (2) whether the defendant knew the nature of the offense with which he was charged or of which he was suspected, (3) whether the defendant was advised that he was not required to make a statement, and whether the defendant was advised that any statement he made could be used against him in court, (4) whether the defendant was told of his right to the assistance of counsel,[19] and (5) whether the defendant was without the assistance of counsel when he was questioned and when he made incriminating statements or gave a confession.[20] The statute makes clear that no single factor is to be conclusive in the judge's analysis of whether the statement in question was voluntarily given (and thus admissible): "The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."[21] Instead, all of the factors are to be considered in the general inquiry of whether the defendant's confession was voluntary.

Until the *Dickerson* case came before it, the Supreme Court

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17. 18 U.S.C. § 3501(a) and (b). The statute effectively restores the law governing admissibility of confessions to the pre-*Miranda* due process or "voluntariness" standard. *Id.*

18. Although time delay between arrest and arraignment is specifically addressed by the *McNabb-Mallory* rule, the due process doctrine prior to *Miranda* also considered the length of time a suspect was in custody before confessing. *See* Part III. A, *infra*.

19. Note that factors three and four encompass the rights articulated by the Court in *Miranda*. 384 U.S. 469-73. Factor three includes the suspect's right to silence and to understand that any statements he makes may be used against him in court, and factor four includes the suspect's right to have an attorney present during custodial questioning. *Id.* The factors do not include the fourth *Miranda* warning, that the suspect has a right to have an attorney appointed for him free of charge if he cannot afford one. *Id.* at 473.

20. 18 U.S.C.A. § 3501(b).

21. *Id.*

had never considered whether § 3501 overruled *Miranda*, or, indeed, whether the statute was constitutional.[22] The Court failed to consider the issue for two reasons. First, the Department of Justice refused to argue that § 3501 governed confessions obtained through custodial interrogation, and continued to follow *Miranda* as the standard by which such confessions should be admitted at trial. This refusal extended consistently through seven Presidential administrations.[23] Second, the Court generally followed a discretionary rule not to consider arguments not raised before it. Since the government consistently refused to raise the § 3501 issue, the Court declined to consider it.

It should be noted that the Court's refusal to consider the § 3501 issue was based on a discretionary prudential doctrine, not a mandatory or constitutional one. It would have been legally possible for the Court to consider the § 3501 issue *sua sponte*, despite the government's refusal to argue it. Indeed, Justice Scalia argued for such consideration in his concurrence in *Davis v. United States*,[24] the most recent case before *Dickerson* in which § 3501 would have been applicable. In that case, he wrote:

> [T]he refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary. As far as I am concerned, such a time will have arrived when a case that comes

22. It should be noted that, prior to *Dickerson* lower courts, notably the Tenth Circuit, considered the § 3501 issue, and found the statute to be constitutional. *See, e.g.*, United States v. Crocker, 510 F.2d 1129, 1138 (10th Cir. 1994); United States v. Rivas-Lopez, 988 F. Supp. 1424, 1429-30 (D. Utah 1997).

23. *See* Eric Miller, Comment, *Should Courts Consider* 18 U.S.C. § 3501 *Sua Sponte?*, 65 U. CHI. L. REV. 1029 (1998) (explaining that there was a brief period during the Nixon administration during which the Attorney General indicated that government attorneys could invoke the statute when there was only a minor deviation from the *Miranda* doctrine). Courts generally avoided the issue. *Id.* at 1034.

24. 512 U.S. 452 (1994). In *Davis*, the defendant, a member of the U.S. Navy, was questioned by the Naval Investigative Service about his involvement in a murder. He was given the *Miranda* warnings and waived his rights to silence and to counsel at the outset of the interrogation. *Id.* After an hour and a half of questioning, the defendant said, "Maybe I should talk to a lawyer." *Id.* The interrogating officers re-informed him of his rights under *Miranda*, and the defendant indicated that he wished to continue without a lawyer. *Id.* The interrogation continued for another hour, at which point the defendant indicated that he would answer no more questions without a lawyer. *Id.* The defendant was convicted of murder based on statements he made during that questioning session. *Id.* Under *Miranda*, the Court's analysis had to consider whether the defendant had invoked his *Miranda* rights, as interpreted by *Edwards v. Arizona*, 451 U.S. 477 (1981), when he first stopped the questioning. *Id.* at 453. If § 3501 were the governing doctrine, the statements would all have been clearly admissible.

within the terms of this statute is next presented to us.[25]

Thirty-two years after Congress passed its statutory challenge to *Miranda*, the Court finally addressed the constitutionality of § 3501, and, by extension, the constitutionality of *Miranda* itself. The case presenting the issue was *United States v. Dickerson*, in which the Fourth Circuit considered the § 3501 issue head-on and decided that the statute was constitutional, and that it superseded the *Miranda* doctrine in federal prosecutions.[26]

In *Dickerson*, the defendant, Charles Dickerson, confessed to committing a series of bank robberies in Maryland and Virginia.[27] Following the robbery of the First Virginia Bank in Alexandria, Virginia, FBI agents spotted what was reported to be the getaway car outside Dickerson's apartment building in Takoma Park, Maryland.[28] The agents went to Dickerson's apartment and asked him if he would accompany them to the FBI Field Office in Washington, D.C.; he agreed to do so. [29] Dickerson was not formally placed under arrest or handcuffed when he agreed to answer questions at the FBI office.[30] During the interview, FBI agents obtained a warrant to search Dickerson's residence.[31] When the agents informed him of this development, Dickerson admitted to the robbery in question and to being the getaway driver in a series of other similar robberies.[32] Following his statements, the agents arrested him.[33]

The district court granted Dickerson's motion to suppress his statement.[34] The court found that Dickerson was in custody during the interview, and that the FBI agents were therefore required to inform him of his rights under *Miranda* before soliciting answers to their questions.[35] Since the statement was obtained without a prior reading of the *Miranda* warnings, the district court held that they were obtained in violation of

25. 512 U.S. at 464.
26. United States v. Dickerson, 166 F.3d 667, 695 (4th Cir. 1999).
27. *Id.* at 671.
28. *Id.* at 673.
29. *Id.*
30. *Id.*
31. 166 F.3d at 674.
32. *Id.*
33. *See id.* at 675 (discussing the conflicting testimony at trial as to whether Dickerson was read the *Miranda* rights before or after he made his statement). The district court resolved the dispute by finding that Dickerson made his statement without first being read the *Miranda* warnings. Accordingly, the court suppressed the statement, finding that Dickerson was in police custody when he confessed, and that he confessed in response to police interrogation, both of which would require that he be read the *Miranda* warnings before incriminating himself. *Id.*
34. *Id.*
35. *Id.*

Miranda.[36] Thus, the confession itself was suppressed.[37] However, the district court allowed into evidence the statement of an accomplice identifying Dickerson as the getaway driver, even though the accomplice was found only through Dickerson's own confession, finding that the confession, although obtained in violation of *Miranda*, was voluntary under the Fifth Amendment.[38] The government filed a motion requesting the district court to reconsider its order suppressing Dickerson's statements, arguing that because the statements were voluntary, they were admissible under 18 U.S.C. § 3501.[39]

Although the government raised the issue of the applicability of § 3501 in its motion to reconsider, it did not brief the issue on appeal, because the Department of Justice prohibited the U.S. Attorney's Office from doing so.[40] However, Paul Cassell, professor at the University of Utah College of Law, filed an amicus brief arguing that *Miranda* did not set forth constitutionally required rules, and that the voluntariness standard set forth in § 3501 should be the standard by which the admissibility of confessions is judged in federal court.[41] The Fourth Circuit, per Judge Williams, accepted Cassell's argument and upheld the statute, deciding that § 3501, and not *Miranda*, governed the admissibility of confessions in federal court.[42] In holding the statute constitutional, the Fourth Circuit noted that in a number of cases since *Miranda*, the Supreme Court limited the protective reach of the *Miranda* decision.[43] Further, the Fourth Circuit pointed out that the

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36. 166 F.3d at 675.

37. *Id.*

38. *See id.* at 676 (characterizing the defendant's statement as voluntary under the Due Process Clause of the Fifth Amendment). Under *Oregon v. Elstad*, the "fruits" of a confession obtained in violation of *Miranda* are admissible as part of the prosecution's case in chief. *See* 470 U.S. 298, 305-07 (1985) (holding that "fruits of the poisonous tree" doctrine does not apply to *Miranda* violations, because the *Miranda* warnings are prophylactic measures designed to ensure that a suspect's Fifth Amendment right against compulsory self-incrimination is not violated, rather than actual Constitutional rights).

39. 166 F.3d at 676. The district court also suppressed the evidence found during the search of Dickerson's apartment, on grounds that the warrant did not sufficiently describe the items to be seized. *Id.* The government accordingly filed an additional motion asking the district court to reconsider its ruling regarding the evidence seized during the search of Dickerson's apartment. *Id.* The Court denied the motions. *Id.* at 676-77.

40. *Dickerson*, 166 F.3d at 672.

41. *See* Terry Carter, *The Man Who Would Undo* Miranda, A.B.A. J. 44, 45 (2000) (describing Cassell's views of *Miranda* and § 3501).

42. *Dickerson*, 166 F.3d at 692.

43. *See id.* at 672 (discussing decisions limiting the original scope of *Miranda* protections finding that § 3501 controls the admissibility of confessions in federal courts). *See, e.g.*, Oregon v. Elstad, 470 U.S. 298 (1985) (reasoning that the fruits of statements obtained in violation of *Miranda*,

Supreme Court explicitly stated in prior cases that the *Miranda* rule was a prophylactic, procedural one, meant to ensure against the impingement of a suspect's constitutional rights, but not required by the Constitution itself.[44] The circuit court concluded that Congress was within its authority to promulgate rules of procedure and evidence in the federal courts in enacting § 3501, and therefore, the statute was constitutional.[45] Applying the statute's voluntariness standard to the facts of the case, the Fourth Circuit held that, since the district court had found that Dickerson's confession was voluntary, the confession was therefore admissible.[46] Dickerson appealed the decision, and the Supreme Court granted certiorari to resolve the constitutional question.[47]

Because neither the government, nor Dickerson himself, sought to argue that § 3501 was constitutional, the Court appointed Paul Cassell to argue in favor of the statute as amicus curiae.[48] Perhaps the most prominent voice in the legal community to speak out consistently against *Miranda*, Cassell spent much of his career attempting to convince the Supreme Court to reconsider and overrule *Miranda*.[49] In attempting to convince the Court to uphold § 3501 as constitutional, Cassell attacked *Miranda* from both legal and policy perspectives, using many of the same arguments he had leveled against *Miranda* for years.

Cassell's basic constitutional argument to the Court against *Miranda* was twofold: first, that the rule set forth in *Miranda* was not constitutionally required; and second, that *Miranda*'s protections extended beyond the requirements of the Fifth Amendment in prohibiting clearly voluntary confessions.[50] In

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including subsequent confessions from the defendant after valid waiver of *Miranda* rights, are admissible as part of the prosecution's case in chief); New York v. Quarles, 467 U.S. 649 (1984) (stating that police are not required to give *Miranda* warnings when asking a suspects in the field for information officers need to ensure or secure the public safety); Harris v. New York, 401 U.S. 222 (1971) (holding that statements obtained in violation of *Miranda*, although inadmissible as part of the prosecution's case in chief, could be used to impeach the defendant on the stand at trial).

44. *See Dickerson*, 166 F.3d at 690 (reasoning that the Supreme Court does not equate the *Miranda* warning with constitutional rights); Michigan v. Tucker, 417 U.S. 433 (1974) (noting that prior case law does not completely bar all seemingly inadmissible evidence under *Miranda*); Davis v. United States, 512 U.S. 452 (1994) (discussing the need to prevent the transformation of *Miranda* into a "wholly irrational obstacle").

45. *Dickerson*, 166 F.3d at 691.

46. *Id.* at 692-93.

47. Dickerson v. United States, 528 U.S. 1045 (1999).

48. Dickerson v. United States, 120 S.Ct 2326, 2335 n.7 (2000).

49. *See* Carter, *supra* note 41, at 45 (recounting Cassell's desire to "fix" *Miranda*).

50. *See* Brief of Court-Appointed Amicus Curiae at 5-6, 12, Dickerson v. United States, 120 S.Ct. 578 (2000) (No. 99-5525) (arguing that *Miranda*

arguing that the *Miranda* doctrine was not constitutionally required, Cassell noted that the Court often referred to the doctrine as prophylactic in limiting the protections of the doctrine in cases subsequent to *Miranda*.[51] In addition, the Warren Court, in the *Miranda* opinion itself, stated that either Congress or the state legislatures could modify the doctrine.[52] Cassell asserted that, in passing § 3501, Congress had simply modified the doctrine in accordance with this language in *Miranda*.[53] In arguing that *Miranda*'s protections were overbroad, Cassell noted that the original rationale for the *Miranda* rule was that confessions obtained from suspects not informed of their rights before custodial interrogation are presumptively involuntary and, therefore, inadmissible.[54] Since the Fifth Amendment only protects suspects against compulsory (*i.e.*, involuntary) self-incrimination, *Miranda*'s bright-line prohibition against the admissibility of confessions obtained without warnings overreaches its own constitutional rationale because the prohibition protects suspects that confess voluntarily.[55]

Cassell's policy argument to the Court, drawn from ideas in his own writings on the subject, was that *Miranda* seriously impeded the efforts of law enforcement to apprehend and convict criminals, and therefore, the Court should overturn the decision.[56] Under the *Miranda* regime, according to Cassell, police have a more difficult time clearing crimes efficiently.[57] Often, *Miranda*'s requirements prevent police from clearing crimes that were easily solvable under the previous due process regime. Since society has an overriding interest in having crimes solved and in having criminals rightly imprisoned, the *Miranda* rule is too protective of suspects' interests, and should be altered to allow all confessions which are voluntarily obtained[58] to be admitted as evidence of the

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reaches beyond the constitutional boundaries of the Fifth Amendment).

51. *See id.* at 7-9 (discussing cases that do not view *Miranda* as a constitutional prerequisite).

52. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

53. Brief of Court-Appointed Amicus Curiae at 10, Dickerson v. United States, 120 S.Ct. 578 (2000) (No. 99-5525) (arguing that *Miranda* and § 3501 are consistent).

54. *Id.* at 1-2.

55. *See id.* at 12-14 (explaining that in enacting § 3501 Congress believed that under certain circumstances voluntary confessions trigger admissibility).

56. Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 438 (1996).

57. *Id.*

58. Cassell assumes a very broad definition of voluntariness which is questionable under case law interpreting the Fifth and Fourteenth Amendments before the *Miranda* decision. Under his definition, it seems that only confessions which are physically compelled would be involuntary; all other confessions would be voluntary. As the analysis in Part III of this Article, *infra*, will show, this does not necessarily comport with the Court's

defendant's guilt at trial.[59]

The Court rejected Cassell's arguments and held that the *Miranda* doctrine must protect the Fifth Amendment rights of all suspects in custodial interrogations.[60] In an opinion authored by Chief Justice Rehnquist, the Court plainly stated that the *Miranda* doctrine, in its current form, was a constitutional requirement.[61] Deducing *Miranda*'s constitutionality from the circumstantial facts of *Miranda* itself, the Court declared that, because the original decision in *Miranda* applied to trials in state courts, the Warren Court considered *Miranda* to be a constitutional requirement.[62] In addition, the language used in the *Miranda* opinion indicated that the Warren Court believed that it was announcing a constitutional rule.[63] Further, the majority rejected the argument that the language in *Miranda* inviting state and federal legislatures to impose their own potentially alternative safeguards proves that the *Miranda* doctrine is not constitutionally required.[64] Rather, the fact that the Warren Court clearly stated that only alternatives which are as protective as the *Miranda* rule would be acceptable shows the opposite: that the *Miranda* rule is a clearly constitutional standard.[65] Finally, the majority dismissed the argument that the Court's willingness to limit the protections offered by *Miranda* in subsequent cases proves that the *Miranda* doctrine is not a constitutional requirement.[66] Noting that subsequent cases have also broadened *Miranda*'s protections, Chief Justice Rehnquist stated that "[t]hese decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable."[67] Thus, the *Dickerson* majority clearly laid to rest the notion that the *Miranda* doctrine is not rooted in the Constitution.

After first deciding the issue of *Miranda*'s constitutionality, the Court then addressed whether § 3501 was an alternative that was at least as protective as the *Miranda* rule.[68] With fairly limited discussion, the Court rejected outright Cassell's argument

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pre-*Miranda* interpretations of the Fifth Amendment.

59. *See* Brief of Court-Appointed Amicus Curiae at 40-49, Dickerson v. United States, 120 S.Ct. 578 (2000) (No. 99-5525) (arguing that the irrebuttable presumption set forth in *Miranda* should be rebuttable if the confession is voluntary).

60. *See* Dickerson v. United States, 120 S.Ct. 2326, 2335 (2000) (denouncing the amicus' views).

61. *Id.* at 2334.

62. *Id.* at 2333.

63. *Id.* at 2334.

64. *Id.*

65. 120 S.Ct. at 2334.

66. *Id.* at 2334-35.

67. *Id.* at 2335.

68. *Id.*

that the due process standard which § 3501 would reinstate would be at least as protective as the *Miranda* doctrine.[69] Accordingly, the Court struck down § 3501 as unconstitutional, and reversed the Fourth Circuit.[70]

In his dissent, Justice Scalia, joined by Justice Thomas, railed against the majority's decision, claiming it was an example of judicial overreaching violative of the separation of powers required by the Constitution.[71] The main rationale behind Justice Scalia's attack is that, while the majority upheld the *Miranda* doctrine as constitutionally required, it also upheld all subsequent modifications of the doctrine, including those which allow confessions obtained in violation of *Miranda* to be admitted against a defendant at trial.[72] Justice Scalia cited subsequent cases holding that confessions which violate *Miranda* are nonetheless admissible in some capacity at trial as necessarily supporting the proposition that "it is possible—indeed not uncommon—for the police to violate *Miranda* without also violating the Constitution."[73] From this, Justice Scalia concluded that it is logically impossible for the majority to be able to uphold *Miranda* as constitutionally required without overruling most of the subsequent modifications to its rule.[74] Yet, in order to comport with the requirements for overturning a Congressional statute on Constitutional grounds, the Court must find Congress in violation of a clear constitutional principle. Since the majority declined to transform the current *Miranda* doctrine into a straightforward prohibition against the admissibility of all confessions obtained in violation of its rule, the Court overreached its own power in striking down § 3501 as unconstitutional.[75]

Putting aside discussions of the constitutional basis for the Court's rule in *Miranda*, the *Dickerson* case provides an opportunity to step back and examine the realities of the *Miranda* doctrine. The *Miranda* majority replaced the due process standard with *Miranda* warnings by implicitly asserting that the Fifth Amendment required more protection to be given to suspects during custodial interrogation than the due process standard

69. *Id.*
70. 120 S.Ct. at 2335.
71. *Id.* at 2337.
72. *Id.* at 2334. For example, under the current doctrine, statements obtained in violation of Miranda are admissible to impeach the defendant if he takes the stand at trial, and information (or "fruits") obtained as a result of a Miranda violation are also admissible against the defendant at trial. Harris v. New York, 401 U.S. 222, 226 (1971); Oregon v. Elstad, 470 U.S. 298, 314 (1985).
73. *Dickerson*, 120 S.Ct. at 2340.
74. *Id.* at 2342.
75. *Id.*

offered.[76] In passing § 3501, Congress put forth the due process standard as its preferred alternative to the *Miranda* doctrine. The majority in *Dickerson* rejected the due process standard as a viable alternative almost out-of-hand, choosing to adhere to the view which prompted the Warren Court to require the *Miranda* warnings in the first instance.[77] In this context, the question to be asked is whether the Warren Court, and now the Rehnquist Court, was correct in assuming that the *Miranda* rule offers more protection to suspects than the due process standard. How much protection does the *Miranda* doctrine offer suspects in practice? If *Miranda* offers suspects a better opportunity to exercise their Fifth Amendment rights against state-compelled self-incrimination than they had under the due process standard, then the doctrine has at least achieved one of the goals set forth in the *Miranda* opinion. If it does not, then it can be concluded that the *Miranda* doctrine has failed to achieve even the barest minimum of its objectives, and the way is paved for the institution of alternatives to *Miranda*.

II. THE EMPIRICAL EFFECTS OF MIRANDA ON SUSPECTS, LAW ENFORCEMENT, AND THE CRIMINAL JUSTICE SYSTEM

When the Court decided *Miranda* in 1966, it caused an uproar in the law enforcement community. Many individuals, including legislators and police officers, felt that *Miranda* would do nothing but impede efforts to put criminals in jail. Indeed, Congress demonstrated its disapproval of the *Miranda* decision in § 3501, passed only two years after *Miranda*.[78] The intensity of the arguments surrounding *Miranda* prompted a number of empirical studies to be conducted between 1966 and 1972.[79] These studies attempted to assess, through observation of police activity, the impact of *Miranda* on police conduct and on custodial interrogations. For the most part, the studies concluded that, after an initial phase-in period, police generally complied with the letter, but not the spirit, of *Miranda*.[80] They found that despite

76. *Miranda*, 384 U.S. at 467.

77. *Dickerson*, 120 S.Ct. at 2335.

78. 18 U.S.C.A. § 3501 (b).

79. *See* Leo, *supra* note 3, at 631 n.72 (listing the empirical studies conducted during the eight years after *Miranda* was decided). Paul Cassell re-analyzed the data from a number of these studies and found that, contrary to the views of many contemporary commentators, the studies supported the conclusion that *Miranda* did have an impact on confession rates. Cassell, *supra* note 56, at 395-418. Cassell's reassessment will be discussed in Part II, *infra*.

80. Leo, *supra* note 3, at 632. This conclusion, drawn by many of the earlier studies, assumes that the rationale behind the *Miranda* warnings was to counteract the inherently coercive atmosphere of custodial interrogations. Although the *Miranda* opinion itself seems to allude to this rationale, some

receiving the warnings, most suspects waived their *Miranda* rights and to that extent the rule had only a marginal effect on the ability of police to elicit confessions.[81] Ultimately, they concluded that *Miranda* had no significant impact on rates of apprehension or conviction of criminal suspects.[82]

There was no additional empirical research on the impact of *Miranda* on law enforcement efforts to apprehend and convict criminals from 1973 until the 1990s. During the 1970s and 1980s, the *Miranda* debate died down considerably, and generally centered around legal theory and philosophy, rather than empirical statistics.[83] Most commentators assumed that the impact of *Miranda* on law enforcement was negligible, and that whatever impact that existed was minimized by the Supreme Court's subsequent decisions permitting the use of confession evidence obtained in violation of *Miranda* against defendants at trial.

In the 1990s a series of articles revived the empirical debate. In 1996, both Paul Cassell and Richard Leo published articles containing new data and new conclusions regarding the *Miranda* rule's impact on confession rates and police conduct.[84] With their improved methodology and data collection techniques, these studies re-opened the empirical debate as to the quantifiable effects of *Miranda* on law enforcement. Throughout the decade, additional studies were conducted and their results were published.[85]

Despite improved data collection techniques and statistical analysis, the recent studies have proved inconclusive in the aggregate for a number of reasons. First, as studies of human behavior within the criminal justice system, much of the data is difficult to categorize accurately because the categorization process itself is subjective. In addition, the subject matter (*i.e.*, arrests and interrogations) is not replicable in a laboratory under "control" conditions; thus, there are an unquantifiable number of variables,

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commentators disagree with that interpretation of the decision. *Id.* at 648-50; *Miranda*, 384 U.S. at 468.

81. Leo, *supra* note 3, at 632.

82. *Id.*

83. (obtaining cite from author)

84. *See generally* Leo, *supra* note 15; Cassell, *supra* note 56.

85. *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 (1998) (analyzing *Miranda's* effects on crime clearance rates in the U.S.). *See also* Cassell & Hayman, *supra* note 15 (analyzing the frequency and importance of confession rates in prosecutions); Leo, *supra* note 15 (quantifying and analyzing patterns in police techniques, suspect behavior and interrogation outcomes); Leo & White, *supra* note 14 (stating that a study of the quantifiable effects of *Miranda* is impossible but analyzing how law enforcement seeks to work around *Miranda).*

many of them not directly apparent to the impartial observer, which play a significant role in the data obtained, and which cannot be distilled from the data collected. Another problem is that each study contains a small sample of suspects and cases, from which it is difficult to obtain figures of any statistical significance. Further, the authors in each study, all of whom are professors, were necessarily present during the data collection process, which clearly could have influenced the conduct of the police officers being observed. Finally, although each study clearly sets forth the methodology used in collecting and analyzing the data, no two studies use exactly the same methodology. This lack of harmonization makes comparisons of results across studies difficult, and impossible to perform in a truly accurate manner.[86]

The only way to accurately assess the current effect of *Miranda* on law enforcement would be to conduct a nation-wide study, using the same data collection and analytical techniques for all areas observed. The resources and cooperation between scholars necessary to carry out such a project do not seem to be available, so the best alternative in attempting to assess the empirical impact of *Miranda* is to glean the relevant findings of each study and try to construct out of those findings how *Miranda* has impacted law enforcement efforts nationally.

This Part will proceed in four sections. The first section will attempt to assess the effects of *Miranda* on police conduct through both an examination of actual interrogation methods as observed by authors of empirical studies, and an examination of the interrogation methods set forth in police training materials. In the second section, *Miranda*'s impact on confession rates will be explored through a discussion of the empirical data on suspects' invocation of their *Miranda* rights before and during questioning. The competing analyses of confession rates before and after the *Miranda* decision will also be dealt with. The third section will assess *Miranda*'s impact on criminal adjudication through an examination of the limited data available regarding the importance of confession evidence to a defendant's conviction. Finally, in the fourth section, some general conclusions will be made about the findings of the recent studies, and ultimately about what those findings indicate about the effectiveness of the *Miranda* doctrine overall.

86. It should be noted that, even if the current studies contained comparable data, it would be impossible to assess the impact of *Miranda* across decades by comparing the recently-collected data with the data collected between 1966 and 1972. This is because the methodology employed in the earlier studies was not only different from that used in the recent studies, but was also not completely and accurately recorded in each study.

A. The Effects of Miranda on Police Conduct

Although commentators agree that it took at least four years after *Miranda* was decided for police departments around the country to implement its rules as operating procedure, since 1970, police seem to have been following the letter of *Miranda*.[87] The current studies found that police routinely read suspects the *Miranda* warnings prior to custodial interrogation.[88] However, while police are following the letter of *Miranda*, it is clear that they are not following the spirit of the decision. All studies found that police had developed sophisticated techniques and strategies for extracting confessions within the bounds of the *Miranda* doctrine.

Modern police departments have developed a series of strategies designed to minimize the impact of the *Miranda* warnings in an attempt to induce suspects to waive their *Miranda* rights.[89] Some of the more straightforward minimization strategies used include: calling attention to the formality of the warnings, implying that they are simply bureaucratic requirements and therefore unimportant; referring to the warnings' dissemination in popular American television shows;[90] or blending the warnings into the conversation.[91] Police also use more sophisticated psychological strategies to minimize the warnings' importance in the mind of a suspect. For example, an officer seeking to minimize the warnings effect might focus the suspect's attention on the importance of telling his story to the interrogator (which the suspect can do only if he waives his rights under *Miranda*), or might create the appearance of a non-adversarial relationship between the interrogator and the suspect, in which the interrogator is the suspect's friend or guardian whose goal is not to obtain incriminating statements, but to help the suspect.[92]

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87. Leo, *supra* note 3, at 632.

88. Cassell & Hayman, *supra* note 15, at 887-88; Leo, *supra* note 15, at 276. Indeed, Cassell & Hayman found only three *Miranda* violations in all of the interrogations he observed, and Leo found only four questionable violations, two of which did not result in charges filed against the suspect, and one of which did not result in an incriminating statement from the suspect. Cassell & Hayman, *supra* note 15, at 889; Leo, *supra* note 15, at 283.

89. *See* Leo & White, *supra* note 14, at 432 (discussing the various methods interrogators use to obtain *Miranda* waivers).

90. Some commentators have argued that the portrayal of the *Miranda* requirements on television police dramas, such as *NYPD Blue*, gives suspects an incorrect idea of what their rights are, because the officers in such dramas violate *Miranda* in almost every interrogation portrayed. *See* Susan Bandes & Jack Beermann, LAWYERING UP, 2 GREEN BAG 2D 5 (1998) (examining what the American public has learned about *Miranda* rights from television).

91. Leo & White, *supra* note 14, at 433.

92. *See id.* at 435-36, 439 (discussing various methods of de-emphasizing the *Miranda* warnings).

Although minimization is the strategy most commonly used by police when reading suspects the *Miranda* warnings, police also engage in the practice of offering benefits to suspects in exchange for a *Miranda* waiver.[93] Implicit benefits are the most commonly offered; police employing this strategy often act as if they want to befriend the suspect. Some officers employing this strategy tell the suspect that, although they want to believe that the suspect is a good person, they cannot unless the suspect tells them his version of exactly what happened.[94] The implicit benefit in such a scenario is the assistance of the officer who offers his friendship and support. Police also offer explicit benefits to convince suspects to waive their *Miranda* rights. When explicit benefits are offered, they usually involve matters over which the police have no jurisdiction or control.[95] Examples of promises of explicit benefits offered by police to elicit *Miranda* waivers from suspects include: that police will obtain more lenient treatment for the suspect in exchange for his waiver;[96] that the suspect's charges will be dropped or diminished if he waives his *Miranda* rights;[97] or that police will obtain psychological (or other) treatment for the suspect if he gives a statement.[98]

Successful implementation of these strategies may be one reason why as many as 84% of suspects choose to waive their *Miranda* rights at the initial stages of an interrogation.[99] These strategies may also be responsible for the low percentage of suspects who choose to invoke their rights during questioning. In his study of interrogations in Berkeley, California, Leo found that only 1.1% of suspects eventually invoke their right to silence or to counsel after initially consenting to custodial questioning.[100] Similarly, in their study of interrogations in Salt Lake County, Cassell and Hayman found that only 4% of suspects chose to invoke their rights during custodial questioning.[101]

Police also attempt to avoid reading the warnings altogether by using tactics permitted under Supreme Court cases creating exceptions to the *Miranda* rule. In their study of Salt Lake County, Cassell and Hayman found that police used non-custodial interrogation wherever possible to avoid having to read the

93. *Id.* at 440.
94. *Id.* at 441-43.
95. *See id.* at 444-46.
96. *See* Leo & White, *supra* note 14, at 444.
97. *See id.* at 444-45.
98. *See id.* at 446.
99. *See* Cassell & Hayman, *supra* note 15, at 860. Leo's study of interrogations in Berkeley, California found that 78% of suspects chose to waive at the outset of or shortly into an interrogation. *See* Leo, *supra* note 15, at 286.
100. *See* Leo, *supra* note 15, at 275.
101. Cassell & Hayman, *supra* note 15, at 859.

Miranda warnings before questioning a suspect.[102] Another strategy used by police is to question suspects regardless of whether they waived their rights under *Miranda*. Police departments employing this strategy call it questioning "outside *Miranda*," and it includes any interrogation conducted without reading the *Miranda* warnings to a suspect at the outset, or any interrogation in which police continue questioning after a suspect invokes his right to silence or to counsel.[103] Police training videos instruct officers to question "outside *Miranda*" in situations where the officer thinks that he only has one chance to obtain an admission from the suspect.[104] Interrogating officers attempting to question a suspect "outside *Miranda*" usually do so by first convincing the suspect that any statement he makes cannot be used against him in court for any purpose.[105] When the suspect indicates that he understands that his statements are now "off the record," as it were, the officer continues questioning within the broad confines of the due process standard, until the suspect confesses.[106] Although neither Cassell and Hayman's study nor Leo's study observed instances in which suspects were custodially questioned without having been read the *Miranda* warnings, court decisions from forty-one states report circumstances in which police engaged in questioning "outside *Miranda*."[107]

In sum, recent studies show that, as a general matter, police

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102. Cassell & Hayman, *supra* note 15, at 881. Leo also observed instances of non-custodial interrogations in his study of Berkeley, California. *See* Leo, *supra* note 15, at 275. This tactic is completely legal under *California v. Beheler*, 463 U.S. 1121, 1125 (1983), and related cases. *See* Part III.B, *infra*.

103. *See* Leo & White, *supra* note 14, at 460-61; *See also* Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 133 (1998).

104. *See* Weisselberg, *supra* note 103, at 135. It should be noted that questioning "outside *Miranda*" would be ultimately governed by the due process standard. Leo & White, *supra* note 14, at 437. In order for any statements obtained in violation of *Miranda* to be used for purposes other than in the prosecution's case in chief, the statements still have to be "voluntarily" given within the meaning of cases establishing the due process standard. *Id.* at 458. Under this standard, neither trickery, nor lengthy questioning, nor repeated denial of a suspect's request to confer with counsel have been sufficient *by themselves* to render a suspect's statement inadmissible for impeachment purposes. *Id.*

105. *See* Part III.B, *infra* (stating that under the *Harris* line of cases, statements obtained in violation of *Miranda* can be used as impeachment evidence against a defendant at trial, and after *Elstad*, evidence obtained as a result of a *Miranda* violation can be used against the defendant at trial).

106. *See* Leo & White, *supra* note 14, at 448 (acknowledging that interrogators who take this approach inform the suspect that they are questioning despite his invoking *Miranda* rights, but suggest the answers will stand "outside *Miranda*" and cannot be used against him).

107. *See* Weisselberg, *supra* note 103, at 137 (combining three jurisdiction where officers deliberately violated *Miranda* with thirty-eight jurisdictions that reported continued questioning after invocation).

follow the letter of the *Miranda* decision. Most suspects are read the *Miranda* warnings before being custodially questioned. However, police have developed extremely sophisticated strategies for extracting confessions from suspects within the constraints of *Miranda*.[108] The successful implementation of strategies to solicit valid waivers of *Miranda* has most likely had a very significant influence on the high rate at which suspects waive their *Miranda* rights. Further, the findings show that some of the exceptions to the *Miranda* doctrine have had an effect on police conduct. The increased tendency of police to question suspects in non-custodial settings demonstrates that the U.S. Supreme Court's decision in *California v. Beheler*[109] and similar cases, that *Miranda* warnings need not be read to suspects questioned in "non-custodial" settings, has impacted police behavior to some extent. Similarly, the increasing prevalence of questioning "outside *Miranda*" indicates that the exceptions to *Miranda*'s prohibition against the admissibility of confessions obtained in the absence of any *Miranda* warnings, created in cases such as *Oregon v. Elstad*[110] and *Harris v. New York,*[111] also have had some effect on police conduct.

B. The Impact of Miranda on Confession Rates

Most commentators view confession rates as the most relevant indicator in examining the effects of *Miranda* on law enforcement. Accordingly, the findings of recent empirical studies regarding *Miranda*'s impact on confession rates have met with the most controversy in the scholarly community and have been the least consistent across *Miranda*-related studies.[112] Despite the

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108. This should come as no surprise. As early as 1959, the Supreme Court recognized the increasing level of sophistication of police interrogation strategies. Spano v. New York, 360 U.S. 315, 321 (1959) (stating that "the methods used [by law enforcement officers] to extract confessions [are becoming] more sophisticated").

109. 463 U.S. 1121 (1983). *See* Part III.B *infra* (discussing the holding in *Beheler*, as well as an examination of the exceptions to the *Miranda* doctrine).

110. 470 U.S. 298 (1985). *See* Part III.B, *infra* (discussing the holding in *Elstad*, as well as an examination of the exceptions to the *Miranda* doctrine).

111. 401 U.S. 222 (1971).

112. Every recent empirical study asserting a statistical finding of *Miranda*'s impact on confession rates has met with dissent from others in the scholarly community. For example, one such discussion took place in a series of articles between Paul Cassell, George Thomas, and Richard Leo. *See* Cassell & Hayman, *supra* note 15, (re-analyzing the findings in Leo, *Inside the Interrogation Room*); George C. Thomas III, *Plain Talk About the Miranda Debate: A "Steady-State" Theory of Confessions*, 43 UCLA L. REV. 933 (1996) (disagreeing with Cassell's characterization of Leo's results, and finding fault with Cassell's data). Another such discussion took place between Paul Cassell and Stephen Schulhofer. *See* Cassell, *supra* note 56, at 418 (asserting a 16.1% drop in confession rate after *Miranda*); Stephen J. Schulhofer, *Miranda's*

intense disagreement between the studies' authors and the inconsistencies between their findings, a discussion of confession rates is necessary to any empirical assessment of the *Miranda* decision. If *Miranda* impacts any quantifiable element in the criminal justice system, it should impact confession rates, since the holding imposed a bright-line rule requiring a certain level of police conduct, in place of the flexible and more permissive due process standard. Accordingly, an analysis of confession rates from 1966 through the present should answer the question whether the *Miranda* rule was more restrictive of police behavior, and if so, by how much.

Within the first eight years after *Miranda* was decided, a number of studies attempting to assess the impact of *Miranda* on the criminal justice system were conducted around the country. In 1996, Paul Cassell re-interpreted these studies, and found that, after *Miranda* was decided, the confession rate dropped an average of 16% across the country.[113] Cassell calculated the pre-*Miranda* confession rate, based on estimations and on data from earlier studies, to be around 60%.[114] From these statistics, Cassell concluded that *Miranda* had a severely negative impact on the ability of law enforcement to apprehend and ultimately secure convictions of criminals.[115] A number of commentators have disagreed with Cassell's interpretations of the earlier studies, most notably Steven Schulhofer and Richard Leo, both of whom point out problems with Cassell's methodology and with the data itself.[116] However, all agree that the data from the studies done

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Practical Effect: Substantial Benefits and Vanishingly Low Social Costs, 90 NW. U. L. REV. 500, 545 (1996) (re-analyzing Cassell's data and arguing that the average drop was 4.1%).

113. *See* Cassell, *supra* note 56, at 446.

114. *See* Cassell & Fowles, *supra* note 85, at 1062 ("Although broad generalizations are hazardous, before-*Miranda* confession rates in this country were probably somewhere around 55-60%").

115. *See* Cassell, *supra* note 56, at 438 (arguing from the confession rate drop that the *Miranda* rule results in lost convictions of 3.8% of all criminal suspects questioned in America each year).

116. *See* Schulhofer, *supra* note 112, at 112 (arguing that, after including all of the relevant studies in this area, which Cassell did not do, and after making adjustments for the over-representation of urban areas in the data and for other developments independent of *Miranda* which could have an impact on confession rates, the average drop in the confession rate attributable to *Miranda* is only 4.1%). *See* Leo, *supra* note 3, at 633-45 (arguing that Cassell's conclusions are not compelled from the data reported in the old studies). Richard Leo re-interpreted the data from the earlier studies and came to six conclusions. *Id.* at 645. First, from 1966-1969, American police complied with the *Miranda* requirements. *Id.* Second, despite receiving the warnings, most suspects waived their rights. *Id.* Third, once waiver of *Miranda* was obtained, tactics and techniques of interrogation did not change because of *Miranda*. *Id.* Fourth, suspects still continue to provide detectives with confessions and incriminating statements, but in some studies at a lower

within the first decade after *Miranda* was decided show that *Miranda* had *some* effect on confession rates, whether significant, as Cassell claims, or negligible, as Leo and Schulhofer argue.[117]

The findings of recent studies reporting data for confession rates have also differed, one from another. In his study of interrogation Salt Lake County, Cassell found that only 33% of the interrogations he observed were successful in eliciting an incriminating statement from the suspect.[118] By contrast, in his study of interrogations in Berkeley, California, Leo found that 64.29% of the interrogations he observed were successful.[119] It is worth noting that, in Cassell's study, 21% of all suspects were not subjected to any questioning, a fact which, according to some commentators, skews his findings considerably.[120] There are other factors which may account for the difference in the confession rates reported in the two studies. For instance, Leo only observed interviews conducted by detectives, whereas Cassell observed interrogations conducted by all police officers, including rookies. Also, Leo observed only custodial interrogations, whereas Cassell included all interviews he observed, including non-custodial ones, in his data.[121] The confession rates reported by Leo and Cassell, therefore, may not be reasonably comparable.[122]

Given the impossibility of collecting data for the immediate post-*Miranda* period, and the logistical difficulties of observing the police practices of a large number of jurisdictions in one study,

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rate than before *Miranda*. *Id.* Fifth, clearance and conviction rates were not significantly affected by *Miranda*, although in a few studies, conviction rates were found to have dropped. *Id.* Sixth, *Miranda* may have been responsible for lessening the effectiveness of the police in collateral functions of an interrogation, such as obtaining the names of accomplices, clearing other crimes, and recovering stolen property; however, *Miranda* does not appear to have undermined the effectiveness of criminal investigations in the way that the law enforcement community had feared when *Miranda* was decided. *Id.*

117. *See generally* Cassell, *supra* note 56; Leo, *supra* note 3; Schulhofer, *supra* note 112.

118. *See* Cassell & Hayman, *supra* note 15, at 868.

119. *See* Leo, *supra* note 15, at 280 (postulating that 64% were successful if success is defined as the gain of any incriminating evidence by a detective).

120. *See* Thomas, *supra* note 112, at 946 n.54 (noting that the percentage included suspects whose whereabouts were unknown and that if they were removed from the sample, the interrogation rate jumps to 84.3%).

121. *See* Cassell and Hayman, *supra* note 15, at 902 (finding that more experienced detectives were more successful interrogators than less experienced officers).

122. *See id.* at 876 (arguing that the figures are comparable, and that Leo's figures are inflated). Thomas also argue that the rate Leo calculated is more in line with the result of past studies. *Id.* *But see* Thomas, *supra* note 112, at 953-54 (asserting that the comparisons between the two figures and the resulting downward adjustment made to Leo's figure by Cassell was improperly done). Additionally, Thomas asserts that the confession rate in Cassell and Hayman's Salt Lake County study was higher than reported. *Id.*

some commentators have turned to clearance rates[123] as an indicator of *Miranda*'s impact on confession rates. In 1998, Paul Cassell and Richard Fowles obtained nationwide clearance rate data for the period between 1966 and 1998 from the FBI and compiled it in an attempt to discern the effect of *Miranda* on clearance rates.[124] Cassell and Fowles found that although clearance rates dropped between 1966 and 1970, they have remained stable since 1970.[125] After running a regression analysis, they found that *Miranda* had an effect on clearance rates for robbery, larceny, vehicle theft, and burglary, but not on rates for homicide, rape or assault.[126] Based on these findings, the authors conclude that *Miranda*'s requirements adversely affected the ability of police to obtain confessions from suspects and ultimately solve crimes.[127]

As with the confession rate studies, many commentators have disagreed with Cassell and Fowles' clearance rate conclusions. Some have argued that a decline in clearance rates could be attributed to a number of factors other than *Miranda*, such as the coinciding deterioration of police-citizen relations in the 1960s and 1970s, changing patterns in commission of certain types of crimes, and improved police professionalism, which reduced the artificial inflation of clearance rates.[128] Further, the accuracy of FBI clearance rate data is notoriously suspect—a fact which Cassell and Fowles admit, but which they seem to do little (if anything) to correct.[129] Finally, the use of clearance rates instead of confession rates as an indicator of *Miranda*'s effects on law enforcement is questionable because confessions are not necessary to the solution of every crime. Cassell and Fowles admit as much when they

123. *See* Cassell & Fowles, *supra* note 85, at 1059 (defining clearance rates as "the rate at which police declare crimes solved"). The authors argue that clearance rates can act as a proxy for confession rates in discerning the effects of *Miranda* on law enforcement because confession evidence is often the most crucial piece of information used by police to solve crimes. *Id.* at 1063.

124. *Id.* at 1074.

125. *Id.* at 1068.

126. *Id.* at 1089.

127. *Id.* at 1126.

128. *See generally* John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998). *See* Cassell & Fowles, *supra* note 85, at 1116 (noting that some commentators have disagreed with the conclusions drawn from the clearance rate data).

129. *See* Cassell & Fowles, *supra* note 85, at 1075 n.95 (recognizing that reporting problems across jurisdictions, as well as tendencies of departments to inflate their numbers, and the number of subjective judgments necessary to the reporting process, could impact the accuracy of the clearance rate data). The authors assert that these objections did not affect their study because it examined the data in the aggregate, therefore minimizing inaccuracy problems. *Id.* at 1076. This is an unsatisfying justification, especially in the context of an empirical study.

assert, as a possible explanation for why they found no *Miranda* effect on the clearance rates for homicide, that police could have shifted their resources away from solving less serious crimes towards solving homicides.[130] If this is so, then Cassell and Fowles seem to admit that confessions are necessary insofar as they are a shortcut used by police to investigate crimes, as opposed to information that police need to solve crimes.[131] This means that a decline in clearance rates could be attributable to a decline in the use of other investigative techniques rather than a decline in the confession rate,[132] or to other legal restraints on police conduct, such as the Fourth Amendment exclusionary rule, rather than to *Miranda* itself.

To summarize, recent empirical studies attempting to assess the impact of *Miranda* on confession rates have proved inconclusive and controversial. At base, all commentators would agree that *Miranda* has resulted in some lost confessions. However, whether the number of confessions lost due to the *Miranda* doctrine is negligible or significant is still a matter of debate.

C. The Impact of Miranda on Criminal Adjudication

The available empirical evidence regarding the use of confession evidence in criminal trials supports what many practitioners and judges in the criminal justice system already know: confession evidence is extremely prejudicial to the defendant's case. Studies of psychological reactions to confession evidence have shown that such evidence substantially biases the trier of fact's evaluation of the case in favor of conviction.[133] In fact, confession evidence is so persuasive that conviction results in the vast majority of cases in which such evidence is presented against the defendant, even in cases where the confession is not corroborated by other physical evidence.[134]

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130. *Id.* at 1090.

131. Undoubtedly, confessions are necessary to solve certain crimes. However, this does not detract from my point that, contrary to Cassell and Fowles' apparent position, confessions are not absolutely necessary to solve most crimes.

132. A police department's lack of funds, for example, could explain a decline in the use of certain types of investigative techniques.

133. *See* Saul M. Kassin & Lawrence S. Wrightsman, *Confession Evidence*, *in* THE PSYCHOLOGY OF CONFESSION EVIDENCE AND TRIAL PROCEDURE 67, 67-68 (Saul M. Kassin & Lawrence S. Wrightsman, eds., 1985).

134. 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 J. CRIM. L. & CRIMINOLOGY 429, 494 (1998). In the case of false confessions, Leo and Ofshe found that, because criminal justice officials and jurors treat confession evidence with such deference, the inferences of guilt caused by a defendant's false confession often outweighs strong circumstantial evidence of a defendant's innocence. *Id.*

Richard Leo was able to quantify this prejudicial effect in his study of interrogations in Berkeley. Leo tracked the suspects he observed through the case-processing stage of the criminal justice system.[135] He found that suspects who incriminated themselves during interrogation were 20% more likely to be charged with a crime, 24% less likely to have their cases dismissed, 25% more likely to plea bargain, and 26% more likely to be found guilty than those who did not self-incriminate.[136] In their study of interrogations in Salt Lake County, Cassell and Hayman did not calculate percentages for the same categories, but did find that 78.9% of defendants who made incriminating statements during questioning were convicted, whereas only 56.7% of defendants who did not make incriminating statements were ultimately convicted.[137] In other words, Cassell and Hayman found that suspects who confessed were more likely to be convicted, and of more serious charges, than those who did not.[138]

Although confession evidence is clearly prejudicial to defendants, it may not be necessary to obtain a conviction in every case. An assessment of *Miranda*'s impact on criminal adjudications therefore requires an examination of the necessity of confession evidence to criminal convictions. It is worth noting that the determination whether confession evidence is necessary to convict a defendant in a particular case is ultimately a subjective one.[139] It is therefore impossible to accurately quantify the necessity of confessions to criminal convictions. However, some attempts at estimating the importance of confessions to criminal trials have been made. The empirical studies conducted between 1966 and 1972 attempted to assess the importance of confessions in obtaining convictions.[140] According to Cassell's re-analysis of their findings, confession evidence is crucial to obtaining convictions in somewhere between 10.3% and 29.3% of all cases.[141] However, it should be noted that Cassell excluded a number of studies from his calculus, including his own recently-conducted study (discussed *infra*), which supports a different conclusion.[142]

The only recent attempt to assess the importance of confession evidence to criminal adjudication was made in the Salt

135. Leo, *supra* note 15, at 268.
136. *Id.* at 298-99.
137. Cassell & Hayman, *supra* note 15, at 914.
138. *Id.* at 909.
139. Cassell, *supra* note 56, at 423.
140. *See id.* at 424-33 (providing a more thorough examination of the assessments of the earlier studies as to the importance of confession evidence to convicting defendants).
141. *Id.* at 433.
142. *Id.*; *See also* Schulhofer, *supra* note 112, at 502 (pointing out flaws in Cassell's methodology).

Lake County study conducted by Cassell and Hayman.[143] They calculated percentages for prosecutorial case-screening, a procedure which requires prosecutors to assess whether the state has enough evidence with which to proceed against the defendant. In Salt Lake County, prosecutors filed charges in 87.5% of cases in which an incriminating statement was elicited from the suspect, as opposed to 81% of cases in which no incriminating statement was obtained.[144] Unfortunately, these figures are inconclusive. Although the failure to obtain a confession seems to account for a 6.5% decrease in the likelihood of filing charges, prosecutors also failed to charge suspects in 12.5% of cases in which an incriminating statement was obtained from the defendant. Since the percentage for cases in which a prosecutor had a statement from the defendant but could not file charges is almost one and one half times that for cases in which prosecutors did not have a statement and could not file charges, it is impossible to draw any conclusion about the necessity of confession evidence to convicting defendants.

Plea-bargaining is another area in which the importance of confession evidence should be assessed. The vast majority of criminal cases in America today are resolved by a guilty plea rather than a trial; in fact, between 70% and 90% of all felony cases in most jurisdictions are resolved by a plea of guilty or its functional equivalent.[145] Because the plea for which the defendant negotiates depends on the strength of the state's case against him, Cassell argues that the effects of confession evidence on plea bargaining is an indicator of the impact of *Miranda* on criminal adjudications.[146] Cassell asserts that two of the studies conducted immediately after the *Miranda* decision[147] found that the presence

143. *See* Cassell & Hayman, *supra* note 15, at 905-06. The authors first attempted to assess the necessity of confessions by collecting fifty-nine cases in which incriminating statements had been elicited from suspects, showing the cases to prosecutors, and asking them whether those statements were necessary to obtain a conviction. *Id.* at 906. In thirty-six of the cases, prosecutors thought that the confessions were necessary; in twenty-three of them, prosecutors thought the statements were unnecessary. *Id.* This led Cassell and Hayman to conclude that, in 61% of cases, prosecutors need confessions in order to obtain a conviction. *Id.* However, the data that Cassell and Hayman collected on actual prosecutorial case-screening contradicts this result. *Id.* at 908. Since the data on case-screening is actual data, rather than the solicited opinions of prosecutors, I consider it a more accurate finding and accordingly discuss it in the body of this Article.

144. *Id.* at 908.

145. Cassell, *supra* note 56, at 440-41.

146. *See id.* at 441-42.

147. The studies Cassell cites are David Neubauer's study of confessions in "Prairie City," a pseudonym for a medium-sized city in central Illinois, and the Yale Project, which studied the impact of *Miranda* on police conduct in New Haven, Connecticut. *Id.* Cassell also notes that a 1988 study of plea

or absence of confession evidence had a definite effect on the outcomes of the plea bargaining process.[148] Cassell and Hayman's 1994 study of Salt Lake County found that defendants who confessed were less likely to receive concessions in plea bargaining, and were less likely to have their charges dropped.[149] In his study of Berkeley, California, Leo found that suspects who made incriminating statements were 24% less likely to have their cases dismissed, and 25% more likely to have their cases resolved by plea bargaining.[150] From this data, it is clear that confession evidence strengthens the state's case against the defendant, and thus increases both his chances of conviction and his chances of taking a less favorable plea.

However, the evidence obtained from all of these studies does not speak to the necessity of confession evidence to the prosecution's case. As Schulhofer points out, *Miranda* can be interpreted as having an adverse effect (on the part of the state) on plea bargaining only if the group of cases assessed are those in which, absent confession evidence, the state absolutely cannot obtain a conviction.[151] In the studies quoted by Cassell, as well as in that conducted by Cassell and Hayman, a confession was counted as "necessary" any time other evidence in the case was insufficient to make conviction likely at trial.[152] This is a result-oriented definition, which only looks to the outcome of each case at trial, rather than to ultimate dispositions in the criminal justice system. Thus, cases were counted as "lost" not only when the lack of a confession would result in the defendant's acquittal, or in the case being dismissed, but also when the prosecutor agreed to the defendant's guilty plea to a reduced charge or sentence.[153] The problem with this definition is that it fails to recognize that prosecutors have leverage at their disposal to obtain guilty pleas in cases otherwise considered "lost" due to lack of sufficient evidence to secure a conviction at trial.[154] Although the strength of the state's case is one factor contributing to a prosecutor's plea-bargaining position, other factors, such as the higher credibility prosecutors have with both judges and juries, the power to increase or decrease charges, and the fact that their own liberty is not at stake in the bargaining process (whereas the defendant's liberty is), enable prosecutors to retain good negotiating positions

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bargaining in the criminal justice system conducted by Peter Nardulli, James Eisenstein, and Roy Flemming also found a correlation between the presence or absence of confession evidence and plea-bargaining outcomes. *Id.* at 442-44.

148. *See id.*

149. Cassell & Hayman, *supra* note 15, at 911.

150. Leo, *supra* note 15, at 298-99.

151. *See* Schulhofer, *supra* note 112, at 542.

152. *See id.* at 542-43.

153. *See id.*

154. *See id.* at 543.

in almost every plea-bargaining situation. Thus, a plea-bargained sentence may be lower in a case without confession evidence than in a case with confession evidence, but the case without the confession will not be lost altogether.[155] When the inherent strength of the prosecutorial position in plea-bargaining is considered, the negative effects of *Miranda* on plea-bargaining[156] seem non-existent, or at least not quantifiable.

In sum, the available empirical results support the conclusion that confession evidence is extremely prejudicial to defendants at all stages of the criminal justice system. Incriminating statements by a defendant strengthen the prosecution's case against him, and as such, make it more likely that he will be convicted at trial and less likely that he will be able to secure a favorable plea. However, the necessity of confession evidence to convict a defendant in the criminal justice system is unclear. As seen in Cassell and Hayman's examination of prosecutorial screening, there does not seem to be a direct correlation between prosecutors' decisions whether to charge a defendant and whether or not the defendant made an incriminating statement.[157] An empirical study seeking specifically to isolate the importance of confessions themselves to case dispositions in the criminal justice system is needed to answer fully the question of *Miranda*'s impact on criminal adjudication.

D. Is the Miranda Doctrine Effective?

For decades, conservative and liberal commentators have argued for the abandonment of the *Miranda* doctrine. Conservatives argue that the doctrine is too restrictive of law

155. Schulhofer also points out that the plea-bargained sentence could be judge-imposed, in which case it may not be lower than what the defendant would have obtained at trial. *Id.* Further, the criminal justice system has other mechanisms by which a defendant may be punished, even without evidence sufficient to convict him at trial. *Id.* For example, if the defendant is convicted for something else, the Federal Sentencing Guidelines require a judge to take into account the defendant's prior conduct in imposing a sentence for the current offense. *Id.* at 543-44.

156. Cassell concludes that, due to the importance of confession evidence to the prosecution's position, *Miranda* has had a negative impact on the plea-bargaining process from the point of view of prosecutors. Cassell, *supra* note 56, at 445. In this context, he does not explain why the Department of Justice, the agency in charge of all federal prosecutors in the United States, has not consistently supported the re-instatement of the due process standard for any significant period of time. Indeed, the Department of Justice argued on the side of the petitioner, Charles Dickerson, rather than the Fourth Circuit, in the *Dickerson* case. *Dickerson*, 166 F.3d at 670.

157. It should be noted that, because confessions often lead police to uncover additional evidence against suspects, confessions might have a greater impact than the current empirical data seem to indicate. Cassell, *supra* note 56, at 471-72.

enforcement's efforts to secure the conviction of criminals.[158] On the other hand, liberals argue that the doctrine is not sufficiently protective of suspects' rights.[159] The availability of recently-collected empirical data provides an opportunity to assess the effectiveness of the *Miranda* doctrine in practice. What do the empirical findings indicate about the current state of the *Miranda* doctrine vis-à-vis the rights of suspects and the interests of law enforcement?

The empirical findings support the theoretical argument that *Miranda* offers more protection to suspects than due process standard. In the studies conducted by Leo and by Cassell and Hayman, some suspects did invoke their right to silence or counsel during a custodial interrogation.[160] Both recent studies also observed that police read the warnings to all suspects at the outset of a custodial interrogation.[161] Studies of clearance and confession rates after *Miranda* indicate that police have obtained fewer confessions from suspects since *Miranda* was decided, although the precise extent of this decline is still debated.[162] These basic findings clearly indicate that *Miranda* has constrained somewhat the ability of law enforcement to obtain confessions from suspects during custodial interrogation. Insofar as the greater number of confessions obtained in the due process regime was due to a higher incidence of police coercion[163] in the aggregate, it is reasonable to conclude that *Miranda* offers suspects more protection against being compelled by the state to incriminate themselves than the due process standard.

Even though *Miranda* has improved on the due process standard in terms of reducing police coercion in the aggregate, the empirical findings also uncover some problems with the *Miranda* doctrine. Most troubling to an assessment of the success of the *Miranda* regime is that a high percentage of suspects—as many as

158. *See, e.g.*, Cassell, *supra* note 56, at 471.

159. *See, e.g.*, Charles J. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826 (1987).

160. Leo, *supra* note 15, at 275-76; Cassell & Hayman, *supra* note 15, at 859-60.

161. Leo, *supra* note 15, at 275-76; Cassell & Hayman, *supra* note 15, at 887.

162. *See supra* notes 112-132 and accompanying text.

163. Police coercion here does not refer to physical violence committed by police against suspects to induce confessions. As the *Miranda* Court recognized, the majority of confessions obtained under the due process standard as it existed in the 1960s were psychologically, not physically, compelled. Miranda v. Arizona, 384 U.S. 436, 448 (1966). The *Miranda* warnings were designed to combat the psychologically compelling nature of custodial interrogations. Assuming that the *Miranda* Court is correct in asserting that the nature of custodial interrogation is inherently coercive, the decrease in the number of confessions obtained under the *Miranda* regime indicates that, in the aggregate, custodial interrogations are less coercive than they were under the due process regime.

84%—waive their rights at the outset of a custodial interrogation.[164] Thus, although aggregate findings indicate that interrogations are less coercive, the vast majority of individual suspects are not protected under the *Miranda* regime. This is probably due in large part to the myriad strategies developed by police to minimize the *Miranda* warnings.[165] In addition, the structure of the rule itself is partially responsible for the high waiver percentage. Since the *Miranda* rule does not alleviate the secrecy of the custodial situation, on which many successful interrogators capitalize, it does not truly combat the inherently coercive nature of the atmosphere in the interrogation room.[166] Further, full protection of the rule does not extend without the positive action of suspects, who, if intimidated by the custodial surroundings, are not likely to take a proactive position and exercise their *Miranda* rights. Thus, police sophistication combined with the structure of the rule itself has caused *Miranda* to be ineffective from the point of view of the majority of suspects.

In addition, recent empirical findings show that the exceptions made to the *Miranda* doctrine do have some effect on police conduct and on the ultimate outcome of certain custodial interrogations.[167] Many modern police departments take advantage of the exceptions to *Miranda*'s admissibility requirements created by the Supreme Court. Studies of current police practice indicate that a number of police departments advocate questioning "outside *Miranda*" in certain circumstances, a policy made possible as a practical matter by the Supreme Court's decisions in *Harris* and *Elstad*.[168] Further, some police departments have turned wherever possible to non-custodial interrogation, in which, under the *Beheler* line of cases, *Miranda* warnings are not required before questioning, in place of custodial interrogation.[169] These findings clearly indicate that police are using some of the exceptions to the *Miranda* rule in attempting to extract confessions from certain suspects. However, the effects of the *Miranda* exceptions are not sweeping. It is important to note that not all police departments are using these exceptions as a

164. Cassell & Hayman, *supra* note 15, at 860.

165. Leo & White, *supra* note 14, at 432.

166. Indeed, in his interrogation manual, Fred Inbau asserts that effective interrogations owe their success to the privacy of the custodial situation. FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS 24-28 (3d ed. 1986).

167. It should be noted that not all exceptions to the *Miranda* doctrine have been found to have a discernible empirical effect. For example, use of the *Quarles* exception was not observed in any of the empirical studies assessed here.

168. Leo & White, *supra* note 14, at 460-61; Weisselberg, *supra* note 103, at 133.

169. Cassell & Hayman, *supra* note 15, at 881-82.

general practice, and that departments that use the exceptions do not do so with all suspects. Accordingly, only some of the recent empirical studies have found that police do not read suspects the *Miranda* warnings, or that police do not respect suspects' invocations of their *Miranda* rights.[170] The majority of suspects, even in precincts which engage in questioning "outside *Miranda*," are interrogated pursuant to *Miranda*'s requirements.

Therefore, the empirical findings show that, as a general matter, police adhere to the core requirements of the *Miranda* doctrine. The vast majority of suspects are read the *Miranda* warnings before custodial interrogation begins. Yet the fact remains that a very high percentage of suspects waive their *Miranda* rights and give incriminating statements during custodial interrogations. This data alone indicates that the *Miranda* doctrine is not fulfilling the rationale set forth to originally justify it; that is, the *Miranda* rule, in practice, is not adequately combating the inherently coercive atmosphere of custodial interrogations.

There are a number of possible reasons why suspects waive their rights to silence and counsel in the interrogation room. The sophisticated strategies that police have developed to induce waiver provide one explanation. As Leo and White found, police are trained in over fifteen different methods of reading the *Miranda* warnings to suspects, many of them psychologically compelling, which generally result in suspects waiving their rights.[171] These strategies are probably responsible for the majority of *Miranda* waivers. An alternative explanation is that some suspects act on their own desire to waive their rights, thinking that, if they give a statement, they can outwit the police and exonerate themselves. Since the *Miranda* protections do not extend as a practical matter unless the suspect invokes them, *Miranda* cannot protect suspects who confess in an attempt to outsmart the police or out of personal guilt.

One further explanation for the high percentage of suspects who waive their *Miranda* rights is that suspects do not understand their rights under *Miranda* when they waive them, and the standards used to determine the voluntariness of a *Miranda* waiver make it difficult for a defendant to prove involuntariness.[172] It is true that the frequent appearance of the *Miranda* warnings in mass media and popular culture makes it unlikely that suspects have never heard them before setting foot in the interrogation room. The logical conclusion from the popularity of the *Miranda* warnings in movies and on television is that every

170. Leo, *supra* note 15, at 275; Cassell & Hayman, *supra* note 15, at 860.
171. Leo & White, *supra* note 14.
172. *See* Ogletree, *supra* note 159, at 1827.

suspect understands his rights under *Miranda* before being custodially questioned. However, this conclusion appears seriously flawed in light of the fact that the *Miranda* rights are not portrayed accurately on television.[173] In popular police dramas, suspects' *Miranda* rights are often violated by police, who use a range of prohibited tactics, including physical violence, to obtain confessions from suspects.[174] If this is the source by which suspects are educated about their *Miranda* rights, it is not necessarily clear that they understand the substance of those rights when police read them at the outset of a custodial interrogation. In fact, it is likely that suspects who learn about *Miranda* on television *mis*understand the substantive meaning of the warnings.

The fact that so many suspects waive their rights, despite the fact that the *Miranda* doctrine is followed most of the time, necessarily calls the doctrine itself into question. Clearly, if the underlying rationale of the *Miranda* doctrine is to prevent suspects from unwittingly issuing incriminating statements to police, then the doctrine as constructed by the Warren Court has failed. Does the *Miranda* doctrine work under any rationale? In response to this question, the justifications for *Miranda* advanced in case law and in scholarship are relevant. The two most commonly advanced grounds for the doctrine are that it was created to combat the inherently coercive atmosphere of custodial interrogations, and that it was created to strike a balance between the rights of suspects and the interests of law enforcement.[175] If the *Miranda* doctrine, considered in terms of its practical effects, satisfies either of these rationales, then it can be said to "work" in some sense. If it does not, then an alternative must be seriously considered.

The Supreme Court's decision in *Miranda* hinged largely on its determination that custodial interrogations were inherently coercive from the point of view of suspects. In language emphasizing the importance of individual free will in the Fifth Amendment context, the Court held that custodial interrogations conducted without informing the suspect of his constitutional rights to silence and to counsel are coercive, "created for no purpose other than to subjugate the individual to the will of his

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173. *See* Bandes and Beermann, *supra* note 90, at 6-7 (discussing the portrayal of the *Miranda* rights on the TV program *NYPD Blue*).

174. *Id.* at 7-8.

175. It should be noted that these two rationales are not incompatible with each other. The idea of combating the coercion inherent in the interrogation setting is easily fit into the structure of the balancing rationale as one of the major interests of suspects (if not the most prominent interest). In addition, as argued briefly above, the balancing rationale was contemplated, at least implicitly, by the *Miranda* majority. *See infra* notes 249-320 and accompanying text.

examiner."[176] Because the atmosphere of custodial interrogation "carries its own badge of intimidation" which is at odds with human dignity, the Court found that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."[177] Finally, when the Court announced its rule that the fourfold warnings must be read to all suspects at the outset of custodial interrogation, it asserted as its rationale that "such a warning is an absolute requirement in overcoming the inherent pressures of the interrogation atmosphere."[178] Thus, it is fair to conclude from the language of the opinion that the *Miranda* Court was primarily concerned with protecting suspects' free will in situations of custodial interrogation. Since the Court viewed custodial interrogations as inherently coercive to suspects, it had to construct the fourfold warnings in order to give suspects the knowledge that, despite being under the custodial control of the state, they were not required to respond in an incriminating manner to any questions asked by police.[179]

The available evidence about *Miranda*'s effects on the criminal justice system shows that the *Miranda* rule does not affect its rationale of combating the inherently coercive atmosphere of custodial interrogations. The high percentage of suspects who waive their rights when it is clearly not in their interests to do so, and the correspondingly low percentage of suspects who invoke their rights during an interrogation are both indications that the custodial interrogation situation is still inherently coercive to suspects. One reason for *Miranda*'s failure to adequately combat the coerciveness of custodial questioning is that the Court gave *suspects* the power to stop the questioning. Since the power attaches when the suspect is in custody, the rule's protections kick in only when the suspect is isolated and surrounded by police hostile to his interests—solely in the inherently coercive situations which the *Miranda* Court was striving to combat.[180] Further, *Miranda*'s protections are initiated

176. Miranda v. Arizona, 384 U.S. 436, 457 (1966).

177. *Id.* at 457-58.

178. *Id.* at 468.

179. The Court did not construct this rationale out of thin air. The Supreme Court viewed voluntariness in terms of whether the defendant's free will was impeded by police conduct at the end of the nineteenth century. In *Bram*, for example, the Court held that a detective's misrepresentation of the evidence against the defendant, made in order to induce the defendant to confess, rendered the confession involuntary because it negated the defendant's ability to freely decide whether to incriminate himself. Bram v. United States, 168 U.S. 532, 562 (1897).

180. Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U. L.Q. 11, 14-15 (1988).

by police, who, contrary to their own interests, must read the warnings to the suspect. In order to minimize the number of suspects who invoke their rights under *Miranda*, police have devised many successful strategies by which to affect *Miranda* waivers.[181] From the recent empirical evidence, it is clear that, even excepting consideration of police who question "outside *Miranda*," the *Miranda* rule does not work if its underlying rationale is to combat the inherently coercive atmosphere of custodial interrogations.

An alternative rationale given to justify *Miranda* is that its rule was designed to strike a balance between the interests of society and the interests of individual suspects. Advanced implicitly in the decision itself,[182] as well as in subsequent case law[183] and by commentators on the decision,[184] this theory assumes that society's interests are aligned with law enforcement's interests in apprehending and ultimately convicting criminals.[185] Taking as given that the interests of society are, for the most part, conflated with those of law enforcement, does *Miranda* satisfy this rationale? In order to determine whether the *Miranda* doctrine really does effect a careful balance between the interests of suspects and the interests of law enforcement, a discussion of the costs and benefits resulting from *Miranda* is necessary.

From the perspective of society and law enforcement, *Miranda* confers a number of benefits. First, the *Miranda* rule has been a civilizing influence on police conduct inside the interrogation room. Although instances of physically coercive interrogations were on the decline before *Miranda* was decided, the bright-line rule imposed on police conduct seems to have sent an effective message to police departments around the country that tactics employing physical brutality will not be tolerated.[186] It

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181. *See supra* notes 89-98 and accompanying text.

182. *See Miranda*, 384 U.S. at 477 ("Our decision is not intended to hamper the traditional function of police officers in investigating crime.").

183. *See, e.g.*, Moran v. Burbine, 475 U.S. 412, 434 n.4 (1986) ("As any reading of *Miranda* reveals, the decision, rather than proceeding from the premise that the rights and needs of the defendant are paramount to all others, embodies a carefully crafted balance designed to fully protect both the defendant's and society's interests.")

184. Cassell & Fowles, *supra* note 85, at 1129.

185. As a blanket assumption, this is clearly flawed. It is possible to imagine a number of examples in which the interests of society and those of law enforcement would diverge. The issue of searches conducted by police provides one such example. While it would be far easier for police to investigate crime if they could search houses of all residents at any time, individuals would seek to prevent such conduct because their interests in maintaining their personal space private and secure from the unreasonable reach of government would undoubtedly outweigh their interest in reducing the aggregate crime rate.

186. Leo, *supra* note 3, at 668.

is true that the use of physical force to compel a suspect to make a statement violates the due process standard; however, *Miranda*'s bright-line standard made the line between proper and improper conduct clear for all police officers. Accordingly, since *Miranda* was decided, incidences of physical coercion during interrogations have decreased to the point that suppression of confessions due to physical coercion rarely occurs today.[187]

Another benefit to society and to law enforcement is that *Miranda* has increased the level of professionalism in police departments across the country. *Miranda* established an objective set of rules for police to follow in conducting custodial interrogations. To some extent, this objective standard has made it easier to hold police and their departments accountable for their misconduct. This accountability, in turn, has lead to an increase in public support for police in the decades following *Miranda*.[188] Since public support leads to increased citizen cooperation with police, the accountability imposed by the *Miranda* rule has directly benefited police as well as society. Further, the level of training in modern police departments has increased since the *Miranda* decision, undoubtedly due to the accountability its bright-line rule conferred. Police today receive training in evidence, criminal procedure, and in investigatory techniques to a greater extent than thirty years ago.[189] This makes police officers, as a general rule, better at their jobs, and more respectful of individuals' rights.

A related benefit to law enforcement is that the implementation of *Miranda* gave police added credibility in the courtroom. If police read the *Miranda* warnings to a suspect, and the suspect waives and makes a statement, the vast majority of judges and juries will find that the suspect's waiver and subsequent confession valid and admissible. This credibility, combined with the fact that police devised sophisticated strategies for obtaining statements in compliance with *Miranda*, caused police departments to speak out *in favor* of *Miranda* in recent years.[190]

Along with the benefits it confers on society and law enforcement, *Miranda* also resulted in some tangible costs which are reflected in empirical data. Since 1966, the confession rate has declined.[191] Even if the percentage decline is only 0.78%, as Schulhofer argues, such a percentage still translates to over a thousand criminals set free every year because *Miranda* impeded police efforts to obtain enough evidence to ensure criminal

187. *Id.* at 669.
188. Cassell & Fowles, *supra* note 85, at 1116.
189. Leo, *supra* note 3, at 670.
190. *Id.* at 671.
191. *Supra* notes 114-123 and accompanying text.

convictions.[192] Similarly, clearance rates have declined since 1966.[193] Again, even if this decline is negligible, it still accounts for over a thousand guilty suspects going free every year because of the restraints imposed by *Miranda* on police investigatory techniques. A decline in the clearance rate also impacts the ability of police departments to solve other crimes, because solving crimes through confessions is far more efficient in terms of time and resources spent on each case. If crimes which previously were solved via confession evidence can no longer be cleared this way, police departments must either expend more resources to solve them, or allow those cases to go unsolved. Since confession evidence is considered by factfinders to be the most persuasive evidence of a defendant's guilt at trial,[194] and since confessions are a commonly-used investigatory method, the loss of confessions is a cost of the *Miranda* doctrine that must be taken seriously.

From the perspective of suspects, the *Miranda* doctrine confers some benefits. Compared to the due process standard, *Miranda* empowers suspects to protect themselves against being compelled by the state to confess to a crime. Under *Miranda*, suspects can stop custodial questioning at any time by simply invoking their right to silence or to counsel. Suspects are advised of these rights before questioning begins, so that, theoretically, they begin each interrogation from an empowered position. *Miranda* gives suspects some power to control the course of a custodial interrogation. However, as argued above, the empirical evidence shows that this empowerment may be only theoretical. An extremely high percentage of suspects waive their rights and make incriminating statements, and an extremely low percentage of suspects invoke their rights during interrogation. Thus, a very minimal percentage of suspects actually enjoy the benefits that *Miranda* confers; the vast majority of suspects never use the power that *Miranda* gives them.

An additional benefit *Miranda* gives suspects and the public is an increased awareness of the rights of individuals during custodial interrogations. A national poll conducted in 1984 found that 93% of those surveyed knew that they had a right to an attorney if arrested, and a national poll conducted in 1991 found that 80% of those surveyed knew that they had a right to remain

192. Schulhofer, *supra* note 112, at 544. *See also* Cassell, *supra* note 56, at 440 (citing estimates that the number of cases lost due to the confession rate decline induced by *Miranda* is in the hundreds of thousands per year); Cassell & Hayman, *supra* note 15, at 918 (concluding that *Miranda* imposes societal costs by reducing confessions and prosecutorial success).

193. Cassell & Fowles, *supra* note 85, at 1068, 1126.

194. *See* LAWRENCE S. WRIGHTSMAN & SAUL M. KASSIN, CONFESSIONS IN THE COURTROOM 102-26 (1993) (describing juror reactions to confessions based on case studies).

silent if arrested.[195] One common argument made about *Miranda* is that the prominent use of the warnings in police dramas on television and in films has not only made *Miranda* one of the most well-known Supreme Court decisions among non-lawyers, but has also informed the general public of their rights upon arrest.[196] Thus, the argument proceeds, even suspects who have had no prior contact with the criminal justice system know and understand their rights in a custodial interrogation situation.

However, if suspects and the public obtain information about their rights in the interrogation room from television, it is likely that they are misinformed as to the substance of those rights. As noted above, the portrayal of suspects' rights under *Miranda* in police dramas are often inaccurate.[197] During custodial interrogations on television, police often use physical force and other tactics which would be illegal under *Miranda* and the due process standard.[198] Police on television often get angry and mistreat suspects who attempt to invoke their right to counsel in the interrogation room, whereas they are much more pleasant to suspects who "cooperate," and make incriminating statements.[199] From this, suspects learn not that they have the power to stop custodial interrogations at any time, but that if they attempt to invoke their *Miranda* rights, police will get angry with them, treat them badly, or ignore their invocation entirely. Ironically, the dissemination of the *Miranda* doctrine through popular culture may have contributed to the high waiver percentage by gutting the protections in the minds of suspects.[200]

Although *Miranda* theoretically confers benefits on suspects, empirical and other studies seem to indicate that most suspects do not receive those benefits. In addition, confession evidence remains the most prejudicial type of evidence a defendant could face at trial. Confession evidence is so persuasive to factfinders that defendants are convicted in the vast majority of cases in

195. Leo, *supra* note 3, at 672.

196. *Id.* at 671.

197. *See* Bandes & Beermann, *supra* note 90, at 6 (calling television's portrayal of Miranda "oversimplified").

198. *See id.* at 7-8 (describing *N.Y.P.D. Blue* episode in which officers used physical force and ignored suspect's request for the assistance of counsel).

199. *See id.* at 9 (describing how *N.Y.P.D. Blue* "created the impression that if the suspect cooperates," he will receive more favorable terms in his case).

200. *Id.* at 6. An additional complication with the argument that *Miranda* has educated suspects and the public through popular culture portrayals of police work is that it ignores how police are portrayed in popular culture. *Id.* Since the 1980s, police work has tended to be portrayed heroically. *Id.* Police dramas are structured so that the viewer empathizes with the officers and feels that the suspects—portrayed as the "bad guys"—are getting what they deserve, even when their Constitutional rights are violated. *Id.* at 13. This could have implications on how suspects internalize their *Miranda* rights. *Id.* at 14.

which such evidence is presented, including cases in which the confession was not corroborated (and was sometimes contradicted) by other physical evidence.[201] Because factfinders view confessions as such persuasive evidence of guilt, it is important that any assessment of the costs and benefits of *Miranda* include the fact that the *Miranda* rule has increased the credibility of confession evidence.[202] But while it heightened the stakes against the defendant at trial, the *Miranda* rule has not adequately ensured that suspects are not psychologically pressured into waiving their rights and making incriminating statements. In this sense, the increased credibility of confession evidence (and of police testimony) after *Miranda* can be viewed as a cost to suspects.

Therefore, the fact that, in practice, suspects do not receive the benefits intended for them by the *Miranda* rule, necessitates the conclusion that the doctrine does not work as a balance between the interests of society or law enforcement and the interests of suspects. From the perspective of the criminal justice system, the fact that suspects do not seem to receive the empowerment intended by the *Miranda* rule means that no group as a whole is benefited by the costs of the rule in lower confession rates and lower clearance rates. Arguably, *Miranda* struck a "carefully crafted balance" because law enforcement receives some benefits in exchange for losses in confession and clearance rates, while confession evidence is still obtained in the vast majority of cases. However, this interpretation of the balance struck by *Miranda* largely ignores the interests of suspects, and is therefore nothing more than a rhetorical sleight-of-hand. The fact remains that police obtain some benefits in exchange for the costs of lower clearance and confession rates, whereas suspects are not able to realize the theoretical benefits conferred on them by the *Miranda* rule in exchange for the costs of their increased chances of conviction at trial if they give an incriminating statement. If the objective of a rule governing the admissibility of confessions is to balance the interests of suspects on the one hand and law enforcement on the other, surely there is a balance that is more efficient and more effective than *Miranda* from both points of view.

From the preceding discussion, it is clear that the *Miranda* rule does not work under either commonly-advanced rationale. It does not effectively combat the coercive atmosphere of custodial interrogations, and it does not effect a true balance between the interests of suspects and the interests of law enforcement or of society. Thus, an alternative to the *Miranda* rule must be

201. Leo & Ofshe, *supra* note 134, at 494.

202. *See* Leo, *supra* note 3, at 671 (describing how *Miranda* has improved law enforcement's image in front of the members of the judicial system).

considered. In 1968, Congress proposed and passed as its alternative the reinstitution of the due process standard in § 3501.[203] As previously discussed, § 3501 did include the reading of *Miranda* warnings as a factor to be considered within a larger inquiry of the "totality of the circumstances," precisely the method of analysis used under the pre-*Miranda* due process standard.[204] In *Dickerson* the Court declared this statute unconstitutional, reasoning that the statute was neither as protective nor more protective of suspects' rights than the *Miranda* rule.[205] However, Paul Cassell has argued, both in his writings and at oral argument in *Dickerson*, that the totality of the circumstances analysis set forth in § 3501 is just as protective against the admission of involuntary confessions as the *Miranda* doctrine is in practice.[206] If this is true, then the language of the *Miranda* opinion itself sanctions the implementation of § 3501 instead of the *Miranda* doctrine, and the *Dickerson* case was wrongly decided (at least as to the constitutionality of the statute).[207] In its concurrent examination of the due process standard and the *Miranda* doctrine, the next section inquires as to whether Cassell's argument is fundamentally or theoretically true.

III. COMPARING THE DUE PROCESS STANDARD AND THE MIRANDA DOCTRINE

The general wisdom regarding the *Miranda* doctrine is that it gave suspects more protection than did the due process standard. The *Miranda* Court itself seemed to assume this when it set forth its bright-line rule, and the *Dickerson* Court adopted this assumption when it rejected the notion that the due process standard was as protective as the *Miranda* rule in practice. Is the general wisdom correct? In an attempt to answer this question, this Part analyzes both the due process standard and the *Miranda* doctrine side-by-side, ending with a direct comparison of the protections both doctrines offer suspects during custodial interrogation.

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203. 18 U.S.C. § 3501.

204. 18 U.S.C. § 3501(b).

205. *See* Dickerson v. United States, 120 S.Ct. 2326, 2335 (2000) (holding that § 3501 is not equally "as effective as *Miranda* in preventing coerced confessions").

206. Brief of Court-Appointed Amicus Curiae at 33, *Dickerson*, 120 S.Ct. at 2335.

207. *See Miranda*, 384 U.S. at 467 (stating that:

> we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. . . .We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.).

A. The Due Process Standard: Assessing Voluntariness Through Multiple Factors

Before the Court decided *Miranda* in 1966, the standard by which judges decided whether to admit a confession was the due process standard, also known as the voluntariness standard.[208] Under this standard, the judge took into account a number of factors in considering the context and conditions under which a defendant's confession occurred to determine whether it was "voluntary" within the meaning of the Fifth and Fourteenth Amendments. It is this standard which Congress attempted to reinstate in 1968 with the passage of § 3501.

The due process standard's doctrinal justification was to ensure that individuals' Fifth and Fourteenth Amendment rights were not infringed upon by police or by other state conduct. This standard, developed in case law, required judges to determine on a case-by-case basis, considering the totality of the circumstances, whether the defendant's confession was voluntary, or not compelled. Put another way, the central inquiry was whether the defendant's "will was overborne" by police interrogation when he confessed.[209] If the confession was found to be voluntary, then it was deemed admissible; if it was found to be compelled, then it was inadmissible.

Because it requires judicial inquiry to be conducted on a case-by-case basis, the due process standard does not contain any bright-line rules.[210] Instead, judges are to apply a list of factors in analyzing the totality of the circumstances surrounding the confession. These factors have not been articulated simultaneously in one case, but were set forth and developed by the Supreme Court in cases dealing with the issue over time. Five major factors, the presence of which will tend to render a confession involuntary, can be gleaned from the Court's decisions

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208. KAMISAR, *supra* notes 4-5 and accompanying text. As noted earlier, for the purposes of this Article, I use the terms "due process standard" and "voluntariness standard" as synonymous ones, both referring to the standard articulated by the Supreme Court to determine whether a confession is admissible either before *Miranda* was decided, or after a suspect's voluntary and intelligent waiver of his *Miranda* rights. To avoid the difficulty of analyzing precisely what the Court meant by "voluntariness" in each case, I approach the standard in terms of which factors the Court applies in deciding whether a confession is admissible as part of the prosecution's case in chief. Such an approach has been suggested by other commentators in this area. *See, e.g.*, KAMISAR, *supra* note 4, at 24-25 (suggesting the "voluntariness" terminology could be eradicated without harm).

209. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 513 (1963) (stating that "the question in each case is whether the defendant's will was overborne at the time he confessed.").

210. It could be argued that the per se rule against confessions obtained through physical abuse of suspects by police is a bright-line rule. However, I discuss this as a factor. *See infra* Part III.A.

applying the voluntariness standard: the excessive length of the interrogation; the presence of physical intimidation or torture; the mental incompetence of the suspect; the presence of psychological intimidation or of explicit promises made by the police to induce a suspect's confession; the suspect's relative lack of knowledge about the criminal justice system at the time of the interrogation. Empirical studies show that only the latter three of these factors remain relevant in the context of modern-day, post-*Miranda* interrogations.[211]

One factor regularly considered by courts in applying the due process standard is the length of the interrogation. This factor indicates compulsion if the defendant is interrogated for an extended period of time, often in conditions which are clearly inhumane.[212] For example, the Court held confessions involuntary in cases in which police questioned the defendant for an extended period of time with effectively no break or sleep.[213] Only truly extended periods of time will result in the length of the interrogation becoming a significant factor in the Court's decision that a confession was compelled.[214]

A second factor which courts consider in assessing whether a confession was voluntary under the due process standard is the presence of physical intimidation or torture by police during the interrogation.[215] This has been applied as a *per se* rule, such that

211. *See, e.g.*, Cassell & Hayman, *supra* note 15, at 892 (finding that only one custodial interrogation in the study lasted longer than one hour); Leo, *supra* note 15, at 279, 283 (finding that over 70% of the interrogations observed lasted less than one hour, and that only 8% of the interrogations observed lasted longer than two hours, and finding no instances of physical coercion by police officers during interrogations).

212. *See, e.g.*, Blackburn v. Alabama, 361 U.S. 199, 204-08 (1960) (holding mentally-ill defendant's confession involuntary where defendant was interrogated for eight or nine hours in a four-by-six-foot room by three detectives without counsel present, and where the confession he signed was written by the interrogating officers); Chambers v. Florida, 309 U.S. 227, 239-40 (1940) (lobbying that confessions were involuntary where defendants confessed following continuous overnight interrogation after having been held incommunicado for several days).

213. *See, e.g.*, Spano v. New York, 360 U.S. 315 (1959) (holding an eight-hour interrogation that lasted until 3 A.M. produced an involuntary confession); Haley v. Ohio, 332 U.S. 596 (1948) (holding a five-hour interrogation of 15-year old defendant inadmissible, but age of defendant, rather than length of the interrogation, was prominent factor in analysis); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (holding that a confession that arose out of a thirty-six hour interrogation was coerced and invalid).

214. It seems that eight hours of questioning or more will result in the Court mentioning the length of the interrogation as a factor in determining that the defendant's will was overborne when he confessed. However, it is difficult to determine precisely what length of time is required for a court to find that police compelled a defendant's confession, since the Court will often not mention the length of the confession if it is not a significant factor.

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

any adverse physical contact between police and a suspect is sufficient grounds for finding the confession inadmissible.[216] The major case clearly establishing this factor is *Brown v. Mississippi*,[217] in which the defendants were hanged by the neck from a tree, beaten with a leather strap, and whipped until they agreed to confess.[218] It seems that this per se prohibition against physical violence, along with the *Miranda* decision, has largely eradicated the use of physical force by police to compel suspects to confess. Empirical data collected after *Miranda* was decided indicates that physical coercion is no longer a tactic used by police to induce confessions.[219]

The mental competence or intelligence of the suspect is another factor considered in the due process analysis.[220] If police capitalize on a suspect's mental illness or inability to comprehend the situation in obtaining a confession, courts are likely to find compulsion.[221] The age and level of education of the defendant have also been considered in assessing whether his will was overborne by official pressure during the interrogation.[222] The Court's rationale for taking age, educational level, and intelligence into account seems to be that a suspect who does not comprehend the nature of his interrogation may be more easily convinced that he should confess.[223] For the same reasons, in its pre-*Miranda* due process jurisprudence, the Court regarded a defendant's mental

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216. *Id.* at 283.

217. *Id.*

218. *Id.* at 281-82. *Brown* is also the first case in which the voluntariness standard was incorporated to the states under the Fourteenth Amendment.

219. *See* Leo, *supra* note 15, at 277-78 (finding that physical compulsion was not a tactic used by police in custodial interrogations from empirical observations of police conduct).

220. Haley v. Ohio, 332 U.S. 596, 600-01 (1948).

221. *See, e.g.*, Fikes v. Alabama, 352 U.S. 191, 196-98 (1957) (holding that the defendant's confession was not voluntary because law enforcement had applied great pressure to an individual of low mentality, and who they knew may have been mentally ill). The defendant in *Fikes* had started school at age eight and left at sixteen, unable to pass the third grade, and there was some evidence that he suffered from schizophrenia. *Id.* at 193, 196. The Court's main concern seemed to be that, because of his lack of intelligence, the defendant was particularly susceptible to having his will overborne by police interrogation. *Id.* at 198.

222. *See, e.g., Spano*, 360 U.S. 315 (holding that a confession of foreign-born defendant who was 25 years old and had not finished the ninth grade was involuntary); *Haley*, 332 U.S. 596 (holding that the confession of 15-year-old defendant who confessed after five-hour interrogation was involuntary).

223. As the Court stated in *Haley*:

> [W]hen, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. . . .[A 15-year-old boy] needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, may not crush him.

Haley, 332 U.S. at 599-600.

illness to be a significant factor in rendering his confession compelled.[224]

A fourth factor considered in the due process analysis is whether police psychologically intimidated the suspect during custodial interrogation.[225] As early as 1897, the Supreme Court held that if police or interrogating officials made statements tending to induce a suspect to confess, any resulting confession was involuntary.[226] Under this standard, if police inform a suspect that another suspect has implicated him in the crime in question, or if police tell a suspect that it would be better for him if he just confessed to the crime in question, any resulting confession would be deemed involuntary and inadmissible.[227] Although this rule has not been followed in the criminal jurisprudence of the modern era, the Court has recognized and prohibited as unduly coercive psychological intimidation by police during custodial interrogations.[228] Under the current standard, egregious inducements by police are clearly prohibited. For example, withholding basic rights from a suspect, such as the ability to call his spouse, and then offering those rights as an inducement for the suspect to make an incriminating statement is not permitted.[229] However, promises of services not regularly provided by police, such as psychiatric treatment, in exchange for a statement[230] have been held to be permissible by modern courts.[231]

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224. *See, e.g.*, *Blackburn*, 361 U.S. at 207-08 (stating that the defendant's mental illness is relevant to a voluntariness inquiry because an individual with the defendant's level of mental illness could not have sufficient "independence of will" to withstand police interrogation). This factor has been modified in the Court's post-*Miranda* due process jurisprudence, so that the mental illness of a suspect, without additional action by the police, is not enough to render his confession involuntary. Colorado v. Connelly, 479 U.S. 157, 163-64 (1986). The police must actively capitalize on the suspect's mental state in order for the post-*Miranda* Court to find that his confession was made involuntarily. *Id.*

225. Bram v. United States, 168 U.S. 532, 542-43 (1897).

226. *Id.* (asserting that the Fifth Amendment guards against confessions that were induced by threats or promises).

227. *See id.* at 560-65 (noting that the defendant was both encouraged to lessen the punishment by confessing to a crime, as well as told he was implicated by a co-suspect).

228. *See, e.g.*, Chambers v. Florida, 309 U.S. 227, 239 (1940) (holding defendants' confessions involuntary on the basis that the conditions in which they were obtained were psychologically coercive; or, in the Court's words, "were such as to fill petitioners with terror and frightful misgivings.").

229. *See* Haynes v. Washington, 373 U.S. 503, 504 (1963) (defendant held incommunicado for between five and seven days; police promised that he could call his wife and an attorney only after he made a statement regarding the crime in question).

230. This kind of quid pro quo arrangement would be prohibited if the modern Court followed the rule set forth in *Bram*. *Bram*, 168 U.S. at 560-65.

231. *See, e.g.*, Miller v. Fenton, 796 F.2d 598, 612-13 (3d Cir. 1986) (holding that an implicit promise of leniency and psychiatric care was not enough to

Although not as important or prominent a factor as the other four discussed here, a defendant's knowledge of the criminal justice system is mentioned in many cases as a factor to be considered in evaluating whether a defendant's confession was voluntary.[232] As in the case of a suspect's youth, education, or mental illness, a suspect's knowledge of the system is relevant in ascertaining whether a suspect sufficiently understood the nature of the interrogation situation when he confessed. From the Court's perspective, a suspect's lack of knowledge or understanding about the criminal justice system could make it easier for police to confuse, trick, or simply coerce him into making an incriminating statement during custodial interrogation.[233] Thus, the defendant's knowledge of the criminal justice system, while not of utmost importance to the Court's analysis, is another factor considered in the totality of the circumstances determination of whether a defendant's confession was voluntary.

These five factors comprise the means by which courts determined whether confessions were voluntary before *Miranda* was decided. Of course, the due process standard has continued to be used to assess voluntariness after the *Miranda* decision; however, it is no longer the primary method of analysis. In the *Miranda* framework, the initial inquiry is whether a defendant was read and understood his rights before making an incriminating statement. Only after a defendant waives his *Miranda* rights is the due process standard used to determine whether the statement was voluntary.[234] In this role, the due process standard has continued to develop in post-*Miranda* case law.

The post-*Miranda* cases assessing confessions under the voluntariness standard use the same factors as courts did before *Miranda* was decided.[235] However, in the decades following

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render a confession inadmissible under voluntariness standard).

232. *See, e.g.*, Spano v. New York, 360 U.S. 315, 321 (1959) (noting that the defendant had "no past history of law violation or of subjection to official interrogation.").

233. *See* Haley v. Ohio, 332 U.S. 596, 600-01 (1948) (dismissing the argument that the defendant had been informed of his constitutional rights before he confessed in light of defendant's young age and the denial of access to counsel or to his mother during the interrogation).

234. It should be noted that many courts, including the Supreme Court, seem to have treated these two steps of the analysis as one inquiry. *Id.* Nonetheless, the due process test has been clearly applied by courts in a number of cases following *Miranda*. *See* Steven Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 440 (1987). In these post-*Miranda* due process cases, courts have continued to consider the factors mentioned above in making a judgment as to whether the confession was voluntary in light of the totality of the circumstances.

235. For example, in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court referred back to its pre-*Miranda* due process jurisprudence in

Miranda, it has become increasingly difficult to exclude a confession as involuntary under the due process standard. *Miranda* itself seems to have contributed to this effect, since, in most cases involving the due process standard, the defendant in question necessarily waived his *Miranda* rights. In cases in which the *Miranda* warnings were waived by a defendant prior to confession, courts are much less likely to find resulting confessions involuntary.[236] On the other hand, in situations in which a suspect was not read his *Miranda* rights, courts are more likely to find any resulting statement involuntary.[237]

Thus, the presumption of coercion in the interrogation room, which the *Miranda* Court recognized and which the *Miranda* rule is designed to combat, has impacted subsequent applications of the due process standard. It is true that the presumption of coercion created by the *Miranda* rule gives police an incentive to read the warnings in every case.[238] Unfortunately, this presumption has become a double-edged sword in the hands of the Supreme Court. Once the *Miranda* warnings are read, the presumption of coercion is removed, and it becomes more difficult for suspects to prove that their confessions were involuntary under the due process standard. Indeed, it seems that the Court applies a presumption *against* coercion in cases in which a suspect is found to have knowingly and intelligently waived his *Miranda* rights. This

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explaining its application of the voluntariness standard:

> In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.

412 U.S. at 226 (citations omitted). The Court further asserted that these factors are to be assessed in each individual case, that no one factor is dispositive to the analysis, and that the Court must take into account the totality of the circumstances. *Id.* at 226-27.

236. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157 (1986) (*Miranda* warnings given, waived by the defendant; confession held voluntary in spite of evidence that the defendant was mentally ill when he confessed); *Miller*, 796 F.2d at 600 (*Miranda* warnings given, waived by the defendant; confession held voluntary).

237. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279 (1991). The defendant was befriended by a FBI informant while in jail. *Id.* at 283. When the informant promised to protect him from harm at the hands of the other inmates in exchange for his confession, the defendant made incriminating statements to him. *Id.* at 286. The Supreme Court held that the confession was involuntary due to coercion. *Id.* at 288.

238. *See* Oregon v. Elstad, 470 U.S. 298, 307 (1985) ("Failure to administer *Miranda* warnings creates a presumption of compulsion.").

seems to be a perverse result of the *Miranda* decision, since it essentially leaves suspects with no protection once they agree to submit to questioning after being told of their rights to silence and to counsel.

In the context of the congressional alternative before the Court in *Dickerson*, of course, the direct impact of *Miranda* on the due process standard is irrelevant. What is important to consider is exactly what the due process standard is, as it exists today. The due process standard consists of several factors, none of which are determinative. The flexible nature of the standard is such that, although the presence of more factors makes it increasingly likely that a court will find the defendant's confession involuntary, it is extremely difficult to predict the outcome of a due process analysis in most factual situations. The only clear rules in the current due process doctrine are that the use of physical force or violence by police in order to induce a confession is prohibited, and that state action is necessary for a confession to be found involuntary. Otherwise, courts evaluate the totality of the circumstances by noting whether the length of the interrogation was excessive, whether the defendant was mentally incompetent, whether police engaged in obvious psychological intimidation, and whether the defendant lacked any prior knowledge of the criminal justice system. If more of these factors are present in the evaluated circumstance, then a court may find the defendant's confession to be involuntary and thus inadmissible.

In order to answer the question whether *Miranda* is truly more protective of suspects' Fifth Amendment rights than the due process standard, an examination of the *Miranda* doctrine in its current state is required. The next section will provide an overview of the current protections offered by the *Miranda* doctrine as it exists today more than thirty years after it was originally instituted. After the legal implications of *Miranda* and its progeny are set forth, a comparison between the due process standard and the *Miranda* doctrine will be made from the perspectives of suspects, law enforcement, and the criminal justice system. From that comparison, an assessment as to whether the *Miranda* decision is at least more protective than the due process standard will be possible.

B. The Current State of the Miranda *Doctrine: Protector of Rights or Pragmatic Illusion?*

The due process standard, with its consideration of the totality of the circumstances surrounding each confession, is a flexible standard requiring a fact-intensive inquiry. By contrast, the Supreme Court in *Miranda* set forth a bright-line rule designed to ensure the protection of individual suspects' Fifth Amendment privilege against compulsory self-incrimination.

Noting that the atmosphere in a custodial interrogation is inherently intimidating, the Court held that protective devices (later called "prophylactic rules") were necessary to enable suspects to make a truly voluntary decision of whether to confess during a custodial interrogation.[239] The Court returned to a seemingly abandoned definition of voluntariness in asserting that a confession was not voluntary unless the confessor "chooses to speak in the unfettered exercise of his own will."[240] Construing the Fifth Amendment broadly,[241] the Court extended its protection beyond statements made by individuals in court proceedings, and on that basis justified the formulation of the now-famous *Miranda* warnings, and their application to custodial interrogation situations.[242]

The Warren Court created a fairly clear rule in *Miranda*. Before the custodial interrogation of a suspect takes place, police must read the suspect four warnings, to inform the suspect of his rights. The four warnings are: that the suspect has a right to remain silent; that any statement the suspect makes may be used against him in court; that the suspect has the right to the presence of an attorney; and that if the suspect cannot afford to hire an attorney, one will be provided for him.[243] The suspect may waive these rights, provided that he does so knowingly, voluntarily, and intelligently.[244] The suspect may also invoke these rights at any time during a custodial interrogation, even if he waived his rights at the outset of the interrogation.[245] If a suspect invokes either his right to silence or his right to have counsel present at any point during questioning, the interrogation must immediately cease.[246] Informing a suspect of his *Miranda* rights before custodial questioning begins is an absolute prerequisite to the admissibility of any statement made during the questioning session by the suspect.[247]

In *Miranda*, the Court did not explicitly state that it was attempting to strike a balance between the interests of law enforcement in apprehending and convicting suspects and the interests of suspects in not being compelled to incriminate themselves. Rather, the Court used a coercion rationale to justify

239. Miranda v. Arizona, 384 U.S. 436, 458 (1966): "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."

240. *See id.* at 460 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).

241. *Id.* at 461.

242. *Id.*

243. *See id.* at 444, 467-73.

244. *See id.* at 444.

245. *Miranda*, 384 U.S. at 444-45.

246. *Id.* at 473-74.

247. *See id.* at 476.

its holding; that is, the Court asserted that the required warnings are necessary to combat the inherently coercive atmosphere of custodial interrogations.[248] However, the Court did note that the privilege against self-incrimination itself was meant to achieve a "fair state-individual balance,"[249] and it insisted that the rule it announced was not meant to hamper the abilities of police to investigate crime.[250] Thus, it seems clear that, although the primary rationale underlying the *Miranda* doctrine was to combat the coercion inherent in custodial interrogations, an implicit balancing rationale was present as well. In cases subsequent to *Miranda*, the Court has moved away from the coercion rationale, often justifying the exceptions it creates to the *Miranda* doctrine by noting that the warnings themselves are prophylactic,[251] or by asserting that the rule was meant to strike a balance between the interests of suspects and the interests of society or law enforcement.[252]

In assessing the effectiveness of the *Miranda* doctrine, either in terms of the anti-coercion rationale or the balancing rationale, only a few of the cases subsequent to *Miranda* are relevant. This is so for two reasons. First, only the effects of cases establishing sweeping exceptions to the doctrine are assessable through empirical evidence. The effects of cases such as *Michigan v. Mosley*,[253] which undoubtedly made it more difficult for suspects to assert their rights to silence during custodial interrogation, are nonetheless extremely difficult to capture in empirical data.[254] Second, many of the exceptions to the *Miranda* doctrine have been created in uncommon fact patterns, which have not been extended to cover many other cases. For example, in *Fare v. Michael C.*,[255] the Court held that a juvenile offender's request for his probation officer, rather than a lawyer, was not the equivalent of a request for counsel under *Miranda*. Although the holding may impact juveniles in similar situations across the country, it does not affect

248. *See id.* at 467.
249. *Id.* at 460.
250. *Miranda*, 384 U.S. at 477.
251. Oregon v. Elstad, 470 U.S. 298, 307 (1985).
252. Moran v. Burbine, 475 U.S. 412, 433 n.4 (1986).
253. 423 U.S. 96 (1975) (holding that a suspect's invocation of his right to silence under *Miranda* does not create a per se proscription of indefinite duration on further questioning by officers on any subject; the proper inquiry under *Miranda* is whether the suspect's right to silence, once invoked, was "scrupulously honored" by the questioning officers, a standard which is satisfied if officers leave when the suspect invokes, and then come back some time later to resume questioning).
254. One reason for this difficulty is the likelihood that police will alter their conduct if being observed by researchers (who are usually law students or law professors). For a further discussion of the inherent difficulties in obtaining accurate empirical evidence of police conduct, see *supra* Part II.
255. 442 U.S. 707 (1979).

the protections offered by the *Miranda* doctrine to all suspects. The relevant exceptions to the *Miranda* rule can be loosely divided into two categories: (1) admissibility of confessions obtained in violation of *Miranda*; and (2) the definition of "custody" for purposes of the *Miranda* doctrine. In the cases in each category, the Court has implicitly redefined the balance between the rights of suspects and the interests of law enforcement, almost always in favor of law enforcement.

1. Admissibility of Confessions Obtained In Violation of Miranda

In *Miranda*, the Supreme Court was clear that a suspect's confession obtained before the police read him or her the required warnings will not be admissible against him in court.[256] Despite the straightforward language establishing this prohibition, the Court found enough ambiguity in it to limit its application five years later. In *Harris v. New York*, the Court interpreted the *Miranda* Court's prohibition against admissibility to apply only to the use of the confession in the prosecution's case in chief.[257] Under the rule announced in *Harris*, a confession obtained in violation of *Miranda* can be used to impeach the defendant if he chooses to testify at trial.[258] In a subsequent case, *Oregon v. Hass*,[259] the Court followed *Harris* and rejected the argument that the *Harris* rule would not deter police conduct that *Miranda* sought to prohibit: "Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."[260] The rationale behind both *Hass* and *Harris* was the fear that *Miranda*'s protections would enable defendants to take the stand and testify falsely, despite having confessed to the crime during interrogation.[261] However, the Court admitted to having no answer for the potential problem that the *Harris* rule provides police with the incentive to continue questioning a suspect after he invokes his right to silence or to an attorney.[262] Further, the Court seemed to ignore the argument,

256. *Miranda*, 384 U.S. at 476.
257. *Harris*, 401 U.S. at 224.
258. *Id.* at 225-26.
259. 420 U.S. 714 (1975).
260. *Id.* at 721; *Harris*, 401 U.S. at 225.
261. *See Harris*, 401 U.S. 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."); *Hass*, 420 U.S. at 722 (applying the rule in *Harris* to a situation in which police questioned defendant without reading *Miranda* warnings and obtained incriminating statements, which the prosecution used to impeach the defendant's testimony at trial).
262. *See Hass*, 420 U.S. at 723 (admitting that police might have an incentive to continue questioning after invocation of *Miranda*, but asserting

asserted in the *Harris* dissent, that a rule allowing the defendant's confession to be used for impeachment purposes would effectively allow the entire confession in evidence via cross examination of the defendant, and would therefore impede a defendant's decision to testify in his own defense.[263]

The Court made further inroads on the admissibility protections set forth in *Miranda* in *Oregon v. Elstad*.[264] In *Elstad*, the Court held that any information, including that provided by witnesses, evidence, or additional incriminating statements made by the defendant, obtained as a result of a *Miranda* violation are admissible at trial as part of the prosecution's case in chief.[265] As its rationale for not excluding evidence obtained in violation of *Miranda* under the "fruits of the poisonous tree" doctrine,[266] the Court stated that the *Miranda* doctrine was "prophylactic" in nature, and therefore not constitutionally required.[267] Thus, the Court's decision in *Elstad* gave police further incentives to forego reading a suspect the *Miranda* warnings, since even confessions made after a *Miranda* violation are admissible as part of the prosecution's case in chief, so long as they are made pursuant to a subsequent waiver of the suspect's *Miranda* rights.

2. *The Meaning of "Custody" Under Miranda*

A suspect's rights under *Miranda* attach only when he is in custody.[268] The Court in *Miranda* stated that a custodial situation occurs when an individual is deprived of his freedom of action in any significant way.[269] Given the backdrop of the *Miranda* Court's concerns about the inherently coercive atmosphere creating a compulsion to confess,[270] this standard requires an examination of the suspect's point of view regarding whether the police impaired

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that "the balance was struck in *Harris*, and we are not disposed to change it now.").

263. *Harris*, 401 U.S. at 227 (Brennan, J., dissenting).

264. 470 U.S. 298 (1985).

265. *Id.* at 314. In *Elstad*, police failed to read the *Miranda* warnings to the defendant, who made incriminating statements. *Id.* After the statements were made, police read the defendant his *Miranda* rights, he waived them, and issued a written confession. The Court held the confession admissible. *Id.*

266. *See* Wong Sun v. United States, 371 U.S. 471, 484-86 (1963) (explaining that "[t]he fruits of the poisonous tree" doctrine applies to evidence obtained in violation of the Fourth Amendment); *Elstad*, 470 U.S. at 306 (reasoning that since the Court held that the *Miranda* warnings were not constitutionally required by the Fifth Amendment, the "fruits" doctrine, which is constitutionally required, is inapplicable).

267. *Elstad*, 470 U.S. at 306.

268. *See Miranda*, 384 U.S. at 467 (specifically stating that the holding of the case pertains to "in-custody interrogation").

269. *Id.* at 444.

270. *Id.* at 468.

his freedom to act. However, as subsequent decisions have shown, the determination whether an individual is "in custody" is actually quite objective and formalistic. The fact that an individual is the "focus" of an investigation when he is questioned by officers is not enough for the questioning to be custodial.[271] Further, the fact that the questioning took place in an inherently coercive environment, such as a police station, is not determinative.[272] For purposes of the *Miranda* doctrine, the only relevant inquiry is whether an individual's freedom was restricted at the time of the interrogation.[273]

In addition to construing the *Miranda* Court's definition of "custody" narrowly, the Supreme Court has explicitly approved a form of police questioning which has been growing in popularity since the Court decided *Miranda*.[274] In *California v. Beheler*,[275] the Court held that when a suspect agrees to accompany police officers to the stationhouse for questioning, an ensuing questioning of the suspect does not constitute a custodial interrogation under the *Miranda* doctrine.[276] In so holding, the Court reiterated that the ultimate determination of whether a suspect is "in custody" for *Miranda* purposes hinges on "whether there is formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."[277] Thus, police need not read a suspect the *Miranda* warnings when the suspect agrees to submit voluntarily to questioning at the stationhouse, regardless of whether the

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271. *See* Beckwith v. United States, 425 U.S. 341, 347 (1976) (asserting that the issue whether an individual is the "focus" of an investigation is relevant to whether questioning was custodial, but that *Miranda* defined "focus" as "questioning initiated by law enforcement officers *after* a person has been taken into custody or otherwise deprived of his freedom of action in any significant way;" and concluding that the threshold inquiry for "custody" is therefore whether a suspect was deprived of his freedom of action).

272. Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

273. The Court's interpretations of factual situations to determine whether an individual's freedom was restricted by police have been quite literal in that they seem to require clear circumstantial evidence that the individual subject to questioning could not have been voluntarily questioned. *See* Mathis v. United States, 391 U.S. 1, 7-8 (1968) (finding a suspect's freedom restricted where the suspect was questioned in prison, while he was serving a prison term for another offense); Orozco v. Texas, 394 U.S. 324, 327 (1969) (finding a suspect's freedom restricted where the suspect was questioned in his home following his arrest). *But see Beheler*, 463 U.S. at 1125 (finding that a suspect's freedom was not restricted where a suspect voluntarily submits to questioning by police at the stationhouse).

274. *See* Cassell & Hayman, *supra* note 15, at 881 (stating that according to recent empirical data, police have attempted to circumvent the *Miranda* requirements by turning to non-custodial questioning as defined by the Court in the *Beheler* line of cases).

275. 463 U.S. 1121 (1983).

276. *Id.* at 1125.

277. *Id.*

interview takes place in a closed room or whether the suspect is in fact the focus of any criminal investigation.[278]

The Court has also acknowledged one type of situation in which the *Miranda* rights do not attach even if a suspect is "in custody." In *New York v. Quarles*,[279] the Court established a "public safety" exception to *Miranda*'s requirement that the warnings be read prior to questioning any suspect placed in custody. In an exigent situation, in which police must obtain information from a suspect in order to ensure the public safety, police are not required to read the suspect the *Miranda* warnings before questioning him to obtain the information they need.[280] According to the Court, this is a narrow exception to the *Miranda* rule, rather than a means by which police can circumvent *Miranda*.[281] Although many commentators decried the *Quarles* decision when it was originally handed down as striking a significant blow to the *Miranda* doctrine, the *Quarles* exception has had little effect on police behavior.[282] One possible reason for *Quarles*' minimal effect is the practical effect of the Court's rule in *Elstad*. Since the *Elstad* exception permits evidence obtained from *Miranda* violations to be admitted as part of the prosecution's case in chief,[283] there is no need for police to stretch the boundaries of exigent circumstances in the attempt to obtain confession evidence against a suspect.

C. *Assessing the Miranda Doctrine Vis-À-Vis the Due Process Standard*

The *Miranda* doctrine as it exists today is clearly less protective than it was when the Court originally announced its decision in 1966. However, its core rule still remains. In order to ensure that a confession be admissible as part of the prosecution's case in chief, police still must read a suspect the *Miranda* warnings before beginning an interrogation. If police simply want to induce a confession, on the other hand, the *Miranda* warnings need not be read, and any statement obtained is admissible as impeachment evidence, if the defendant chooses to testify.[284]

278. *Id.*
279. 467 U.S. 649 (1984).
280. *Id.* at 655-56.
281. *Id.* at 658.
282. *See* Oregon v. Elstad, 470 U.S. 298, 306-07 (1985) (announcing the rule that allows information obtained from a *Miranda* violation into evidence as part of the prosecution's case in chief). Thus, even without the *Quarles* exception, any evidence obtained as a result of a suspect's answers to questions asked at the crime scene would be admissible, regardless of whether the suspect had been read the *Miranda* warnings before making any statements. *Id.*
283. *Id.* at 318.
284. Harris v. New York, 401 U.S. 222, 224 (1971).

Similarly, any evidence resulting from a confession obtained pursuant to a *Miranda* violation is also admissible at trial.[285] Police have the further option of interrogating a suspect without reading the warnings, obtaining a confession, and then reading the warnings, hoping that the suspect will waive his rights to silence and counsel and will confess again.[286] Certain situations are also exempt from *Miranda*'s protection. If police are asking questions to protect the public safety,[287] or if a suspect voluntarily accompanies officers to the police station for questioning, the *Miranda* rule does not apply.[288]

Even with all of its exceptions, the *Miranda* doctrine offers police a bright-line rule to follow. In order to ensure that a suspect's confession be admissible against him at trial, police must read the suspect the four *Miranda* warnings. If the suspect waives these rights knowingly, intelligently, and voluntarily, police may proceed with the interrogation. If he invokes his right to silence or to counsel, police must cease questioning unless the suspect initiates further conversation, or until a suspect's lawyer is present. In this sense, the *Miranda* rule imposes a bright-line standard to balance the rights of individual suspects against the interests of law enforcement.

By contrast, the due process standard is a flexible series of factors with no definitive guidelines addressing what constitutes coercion for constitutional purposes. Under the due process standard, a confession is assessed for voluntariness by application of a set of factors to the specific facts of the circumstances surrounding the confession. Although the flexibility of the standard allows for determinations of voluntariness tailored to or based on the facts of each individual case, it provides neither courts nor police with much guidance regarding what is required by the constitutional rights the standard is supposed to protect.

Although the due process standard is applied by courts, it provides courts with little guidance as to how to evaluate the admissibility of confessions. Under the due process standard, courts are to determine whether a confession was given voluntarily by applying a set of factors, none of which are determinative, to each factual instance. Since each judge

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285. *Elstad*, 470 U.S. at 314.

286. Psychological studies show that suspects who confess without being "Mirandized" will not perceive the legal significance of waiving their rights when they are actually read to them. *Id.* at 311. Suspects perceive the confession itself as significant, not the circumstances surrounding it. *Id.* Thus, it would not be difficult for police to use the *Elstad* exception to induce a confession without informing a suspect of his *Miranda* rights, and then to obtain a waiver and a subsequent confession from that suspect after reading the warnings. *Id.*

287. New York v. Quarles, 467 U.S. 649, 655-56 (1984).

288. California v. Beheler, 463 U.S. 1121, 1125 (1983).

undoubtedly by themselves has her own view of which factors are decisive in determining whether a confession was voluntary in each factual instance, judicial discretion plays a major role in the outcome of each case under the due process standard.

Leaving important evidentiary issues such as whether a confession is admissible against a defendant at trial to the discretion of individual judges is extremely problematic for courts, for police, and for the criminal justice system. A discretionary system lacks predictability. Since the due process standard contains no determinative factors, each judge would have her own view of what the standard requires, depending on the facts of each individual case. The presence of so many variables would make it almost impossible for prosecutors and defense attorneys to gauge the likelihood of a confession's admissibility in each case. Because confession evidence is often the evidence most likely to ensure conviction of a defendant,[289] whether a confession is admissible at trial directly affects the plea bargaining process. If the admissibility of a confession is unclear or unpredictable, negotiations between prosecution and defense for a plea bargain may be severely impeded.[290]

The lack of predictability inherent in the due process regime gives police little guidance as to what conduct is constitutionally permissible in questioning suspects.[291] As a fact-intensive inquiry whose outcome largely depends on the facts of each individual case, the due process standard offers very few rules which police can easily distill and follow. In addition, as a rule imposed by courts *ex post facto*, rather than a standard applicable by police in the present instance, the due process regime does not enable police to proactively tailor their behavior to the appropriate constitutional standard. When combined with the interests of police to clear crimes by extracting a confession, the general lack of guidance offered by the due process standard increases the likelihood that police will infringe upon the Fifth and Fourteenth Amendment rights of individuals.

By contrast, *Miranda* offers police a clear standard of conduct, which, if followed, will predictably result in the admission of a suspect's confession into evidence as part of the prosecution's case in chief. Similarly, the *Miranda* doctrine is far easier for courts to apply than the due process standard. Barring extreme instances of physical violence against a suspect during the interrogation, if the *Miranda* warnings were given to a suspect, and the suspect confessed, then the confession is admissible. It is

289. Kassin & Wrightsman, *supra* note 133, at 67-68.

290. This is important given the increased reliance of trial courts on plea bargaining as an efficient method of clearing cases off the docket.

291. The only real guidance provided to police by the due process standard is its prohibition against use of physical force to induce a confession.

true that, under *Miranda*, courts must assess whether a suspect's waiver of his rights to silence or to counsel was voluntary, and that this results in an inquiry similar to the due process standard's factor analysis. However, the inquiry is factually narrower than assessing an entire confession for voluntariness, and thus easier for courts to manage.

Miranda also differs from the due process standard in that it provides a direct check on police conduct that infringes an individual's constitutional rights. The due process standard is applied only by judges after the actual interrogation has transpired. The *Miranda* doctrine, by contrast, enables suspects to restrain police conduct during the interrogation, by asserting their rights to silence and to counsel. In this sense, the theoretical structure of the *Miranda* rule provides an external check on police conduct not present in the due process standard. By empowering suspects to stop questioning at any time, *Miranda* gives police incentives to treat suspects better than the due process standard does. Thus, police are less likely to violate the constitutional rights of suspects under the *Miranda* regime than they are in the due process regime.

Comparing the due process standard and the *Miranda* doctrine clearly shows that the *Miranda* doctrine does offer suspects more protection against police coercion than the due process standard. *Miranda* provides courts with a straightforward rule to apply, thereby enhancing the predictability of the criminal justice system. It gives police a bright-line rule to follow regarding appropriate conduct during custodial interrogations. By empowering suspects to invoke their rights during questioning, it provides a check against coercive police conduct. Therefore, even with its myriad exceptions, the *Miranda* doctrine offers suspects better and more easily administrable protection against police coercion than the due process standard.

Concluding that *Miranda* offers suspects more protection than the due process standard clearly answers the question whether the *Dickerson* Court was correct in concluding that the due process standard is not a viable alternative under the Court's current interpretation of the Fifth Amendment. As Chief Justice Rehnquist stated in *Dickerson*, the *Miranda* Court asserted that although the rule set forth was not specifically required by the Fifth Amendment, the substantive protections resulting from it were. Thus, no alternative which offers less protection than the *Miranda* doctrine is constitutional.[292] Therefore it follows that, as

292. Dickerson v. United States, 120 S.Ct. 2326, 2334 (2000). The *Miranda* Court clearly stated that, in order for alternative procedures to be constitutional under the Fifth Amendment, they must be "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it." *Miranda*, 384 U.S. at 467.

long as the *Miranda* doctrine is constitutional, any alternative which merely reinstitutes the due process standard, as does § 3501, is unconstitutional.[293]

These conclusions about the due process standard, as clearly set forth in the *Dickerson* opinion, remove it from consideration as a viable alternative to the *Miranda* doctrine. Yet, as was seen in the discussion of empirical findings about the effectiveness of the *Miranda* rule, an alternative system must be constructed if the rationale behind the *Miranda* decision is to be truly realized. In this vein, the next section considers alternatives to the *Miranda* doctrine, and assesses whether they would better facilitate the achievement of the rationales behind the doctrine in the practical circumstances of custodial interrogations.

IV. ALTERNATIVES TO THE MIRANDA DOCTRINE

Commentators from both sides of the issue have argued for decades that the *Miranda* doctrine is ineffective. As a result, many alternatives have been suggested. Some of these alternatives propose rules attempting to re-strike the balance between the competing interests of suspects and law enforcement. Others attempt to effect the anti-coercion rationale articulated in *Miranda*, and propose rules which would guarantee that suspects would not be subject to a coercive environment during police interrogation. Still others see the entire system of police interrogation as flawed, and thus propose to restructure the criminal justice system in accord with different investigatory principles. Prominent proposals advancing each of these viewpoints will be discussed in this section. In my view, none of the proposed alternatives discussed here are satisfactory in terms of effecting the rationale underlying *Miranda* or in terms of imposing a rule which would work, as a practical matter, in the current American criminal justice system. After fully discussing the positives and negatives of each proposal in this section, therefore, I will propose my own alternative to the *Miranda* doctrine in the concluding section of this Article.

One possible alternative to the *Miranda* doctrine is to replace *Miranda* with a *per se* prohibition against custodial interrogation.[294] Under this rule, advocated by Professors Irene Merker Rosenberg and Yale Rosenberg, non-custodial questioning would be permitted, and any incriminating statements made by a suspect during such questioning would be admissible in court.[295]

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293. The question whether the *Miranda* Court was correct in interpreting the Fifth Amendment to require substantive protections achieved in the warnings is not beyond doubt; however, it is beyond the scope of this Article.

294. Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69 (1989).

295. Rosenberg & Rosenberg, *supra* note 294. Such statements are

This rule aims at fulfilling the anti-coercion rationale announced by the *Miranda* Court.[296] According to the Rosenbergs, all custodial interrogations are psychologically coercive from the point of view of suspects.[297] If the *Miranda* rule was designed primarily to ensure that all confessions made by suspects are truly voluntary and made with suspects' full knowledge of their constitutional rights, then even imposing the mandatory, non-waivable right to counsel at the outset of a custodial situation would not ensure that a confession to police was not the product of a psychologically coercive situation.[298] Given the inherent coercion present in custodial interrogation situations, the free will of a suspect can only be preserved by a rule forbidding interrogation of any suspect in custody. Thus, only non-custodial questioning would be permitted, and statements given pursuant to such questioning would be admissible in court.[299] Additional evidence against a defendant would have to be obtained through means other than custodial interrogation.[300]

The Rosenbergs' rule tips the balance strongly in favor of the free will of the individual suspect, at the clear expense of law enforcement's ability to efficiently clear crimes. There are a few problems with this rationale in the context of the current American criminal justice system. First, putting the suspect's free will above all other considerations may be theoretically appealing, but it is only questionably supported by the current Court's interpretation of *Miranda*. Insofar as the current Court views *Miranda* as a *balance* between the rights of suspects and the interests of law enforcement, the Rosenbergs' rule goes against the Court's rationale, completely ignoring the importance of custodial interrogation and the confessions obtained therefrom to effective and efficient law enforcement. In addition, the practical implications of the Rosenbergs' proposal would be to cause police to push the boundaries of non-custodial interrogations. Just as police have developed sophisticated strategies enabling them to extract confessions under the *Miranda* regime, police would use techniques devised to induce suspects to make incriminating statements in non-custodial situations.[301] The idea that non-custodial interrogations, which often involve the suspect

admissible under current law. *Beheler*, 463 U.S. at 1125-26.

296. Rosenberg & Rosenberg, *supra* note 294, at 74.

297. *Id.* at 110.

298. *Id.* at 105.

299. *Id.* at 113.

300. *Id.*

301. Indeed, police departments under the *Miranda* regime have turned to non-custodial interrogation as one method of circumventing *Miranda*'s requirements. *See* Cassell & Hayman, *supra* note 15, at 881 (suggesting that police have adjusted to *Miranda* by shifting to non-custodial "interviews" to skirt *Miranda*'s requirements).

"voluntarily" accompanying police to the stationhouse and being questioned there, would not be coercive is naïve at best.[302] The result of the Rosenbergs' rule would be an increase in such interrogations, in which suspects would not be advised of their rights not to answer questions—the very situation which the Rosenbergs seem to be attempting to prevent.[303]

Another possible alternative to the *Miranda* rule is advocated by Professor Charles Ogletree.[304] His rule requires all suspects to be appointed counsel at the stationhouse, before custodial interrogation begins.[305] This would be a bright-line rule that an individual's right to counsel attaches upon arrest, rather than upon arraignment, as current law requires. No suspect would undergo custodial interrogation without the assistance of counsel, and any incriminating statements made by a suspect before consultation with counsel would not be admissible in court.[306] Admissions made by a suspect after consultation with counsel would be admissible against the suspect at trial.[307]

The rationale behind Professor Ogletree's proposal is that the *Miranda* rule does not adequately ensure that suspects understand their rights when they are supposed to decide whether to submit to questioning or to keep silent at the outset of custodial interrogations. Citing the numerous empirical studies conducted within the first five years after *Miranda* was decided, he notes that most suspects waive their rights and give incriminating statements to police.[308] From this, and from his experience as a

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302. It is interesting to note that, if non-custodial interrogations are recognized as somewhat coercive, then the Rosenbergs' rule is prohibited by its own rationale.

303. It is important to note that, although all police interrogations are coercive on some level, non-custodial interrogations are inherently less coercive than custodial interrogations. Indeed, as Cassell and Hayman found in their study of interrogations in Salt Lake County, non-custodial interrogations were less successful at obtaining incriminating statements than custodial interrogations. Cassell & Hayman, *supra* note 15, at 883. If the Rosenbergs' argument was simply that a less coercive alternative to custodial interrogation is desirable, then the shift to non-custodial interrogations which would be caused by their rule would not be relevant. However, their argument is that custodial interrogations are objectionable *because* they are coercive, and as such prevent suspects from exercising their own free will. Thus, the fact that non-custodial interrogations are successful in the current system (and would be arguably more successful in a system prohibiting custodial interrogations) undermines their conclusion that suspects' exercise of free will would be protected under their proposed regime.

304. Ogletree, *supra* note 159, at 1842.

305. *Id.*

306. *Id.*

307. *Id.*

308. Although these earlier studies are methodologically suspect, the conclusion that Professor Ogletree derives from them is in line with the results of more recent studies. Cassell & Hayman, *supra* note 15, at 860; Leo,

public defender in Washington, D.C., Professor Ogletree concludes that the *Miranda* warnings do not ensure that suspects understand their rights when police read them.[309]

Another problem with the *Miranda* doctrine, according to Professor Ogletree, is the conflicting roles it gives to police.[310] In administering the warnings, police must act as guardians of suspects' rights. On the other hand, police must investigate and clear as many crimes as possible. The most efficient way (and sometimes the only way) to solve crimes is to obtain a confession from the perpetrator. Thus the *Miranda* rule places police in the contradictory position of telling suspects that they have the right not to speak to them, while simultaneously attempting to induce a confession.

The *Miranda* rule also fails to prevent police from misrepresenting the evidence against suspects in attempting to induce suspects to confess, tactics which Professor Ogletree views as inherently coercive.[311] Since interrogations are secret, courts have no ability to review the context in which the confession was obtained, aside from hearing testimony from police and from the defendant as to what transpired during the interrogation.[312] Thus, tactics that are coercive in the interrogation room are downplayed in court, and confessions induced through police trickery are found to be voluntary and admissible.

Professor Ogletree concludes that the only way to ensure the ability of suspects to exercise their rights fully under *Miranda* is to provide suspects with a *per se*, nonwaivable right to counsel before they are interviewed by police.[313] This rule would make the appointed attorney the guardian of suspects' rights, consequently alleviating the conflict between the roles given police by the *Miranda* doctrine and ensuring that suspects understand their right to silence and that they waive it voluntarily.[314] In addition, a rule imposing a mandatory right to counsel would relieve courts from having to deal with the issue of whether a suspect waived his

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supra note 15, at 275.

309. Ogletree, *supra* note 159, at 1827.

310. *Id.* at 1842-43.

311. *Id.* at 1828-29. These types of tactics were forbidden by the Supreme Court as early as 1897, under the rationale that they hamper the free will of suspects to choose whether or not to incriminate themselves. Bram v. United States, 168 U.S. 532, 562 (1897). However, modern courts have permitted such tactics, apparently on the assumption that no individual would choose to incriminate himself, given the legal consequences of such an act, unless he is telling the truth. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 739 (1969) (stating that misrepresentation of statements made by a third party do not trigger exclusion of an otherwise voluntary confession).

312. Ogletree, *supra* note 159, at 1843.

313. *Id.* at 1842.

314. *Id.* at 1842-43.

rights voluntarily, since no waiver of the right to counsel would be permitted at all, and no waiver of the right to silence would be permitted until after the suspect spoke with his attorney.[315]

There are a number of problems with Professor Ogletree's proposed rule, both practical and theoretical. First, since any minimally competent attorney would advise a suspect not to say anything to police, the logical result of the rule would be to prevent law enforcement officers from obtaining confession evidence altogether. Thus, a nonwaivable appointment of counsel regime would preclude police from investigating and clearing crimes through incriminating statements made by suspects. Professor Ogletree does not offer a rationale nor argue the merits of such a result, and our current criminal justice system does not contemplate police investigation without confession evidence. Unless we want to abolish the use of confessions in law enforcement altogether, a rule imposing the nonwaivable appointment of counsel at the stationhouse door would not be desirable.

A second problem with the nonwaivable right to counsel is that its effects would be overbroad *vis-à-vis* the suspects whose confessions it would prevent. One of the main justifications Professor Ogletree offers for his rule is that most suspects do not understand their rights when they waive them. However, recently collected empirical data indicates that this is not the case. While it is true that police often minimize the importance of the *Miranda* warnings when administering them, and that police use a number of strategies to induce suspects to confess,[316] it is also intuitive that many suspects decide to confess for reasons independent of police conduct in the interrogation room.[317] Therefore, a rule providing for the nonwaivable right to counsel would be overbroad, as it would prevent the clearly voluntary statements of suspects who understand their rights as well as statements from those who do not.

Third, Professor Ogletree's rule would be institutionally difficult to implement and run efficiently. Unless each stationhouse contained its own public defenders' office,[318] a nonwaivable right to counsel regime would be extremely hard to manage. Public defenders across the country are overworked in

315. *Id.* at 1843.

316. Leo & White, *supra* note 14, at 433-50.

317. *See* Gisli H. Gudjonsson & Hannes Petursson, *Custodial Interrogation: Why Do Suspects Confess and How Does It Relate to Their Crime, Attitude, and Personality?*, 12 PERSONALITY & INDIVIDUAL DIFFERENCES 295 (1991) (finding that, in the context of false confessions, suspects confess for a variety of reasons, including, but not limited to, police intimidation).

318. This would be extremely expensive to implement, as well as institutionally contradictory.

the current system. It would not be unreasonable to think of a situation in which a suspect was brought in to be interviewed and a defender could not be located. This would result in a delay for everyone involved, including the suspect whose rights this rule attempts to safeguard. It is true that the police do not interrogate every suspect immediately. On the other hand, the Supreme Court has viewed delays between arrest and arraignment as violative of suspects' rights for over thirty years.[319] Although no such rule exists regarding delays between arrest and interrogation, the reasoning is equally applicable. Delays in processing make suspects acutely aware that they are directly under the state's power and control, and have therefore been viewed as cruel to suspects. Given this history, it would seem counterproductive to introduce delays into the system in the name of ensuring suspects' rights.

In addition, imposing a nonwaivable right to counsel is an overly costly way to prevent police abuses like misstating the evidence or making false promises during interrogations, given that other, less expensive methods of preventing such police conduct are available. Assuming, as Professor Ogletree does, that police behavior of this sort would be sufficient to warrant a conclusion of coercion by a reviewing court,[320] a requirement that all *Miranda* waivers and custodial interrogations be videotaped would be a significantly less expensive method of achieving the same result as the presence of counsel in the interrogation room. In terms of monitoring and preventing certain types of police conduct, videotaping would be as effective as the presence of counsel, because videotaping would allow judges to be third-party observers of interrogations. Judges could decide from the tape

319. *See, e.g.*, *McNabb*, 318 U.S. at 344-45 (noting that legislation requiring police to act with reasonable promptness constitutes an important safeguard); *Mallory*, 354 U.S. at 455 (noting that delays between arrest and arraignment "must not be of a nature to give opportunity for the extraction of a confession"). In *McNabb* and *Mallory*, the Supreme Court interpreted Rule 5(a), a rule of procedure passed by Congress requiring that an accused be brought before a magistrate after arrest, as well as a rule of evidence, which rendered any confession obtained as a result of unnecessary delay inadmissible, even if voluntary. In § 3501, Congress altered the evidentiary rule so that delay would be a factor in the voluntariness analysis, rather than a bright-line indication of involuntariness. *See* 1 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 73 (3d ed. 1999) (discussing the application of Rule 5(a) to *Malory* and *McNabb*).

320. Professor Ogletree's argument as to the benefits of his proposed rule makes the assumption that the conduct he describes as "police trickery" would be considered coercive as a matter of law. However, under current law, the presence of police trickery alone is not enough to warrant a court's conclusion that any statement obtained therefrom was coerced. *See Frazier*, 394 U.S. at 739 (stating that these cases "must be decided by viewing the 'totality of the circumstances.'").

whether a suspect waived his *Miranda* rights knowingly, as well as whether the interrogation itself was coercive. Because all of the relevant information would be on the tape, admissibility hearings would take less time (or even be unnecessary), and would thus be less costly to the criminal justice system. Knowing that judges would personally review each tape, police would have an incentive not to use coercive interrogation strategies. Thus, while the prevention of certain types of police trickery would be one benefit achieved by Professor Ogletree's rule, there are other, less expensive ways of achieving the same result in the criminal justice system.

Finally, like the Rosenbergs' proposal, Professor Ogletree's rule would cause police to push the boundaries of non-custodial interrogations. Since custodial interrogations would no longer provide an opportunity for police to obtain information from suspects, police would turn to non-custodial interrogations as their primary investigatory source. Non-custodial interrogations provide police with an opportunity to question suspects without having to take the counterproductive step of informing suspects of their rights to silence and to counsel. Indeed, some police departments use non-custodial interrogations wherever possible, because no warnings are required in such situations.[321] Thus, the practical prohibition against custodial interrogations in a mandatory right to counsel situation would cause most suspects to be questioned without even cursory knowledge of their rights. Further, just as police have developed sophisticated strategies to enable them to obtain information from suspects under the *Miranda* regime, police would develop other strategies to induce admissions from suspects in a non-custodial interrogation environment. These new techniques may not be as effective as those used in custodial interrogation, but they would still significantly empower officers at the expense of suspects. Ironically, the imposition of a nonwaivable right to counsel at the stationhouse could cause more psychologically coercive interrogations in some circumstances.

The numerous problems with the *Miranda* doctrine cited by Professors Rosenberg and Ogletree have caused some scholars to argue that the current police interrogation regime should be discarded and replaced with a system of judicial interrogation.[322] Legal scholars have advocated some version of a judicial

321. Cassell & Hayman, *supra* note 15, at 881.

322. *See* Donald A. Dripps, *Foreword: Against Police Interrogation – And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 730 (1988) (noting proposals for judicial questioning of the accused). *See also* Marvin E. Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U. L. REV. 516, 529-32 (1976) (proposing that defendants be questioned in public by a judicial officer).

interrogation system since before *Miranda* was decided, when the due process standard was the governing rule.[323] Proponents of the theory as a potential answer to the problems of the *Miranda* regime interpret *Miranda* as a compromise between the government's interests in investigating and clearing crimes, and suspects' twin interests in freedom from police abuse and in the preservation of their personal autonomy.[324] In practice, however, the *Miranda* rule has not achieved the balance it sought. *Miranda* has not effectively combated the inherently coercive atmosphere of custodial interrogations, nor has it prevented defendants from being tricked or cajoled into giving incriminating statements during custodial questioning. Indeed, cases following *Miranda* have been increasingly permissive of police strategies designed to convince suspects to waive their rights and confess.[325]

Proponents of the shift to a judicial interrogation system note an apparent paradox in Fifth Amendment jurisprudence. While the Fifth Amendment does not prevent against most strategies used by police to extract confessions during custodial interrogations, it unequivocally protects defendants from being compelled by the state to incriminate themselves in court, where assurances against state abuses are greatest.[326] To solve this apparent contradiction, Judge Marvin Frankel proposed that suspects be questioned by a magistrate, in court, rather than by police at the stationhouse.[327] In Judge Frankel's system, suspects would appear in court and would be interrogated by the presiding judge or magistrate on the witness stand.[328] Throughout the interrogation, suspects would be represented by counsel.[329] Custodial interrogations by police would be prohibited by making

323. *See, e.g.*, Paul G. Kauper, *Judicial Examination of the Accused – A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1225 (1932) (calling judicial examination of the accused the "most promising remedy" for policy abuse cases). Advocates of judicial interrogation have built their arguments upon Kauper's article after *Miranda* was decided. *See, e.g.*, Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 721-22 (1968) (proposing an amendment to the U.S. Constitution that prohibits application of the 5th Amendment to certain types of testimony). Since Judge Frankel's proposal is generally in line with earlier ones, and since he attributed the fundamentals of his proposal to these earlier writings, I have used his proposal as representative of the viewpoint for the purposes of this Article.

324. *Dripps*, *supra* note 322, at 700.

325. *See id.* (noting that since *Miranda* was decided courts have attempted to maximize the frequency of confessions); Frankel, *supra* note 322, at 527 (noting that *Miranda* allows officials a wide variety of ways to obtain statements from suspects).

326. Frankel, *supra* note 322, at 527.

327. *Id.* at 529.

328. *Id.*

329. *Id.*

the *Miranda* rights nonwaivable.[330] If a suspect invoked his Fifth Amendment privilege against self-incrimination during a judicial interrogation, however, the prosecutor would be permitted to comment on it at trial.[331]

Professor Donald Dripps suggests an alternative method of implementing a judicial interrogation method. His version of a judicial interrogation system, which seems to draw on the federalism inherent in the American court system, would repeal the Fifth Amendment privilege against self-incrimination and direct states to establish their own systems of in-court interrogation.[332] In order to ensure an effective prohibition on custodial questioning, any statement obtained by police from an arrested suspect would be inadmissible at trial.[333] Under this rule, psychologically coercive tactics practiced by police to induce confessions would be prevented, while suspects would be simultaneously prohibited from frustrating the investigatory process by using the right to silence as a shield against giving incriminating information.

As a practical matter, a system of judicial interrogation, whether following Professor Dripps' model or Judge Frankel's model, would be impossible to implement in the American criminal justice system. Imposition of Judge Frankel's model would require the Court to overrule long-standing precedent[334] and simultaneously to expand its interpretation of both the Fifth and Sixth Amendments.[335] Imposition of Professor Dripps' alternative would require disincorporation of the Fifth Amendment privilege against self-incrimination from the Fourteenth Amendment's Due Process Clause, so that it no longer applied to the states.[336] It is extremely unlikely that any of these legal changes would take

330. *Id.*

331. Note that implementation of such a rule would violate the Supreme Court's prohibition on comments regarding a defendant's refusal to testify. *See Griffin v. California*, 380 U.S. 609, 615 (1955) (holding that the Fifth Amendment forbids a prosecutor's or Court's comment on a defendant's refusal to testify at trial).

332. *See, e.g., Dripps*, *supra* note 322, at 728-31 (discussing ways in which the Court could prod states to impose equivalent protections).

333. *Id.* at 728.

334. As stated earlier, allowing prosecutors to comment on a defendant's silence would violate the Court's holding in *Griffin*. *Griffin*, 380 U.S. at 615.

335. Constitutional authority for prohibiting custodial interrogations at the stationhouse would presumably have to come from an extension of the current interpretation of the Fifth Amendment, following from *Miranda*. An extension of the Sixth Amendment, which currently requires the right to counsel to attach only at arraignment, provides authority for the mandatory presence of counsel at judicial interrogation.

336. This would require the Court to overrule *Malloy v. Hogan*, 378 U.S. 1 (1964), which originally incorporated the Fifth Amendment privilege to apply to the states.

place in our current system. Police interrogation has been an integral part of the American criminal justice system for over a century; all of American criminal law is designed around it. To suddenly change to a system of judicial interrogation would require a massive restructuring of the entire criminal justice system, and there is no sign that judges or legislators are interested in embarking on such a project. Repeal of the Fifth Amendment, which would be required to implement Professor Dripps' version of judicial interrogation at the federal level, is also unlikely, given the amendment process provided in the Constitution and the symbolic significance the privilege has amongst American citizens.

Aside from the practical difficulties of implementation, shifting the investigatory role of the police to the judicial branch has other problems. In the current system, the judiciary provides a check on police behavior. When courts review confessions for voluntariness, or when magistrates issue search warrants, the judiciary is, at least theoretically, preventing the state from abusing its power in investigating the activities of its citizens. If the judiciary itself were to perform interrogations, however, nothing would be left to provide a check on judicial power. The resulting system could be more intrusive of the rights of individuals than the current system.

In addition, it is not clear that a system of judicial interrogation would significantly diminish the psychologically coercive environment of interrogations. Admittedly, the more public and open setting of a courtroom would make judicial interrogations inherently less coercive than custodial interrogations. But it is not clear that a judicial interrogation system would not still be coercive to suspects, despite the presence of counsel. From the point of view of some suspects, standing before a judge or magistrate in a courtroom could be more intimidating, and thus more psychologically coercive, than talking with a police officer in the stationhouse. This could be due to class differences between the judge and the suspect, or to the formal nature of the judicial institution, which can be alienating to lay-persons. Whatever the reason, if it is true that some suspects would find judicial interrogations at least as intimidating as police interrogations, then judicial interrogation does not truly solve the coercion problem – the main rationale advanced for its implementation.

One benefit which could result from a judicial interrogation regime is that it would render unavailable the sophisticated strategies commonly used by police to induce confessions in the current system. As argued above, however, it is not at all clear that these techniques should be prohibited in a system which continues to rely on confession evidence to clear crimes and convict

defendants.[337] Further, there are other available methods of monitoring police conduct, such as imposing a rule requiring that all custodial interrogations be videotaped,[338] which would not require a massive restructuring of the American criminal justice system.

A final alternative to the *Miranda* doctrine that warrants serious consideration is the imposition of mandatory videotaping for all custodial interrogations. Videotaping interrogations has been suggested as a systemic remedy for abusive police conduct for decades, and has been implemented in some American police departments since the 1980s.[339] Some police departments already videotape all of their interrogations to foster an image of legitimacy amongst the public, to train other officers in proper interrogation techniques, and to preserve a record of suspects who waive their *Miranda* rights.[340] Commentators advocating mandatory videotaping as a modification of the *Miranda* doctrine have generally put forth two distinct proposals. The first is to retain the *Miranda* doctrine while mandating the use of videotaping for all custodial interrogations.[341] Under this regime, all custodial interrogations would be videotaped, from the point at which police read the *Miranda* warnings to the suspect through the end of the interrogation.[342] The second alternative proposed regarding videotaped confessions is to impose mandatory videotaping of custodial interrogations in lieu of *Miranda*, so that all custodial questioning would be videotaped, but no *Miranda* warnings would be given.[343] Under this rule, courts would use the videotape to assess the voluntariness of the confession, with the result that the confession would be admitted in evidence unless it was viewed on tape by the presiding judge and deemed to be involuntary.[344] The due process standard would once again be the

337. Leo & White, *supra* note 14, at 451-514.

338. *See supra* text accompanying note 321.

339. Leo, *supra* note 3, at 681. Mandatory videotaping has become increasingly popular across the country. *Id.* Some states have gone so far as to impose mandatory audio taping or videotaping requirements on police departments as a matter of law. *See, e.g.*, Stephan v. State, 711 P.2d 1156, 1162 (Alaska 1985) (adopting a rule to require electronic recording of custodial interrogations); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (calling the recording of custodial interrogations a "reasonable and necessary safeguard" for defendants).

340. Leo, *supra* note 3, at 683.

341. *Id.* at 681-82.

342. *Id.* at 682.

343. *See* Cassell, *supra* note 56, at 487 (suggesting that videotaped custodial interrogations should actually replace *Miranda* warnings); Cassell & Fowles, *supra* note 85, at 1130.

344. *See* Cassell & Fowles, *supra* note 85, at 1130 (stating that judges would determine the voluntariness of the confession after actually viewing the confession itself).

governing standard of the admissibility of confessions, with the modification that judges would be able to assess voluntariness themselves, by viewing the videotaped interrogation, rather than by listening to testimony from police and the defendant.

From the perspective of police, the benefits of videotaping, with or without the *Miranda* warnings, are numerous. Videotaping would lend credibility and legitimacy to this aspect of police work in the eyes of the public.[345] An indisputable record of actual interrogations would protect police against false accusations of impropriety and abuse.[346] Since officers could be observed on tape by superiors as well as courts, videotaping could improve the quality of police work.[347] Further, videotaping would aid police in investigating and solving crimes more effectively, because detectives could view the interrogation additional times, either in light of new evidence discovered in a case, or to uncover more details originally missed by the interrogating officers.[348] Videotaping would also enable police to use resources more efficiently, since an additional officer would no longer need to be present to take notes during the interrogation. The tapes could also be used for police training purposes.[349] Videotaping would be relatively inexpensive to implement, especially given that many police departments are already equipped with videotaping capabilities.[350] Further, videotaping would save police departments money in terms of time and resources, since fewer personnel would be required to be present during interrogations, and since police would no longer have to testify at hearings regarding voluntariness. In addition, a mandatory videotaping rule is bright-line and would be easy for police to follow and for courts to monitor.

Suspects would also benefit from the videotaping of custodial interrogations. The "swearing contest" between the interrogating officer and the defendant on the stand as to whether *Miranda* rights were truly waived, or whether the defendant's confession was coerced, would be eliminated due to the preservation of an accurate record.[351] Videotaping would reinforce the current judicial check on police conduct, because judges would be able to review the circumstances of all custodial interrogations. Physical

345. *See* Leo, *supra* note 3, at 683 (describing the many benefits of videotaped interrogations to the police).

346. *Id.*

347. *Id.*

348. *Id.* at 683-84.

349. *See id.* at 683.

350. *See* Leo, *supra* note 3, at 684-85 (discussing the current use of videotaping by many police departments and the misconceptions of police departments in some jurisdictions about the costs of videotaping).

351. *See id.* at 687 (suggesting that such confrontations in court are typically decided in favor of police).

coercion by police during interrogations would be eradicated, since any actions made by the interrogating officers would be captured on videotape.[352] By enabling others to view the interrogation, videotaping would significantly diminish the secrecy of the custodial situation used by police to intimidate suspects during interrogations.[353] Finally, suspects and the criminal justice system as a whole would benefit from the increased fairness resulting from truly informed judicial review.

The concept of mandatory videotaping provides a possible solution to the criticism that *Miranda* does not perform an adequate check on both physically and psychologically coercive police practices. Assuming that judges or juries would be applying proper standards to determine whether a confession was voluntary, the window into custodial interrogations provided by videotaping could enable courts to monitor and stop certain coercive strategies used by police to extract confessions. At the same time, videotaping would not provide a shield behind which guilty defendants could hide their admissions of culpability. However, neither proposal articulated above would sufficiently ensure the achievement of this balance. Without additional safeguards, videotaping could be manipulated by police just as the *Miranda* warnings have been. Many defense attorneys have argued against videotaping, asserting that it is prone to police circumvention while simultaneously appearing as extremely credible evidence of a defendant's guilt to judges and juries.[354] Without additional rules, a videotaping regime does nothing to prevent police from using sophisticated psychological strategies to convince suspects to confess on camera, because such strategies do not constitute coercion under the due process standard. Jurors, already prone to regard confessions as highly probative of guilt, may put even more weight on videotaped confessions than on transcripts in convicting defendants, since actually seeing the defendant confessing on tape would have more impact than paper testimony.[355] Thus, although videotaping could provide part of a viable alternative to *Miranda*, by itself it is not a sufficient replacement for the current doctrine.

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352. *See* Cassell, *supra* note 56, at 486 (stating that videotaping is one possible tool for combating police coercion since the *Miranda* decision).

353. *See* INBAU ET AL., *supra* note 166, at 24-28. Police interrogation expert Fred Inbau asserts that the effectiveness of all successful interrogations is due at least in part to the interrogator's ability to take advantage of the privacy of the custodial situation. *Id.*

354. *See* Leo, *supra* note 3, at 684 (asserting that defense attorneys reject the idea of videotaped interrogations).

355. *See* WRIGHTSMAN & KASSIN, *supra* note 194, at 117 (suggesting that the use of videotaped confessions in the courtroom may influence jurors).

CONCLUSION: ADVOCATING A NEW ALTERNATIVE TO THE MIRANDA DOCTRINE

In articulating its bright-line rule governing the admissibility of confessions, the *Miranda* Court asserted as its rationale that suspects should be given the means by which to combat the inherent coercion present in custodial interrogations. In recent decades, *Miranda* has been viewed as attempting to achieve a balance between the interests of law enforcement in solving crimes and convicting criminals, and the interests of suspects in not being induced to confess by police tactics.[356] Although these two rationales are often discussed as different approaches, they can be reconciled within the same theory by viewing coercion in terms of suspects' interests. The interests of suspects in not being convinced by police to issue a confession can be restated as an interest not to be compelled by sophisticated police techniques to give a confession during a custodial interrogation. Thus, the balancing rationale can be recast as a compromise between law enforcement's' interests in obtaining confession evidence by any means necessary, and suspects' interests in not being subject to certain practices designed to induce them, psychologically or physically, to incriminate themselves.

If this is the theory *Miranda* is supposed to effect, it is clear that the Warren Court's attempt has failed. The warnings fail to adequately combat much of the inherently coercive atmosphere of the interrogation room. Approximately 80% of all suspects waive their *Miranda* rights at the outset of custodial interrogations.[357] Police have developed myriad techniques by which to effect waivers and to induce confessions, none of which are regulated under the *Miranda* doctrine. With the advent of exceptions to the *Miranda* doctrine in recent decades, police departments across the country have begun to question certain suspects "outside *Miranda*" altogether. Although the declines in clearance and confession rates after *Miranda* was decided show that *Miranda* has probably had some impact on the ability of police to obtain confession evidence in the aggregate, the extent of this impact is debatable, as is the extent of the attribution of both declines to *Miranda* alone. Even assuming that the clearance and confession rate data support the proposition that *Miranda* has had some detrimental effect on law enforcement's ability to solve crimes and convict defendants, this cost to law enforcement does not equal a benefit to individual suspects. The only way that *Miranda*'s "careful balance" can truly work is if suspects gain protections in exchange

356. As argued above, this balancing rationale does have some implicit root in the *Miranda* decision itself. *See Miranda*, 384 U.S. at 460, 477. *See also* Oregon v. Elstad, 470 U.S. 298, 307, 477 (1985).

357. Cassell & Hayman, *supra* note 15.

for the costs borne by law enforcement. Because the current rule does not adequately protect suspects from coercive police tactics, the practical effects of *Miranda* have fallen short of the decision's stated objectives.

The proposed alternatives to the *Miranda* doctrine discussed above also fail to strike the appropriate balance between the interests of law enforcement and those of suspects. The rules advocated by Professors Rosenberg and Ogletree err in viewing the anti-coercion rationale as the only desired end of the *Miranda* rule. It is true that a rule abolishing custodial interrogations or a rule mandating the right to counsel in custodial interrogations would almost completely eradicate the use of coercive tactics by police to induce suspects to confess, but it would be at the expense of eliminating the use of confession evidence in the criminal justice system. This would greatly disadvantage the ability of law enforcement to clear crimes and obtain convictions, a result not contemplated by the balancing rationale adopted by the Court in recent decades, but also not practical considering the importance of confession evidence to efficiency of crime clearance, and to the ultimate conviction of defendants. Shifting to a system of judicial interrogation might be one way to alleviate the coercion of custodial interrogations while still facilitating the use of confession evidence, but implementation of such a system would require a complete overhaul of the criminal justice system, and has some practical pitfalls. On the other hand, while mandatory videotaping would be fairly easy to implement in our current system, videotaping without additional standards would not sufficiently protect suspects against coercive police tactics during custodial interrogations.

In order to more effectively achieve the balance between the interests of suspects and the interests of law enforcement for which the Court and commentators have argued, I propose a new alternative to the *Miranda* doctrine. Videotaping should be made mandatory for all custodial interrogations. The *Miranda* warnings should be retained, and the requirement that they be given at the outset of the interrogation should still stand. The issuance of the warnings and any waiver made by a suspect would be included in the videotape of the interrogation. Failure to videotape interrogations in their entirety, including the issuance of the *Miranda* warnings and any waiver made by the suspect, would render any statement obtained therefrom inadmissible in any capacity at trial. In addition, promises of leniency and any misrepresentation of the evidence against the suspect would be prohibited as tactics used by police to induce a confession. The use of such tactics by police, either to induce a *Miranda* waiver or to induce a confession during custodial interrogation, would render any incriminating statements on the tape inadmissible for any

purpose at trial.[358] The videotapes would be reviewed by the judge prior to trial to resolve issues such as whether a suspect voluntarily waived his *Miranda* rights, or whether a suspect's confession is admissible. Once the content of the videotape is deemed admissible, then jurors would be permitted to view the confession on videotape as part of the evidence in the case.

A modified videotaping procedure contains all of the benefits to law enforcement associated with mandatory videotaping of custodial interrogations generally.[359] From the perspective of police, videotaping would enable them to use their personnel and resources more efficiently, to supervise officers more closely, and to train officers more effectively. Videotaping would also enhance the reputation of police amongst the public. In addition, as bright-line rules, the prohibitions against promises of leniency and misrepresentation of the evidence against suspects would give police clear guidance as to what types of tactics would render a confession inadmissible. Under the current standard, once a suspect waives his *Miranda* rights, police and courts have only the flexible due process standard as guidelines by which to determine proper police conduct. Imposing bright-line prohibitions against two specific types of conduct would be relatively easy for courts to apply and for police to follow.

From the perspective of suspects, a modified videotaping system would lead to better treatment by police and a less coercive atmosphere during custodial interrogations. The knowledge that a judge will be reviewing the taped interrogation to determine the admissibility of any incriminating statements made by a suspect would cause police to treat suspects more respectfully, and would render interrogations less intimidating. Interrogators would no longer be able to view the custodial situation as secret, and their ability to use this characteristic of the custodial situation to intimidate suspects would be impaired as a result, especially if suspects were aware that third parties will watch the tape afterwards. In addition, videotaping would eliminate the in-court "swearing contest" between the interrogating officer and the defendant, almost always resolved in favor of the officer, as to whether the defendant voluntarily waived his *Miranda* rights, or as to what happened inside the interrogation room to induce the defendant to confess. Further, overly coercive tactics by police would be eliminated because of the individual accountability made

358. Because *Elstad* and *Harris* apply only to confessions obtained in violation of *Miranda*, they do not prohibit the formulation of the bright-line prohibition against admissibility articulated here.

359. *Stephan*, 711 P.2d at 1158; *Scales*, 518 N.W. 2d at 591-93; Cassell, *supra* note 56, at 487; Cassell & Fowles, *supra* note 85, at 1130; Leo, *supra* note 3, at 681-87; INBAU, ET AL., *supra* note 166, at 24-28; WRIGHTSMAN & KASSIN, *supra* note 195, at 117.

possible by mandatory videotaping. In short, the institution of meaningful judicial review through videotaping would cause police conduct to become more professional, while making the atmosphere of interrogations inherently less coercive.

The prohibitions against promises of leniency and misrepresentation of the evidence against the subject of the interrogation would also benefit suspects by reducing the amount of coercion present in custodial interrogations. Empirical evidence collected from studies of false confessions has shown that these strategies are amongst those most likely to induce a suspect to confess falsely.[360] The fact that such tactics result in a significant number of false confessions shows that they are especially compelling from the point of view of suspects.[361] In addition, the Supreme Court has recognized the inherently coercive nature of the use of both tactics in inducing suspects to confess.[362] From this evidence, it is clear that the elimination of such tactics would render interrogations less coercive from the point of view of suspects generally.

The modified videotaping regime proposed here would also confer a number of benefits on the criminal justice system. First, such a rule would increase the trustworthiness of confessions and would reduce the number of false confessions obtained by police every year. Empirical studies have found that promises of leniency and misrepresentations of the evidence against suspects are amongst those strategies most likely to induce false confessions during custodial interrogations.[363] A bright-line prohibition against such procedures would therefore increase the trustworthiness of confessions in the aggregate, a desirable result

360. Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2050-54 (1998).

361. *See id.* at 2046. It should be noted that the other tactic found to result in a significant number of false confessions was questioning a suspect for an especially lengthy period of time—a strategy which has been limited by courts' application of the due process standard. Cassell & Hayman, *supra* note 15, at 920; Leo, *supra* note 15, at 279, 282-283; *Ashcraft*, 322 U.S. 143; *Spano*, 360 U.S. 315; *Fikes*, 332 U.S. 596.

362. *See Bram*, 168 U.S. at 562 (holding that misrepresentation of the evidence against a suspect renders confession involuntary because such a tactic necessarily indicates that the decision to confess was not made under the suspect's own free will); Lynumn v. Illinois, 372 U.S. 528 (1963) (holding that promises of leniency rendered confession involuntary where interrogator told suspect that, if she did not confess, she would get ten years in prison and her children would be taken away from her, but that if she did confess, he would recommend leniency and ensure that she would keep her children). Also note that the presence of police conduct such as misrepresentation of the evidence against the suspect or promises of leniency made in exchange for a confession were considered as factors tending to indicate involuntariness under the pre-*Miranda* due process standard. *See, e.g.*, *Spano*, 360 U.S. at 323. *See also supra* notes 226-230 and accompanying text.

363. *See* White, *supra* note 360, at 2050-55.

from an evidentiary perspective, and one read into the *Miranda* opinion by some scholars.[364] The prohibitions would also reduce the risks that innocent persons would confess to, and ultimately be convicted of, crimes that they did not commit, which would ultimately serve the interests of the criminal justice system in ensuring that the guilty are convicted while the innocent are set free.

Second, the use of promises of leniency and misrepresentation of the evidence against a suspect by officers of the state during custodial interrogation offends the general principles of fairness that are supposed to underlie the criminal justice system. Both strategies require police substantively to lie to suspects in the most blatant manner possible in order to obtain a confession. In neither case could police produce the material fact (*i.e.*, the promise or the evidence) used to persuade the suspect to incriminate himself.[365] It seems obvious that such tactics are clear abuses of state power, as well as simply morally wrong, and should not be permitted on those bases.

Finally, a modified videotaping process would be relatively inexpensive to implement, especially compared with other proposed alternatives to the *Miranda* doctrine. Many police departments already videotape custodial interrogations.[366] In fact, two states have implemented mandatory recording of custodial interrogations as a matter of law.[367] Under a mandatory videotaping regime, police departments would save resources in terms of time and personnel, since the presence of additional officers to observe the questioning or to take notes during the interrogation would no longer be necessary. Videotaping would result in cost savings to courts and prosecutors as well. A judge could review an interrogation to determine voluntariness without conducting extensive hearings. The bright-line prohibitions against specific police conduct would be easy for police to follow and for courts to apply. Prosecutors would be better able to assess the strength of their cases for plea bargaining purposes. Overall, the expense required to implement a modified videotaping regime would be minimal, and would be counteracted by the resulting cost savings to the criminal justice system.

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364. *See* KAMISAR, *supra* note 4, at 473 (interpreting *Miranda*'s underlying rationale as not only an attempt to safeguard the rights of the accused, but also to assure the reliability of statements made during interrogations).

365. Police have no authority over prosecutorial charging decisions, and they do not have the power to obtain treatment of any sort for a suspect. *See* Leo & White, *supra* note 14, at 444-46.

366. *See* Leo, *supra* note 3, at 682.

367. As noted earlier, the two states operating under a mandatory taping regime are Minnesota and Alaska. *See Scales*, 518 N.W.2d at 591-93 (Minnesota's videotaping regime); *Stephan*, 711 P.2d at 1158 (Alaska's audio taping regime).

Although it would prohibit police from using two effective interrogation strategies, the modified videotaping regime would not greatly impair police from obtaining confessions from guilty suspects. Most of the techniques used by police to obtain valid waivers of *Miranda* would still be permitted,[368] although they would be required to be videotaped. Given the range of police conduct permitted by the current voluntariness standard, it is unlikely that any of the strategies most commonly used to induce waivers would be sufficient to render a confession inadmissible.[369] Similarly, most of the strategies used by police to obtain confessions during custodial interrogations would still be available under the modified videotaping regime. Since the videotapes would be reviewed under the post-*Miranda* due process standard, videotaping itself would not change the fact that most police tactics, aside from the physical abuse of suspects, are permissible methods of extracting confessions.[370] Promises of leniency and misrepresentation of the evidence against a suspect would be the only two tactics clearly prevented under the modified videotaping regime. Due to the fact that police have so many other tactics at their disposal, as well as the power advantage in custodial interrogations generally, these prohibitions should have no significant impact on confession rates.

Even if the modified videotaping method proposed here were to result in a decrease in confession rates, it is important to note that the relationship between the ability of police to extract confessions from suspects and suspects' interests in not being compelled to incriminate themselves is not necessarily zero-sum. In assessing the balance between the interests of law enforcement and the interests of suspects, impairing the ability of police to obtain confessions in the aggregate does not necessarily tip the scales in favor of suspects' interests. Many rules could cause confession rates to fall without benefiting most individual suspects. For example, a rule prohibiting the interrogation of any suspect with a history of mental illness would benefit suspects with such a history, and would result in lower confession rates in the aggregate, but would not benefit the majority of suspects, whose individual rights in the interrogation room would remain

368. *See* Leo & White, *supra* note 14, at 431-47 (setting forth at least seven techniques commonly used by police to obtain *Miranda* waivers which would not be prohibited in the modified videotaping regime proposed here).

369. Of the two specifically prohibited tactics, only promises of leniency seem to be used to induce suspects to waive their *Miranda* rights. Both tactics are primarily used during interrogations, rather than during the waiver phase of the process. *See id.*

370. In fact, Paul Cassell, the most prominent pro-law-enforcement commentator in the field of confessions and the criminal justice system, is a strong advocate of using mandatory videotaping in lieu of *Miranda*. *See* Cassell, *supra* note 56, at 486-92.

the same. The rule proposed here would decrease the amount of coercion to which all suspects are subject, and would eliminate unfair conduct in which police regularly engage. It may not result in as large a decrease in the aggregate confession rate as a strict prohibition against interrogation of all suspects with a history of mental illness, but it better ensures the protections given to all suspects by the Fifth Amendment. In this sense, this proposed rule comes far closer than *Miranda* itself to achieving the careful balance contemplated in the Court's post-*Miranda* jurisprudence. It better protects suspects against coercion by police in the interrogation room, while still allowing police to conduct successful custodial interrogations.

Admittedly, the modified videotaping regime that I propose does not completely eliminate the inherently coercive environment present in custodial interrogations. Police will still be able to induce waivers of *Miranda* rights by minimizing the *Miranda* warnings. During interrogations, police will still be able to use numerous psychological techniques, such as proffered sympathy or pretended flattery, to persuade suspects that it is in their best interest to confess. The custodial situation will remain intimidating to suspects, and will continue to give police an advantage in obtaining confessions, even without the use of sophisticated strategies and techniques. In my view, it would be impossible to invent a rule, aside from one barring the use of custodial interrogations altogether, which could truly and completely alleviate the coercion inherent in the custodial situation. It is clear that neither Congress nor the Court is willing to abandon the use of confession evidence obtained through custodial interrogation to convict defendants at criminal trials. Indeed, the *Miranda* Court itself implicitly rejected this possibility when it assumed that its created warnings would be adequate to combat the "inherently coercive nature" of custodial interrogations, rather than extending its announced coercion principle to its logical extent and banning custodial interrogations altogether.[371] Given the fact that the criminal justice system will continue to rely on confession evidence obtained through custodial interrogations, the modified videotaping regime advocated here strikes a more meaningful balance between the interests of police in obtaining confessions and the interests of suspects in not being subject to state-sponsored coercion than any of the other alternatives contemplating the continued use of custodial interrogations, including the *Miranda* doctrine itself.

The modified videotaping regime proposed here also does not

371. In his dissent in *Miranda*, Justice White pointed out the logical fallacy of the Court's reliance on the inherent coercion principle to require that police read the warnings to suspects before commencing with the inherently coercive situation. *See Miranda*, 384 U.S. at 536 (White, J., dissenting).

protect suspects against the practice of questioning "outside *Miranda*." It seems that the only way to prevent such practices would be to overturn the Supreme Court's holdings in *Harris* and *Elstad*, and no longer allow any statements obtained in violation of *Miranda* to be admitted in evidence at trial for any purpose. Insofar as these decisions are valid interpretations of the Fifth Amendment, preventing the practice of questioning "outside *Miranda*" is beyond the ability of any proposed alternative to the *Miranda* doctrine. However, it should be noted that, because of the absolute nature of the bright-line rules forbidding the admissibility of any statements obtained by police through promises of leniency or misrepresentations of evidence, no questioning "outside" those prohibitions could take place.

A related issue that the modified videotaping regime may not adequately address is the possibility of police circumvention. Even though police are required to obtain a suspect's *Miranda* waiver as well as his interrogation on videotape, it is conceivable that police would be able to induce a suspect to waive his rights using prohibited tactics, only to later record the suspect's subsequently calm (and seemingly voluntary) waiver of rights. This is an important concern, considering the immense impact a videotaped confession can have on judges and juries in assessing a defendant's guilt at trial. Unfortunately, it would be impossible to create a rule that would be foolproof against deceit by officers of the government. In implementing any rule governing police conduct, one must assume that police take their responsibilities seriously, and that, if properly trained, they would not view falsifying evidence such as a *Miranda* waiver as an appropriate way to do their jobs. If it is true that the majority of America's police officers would construct false evidence as a means of circumventing bright-line rules in order to obtain an admissible confession from a suspect, then an immediate reform of law enforcement across the country is required.

In *Miranda*, Chief Justice Warren encouraged Congress and the states to search for alternative methods of regulating custodial interrogation which would "increas[e] the rights of individuals while promoting efficient enforcement of our criminal laws."[372] One such alternative has been proposed here. The modified videotaping regime truly realizes the balance struck in *Miranda* between the competing interests of suspects and law enforcement in a custodial interrogation situation. It benefits suspects by imposing clear boundaries on police conduct and by reducing the coercive nature of custodial interrogations. It benefits the criminal justice system by imposing bright-line, administrable rules and by reducing the likelihood of false

372. *Id.* at 467.

confessions. It benefits police in that it promotes the efficient use of police resources, facilitates better training and more effective investigating, and imposes clear rules for police to follow. At the same time, the detriments to police investigatory techniques are small. The only restrictions placed on police conduct during custodial interrogations by the modified videotaping regime are the bright-line prohibitions against promises of leniency and misrepresentations of the evidence against a suspect. These tactics are by no means the only effective interrogation techniques in the average interrogator's arsenal. In light of the significant reduction in the inherent coerciveness of the custodial situation, the availability of other techniques with which to elicit confessions renders the costs of the modified videotaping regime minimal.

After over thirty years, it is clear that the *Miranda* doctrine in its current state does not adequately combat the inherently coercive nature of custodial interrogations. Nor does it strike an appropriate balance between the interests of law enforcement in investigating and clearing crimes and the interests of suspects in not being compelled by the state to incriminate themselves. A new alternative to the *Miranda* doctrine must be considered, if the objectives of the Fifth Amendment are to be truly realized in the interrogation room.