

# Mourning *Miranda*

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## Mourning *Miranda*

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### INTRODUCTION

*Miranda*'s<sup>1</sup> familiar regime of warnings and waivers was intended to

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

afford custodial suspects an informed and unfettered choice between speech and silence and, at the same time, prevent involuntary statements.<sup>2</sup> But there never was evidence to show that a system of warnings and waivers could actually protect Fifth Amendment rights as the justices expected. In the more than four decades since *Miranda* was decided, the Supreme Court has effectively encouraged police practices that have gutted *Miranda*'s safeguards, to the extent those safeguards ever truly existed. The best evidence now shows that, as a protective device, *Miranda* is largely dead. It is time to "pronounce the body," as they say on television, and move on.

There is a raft of thoughtful scholarship about *Miranda*. I hope to add something new to the literature. I have obtained police training materials that are not generally available to the public; the discussion of these resources is perhaps this article's most important contribution. Because most police officers are not lawyers and do not read judicial decisions, training is the link between the Supreme Court's pronouncements and the way in which interrogations are conducted every day in police stations.<sup>3</sup> Combined with data from the social science literature, these training materials demonstrate how the warning and waiver regime coheres with a sophisticated psychological approach to police interrogation, rather than operating apart from it as the *Miranda* Court intended. The training materials also show how law enforcement agencies operate in the shadow of judicial decisions that have weakened *Miranda*'s protections.

The first Part of this Article explains the *Miranda* Court's several holdings. To understand how the application of *Miranda* has evolved in practice, we must examine two critical premises underlying the holdings, as well as the Court's assumptions about how a system of warnings and waivers could actually protect Fifth Amendment rights. Briefly stated, the Court adopted two premises; one about the problem, and another about an appropriate solution.

The Court's first premise was that the process of custodial interrogation

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2. See *Chavez v. Martinez*, 538 U.S. 760, 790 (2003) (Kennedy, J., concurring in part and dissenting in part) (stating that *Miranda*'s procedures were designed "to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause"); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) ("The fundamental purpose of the Court's decision in *Miranda* was 'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.'") (quoting *Miranda*, 384 U.S. at 469).

3. As criminologist Richard Leo writes, interrogation training manuals and courses are "the medium through which investigators acquire their working knowledge of the constitutional law of criminal procedure, the primary source of external restraint on their interrogation practices." RICHARD A. LEO, *POLICE INTERROGATION AND AMERICAN JUSTICE* 109 (2008). The Supreme Court has also observed that "[t]he key to the [exclusionary] rule's effectiveness as a deterrent lies . . . in the impetus it has provided to police training programs that make officers aware of the limits imposed by the [Constitution] and emphasize the need to operate within those limits." *United States v. Leon*, 468 U.S. 897, 920 n. 20 (1984) (quoting Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1412 (1977) (footnote omitted)).

contains inherent pressures that compel suspects to speak. The Court inferred this premise from the interrogation practices it believed predominated in 1966. Based on this premise, the justices reached the legal conclusion that custodial interrogation unacceptably endangers suspects' Fifth Amendment privilege. The safeguards that the Court created to address this concern—*Miranda's* famous system of warnings and waivers—were based on a second premise, namely that such a system of warnings and waivers could in fact counteract the pressures inherent in a custodial interrogation.

This second premise in turn relied upon four critical though untested assumptions about the way police would implement a system of warnings and waivers and how suspects would respond to it. Part I concludes by explaining how these four assumptions animated the Court's solution.

Part II examines whether the Court's first factual premise about the pressures inherent in custodial interrogation is true today. Using training materials and data from social science literature, I describe modern interrogation tactics and conclude that interrogation still contains compelling pressures. This Part of the Article sets the stage for what will follow; in order to assess how *Miranda's* procedures operate within the interrogation process, one must understand the common features of contemporary interrogation.

Next is the heart of the piece. Part III assesses the effectiveness of the system of warnings and waivers by examining the four major assumptions about the operation of the *Miranda* regime in light of subsequent court decisions, police training materials, and social science literature. I find contemporary support for only two of the *Miranda* Court's four assumptions. The best evidence now appears counter to the two most important assumptions: that suspects generally understand *Miranda* warnings and that they are empowered to act upon them.

The last Part of the Article contends that the system of warnings and waivers the Court prescribed as a solution in *Miranda* is now detrimental to our criminal justice system. It is bad enough that *Miranda's* vaunted safeguards appear not to afford meaningful protection to suspects. But it turns out that following *Miranda's* hollow ritual often forecloses a searching inquiry into the voluntariness of a statement. Further, it has frozen legislative and other efforts to regulate police interrogation practices.

A few notes are in order about my research methodology and viewpoint. For well over a decade, I have written and litigated about *Miranda* and police interrogation tactics. I became interested in interrogation training and started collecting police training materials while litigating against the practice of questioning "outside *Miranda*," which generally means continuing to interrogate a suspect who has invoked her rights so that officers can obtain the "fruits" of a statement or information to use for impeachment.<sup>4</sup> Courts

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4. For a description of this practice, see Charles D. Weisselberg, *Saving Miranda*, 84

(correctly, in my view) held that this practice was directly contrary to the requirements of *Miranda*.<sup>5</sup> Then in 2004, the U.S. Supreme Court decided *Missouri v. Seibert*,<sup>6</sup> where officers employed another impermissible technique called “question-first” or “two-step.” Missouri police interrogated Patrice Seibert without warnings and obtained a statement. Then they gave the *Miranda* admonitions and had her repeat what she said before. A majority of the Court found her second “cleaned up” statement to be inadmissible, but could not agree on the rationale for doing so.<sup>7</sup> I began this current research project as an inquiry into police training in light of *Seibert* and a related case, *United States v. Patane*.<sup>8</sup> As I later explain, I found that interrogation training has generally been faithful to these holdings. However, I was so struck by other aspects of interrogation training that I decided to broaden the scope of my work.

My primary research focus is California, which has the largest criminal justice system of all the states.<sup>9</sup> In the fall of 2005, I sent requests to forty-two state and local law enforcement agencies under the California Public Records Act<sup>10</sup> and to two leading federal law enforcement agencies under the Freedom of Information Act. I received responses from thirty of the state and local agencies (71%) and one of the federal agencies.<sup>11</sup> This allowed me to build on materials I obtained from agencies in 2000 under a prior round of Public

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CORNELL L. REV. 109, 132-36 (1998).

5. See, e.g., *Cal. Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1045 (9th Cir. 1999); *People v. Neal*, 31 Cal. 4th 63, 81 (2003); *People v. Peevy*, 17 Cal. 4th 1184, 1202-05 (1998). Disclosure: I participated in these cases.

6. 542 U.S. 600 (2004).

7. See *infra* at notes 156-61, and accompanying text.

8. 542 U.S. 630 (2004). The Court held that the “fruit of the poisonous tree” doctrine does not exclude physical evidence when officers fail to give *Miranda* warnings. *Id.* at 642.

9. According to data provided by the U.S. Department of Justice, of all of the states, California had the largest number of sworn personnel (75,477) and total law enforcement employees (115,912), as well as the highest number of arrests for “Part I” crimes in 2006 (1,543,797). Part I crimes are 29 of the most serious offenses tracked by the FBI. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP’T OF JUSTICE, CRIME IN THE UNITED STATES tbl.77 (Full-Time Law Enforcement Employees by State, 2006), tbl. 69 (Arrests by State, 2006) (2006), available at <http://www.fbi.gov/ucr/cius2006/about/index.html>. As of June 2006, California had 173,453 sentenced prisoners under its jurisdiction, comprising the largest prison population of any state (and more than the entire federal system). See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2006 app. tbl.1 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf>. The five states with the largest prison populations were California, Texas (161,575), Florida (89,082), New York (62,950) and Georgia (51,536). See *id.*

10. CAL. GOV’T CODE §§6250-6276.48 (Deering 2008).

11. My requests went to fourteen county district attorney’s offices, fourteen county sheriff’s departments, thirteen local police departments, and the California Commission on Peace Officer Standards and Training (“POST”). Twenty-two responded with records. Another eight either responded that they had no records or referred me to other agencies (primarily to POST). One agency objected to my request and eleven failed to respond. Of the federal agencies, the Federal Bureau of Investigation did not respond but the Drug Enforcement Administration provided records.

Records Act requests (as well as items I gathered from a variety of other sources), some of which I have discussed in earlier articles.<sup>12</sup> Most significantly, beginning in 2006, I was granted access to the library of the California Commission on Peace Officer Standards and Training (“POST”). POST is an agency within the California Department of Justice<sup>13</sup> that sets standards for basic and advanced police training, certifies courses for law enforcement officers, and widely distributes its own training materials.<sup>14</sup> The POST library archives training materials produced by POST; it is a unique and rich collection of books, journals, and other resources relating to law enforcement.

I have long been an advocate of the *Miranda* decision and its theoretically bright-line rules. This research has changed my beliefs. After a more comprehensive review of police training materials, social science literature, and post-*Miranda* decisions, I have concluded that little is left of *Miranda*’s vaunted safeguards and what is left is not worth retaining.

But why not try to fix *Miranda*’s protections? After all, courts have put a stop to the “question-first” technique and questioning “outside *Miranda*.” The bottom line is that I do not see a reasonable possibility of a meaningful repair, at least in the courts. I no longer believe that a system of standardized warnings can empower suspects to assert their rights. Moreover, while I believe that police training has undermined the effectiveness of a system of warnings and waivers, such training appears to be largely consistent with the views of Supreme Court justices and with lower court rulings. Unlike questioning “outside *Miranda*” and the “question-first” tactic condemned in *Seibert*, most of the current training legitimately pushes the advantages that the Supreme Court has given to police, and I do not foresee the Court changing its course.<sup>15</sup> For these reasons, I have reluctantly come to agree with a number of *Miranda*’s longstanding critics, though I have arrived at this position by a different path and for different reasons.

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12. See Charles D. Weisselberg, *In the Stationhouse after Dickerson*, 99 MICH. L. REV. 1121 (2001); Weisselberg, *Saving Miranda*, *supra* note 4.

13. CAL. PENAL CODE § 13500 (Deering 2008).

14. See CAL. PENAL CODE §§ 13503, 13510-13519.14 (Deering 2008); see also POST Directory & Reference Guide, [http://www.post.ca.gov/About\\_Us/Directory/](http://www.post.ca.gov/About_Us/Directory/) (last visited July 6, 2008).

15. In the past, I have strongly criticized law enforcement trainers and agencies, including POST, for instructing officers on interrogation tactics (such as questioning “outside *Miranda*”) that directly conflict with the requirements of *Miranda*. See Weisselberg, *Saving Miranda*, *supra* note 4, at 167-70; Weisselberg, *In the Stationhouse after Dickerson*, *supra* note 12, at 1136-42. In the present article, I argue that law enforcement officials are for the most part aggressively seeking advantages in interrogation, but they are using openings that the Supreme Court and other courts have given them.

## I

## MIRANDA THEN—HOLDINGS, PREMISES AND UNDERLYING ASSUMPTIONS

During the decades before *Miranda*, the Supreme Court primarily addressed confession issues through the Due Process Clause of the Fourteenth Amendment.<sup>16</sup> *Miranda*, decided in 1966, represented a paradigm shift. While defendants would still be free to argue that their statements were involuntary within the meaning of the Due Process Clause, the focus moved to the Fifth Amendment's Self-Incrimination Clause.<sup>17</sup> In the first of *Miranda*'s several holdings, the justices found that the privilege against self-incrimination protects suspects in the stationhouse.<sup>18</sup> Custodial interrogation, the Court held, contains "inherently compelling pressures" that undermine a suspect's ability to exercise his or her right to remain silent.<sup>19</sup> When a person is taken into custody and questioned, "the privilege against self-incrimination is jeopardized."<sup>20</sup>

In perhaps the most controversial holding of the case, the Court ruled that the "procedural safeguards" described in the decision would be required to protect the privilege, "unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored."<sup>21</sup> If a suspect is placed in custody, he must be warned of his rights to remain silent and to counsel "prior to any questioning."<sup>22</sup> After the warnings have been given, "the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. However, unless and until such warnings and waivers are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."<sup>23</sup> If a statement is taken without counsel present, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."<sup>24</sup>

To help reach its first critical holding that the process of custodial interrogation contains "inherently compelling pressures" that jeopardize the Fifth Amendment privilege, the Court famously relied upon several published

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16. See, e.g., *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Spano v. New York*, 360 U.S. 315 (1959); *Brown v. Mississippi*, 297 U.S. 278 (1936). The Court also flirted with a Sixth Amendment approach. See *Escobedo v. Illinois*, 378 U.S. 478 (1964).

17. In *Bram v. United States*, 168 U.S. 532, 542 (1897), the Supreme Court had earlier used the Self-Incrimination Clause as a vehicle to assess the voluntariness of a statement in a federal criminal prosecution. However, the Self-Incrimination Clause was not incorporated and applied to the states until 1964, when the Court decided *Malloy v. Hogan*, 378 U.S. 1 (1964).

18. *Miranda*, 384 U.S. at 467. See Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 436 (1987) (characterizing *Miranda* as "a complex series of holdings").

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

20. *Id.* at 478.

21. *Id.* at 478-79.

22. *Id.* at 479.

23. *Id.*

24. *Id.* at 475 (citing *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964)).

interrogation manuals, including the first edition of Fred Inbau and John Reid's classic, *Criminal Interrogation and Confessions*.<sup>25</sup> The manuals were extensively excerpted in the American Civil Liberties Union's brief and proved persuasive.<sup>26</sup> Though the Court stopped short of claiming that the manuals accurately described uniform police practices, the opinion distills the essence of the interrogation techniques that the manuals advocated.<sup>27</sup> For example, suspects are to be isolated and deprived of outside support. Police should exude confidence in the suspect's guilt; guilt "is to be posited as a fact."<sup>28</sup> "The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it."<sup>29</sup> Police also may use deception to obtain a statement.<sup>30</sup> One can criticize the Court for relying upon an amicus brief and manuals for such an essential part of the decision, but I believe that the justices got the facts right with respect to basic interrogation techniques. As Part II of this Article explains, these same tactics prevail today.

If there was only modest evidence supporting the Court's description of police practice and its legal conclusion about the "compelling pressures" inherent in a custodial interrogation, there was no empirical basis for the justices' faith that a program of warnings and waivers could counter those pressures and serve as a "fully effective means" of protecting suspects' Fifth Amendment privilege. As Professor Morgan Cloud and colleagues write, this part of *Miranda* "rested upon an untested, unverified, and unproven assumption . . . that [warnings] work."<sup>31</sup> The Court could cite to no manuals or studies on this point, for there were none. The parties generally hypothesized about the

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25. See *Miranda*, 384 U.S. at 448-55 (discussing FRED E. INBAU & JOHN E. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* (1962), CHARLES E. O'HARA, *FUNDAMENTALS OF CRIMINAL INVESTIGATION* (1956), and other texts).

26. See Brief of the American Civil Liberties Union as Amicus Curiae, at 13-19 & apps. 43-67, *Miranda*, 384 U.S. 436 (No. 759).

27. In an early draft of the majority opinion in *Miranda*, Chief Justice Warren wrote that "[b]y considering these texts and other data, it is possible to obtain a fairly accurate composite of procedures followed by police around the country." Draft Opinion, *Miranda* (No. 759) (May 9, 1966) at 10 (on file with the Library of Congress in the Papers of William J. Brennan ("WJB Papers"), Container 145, File "*Miranda*, Folder #3). Warren sent the draft to Justice Brennan for comments. Brennan questioned whether the techniques were in widespread use and suggested that the manuals be characterized as presenting professional recommendations. Letter from Justice William J. Brennan to Chief Justice Earl Warren at 14-15 (May 11, 1966) (on file with the Library of Congress in WJB Papers). Warren revised the opinion accordingly. See *Miranda*, 384 U.S. at 448. Warren also had the Supreme Court Librarian contact the publishers of the manuals to obtain circulation data. See Weissselberg, *Saving Miranda*, *supra* note 4, at 119 n. 48.

28. *Miranda*, 384 U.S. at 450.

29. *Id.*

30. See *id.* at 455.

31. Morgan Cloud, George B. Sheperd, Alison Nodvin Barkoff & Justin V. Shur, *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 517 (2002) [hereinafter Cloud, et al., *Words Without Meaning*]; see also Morgan Cloud, *Ignorance and Democracy*, 39 TEX. TECH L. REV. 1143, 1147 (2007) (quoting Cloud et al, *Words Without Meaning*, *supra*).

impact of counsel's presence during an interrogation<sup>32</sup> or asserted in a conclusory way that a statement would be deemed voluntary under the totality of circumstances if a suspect had been made aware of the right not to speak.<sup>33</sup> The opinion describes FBI practices with respect to warnings, but mostly to demonstrate that law enforcement agencies would be capable of administering such warnings, not to demonstrate their effectiveness.<sup>34</sup> Dissenting, Justice White argued that "for all the Court's expounding on the menacing atmosphere of police interrogation procedures, it has failed to supply any foundation for the conclusions it draws or the measures it adopts."<sup>35</sup>

Without studies or other evidence showing the efficacy of a regime of warnings and waivers, the Court made not one but a series of factual assumptions as to how these measures would operate to offset the pressures of custodial questioning. These assumptions are implicit in the decision. Let me make them explicit here:

*First, the element of "custody" would distinguish interrogations that contain compelling pressures from those that do not.* Warnings need only be given to suspects who have been "taken into custody."<sup>36</sup> Perhaps because the interrogation manuals emphasized isolating suspects and depriving them of outside support,<sup>37</sup> the Court used "custody" to identify those interrogations that use tactics that tend to compel a suspect to speak.

*Second, officers would give warnings and obtain waivers before employing the tactics described in the interrogation manuals. Thus, apart from the compulsion inherent in the very fact of "custody," the Miranda regime would operate in an atmosphere in which compelling pressures are minimized.* The Court emphasized that warnings must be given at the very beginning of interrogation: "At the outset, if a person in custody is to be subjected to interrogation, he must first be informed" of his rights.<sup>38</sup> The justices also made clear that waivers would not be considered voluntary if there was "any

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32. See, e.g., Opening Brief for the Petitioner at 21-31, *Westover v. United States*, 384 U.S. 436 (1966) (No. 761); Brief of the American Civil Liberties Union, *supra* note 26, at 22-31; Brief of the State of New York, et al, as Amici Curiae, at 28-30, *Miranda* (No. 759).

33. See Brief for the United States at 35-37, *Westover*, 384 U.S. 436 (No. 761).

34. See *Miranda v. Arizona*, 384 U.S. 436, 483-86 (1966); see also *Cloud et al., Words Without Meaning*, *supra* note 31, at 524.

35. *Id.* at 537 (White, J., dissenting). More pointedly, Justice White asked: "[I]f the defendant may not answer without a warning a question such as 'Where were you last night?' without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?" *Id.* at 536.

36. *Id.* at 444. The opinion also says that warnings must be given to a suspect who is "otherwise deprived of his freedom of action in any significant way," but that language may have been included only to indicate that "custody" means something different than a formal arrest. See *id.*

37. See *id.* at 449-50, 455.

38. *Id.* at 467. Further, he "must be warned prior to any questioning . . ." *Id.* at 479.

evidence that the accused was threatened, tricked, or cajoled into a waiver.”<sup>39</sup> Given the Court’s extensive and critical discussion of the interrogation manuals, this could only mean that waivers could not be obtained while interrogators were applying the tactics advocated in the manuals. Inbau and Reid—whose training manual was heavily cited in *Miranda*—recognized this point, putting a somewhat optimistic spin on the decision in the next edition of their book. Published just one year after *Miranda* was decided, the new edition stated: “As we interpret the June, 1966, five to four decision . . . , all but a very few of the interrogation tactics and techniques presented in our earlier publication are still valid if used *after* the recently prescribed *warnings have been given* to the suspect . . . , and *after he has waived* his self-incrimination privilege and his right to counsel.”<sup>40</sup>

*Third, if read a standard set of warnings, suspects would comprehend their rights and be capable of making a reasoned choice whether to speak or remain silent.* The Court precisely articulated the warnings that must precede a custodial interrogation.<sup>41</sup> Though the justices determined that any valid waiver of rights would have to be knowing and intelligent,<sup>42</sup> the justices did not suggest that different sets of warnings might be required for suspects who were, for example, poorly educated, non-native English speakers, mentally disabled, or mentally disordered; nor did the justices seem to contemplate that there might be suspects for whom warnings would not be effective at all.<sup>43</sup> The Court thus assumed, as Professor Cloud and colleagues put it, that “the targets of custodial interrogation possess the intellectual and social competence necessary to utilize . . . [the warnings] mechanism.”<sup>44</sup> Under the Court’s conception, a “one-size-fits-all” approach would enable all suspects to make a rational decision. One can understand this assumption in light of the Court’s goal of creating bright-line rules that officers could easily administer, but there never has been empirical support for this belief.

*Fourth, officers would not begin questioning unless suspects clearly and affirmatively waived their rights, and questioning would cease if suspects who initially waived their rights later indicated that they wished to invoke them.* The Court characterized the warnings and waivers as procedural predicates that must be met *before* questioning could be initiated.<sup>45</sup> The Court thus

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39. *Id.* at 476.

40. FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS 1 (2d ed. 1967) (emphasis added).

41. *See Miranda*, 384 U.S. at 444, 467-73.

42. *See id.* at 475 (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938), and its “high standards of proof for the waiver of constitutional rights”).

43. The justices were keenly aware that different suspects have different competencies. *Miranda* was described as an “indigent Mexican defendant” who was “seriously disturbed.” Stewart, the defendant in the case from California, was characterized as “an indigent Los Angeles Negro who had dropped out of school in the sixth grade.” *Id.* at 457.

44. Cloud et al., *Words Without Meaning*, *supra* note 31, at 516.

45. *See Miranda*, 384 U.S. at 444-45 (stating that a person must be warned “prior to any

distinguished between the lack of waiver, which would prevent the *initiation* of interrogation, and an affirmative *invocation*, which would halt questioning after it had legitimately begun. The justices placed a “heavy burden” on the government to show that suspects had waived their rights.<sup>46</sup> There would be no questioning if suspects indicated “in any manner” and “at any stage of the process” that they did not wish to be interrogated or wanted to consult with counsel.<sup>47</sup> The Court assumed, I believe, that the “heavy burden” to show waiver would create a “time out” prior to interrogation, during which well-informed and unpressured suspects could decide whether to speak.

## II

### MIRANDA’S FIRST PREMISE NOW—“INHERENTLY COMPELLING PRESSURES” AND THE CONTEMPORARY PROCESS OF INTERROGATION

How are interrogations conducted today? Does the contemporary process of interrogation still support the legal conclusion that custodial interrogations contain inherently compelling pressures that undermine the Fifth Amendment privilege? I believe that, as a general matter, the answer is yes. Present-day investigators are better trained than their 1960s counterparts, but the basic psychological approach to interrogation described in the *Miranda* decision remains prevalent in the United States. I base that conclusion on much more evidence than was available to the justices in 1966.

#### A. Modern Theories of Interrogation and Officer Training

Law enforcement officers are trained in a variety of ways. New members of a force generally attend a basic academy operated by a state, local, or county agency. These courses may be approved or certified by a state agency. In California, these academies follow curricula mandated and approved by POST.<sup>48</sup> After the academy, police officers receive continuing on-the-job training in an assortment of formats. Officers who become investigators or who move into specialized assignments commonly attend advanced courses, which may be given by law enforcement agencies,<sup>49</sup> professional associations,

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questioning”); *see also id.* at 477 (“The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is *first subjected to police interrogation* while in custody.”) (emphasis added).

46. *Id.* at 475.

47. *Id.* at 444-45.

48. *See* CAL. PENAL CODE § 13510(a) (Deering 2008); 11 CAL. CODE REGS. § 1005 (2008). There are currently forty academies or centers that provide POST-certified basic training. *See* POST, Basic Training Academies, <http://www.post.ca.gov/training/academies.asp> (last visited July 6, 2008).

49. *See* David Vessel, *Conducting Successful Interrogations*, FBI LAW ENFORCEMENT BULL. 1, 5 & 6 n.15 (Oct. 1998) (noting training resources, including interrogation courses given by the Los Angeles Police Department, New Mexico Department of Public Safety, FBI and Georgia Police Academy).

community colleges, and other public or private providers.<sup>50</sup>

The largest national provider of training in interrogation techniques is Chicago-based John E. Reid & Associates. The company offers a menu of programs, including a basic course on “The Reid Technique of Interviewing and Interrogation<sup>®</sup>,”<sup>51</sup> which is taught across the country.<sup>52</sup> The Reid Technique is a highly structured sequence of interviews and interrogations. It expands on the methodology initially explained in the very first edition of the Inbau and Reid text, which was discussed in *Miranda*. The current manual is now in its fourth edition.<sup>53</sup> Reid & Associates claim that “[m]ore than 300,000 professionals in the law enforcement and security fields have attended this three day program since it was first offered in 1974.”<sup>54</sup> According to Reid & Associates, the course is approved by state authorities for officer training in a significant number of states.<sup>55</sup> Although not every police officer is formally trained in the Reid Technique, this Part of the Article will present research that demonstrates that the methods advocated by Reid & Associates are widespread, if not pervasive.<sup>56</sup>

It would help to begin by distinguishing between an “interview” and an “interrogation.” An interview is non-accusatory, “free flowing and relatively unstructured”; its purpose is to gather information.<sup>57</sup> An interrogation, on the other hand, is “accusatory,” conducted “in a controlled environment,” and involves “active persuasion.”<sup>58</sup> Officers understand the difference between an interview and an interrogation; it is discussed in leading interrogation texts and emphasized in police training materials, even in basic police academy training.<sup>59</sup> During an interview, police establish rapport with a suspect and use

50. See, e.g., POST Course Catalog, [http://www.post.ca.gov/Publications/Course\\_Catalog/](http://www.post.ca.gov/Publications/Course_Catalog/) (last visited July 6, 2008).

51. See John E. Reid & Associates, Inc., [http://www.reid.com/training\\_programs/r\\_training.html](http://www.reid.com/training_programs/r_training.html) (last visited July 6, 2008).

52. For example, in June 2008, the course was offered in twenty locations around the country. See John E. Reid & Associates, Inc., Training Schedule, [http://www.reid.com/training\\_programs/r\\_interview\\_schedule.html](http://www.reid.com/training_programs/r_interview_schedule.html) (last visited July 6, 2008).

53. FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS (4th ed. 2001). For discussions of Fred Inbau and the development of the Inbau and Reid text, see LEO, *supra* note 3, at 108-16, and John T. Philipsborn, *Interrogation Tactics in the Post-Dickerson Era*, THE CHAMPION 18, 18-20 (Jan./Feb. 2001).

54. John E. Reid & Associates, Inc., Interviewing & Interrogation, [http://www.reid.com/training\\_programs/r\\_interview.html](http://www.reid.com/training_programs/r_interview.html) (last visited July 6, 2008).

55. See John E. Reid & Associates, Inc., POST Seminars, [http://www.reid.com/educational\\_info/r\\_post.html](http://www.reid.com/educational_info/r_post.html) (last visited July 6, 2008).

56. See *infra* at notes 92-106 and accompanying text.

57. See INBAU ET AL., *supra* note 53, at 5-7.

58. *Id.* at 7-8.

59. See, e.g., POST, *Learning Domain 30, Preliminary Investigation*, BASIC COURSE WORKBOOK SERIES, rev. 2 2001, at 3-3 [hereinafter POST, *Preliminary Investigation*]; SACRAMENTO SHERIFF'S DEP'T TRAINING ACAD., CLASS HANDOUT, INTERVIEWS & INTERROGATIONS 2, 9 (Ron Wells, Instructor, 2004); DAVID E. ZULAWSKI & DOUGLAS E. WICKLANDER, PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION 7-9, 187-93 (2d ed.

verbal and non-verbal information (often including “behavior analysis” questions) to gather information and decide whether, in their view, a suspect is telling the truth.<sup>60</sup> If officers become “reasonably certain of the suspect’s guilt,” they may initiate an interrogation.<sup>61</sup> An officer’s initial judgments about truth and guilt thus determine whether the suspect will be interrogated. In contrast to interviewing, interrogation is a “guilt-presumptive process.”<sup>62</sup> Together, interviews and interrogation form an integrated and theoretically seamless sequence.

The Reid textbook breaks the interrogation part of the sequence into nine steps, though not all of them may be used in every interrogation. After police isolate the suspect in a room, allowing him or her to sit alone for a few minutes, the interrogation begins.<sup>63</sup> The interrogation room is supposed to be private, sparsely furnished, free of all distractions, and should allow minimal noise. Chairs should be straight-backed, and the manuals contain diagrams showing how the chairs should be positioned.<sup>64</sup> Custody and isolation in such a setting “increases stress and the incentive to extricate oneself.”<sup>65</sup>

The first interrogation step is “a direct, positively presented confrontation of the suspect with a statement that he is considered to be the person who

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2002). See also J.P. Blair, *What Do We Know About Interrogation in the United States?*, 20 J. POLICE AND CRIM. PSYCHOL. 44, 45 (Fall 2005) (noting that five leading interrogation manuals, in addition to Inbau et al., similarly distinguish between an interview and an interrogation).

60. See INBAU ET AL., *supra* note 53, at 93-94 (establishing rapport); *id.* at 121-91 (describing the “behavior analysis interview”); see also JOHN R. SCHAFER & JOE NAVARRO, *ADVANCED INTERVIEWING TECHNIQUES: PROVEN STRATEGIES FOR LAW ENFORCEMENT, MILITARY, AND SECURITY PERSONNEL* 39 (2003) (emphasizing rapport-building).

Reid & Associates claim that “interviewers specifically trained and experienced in behavior analysis assessment can correctly identify the truthfulness of a person 85% of the time.” John E. Reid & Associates, Inc., Behavior Analysis Interview, [http://www.reid.com/services/r\\_behavior.html](http://www.reid.com/services/r_behavior.html) (last visited July 6, 2008). See also INBAU ET AL., *supra* note 53, at 123 (citing studies performed under grants awarded to Reid & Associates). Further, in a recent survey of over 600 police investigators, respondents on average claimed that they “can distinguish truthful and deceptive suspects at a 77% level of accuracy.” Saul M. Kassin, Richard A. Leo, Christian A. Meissner, Kimberly D. Richman, Lori H. Colwell, Amy-May Leach, Dana La Fon, *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 389 (2007) [hereinafter Kassin et al., *Self-Report Survey*]. However, there is significant research to counter the claim that police can accurately assess the truthfulness of suspects. See, e.g., Saul M. Kassin, Christian A. Meissner & Rebecca J. Norwick, “*I’d Know a False Confession if I Saw One*”: A Comparative Study of College Students and Police Investigators, 29 LAW & HUM. BEHAV. 211, 218-19, 221-22 (2005) [hereinafter Kassin et al., *Comparative Study*]; Christian A. Meissner & Saul M. Kassin, “*He’s Guilty!*”: Investigator Bias in Judgments of Truth and Deception, 26 LAW & HUM. BEHAV. 469, 477-78 (2002); Aldert Vrij, Samantha Mann, Susanne Kristen & Ronald P. Fisher, *Cues to Deception and Ability to Detect Lies as a Function of Police Interview Styles*, 31 LAW & HUM. BEHAV. 499, 512-14 (2007).

61. See INBAU ET AL., *supra* note 53, at 8.

62. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCHOL. SCI. IN THE PUBL. INTEREST 33, 41 (2004).

63. INBAU ET AL., *supra* note 53, at 216.

64. See *id.* at 57-64.

65. Kassin & Gudjonsson, *supra* note 62, at 43.

committed the offense.”<sup>66</sup> Psychologists Deborah Davis and William O’Donohue have dubbed this the “Borg Maneuver,” after a fictional race of Star Trek characters who regularly proclaim: “Resistance is futile!” and “You will comply!”<sup>67</sup> The confrontation statement is a “maximization” technique, meaning one that operates by increasing anxiety and inducing a sense of hopelessness.<sup>68</sup> Then, “[r]egardless of the suspect’s initial response” to the confrontation statement, the interrogator should “offer a reason as to why it is important for the suspect to tell the truth.”<sup>69</sup>

The second step introduces a theme for the interrogation, a reason for the commission of the crime, which may be a moral (but not legal) excuse or a way for the suspect to rationalize her actions.<sup>70</sup> This can be a “minimization” technique, meaning one in which the sympathetic interrogator morally and psychologically minimizes or “justifies the crime,” from which the suspect may wrongly “infer he or she will be treated leniently” and “see confession as the best possible means of ‘escape.’”<sup>71</sup> The suspect may deny involvement in the offense, which leads to step three, overcoming denials. Interrogators are trained to ignore a weak denial and to reassert confidence in the suspect’s guilt if there is a strong denial.<sup>72</sup> The next steps, four through six, guide the investigator in overcoming the suspect’s reasons why he would not or could not commit the crime, keeping the suspect’s attention and handling a suspect’s passive mood.<sup>73</sup>

Step seven is critical. Here the officer formulates alternative questions, one of which is “more ‘acceptable’ or ‘understandable’ than the other.” The question is followed by a statement of support for the more morally acceptable alternative.<sup>74</sup> However, “[w]hichever alternative is chosen by the suspect, the net effect . . . will be the functional equivalent of an incriminating admission.”<sup>75</sup> Steps eight and nine are taking the suspect’s oral statement and

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66. INBAU ET AL., *supra* note 53, at 213.

67. Deborah Davis & William T. O’Donohue, *The Road to Perdition: Extreme Influence Tactics in the Interrogation Room*, in HANDBOOK OF FORENSIC PSYCHOLOGY 897, 904 (William T. O’Donohue & Eric R. Levensky eds., 2004).

68. See Kassin & Gudjonsson, *supra* note 62, at 43.

69. INBAU ET AL., *supra* note 53, at 213.

70. *Id.* at 232. For example, an investigator might suggest to a suspect that anyone else would have done the same thing under similar circumstances, *id.* at 241-43, or that the suspect might not have committed an act except for the influence of drugs or alcohol. *Id.* at 248-49.

71. Kassin & Gudjonsson, *supra* note 62, at 43.

72. INBAU ET AL., *supra* note 53, at 306.

73. *Id.* at 213-14.

74. *Id.* As an example, alternative questions might be: “Joe, was this money used to take care of some bills at home, or was it used to gamble?” *Id.* at 360. Those might be followed by a negative supporting statement such as: “You don’t seem to be the kind of person who would do something like this in order to use it for gambling. If you were that kind of person, I wouldn’t want to waste my time with you, but I don’t think you’re like that,” or a supportive positive statement such as: “I’m sure this money was for your family, for some bills at home. That’s something even an honest person might do, if he was thinking of his family.” *Id.*

75. *Id.* at 214.

converting it to a written confession.<sup>76</sup>

Though Reid & Associates claims to have trained hundreds of thousands of professionals, many investigators are taught within their own departments, at specialized programs in their own state, through professional associations, or in community colleges. College instructors and training officers may follow the Reid format or adapt it for their own purposes. And at least one other company, Wicklander-Zulawski & Associates, is licensed by Reid & Associates to teach what it calls the "Reid Method."<sup>77</sup> In a recent survey of police executives nationwide, about two-thirds of respondents "reported that 'most' or 'some' officers [in their department] had training in the 'Reid method.'"<sup>78</sup>

Officers in California, who may not have attended a Reid program, learn interrogation techniques that mirror some or all components of the Reid method. The basic police academy curriculum includes instruction on interrogation law and practice. Recruits are taught to isolate suspects in a specially arranged room and a number of interrogation tactics are discussed, including "direct factual," "sympathetic," "hostile," "face-saving," and other "approaches" that incorporate parts of the Reid method.<sup>79</sup> Officers also receive more systematic instruction in interrogation tactics through "telecourses" and advanced programs.

Since 1993, California's POST has produced six "telecourses" on interviews, interrogations, and interrogation law, which are listed in the Appendix to this article. The telecourses, each about two hours long, can be shown in their entirety or divided into short "roll-call-length" sections.<sup>80</sup> POST distributes its telecourses free to law enforcement agencies and trainers, and to other paid subscribers.<sup>81</sup>

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76. *Id.*

77. See Wicklander-Zulawski & Associates, Inc., Seminar for Law Enforcement, [http://www.w-z.com/seminars\\_law\\_enforcement.php](http://www.w-z.com/seminars_law_enforcement.php) (last visited July 6, 2008).

78. Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Toward Miranda and Interrogation Policies*, 97 J. CRIM. L. & CRIMINOLOGY 873, 920 (2007).

79. See POST, *Preliminary Investigation*, *supra* note 59, at 3-14 to 3-18.

80. See POST, California POST Training Network, <http://www.post.ca.gov/training/cptn/certified.asp> (last visited July 6, 2008).

All of the POST telecourses discussed in this Article are archived at POST's library in Sacramento, California.

81. Though the distribution methods have changed over time, POST videos are sent free of charge to law enforcement agencies and basic academies in the POST program. Other law enforcement subscribers pay a fee. See POST, Video Ordering and Subscribing, <http://www.post.ca.gov/training/cptn/ordering.asp> (last visited July 6, 2008). DVD telecourses are automatically mailed to officers and departments that are "Certified Telecourse Presenters." See *id.* As of August 2007, POST listed 542 such certified presenters. See POST, Certified Telecourse (Multimedia) Presenters in the California POST Program, <http://www.post.ca.gov/training/cptn/pdf/CertTelePresenterList.pdf> (last visited July 6, 2008) POST also lists 615 agencies and departments as participating in the POST program. See POST, Law Enforcement Agencies, [http://www.post.ca.gov/library/other/agency\\_page.asp](http://www.post.ca.gov/library/other/agency_page.asp) (last visited July 6, 2008). By May 2006, demand for POST's programs had "increased to more than 1,300 DVD copies per program each month." POST, STATUS REPORT ON VIDEO PRODUCTIONS FOR 05-06 FISCAL YEAR (June 21, 2006)

In April 1993, POST distributed two related telecourses, *Interview and Interrogation Techniques, Parts I and II*. The telecourses, as well as materials from other agencies, demonstrate how the Reid method may be adapted and how the telecourses might shape a police department's internal training. The interrogation portion of the 1993 telecourses introduces officers to what POST calls "The Confrontation Interrogation Technique."<sup>82</sup> The narrator says that the technique "was originally developed by John E. Reid."

Like the Reid method, the "Confrontation Interrogation Technique" also teaches a nine-step process, albeit with slightly different steps. The first step, "Psychological Domination,"<sup>83</sup> advises an investigator to leave the suspect alone in the interrogation room "for a period of time" to "heighten[ ] anxiety and stress."<sup>84</sup> Re-entering the room, the officer may use props, including "case files with the suspect's name prominently displayed and real or improvised items of evidence . . . [The officer] may want to inspect the case file. This may create a psychological dominance and will heighten the suspects' anxiety level."<sup>85</sup> In the video, an expert advises officers to stand over the suspect for a few minutes, silently reviewing the case file. The remaining steps essentially follow the Reid Technique, though a few steps are collapsed into one.<sup>86</sup>

The "Confrontation Interrogation Technique," which appears in departmental and other training materials, has been taught in the eighty-hour core course of POST's special school for police investigators, the Robert Presley Institute of Criminal Investigation.<sup>87</sup> The technique also appears in an instructional PowerPoint of the San Francisco Police Department.<sup>88</sup> The interrogation method is the basis for a twenty-page, easy-to-use instructional manual for the Los Angeles Police Department, also entitled *The Confrontation*

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(on file with author).

82. Videotape: Interview and Interrogation Techniques Telecourse, Part II (POST Apr. 1993).

83. CAL. COMM'N ON PEACE OFFICER STANDARDS AND TRAINING, INTERVIEW AND INTERROGATION TECHNIQUES TELECOURSE, PARTS I & II, Apr. 8 & 22, 1993 at 20 (1994) (handbook accompanying telecourse), available at <http://libcat.post.ca.gov/dbtw-wpd/documents/POST/55607142.pdf>.

84. *Id.*

85. *Id.*

86. *Id.* at 20-29; see also SCHAFFER & NAVARRO, *supra* note 60, at 31-33 (describing methods to establish and maintain dominance during an interview).

87. See Memorandum from Senior Deputy C. Flewelling to Lt. A. Kennedy, San Francisco Sheriff's Department (Sept. 26, 2000) (on file with author) (enclosing ROBERT PRESLEY INST. OF CRIMINAL INVESTIGATION, MODULE 8, INTERVIEW AND INTERROGATION, and stating that the materials were used during a course given from September 27 to October 8, 1999). The *Module 8* materials include POST's nine-step confrontation interrogation technique. For a description of the Robert Presley Institute, and the eighty-hour course, see POST, Robert Presley Institute of Criminal Investigation, <http://www.post.ca.gov/training/ici/default.asp> (last visited July 8, 2008).

88. See Letter from San Francisco Police Dep't Acting Lt. Daniel Curiel to author (Aug. 29, 2000) (on file with author) (enclosing PowerPoint used to instruct San Francisco recruit officers and the Inspector's Division).

*Interrogation Technique*, created by an LAPD training officer.<sup>89</sup>

In March 2005, POST distributed two new telecourses, *Interview Techniques* and *Interrogation Techniques*. The name “Reid” is not uttered in four hours of programming, but the techniques mirror much of the Reid method. A training officer in the *Interrogation Techniques* telecourse explains that while instructors may teach interrogation tactics with different numbers of steps, the underlying theory is still the same.<sup>90</sup> In a series of dramatizations, theory is put into practice. Investigators consistently confront suspects and emphasize that the only question still open is “why” (and not “whether”) the suspects committed the crime.

The 2005 telecourses particularly emphasize rapport-building in both interviews and interrogations. Rapport is established through physical interactions with the suspect, body language, and even conversations to obtain booking or biographical information. These preliminary conversations are very important to the interrogation process.<sup>91</sup> In addition to establishing a relationship, the conversations can give investigators the information they need to develop credible themes that will resonate with suspects during interrogation.

#### *B. Interrogation Techniques and the Social Science Literature*

Even if officers are trained in these methods, do they use them? The social science literature indicates they do.

Professor Richard Leo studied interrogations in three police departments in Northern California in 1992 and 1993. He personally observed 122 interrogations and watched videotapes of another sixty.<sup>92</sup> All of them were conducted in interrogation rooms.<sup>93</sup> Leo tracked the various tactics used by officers and ranked them by frequency of use for suspects who were under custodial questioning and had been given *Miranda* warnings. Some of the most common tactics (and the percentage of interrogations in which they were employed) included: appealing to the suspect’s self-interest (88%); confronting the suspect with actual evidence of guilt (85%); undermining the suspect’s confidence in denials of guilt (43%); appealing to the importance of

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89. See L.A. POLICE DEP’T., INVESTIGATION ANALYSIS SECTION, THE CONFRONTATION INTERROGATION TECHNIQUE NO. 9A (rev. Dec. 1995). The author of the manual was one of the experts featured in the 1995 POST telecourses.

90. As a San Francisco police lieutenant explains: “We have all these steps . . . Depending on which technique, you might have six steps in one, and nine steps in another, and twelve. It doesn’t matter how many steps you have there. Theme building is common to all of them. The rationalization is common to all of them.” DVD: *Interrogation Techniques* (POST Mar. 2005).

91. See LEO, *supra* note 3, at 121-23 (describing the role of establishing rapport).

92. See Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 268 (1996). The 122 live interrogations involved forty-five different detectives from a major urban police department. The videotaped interrogations were from two different departments. See *id.*

93. See *id.* at 273.

cooperation (37%); offering moral justifications/psychological excuses (34%); minimizing the moral seriousness of the offense (22%).<sup>94</sup>

Another study was conducted by Professor Barry Feld, who reviewed recordings of the interrogations of sixty-six juveniles conducted by Ramsey County (Minnesota) officers between 1997 and 2004.<sup>95</sup> Ninety-five percent were questioned in custodial settings.<sup>96</sup> Feld tracked the tactics used in questioning the fifty-three juveniles who waived their *Miranda* rights. Maximization strategies were employed in 89% of the cases<sup>97</sup> and officers used minimization strategies in close to half (45%) of the interrogations.<sup>98</sup>

Additionally, a team of psychologists and criminologists led by Professors Saul Kassin and Richard Leo recently surveyed experienced police investigators. Six hundred and thirty-one law enforcement officers responded from sixteen locations in California, Texas, Maryland, Massachusetts, Florida and Canada.<sup>99</sup> Eighty-two percent reported receiving specialized training on interviews and interrogations, though only 11% specifically identified their training as being in the Reid Technique.<sup>100</sup>

Whether or not the surveyed officers recognized the Reid name, they employed many of the same techniques. Participants self-reported the frequency that they used sixteen identified interrogation techniques, rating them on a scale of one (never used) to five (always used). The most frequently-used techniques (with mean scores) were: isolating suspects (4.49); interrogating in a small, private room (4.23); identifying contradictions in the suspect's story (4.23); establishing rapport and gaining trust (4.08); confronting with evidence of guilt (3.90); appealing to the suspect's self-interests (3.46); offering sympathy, moral justifications and excuses (3.38); interrupting denials and objections (3.22); implying or pretending to have independent evidence of guilt

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94. See *id.* at 275-77, 278 tbl.5.

95. See Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 248-49 (2006) [hereinafter Feld, *Police Interrogation*]; Barry C. Feld, *Juveniles' Competence to Exercise Miranda Rights: An Empirical Study of Policy and Practice*, 91 MINN. L. REV. 26, 62 (2006) [hereinafter Feld, *Juveniles' Competence*]. Twenty-one different officers conducted the sixty-six interrogations. Feld, *Police Interrogation*, *supra*, at 254. Sixty-eight percent of the juveniles were questioned by St. Paul juvenile officers; homicide detectives carried out another eight percent. *Id.*

96. Feld, *Police Interrogation*, *supra* note 95, at 254.

97. *Id.* at 263. For example, the juveniles were confronted with evidence in thirty-three of the interrogations. *Id.* at 262 tbl.3. In twenty-three of the interrogations, juveniles were accused of lying. *Id.*

98. *Id.* at 278. The most common strategies were suggesting a scenario or theme that minimized guilt (twelve interrogations), expressing empathy (ten interrogations), and offering to help (nine interrogations), or minimizing the seriousness of the conduct (nine interrogations). *Id.* at 277 tbl.4.

99. See Kassin et al., *Self-Report Survey*, *supra* note 60, at 386 tbl.1. California was perhaps over-represented, with 360 investigators out of 631 (55%) spread over six locations: Los Angeles, Long Beach, Santa Ana, San Bernardino, Inglewood and Westminster. See *id.*

100. See *id.* at 388.

(3.11); and minimizing the moral seriousness of the offense (3.02).<sup>101</sup> Through factor analysis, the researchers identified clusters of certain techniques. One factor—confrontation, which includes elements of identifying contradictions and interrupting denials—had a mean frequency of usage of 3.79.<sup>102</sup> Another factor—isolation, rapport and minimization tactics, which includes elements of appeals to sympathy, self-interest and religion—had a mean frequency of usage of 3.52.<sup>103</sup>

### C. Miranda's First Premise Revisited

I believe that the first premise of *Miranda*—and the legal holding that followed—remain valid today. The *Miranda* Court was forced to extrapolate the prevalence and use of interrogation tactics from leading manuals and circulation data for the manuals. That may or may not have been appropriate; at the time, interrogation manuals were something of a recent innovation. They could be seen as part of an effort to professionalize and reform police, and to encourage a psychological approach to interrogation rather than the third degree.<sup>104</sup> But the manuals have now become an important part of interrogation training and we have better information about which interrogation tactics are widely used in the United States. It turns out that they are many of the same tactics discussed by the justices in 1966. Isolation was then, and remains today, one of the most significant aspects of interrogation.<sup>105</sup> And interrogation, we now know, is a carefully designed, guilt-presumptive process. It works by increasing suspects' anxiety, instilling a feeling of hopelessness, and distorting suspects' perceptions of their choices by leading them to believe that they will benefit by making a statement. Professor Leo calls this "fraud" because "detectives seek to create the illusion that they share a common interest with the suspect and that he can escape or mitigate punishment only by cooperating with them and providing a full confession."<sup>106</sup>

Based on the facts available, the *Miranda* Court concluded that custodial interrogations contain inherently compelling pressures that undermine suspects'

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101. *Id.* at 388 tbl.2.

102. *See id.*

103. *See id.* at 390.

104. For a fascinating account, see LEO, *supra* note 3, at 78-81, 106-116.

105. *See* Kassin et al., *Self-Report Survey*, *supra* note 60, at 390. I do not mean to imply that officers always isolate suspects in order to make a psychological impact. There are other reasons. As an experienced investigator told me, it is difficult for suspects to admit guilt in front of family and friends. Nevertheless, this remains a common aspect of modern interrogation.

106. LEO, *supra* note 3, at 25. Journalist David Simon, who spent a year with the Baltimore Police Department's homicide unit, writes: "The effect of the illusion is profound, distorting as it does the natural hostility between hunter and hunted, transforming it until it resembles a relationship more symbiotic than adversarial. That is the lie . . ." DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 197 (Ballantine Books 1993). Further, "what occurs in an interrogation room is indeed little more than a carefully staged drama, a choreographed performance that allows a detective and his suspect to find common ground where none exists." *Id.*

ability to make a free and informed choice whether to speak. The best evidence today supports the same legal conclusion reached by the *Miranda* Court. I acknowledge that there is little psychological research directly showing the power of the Reid Technique and like methods, though the most significant scholarship supports my conclusion. Researchers in the laboratory have demonstrated that maximization techniques convey implied threats of punishment, and that minimization techniques successfully convey implied offers of leniency.<sup>107</sup> Professors Richard Ofshe and Richard Leo have explained, with examples from real cases, how these interrogation tactics powerfully influence suspects' thinking.<sup>108</sup> With respect to POST's variation of Reid, it is difficult to think of an interrogation method that begins with "psychological domination" as *not* containing compelling pressures. Of course, not every interrogation involves the tactics I have described, and there are suspects who will feel free to assert or waive their rights despite the use of these tactics. Moreover, whether pressures are so strong as to pose an unacceptable risk to the Fifth Amendment privilege is a legal, not factual, judgment. Nevertheless, after reviewing the training materials and studies, I can only conclude that the *Miranda* Court's first premise remains valid today. I am also comfortable concluding that the legal holding based on that premise likewise remains sound.<sup>109</sup>

### III

#### MIRANDA'S SECOND PREMISE AND UNDERLYING ASSUMPTIONS NOW— WARNINGS, WAIVERS AND THE CONTEMPORARY PROCESS OF INTERROGATION

This portion of the Article examines the *Miranda* Court's expectations about the operation of warnings and waivers in light of subsequent judicial

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107. See Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233 (1991). For an overview of research on reasons that people confess, see Kassin & Gudjonsson, *supra* note 62, at 46-48.

Much of the writing about the impact of interrogation methods is centered on a narrower issue, the problem of false confessions. A number of researchers have documented actual cases of false confessions and have linked them to a variety of interrogation tactics. See, e.g., GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS* 34-36, 158-72 (2003); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 910-21 (2004).

Let me set aside the issue of false confessions, however. I accept that the existence of false confessions lets us infer that interrogation techniques are powerful. Nevertheless, the research cannot tell us the incidence of false confessions. My central concern in this article is the impact of interrogation tactics on the ordinary suspect and her ability to decide whether to speak to police, irrespective of the suspect's actual culpability.

108. See generally Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997).

109. To be sure, I am not the only scholar who has concluded that compulsion is inherent in a custodial interrogation. For an interesting recent analysis that reaches back to *Bram v. United States*, *supra* note 17, see Lawrence Rosenthal, *Against Orthodoxy, Miranda is Not Prophylactic and the Constitution is Not Perfect*, 10 CHAP. L. REV. 579, 586-94 (2007).

decisions, police training, and social science literature. I rely primarily on POST telecourses, but also draw on a broader set of training materials, including training resources related to the legal aspects of interrogation. Few officers are attorneys. Police learn about developments in the law from prosecutors, trainers, and others. The materials discussed here illustrate how court rulings are interpreted for officers on the street and how police practices develop in response to judicial decisions.

Basic academy instruction conveys the fundamentals of *Miranda* and Fifth Amendment law. Advanced courses in interviews and interrogations often teach legal constraints and interrogation techniques together. In California, several legal resources are widely used, including legal updates produced by respected prosecutors in several county district attorneys offices (particularly Alameda and San Diego counties),<sup>110</sup> the *California Peace Officers Legal Sourcebook* (published by the Attorney General's Office in loose-leaf and electronic format), *Miranda and the Law* (published by the California District Attorneys Association) and videos and DVDs produced by POST.<sup>111</sup>

In addition to the POST telecourses on interrogation issues, POST produces monthly updates on judicial decisions in a series called *Case Law Today*, which is distributed to law enforcement agencies on DVD. Each *Case Law Today* show contains six segments that typically report a new case and advise officers in light of the decision.<sup>112</sup> Each segment usually features one of three regular contributors to *Case Law Today*, a prosecutor and two judges.<sup>113</sup> For this article, I identified and reviewed all fifty-three *Case Law Today* segments relating to the admissibility of suspects' statements that were produced by POST for a five-and-a-half year period, from January 2002 through June 2008. They are listed in the Appendix to this article. Both in the selection of legal topics by trainers and in the substantive discussions of the court rulings, *Case Law Today* provides a primary resource to examine the way in which officers are trained about judicial decisions and the law as it relates to interrogation.

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110. See, e.g., *Miranda Waivers and Invocations*, POINT OF VIEW ON-LINE (Alameda Co. Dist. Attorney's Office, Cal.), 2006, available at <http://le.alcoda.org/publications/files/MIRANDAWAIVERSINVOCATIONS.pdf>; Robert C. Phillips, *Fifth Amendment; Miranda*, LEGAL UPDATE (Deputy Dist. Attorney & Law Enforcement Liaison Deputy, San Diego, Cal.), Oct. 2005.

111. I have identified these sources as widely used because they are most often referenced by police and sheriff's departments in response to Public Records Act requests.

112. See POST, California POST Television Network, [http://www.post.ca.gov/training/cptn/case\\_law.asp](http://www.post.ca.gov/training/cptn/case_law.asp) (last visited July 6, 2008) (providing a list of *Case Law Today* segments from 1995 to 2008). *Case Law Today* is distributed in the same manner as the POST telecourses. See POST, Video Ordering and Subscribing, <http://www.post.ca.gov/training/cptn/ordering.asp> (last visited July 6, 2008). As with the POST telecourses, all of the *Case Law Today* programs discussed in this Article are archived at the POST Library in Sacramento, California.

113. I should note my strong discomfort with the regular, long-term participation of a trial judge and an appellate justice in a monthly training program produced only for the law enforcement community.

Let me now turn to the four assumptions underlying *Miranda*'s safeguards.

A. *Miranda*'s First Assumption: "Custody" Identifies Interrogations that Contain Inherently Compelling Pressures

The *Miranda* Court assumed that the element of "custody" would separate those interrogations that contain inherently compelling pressures from those that do not. To assess the validity of this assumption today, I start with the legal conceptions of "custody," then describe training about that element, and review a series of court rulings that reflect practices relating to custody, warnings, and waivers. I pay particular attention to a category of interrogations that is not captured by the current definition of custody: those in which suspects are questioned in the stationhouse but are told that they are not under arrest or that they are free to leave. I conclude that the evidence only partially bears out the Court's assumption that "custody" identifies pressure-filled interrogations.

1. *Legal conceptions of "custody"*

From the outset, the Court treated the concept of "custody" as something different than formal arrest. Custody includes not only an arrest, but also circumstances in which a person has been "deprived of his freedom of action in any significant way."<sup>114</sup> For the Court, the practical problem was that officers frequently question suspects before deciding to arrest them, and police routinely isolate suspects during such interrogations. The Court needed some test that would identify these situations. "Deprived of his freedom of action" could have been lent an expansive meaning including, for example, the sort of restraint associated with a brief detention of a motorist or a person on street. After all, as the justices held in *Terry v. Ohio*, even such a brief detention implicates the Fourth Amendment.<sup>115</sup>

Yet the court construed "custody" more narrowly. In *Berkemer v. McCarty*, the Court acknowledged that such a detention does indeed curtail a person's "freedom of action," but "questioning incident to an ordinary traffic [or *Terry*] stop is quite different from stationhouse interrogation."<sup>116</sup> The justices said that "the atmosphere surrounding these stops 'is substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself."<sup>117</sup> The Court likewise rejected reliance on "'focus' of a criminal investigation" as leading to a finding of custody.<sup>118</sup>

One may understand these decisions in light of *Miranda*'s overarching purpose, for the Court concluded that the interrogations in these scenarios do

114. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (footnote omitted).

115. 392 U.S. 1, 19-20 (1968).

116. 468 U.S. 420, 436-38 (1984).

117. *Id.* at 438-39, 440.

118. *Beckwith v. United States*, 425 U.S. 341, 345-47 (1976).

not contain the sort of inherently compelling pressures that require safeguards. But other Supreme Court opinions go much further and allow practices that undermine *Miranda*'s goals. These decisions, particularly *California v. Beheler*<sup>119</sup> and *Stansbury v. California*,<sup>120</sup> have facilitated stationhouse interrogations without *Miranda* warnings in a police-dominated atmosphere. *Beheler* suggests a particular tactic to officers. *Stansbury* provides the theoretical framework that enables the tactic to work.

The defendant in *Beheler* agreed to go with police to the stationhouse. Officers specifically told him that he was not under arrest and they did not give him *Miranda* warnings. Beheler made a statement and was allowed to leave the police station, but was arrested several days later.<sup>121</sup> Relying on an earlier ruling in *Oregon v. Mathiason*, where a suspect was also told he was not under arrest,<sup>122</sup> the Supreme Court held that Beheler was not in custody when he made his statement, and so warnings were not required.<sup>123</sup>

In *Stansbury*, the defendant agreed to go to the police station late at night to answer questions. At some point during his unwarned questioning, investigators determined that Stansbury was involved in a homicide and he was eventually arrested.<sup>124</sup> The Supreme Court ruled that "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."<sup>125</sup> Thus, it does not matter if officers bring a defendant to the police station intending to arrest him or if the defendant actually believes he is in custody, so long as a court determines, at an *ex post* suppression hearing, that some abstract, hypothetical, objectively reasonable person would have felt free to leave.<sup>126</sup> The Supreme Court recently reaffirmed the *Stansbury* framework, and underscored the abstract nature of the "objectively reasonable" person, in *Yarborough v. Alvarado*.<sup>127</sup>

## 2. "Custody" and officer training

Officer training reflects the concepts articulated in the Supreme Court's decisions. In California, the basic academy curriculum instructs recruits that custody means "a formal arrest or its 'functional equivalent,'" such as the restraints normally associated with a formal arrest.<sup>128</sup> Custody is "*objectively*

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119. 463 U.S. 1121 (1983) (per curiam).

120. 511 U.S. 318 (1994) (per curiam).

121. *Beheler*, 463 U.S. at 1122.

122. 429 U.S. 492, 493-96 (1977).

123. *Beheler*, 463 U.S. at 1125.

124. *Stansbury*, 511 U.S. at 320-21.

125. *Id.* at 323.

126. *See id.* at 324-25.

127. 541 U.S. 652, 661-63 (2004). There the Court deferred to a state court finding that a juvenile was not in custody, where the juvenile was brought to the stationhouse by his parents, questioned for two hours, and confronted with evidence against him. *See id.* at 655-58.

128. POST, *Learning Domain 15, Laws of Arrest*, BASIC COURSE WORKBOOK SERIES, rev.

determined by the totality of circumstances,” and therefore an officer’s own suspicion or subjective thinking, if undisclosed to a suspect, is irrelevant to whether custody exists.<sup>129</sup> Recruits are given an example based on *Beheler*: “If a person comes to the police station voluntarily and is believably advised that he or she is free to leave and not answer questions, the person is not in custody and may be interrogated without Miranda warnings.”<sup>130</sup>

Advanced training materials produced by POST and other law enforcement entities emphasize *Beheler* and *Stansbury*. The materials describe *Beheler* as “a wonderful case for use.”<sup>131</sup> Explaining its advantages, a prosecutor writes:

[I]t is always best for law enforcement to consider the following:

- If a subject who is to be interrogated appears to be cooperative and ready to waive, administer a *Miranda* admonishment and obtain a waiver, thus eliminating the issue altogether.
- If, however, the subject appears to be uncooperative and not likely to waive, consider taking the coerciveness (i.e., the “custody”) out of the interrogation by simply informing him that he is not under arrest (e.g.; see *California v. Beheler, infra.*), when practical to do so under the circumstances, and interview the subject without a *Miranda* admonishment and waiver.<sup>132</sup>

These tactics are discussed in three recent segments of *Case Law Today*. In one, the trainer describes a recent case in which a juvenile was questioned at the stationhouse after being told he was not under arrest and was free to leave. As the speaker points out, it does not matter that the officer never intended the juvenile to leave.<sup>133</sup> In another segment, a different trainer addresses the tactic

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2 2001, at 5-4 [hereinafter POST, *Laws of Arrest*]. Those “restraints” include “handcuffs, guns, lockups, etc.” *Id.* Warnings “are not required before interrogating a person who has been detained, for example, during a routine traffic stop, even though the person is not free to leave.” *Id.*

129. *Id.*

130. *Id.* at 5-6.

131. SACRAMENTO SHERIFF’S DEP’T TRAINING ACAD., *supra* note 59, at 18; see also Cal. Peace Officers’ Assoc., *Too Much Miranda*, TRAINING BULL. SERVICE, May 2006, at 2 (noting situation where officer “needlessly Mirandized” a suspect instead of giving a *Beheler* admonition); Cal. Peace Officers’ Assoc., *5 Tips for Eliciting a Subject’s Willingness to Submit to a Voluntary Interview*, TRAINING BULL. SERVICE, Jan. 2007, at 6 (suggesting a series of tactics to convince a subject to come to the police station for an interview without *Miranda* warnings); Cal. Peace Officers’ Assoc., *Miranda: Custody, Interrogation, Due Process and Expectation of Privacy: People v. Leonard, (May 17, 2007) 40 Cal. 4th 1370*, TRAINING BULL. SERVICE, Jan. 2008, at 2-3 (describing case where court applied “well settled rules” to determine that a suspect was not in custody during questioning in an interrogation room).

132. Phillips, *supra* note 110, at 3. Though the prosecutor does acknowledge that this tactic raises an issue of fact for the court, he writes, “[a] *Beheler* admonishment automatically takes the coerciveness out of the situation: No reasonable person would believe he or she is about to be arrested (i.e., “*in custody*,” or “*seized*,” for purposes of *Miranda*) when told that he or she is free to terminate the questioning and walk away.” *Id.* at 18.

133. See DVD: Not All Interviews are Custodial Interrogation (POST Jan. 2006)

as it was reported in a federal case, and notes that if officers make clear to suspects that they are free to leave, they do not need to give *Miranda* warnings. He cautions officers to be careful and suggests that police should actually let the suspect leave if they wish to use the suspect's statement.<sup>134</sup> In the most recent segment, a third trainer describes a judicial decision finding no custody (and thus no need to give warnings) where a mentally impaired suspect was driven to the police station, fingerprinted, and questioned for over three hours by two detectives. The trainer points out that the suspect was not interrogated in an accusatorial fashion. He was told he was free to leave and was in fact driven home after questioning.<sup>135</sup>

The most extensive and aggressive treatment I have seen of this technique is in POST's 2003 telecourse, *Interrogation Law*. The written materials accompanying the telecourse contain an appendix with suggested language for "Beheler admonishments."<sup>136</sup> The telecourse contains a dramatization of an arson investigation. Officers ask the prime suspect, "Sam McRoy," to come to the police station to talk with the detective in charge of the investigation. "Detective Stewart" tells Sam he is not in custody, he can leave any time he wants, and does not have to answer any questions. After a few open-ended interview questions, Detective Stewart leaves the room.

Detective Stewart returns some time later with props—baggies with physical evidence and a three ring binder conspicuously labeled "Arson Investigation." Standing over Sam, he thumbs through the binder, describes his department's extensive investigation and says, "I know for a fact you're the one who set the fire." Sam responds, "Okay, listen, I may know something about . . .," indicating he has some information but is about to deny responsibility. The detective cuts him off, saying, "No, no, Sammy, you're the one that set the fire. I want to know why." After Sam says he may know who set the fire, the detective cuts Sam off again and makes another confrontation statement. Sam then says he would like to leave. Detective Stewart replies that he did promise Sam he could leave, "but I won't be able to get your side of the story if you go."<sup>137</sup> Sam leaves anyway.

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(discussing *In re Kenneth S.*, 133 Cal. App. 4th 54 (2d Dist. 2005)).

134. See DVD: Case Law Today: No *Miranda* Necessary (POST Mar. 2006) (discussing *United States v. Norris*, 428 F.3d 907 (9th Cir. 2005)).

135. See DVD: Case Law Today: *Miranda*: Custodial Interrogation (POST Nov. 2007) (discussing *People v. Leonard*, 40 Cal. 4th 1370 (2007)).

136. See *Interrogation Law 2003*, POST TELECOURSE REFERENCE GUIDE, Aug. 2003, at E1, available at <http://www.post.ca.gov/training/cptn/pdf/Interrogation%20Law%202003.pdf>. A suspect questioned outside of the police station should be told: "You are not under arrest. Do you understand?" "[A]t a police station, you should tell the suspect, in a believable way: 'You are *free to leave or not answer any questions* at any time. Do you understand?' Then you may proceed with interrogation without the need for *Miranda* warnings." *Id. Beheler* is also addressed, though in less detail, in the 1995 *Interrogations/Confessions: Legal Issues* and 2005 *Interrogation Techniques* telecourses.

137. See also ZULAWSKI & WICKLANDER, *supra* note 59, at 463-64 (suggesting strategies to convince a suspect not to leave).

At this point, the story pauses and the experts weigh in. They emphasize that custody is assessed objectively. Under an objective standard, Sam was not in custody even though the officer's intent was to conduct an interrogation. The *Beheler* warning, they say, made certain that the interrogation would be seen as non-custodial. The experts then debate whether there is a tactical advantage in allowing Sam to leave, even if there is sufficient evidence to arrest him. Allowing him to leave will help support a later court finding that the interrogation was non-custodial.<sup>138</sup>

What is significant about the training in this telecourse is that it tells officers that they may use the full toolkit of interrogation tactics—including confrontation, cutting off denials, and minimization techniques—to question a non-custodial suspect at the stationhouse. The participants in the telecourse are unequivocal in teaching that the *Beheler* admonishment has made Sam's interrogation non-custodial. A number of other training materials in California are less aggressive; they caution that other aspects of the interrogation could lead to a conclusion that a setting is custodial even if a *Beheler* admonition is given. For example, in a different publication, another trainer notes that *Beheler* tactics can be employed during a confrontational interrogation, though he warns that officers may need to give an additional admonition to avoid having the interrogation ruled "custodial" by a reviewing court if the interview "becomes accusatory or approaches 'full-blown interrogation.'"<sup>139</sup>

I do not mean to suggest that *Beheler* warnings are given only for this strategic purpose. One investigator has told me that the act of Mirandizing a person who is not in custody may create a custody situation, which may interfere with an investigation. Nevertheless, as I report, the strategic uses of *Beheler* and *Stansbury* are apparent in the training materials.

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138. As one trainer explains in the telecourse, allowing the suspect to leave shows "compliance" with *Beheler*. "You want to demonstrate that when you said you're free to leave, you meant it." There may be other reasons to allow a suspect to leave at least the interrogation room. Another expert, a former prosecutor, suggests: "If you choose to let the person walk out into the parking lot and get in their car you could arrest them then, which is an excellent time because you can probably search their car incident to the custodial arrest."

139. Alameda Co. Dist. Attorney's Office, *Miranda: When Warnings are Required*, POINT OF VIEW ON-LINE (Alameda Co. Dist. Attorney's Office, Cal.), 2005, at 8, available at [http://le.alcoda.org/publications/point\\_of\\_view/files/WebMiranda.pdf](http://le.alcoda.org/publications/point_of_view/files/WebMiranda.pdf) (citing *People v. Aguilera*, 51 Cal.App.4th 1151, 1164 n.7 (1996) (footnotes omitted)); see also ALAMEDA COUNTY DIST. ATTORNEY'S OFFICE, CALIFORNIA CRIMINAL INVESTIGATION 186 (Mark Hutchins, ed., 12th ed. 2008) [hereinafter CRIMINAL INVESTIGATION] ("Telling a suspect he is free to leave, or that he is not under arrest, are strong indications that he was not in custody," though such advisements "would have little [e]ffect if there were other circumstances that reasonably indicated the suspect was not, in fact, free to leave"); Michael Fermin, *Miranda*, HOTSHEET (San Bernardino Co. Dist. Attorney's Office, Cal.), May/June 2004, at 3 (telling suspect he is not under arrest may not, by itself, be sufficient to show no custody, but "the advisement is a factor the court will consider"); Phillips, *supra* note 110, at 19 ("[C]ustody will be found where despite a *Beheler* admonishment, the suspect is treated like he is in custody."); DVD: Interrogation Techniques (POST Mar. 2005) (telling police to be careful not to advise a suspect he is free to leave, and then demonstrate that he is not, such as by handcuffing the suspect or locking the interrogation room door).

### 3. Miranda's assumption about "custody" in today's police investigations

Can we continue to assume that "custody" effectively separates interrogations that contain "inherently compelling pressures" from those that do not? I believe that as a proxy for compulsion, it is at once too broad and too narrow.

"Custody" is too broad because it includes interrogations in which a suspect has already decided to confess and police do not need to employ interrogation tactics (though the very fact of custody may itself have some impact or reinforce that decision). The test of "custody" is most effective at its hard core, identifying interrogations following formal arrest. But "custody" is too narrow in that it fails to capture many pre-arrest interrogations conducted in the stationhouse. This latter issue raises two questions. One is whether what I have reported is a California phenomenon. The second is whether compelling pressures are present in stationhouse interrogations when suspects are told that they are free to leave.

With respect to the first question, I have studied only California training materials in detail. However, there are decisions with some form of *Beheler* admonishments in questioning conducted by federal agents<sup>140</sup> and by police in at least thirty-one additional states and the District of Columbia.<sup>141</sup> Further, a 1985 article in the *FBI Law Enforcement Bulletin* discusses the factors that police departments may consider in crafting warning and waiver policies in

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140. See, e.g., *United States v. McCarty*, 475 F.3d 39, 45-46 (1st Cir. 2007) (Bureau of Alcohol, Tobacco and Firearms); *United States v. LeBrun*, 363 F.3d 715, 718 (8th Cir. 2004) (en banc) (Naval Criminal Investigative Service and Missouri Highway Patrol); *United States v. Crawford*, 372 F.3d 1048, 1051-52 (9th Cir. 2004) (en banc) (FBI and local police); *United States v. Craighead*, 539 F.3d 1073, 1078-79 (9th Cir. 2008) (FBI, Air Force Office of Special Investigations, and county sheriff).

141. See, e.g., *State v. Smith*, 38 P.3d 1149, 1156-57 (Alaska 2002); *State v. Carrillo*, 750 P.2d 883, 892 (Ariz. 1998); *State v. Spencer*, 892 S.W.2d 484, 486 (Ark. 1995); *People v. Matheny*, 46 P.3d 453, 467 (Colo. 2002); *State v. Pinder*, 736 A.2d 857, 874 (Conn. 1999); *Chao v. State*, 604 A.2d 1351, 1354 (Del. 1992); *United States v. Turner*, 761 A.2d 845, 852 (D.C. 2000); *Fitzpatrick v. State*, 900 So. 2d 495, 510 (Fla. 2005); *Wilson v. State*, 432 S.E.2d 211, 211-12 (Ga. Ct. App. 1993); *State v. Kuzmichev*, 976 P.2d 462, 469 (Idaho 1999); *Luna v. State*, 788 N.E.2d 832, 833 (Ind. 2003); *State v. Jennett*, 574 N.W.2d 361, 363-64 (Iowa Ct. App. 1997); *State v. Fritschen*, 802 P.2d 558, 565-66 (Kan. 1990); *State v. Blank*, 955 So. 2d 90, 102 (La. 2007); *Minehan v. State*, 809 A.2d 66, 72 (Md. Ct. Spec. App. 2002); *State v. Bridges*, 829 A.2d 247, 254 (Me. 2003); *State v. Norberg*, 423 N.W.2d 733, 736 (Minn. Ct. App. 1988); *State v. Bronson*, 496 N.W.2d 882, 889 (Neb. 1993); *Silva v. State*, 951 P.2d 591, 594 (Nev. 1997); *State v. Munoz*, 972 P.2d 847, 856-57 (N.M. 1998); *State v. Buchanan*, 543 S.E.2d 823, 824-25 (N.C. 2001); *State v. Newnam*, 409 N.W.2d 79, 83 (N.D. 1987); *State v. Petitjean*, 748 N.E.2d 133, 138 (Ohio Ct. App. 2000); *Crawford v. State*, 840 P.2d 627, 635 (Okla. Crim. App. 1992); *State v. Hobson*, 648 A.2d 1369, 1370-72 (R.I. 1994); *State v. Morato*, 619 N.W.2d 655, 658 (S.D. 2000); *State v. Anderson*, 937 S.W.2d 851, 852 (Tenn. 1996); *Farrar v. State*, No. 03-05-00466-CR, 2006 Tex. App. LEXIS 9779, at \*18 (Tex. App. Nov. 10, 2006); *State v. Doran*, 158 P.3d 1140, 1143 (Utah Ct. App. 2007); *Lee v. Commonwealth*, No. 2607-03-1, 2004 Va. App. LEXIS 500, at \*6 (Va. Ct. App. Oct. 26, 2004); *State v. Woods*, No. 51612-4-I, 2004 Wash. App. LEXIS 473, at \*2-6 (Wash. Ct. App. Mar. 22, 2004); *State v. Potter*, 478 S.E.2d 742, 746 (W. Va. 1996).

light of *Mathiason* and *Beheler*,<sup>142</sup> which (along with other publications and evidence) tends to show a national awareness of the issue.<sup>143</sup>

The second question, whether compelling pressures still exist when suspects are told that they are free to leave, is more difficult. *Beheler* and *Stansbury* permit police to game the reach of *Miranda*, if they are inclined to do so. Officers may attempt to create non-custodial interrogation contexts that are indistinguishable in many respects from post-arrest questioning. For example, officers can bring suspects to the police station for interrogation, intending to place the suspects under formal arrest later and knowing that the suspects *actually believe* they are in custody. If police interrogate without warnings, the resulting statements will be admitted if courts—conducting *ex post* inquiries—conclude that hypothetical reasonable persons (though not *these unreasonable* suspects) would have felt free to leave.<sup>144</sup>

Where, however, suspects actually and reasonably believe that they are free to leave, the effect of some of the most common interrogation tactics may be blunted. Officers can still isolate suspects, but to the extent that interrogators try to convey that resistance is futile and that there is “no way out,” suspects will presumably understand that there is at least a way out of the police station. Thus, though there is no research on point, I believe that some maximization techniques—while still permitted in a non-custodial interrogation—may have less of an impact.

On the other hand, the effectiveness of minimization techniques may be enhanced by a *Beheler* admonishment. Admonishments might help police downplay or distort the consequences of admissions. Officers often try to

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142. See Charles E. Riley, III, *Finetuning Miranda Policies*, FBI LAW ENFORCEMENT BULL. 23, 24-25 (Jan. 1985).

143. See also SPECIAL AGENT EDWARD M. HENDRIE, CRIMINAL PROCEDURE GUIDE FOR DRUG AGENTS 128 (DEA 2005) (“Police informing a suspect prior to interrogation that he is not under arrest is frequently considered persuasive evidence that the suspect was not in custody during questioning.”); POLICE LAW INSTITUTE, ILLINOIS POLICE LAW MANUAL 75-77 (2003) (describing *Beheler* warnings and circumstances of non-custodial interrogation). I know of no study on the incidence of *Beheler* admonitions and non-custodial interrogations. George Thomas examined the outcomes in a sample of 211 published appellate cases with *Miranda* issues. Of the sixty cases where no warnings were given, twenty-eight involved suspects who were found not to be in custody. See George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1970-72 & tbl.1 (2004). This study may indicate that suspects are often questioned out of custody.

144. The technique can backfire on officers if the other circumstances clearly indicate that a reasonable person would not feel free to leave. For example, in *United States v. Colonna*, 511 F.3d 431, 435-37 (4th Cir. 2007), the court of appeals reversed a conviction, holding that the defendant was in custody when questioned without *Miranda* warnings, even though officers expressly told him he was not under arrest. Twenty-four FBI agents executed a search warrant early in the morning, woke up the defendant, and ordered him at gunpoint to get dressed and leave his bedroom. The unwarned interrogation took place in the agent’s car. See *id.* at 433; see also *People v. Elmarr*, 181 P.3d 1157, 1162-64 (Colo. 2008) (even though suspect volunteered to accompany officers to the police station, circumstances indicated that he was in custody and should have been given *Miranda* warnings); *United States v. Craighead*, 539 F.3d 1073, 1082-89 (9th Cir. 2008) (suspect was in *Miranda* custody when questioned by officers from three agencies in his home; although he was told he was “free to leave,” it was not clear where he could go).

convince suspects that *why* they committed a criminal act is most important, and interrogators may offer suspects morally acceptable reasons for their conduct. Research has shown that minimization techniques convey implied promises of leniency.<sup>145</sup> Though there is no research on minimization techniques directly coupled with *Beheler* admonishments, I believe that *Beheler* warnings make the “why” approach all the more credible. The message to suspects is something like this: “You’re not under arrest. In fact you’re free to go. I just need to know why you took the money. Was it because you are a bad person, or did you need to buy food for your kids?”

The *Miranda* Court assumed that the element of “custody” would effectively separate interrogations that contain inherently compelling pressures from those that do not. If California is any indication, officers are now consistently trained in a tactic that allows them to remove a significant category of interrogations from the reach of *Miranda*. Because the practice of giving *Beheler* admonishments has varying effects when coupled with different interrogation techniques, giving *Beheler* warnings does not uniformly make stationhouse interrogations less coercive. The bottom line is that the evidence only partially supports the assumption that “custody” identifies interrogations that contain compelling pressures.

*B. A Second Assumption: Officers Will Give Warnings and Obtain Waivers Before Employing Interrogation Tactics*

The *Miranda* Court assumed that warnings would be given and waivers obtained prior to the start of questioning or the application of the tactics described in the *Miranda* opinion. This Part of the Article explores whether this assumption holds true today.

We might contextualize the issue by acknowledging the disconnect between law enforcement’s theory of interrogation and the Supreme Court’s present-day definition of interrogation. For officers, interrogation is part of a seamless sequence of events, and there are strategic considerations that govern every step in that sequence, beginning with initial contacts with suspects. Police are taught that their very first interactions with suspects can develop or destroy rapport. What officers glean from their conversations with suspects, even about mundane topics, may later help to facilitate a successful interrogation.

Now map onto this understanding the legal definition of “interrogation.” *Miranda* requires officers to give warnings and obtain waivers before interrogating suspects in custody. In *Rhode Island v. Innis*, the Supreme Court defined “interrogation” as “either express questioning or its functional equivalent,” which includes words or actions “that the police should know are

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145. See Kassin & McNall, *supra* note 107.

reasonably likely to elicit an incriminating response.”<sup>146</sup> This definition presumes that the start of “interrogation” can be identified with precision at the point where questioning reaches an incriminating topic. But as already noted, for officers “interrogation” is a portion of a longer strategic sequence that begins much earlier. As a practical matter, as officers progress from initial contacts with suspects to the strategic decisions whether to conduct an interview (or not), to give *Beheler* admonitions (or not), to arrest (or not), or to use minimization or maximization techniques (or not), they also choose strategically when and how to administer *Miranda* warnings to avoid the risk of losing full use of a statement. And of course the sequence of events is not always linear or predictable.

This produces several categories of legal issues. There are often questions of how to treat interactions between police and suspects that may facilitate later waivers and statements. Officers sometimes use “softening up” tactics—such as conditioning suspects to waive their rights or describing the evidence against them and making their situations appear hopeless—before giving warnings or obtaining waivers. Then there are questions that arise when officers directly challenge *Miranda*’s principles, such as when police conduct a “two-step” interrogation (as in *Missouri v. Seibert*) or question “outside *Miranda*.”

This Part of the Article begins with some of the legal developments, especially *Seibert*, *Patane*, and their teachings, and the law concerning the timing of warnings and waivers. It will then review some of the training and literature surrounding “two-step” and “outside *Miranda*” interrogations. Next, it will address the law, social science literature, and training with regard to “softening up.” This Part concludes that there is not a clean separation between administration of *Miranda* warnings and the use of interrogation tactics. Under these circumstances, it is difficult to continue to indulge in the assumption that warnings and waivers take place in an atmosphere in which compelling pressures are minimized.

### *1. Seibert, Patane, and the legal principles surrounding the timing of warnings*

The *Miranda* Court backed up its warning and waiver regime with the remedy of exclusion. At first, it seemed to be a strong exclusionary rule with “fruit of the poisonous tree” protection.<sup>147</sup> Such a rule would, in theory, discourage the problem of late *Miranda* warnings or “two-step” interrogations, since statements taken after late warnings and derivative evidence would likely be excluded as fruits of earlier unwarned statements. However, within a decade, the Supreme Court described *Miranda*’s exclusionary rule as “sweep[ing] more broadly” than the Fifth Amendment it was designed to serve, and indicated that at least some *Miranda* violations would not carry derivative or “fruits”

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146. 446 U.S. 291, 300-01 (1980) (footnotes omitted).

147. See *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

protection.<sup>148</sup> In *Oregon v. Elstad*, the justices found that a second statement obtained after warnings was admissible even though it was arguably the product of a first unwarned statement.<sup>149</sup> A violation of *Miranda* may create a presumption of compulsion, but that is not the same as a violation of the Fifth Amendment itself.<sup>150</sup>

In 2000, the Supreme Court decided *Dickerson v. United States*.<sup>151</sup> The Court rejected a direct challenge to *Miranda*, finding that a federal statute was not a constitutionally adequate substitute for *Miranda*'s warning and waiver procedures.<sup>152</sup> Writing for the majority, Chief Justice Rehnquist called *Miranda* a "constitutional rule" and "constitutionally based," but stopped short of declaring that a violation of *Miranda* is a violation of the Constitution.<sup>153</sup> Scholars debated whether *Dickerson* would alter the contours of *Miranda* or its exclusionary rules.<sup>154</sup> These questions would be answered four years later in *Seibert and Patane*.

Officers first interrogated Patrice Seibert without warnings. Then, after obtaining an inadmissible statement, they administered warnings and had her repeat her confession, which was used to convict her.<sup>155</sup> By a bare majority, a badly divided Court found that the second statement should not have been admitted into evidence, and Seibert's conviction was reversed. In a plurality opinion written by Justice Souter, four justices framed the inquiry as whether midstream "warnings could function 'effectively' as *Miranda* requires."<sup>156</sup> They expressly disclaimed reliance on a test based on the officer's intent.<sup>157</sup> The plurality discussed a series of factors to assess whether midstream warnings could be effective, and found that they were not effective here.<sup>158</sup> Justice Kennedy concurred in the judgment, but advocated a "narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning."<sup>159</sup> Justice O'Connor authored a dissent for four justices, arguing that the Court should adhere to the standard set forth in *Elstad*.<sup>160</sup> The dissenters

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

149. *Id.* at 310; *see also* *Michigan v. Tucker*, 417 U.S. 433, 450-52 (1974) (defendant could not exclude a witness's testimony, even though that witness was discovered pursuant to *Miranda* violation).

150. *See Elstad*, 470 U.S. at 306-09.

151. 530 U.S. 428 (2000).

152. *Id.* at 442.

153. *See id.* at 439, 440. In dissent, Justice Scalia argues that the opinion does not say that "because a majority of the Court does not believe it." *Id.* at 446 (Scalia, J., dissenting).

154. An entire issue of the Michigan Law Review was devoted to the case. *See Symposium, Miranda after Dickerson: The Future of Confession Law*, 99 MICH. L. REV. 879 (2001).

155. *See* *Missouri v. Seibert* 542 U.S. 600, 604-06 (plurality opinion).

156. *Id.* at 611-12. Justices Stevens, Ginsburg, and Breyer joined Justice Souter's opinion.

157. *See id.* at 616 n.6.

158. *See id.* at 613, 615.

159. *Id.* at 622 (Kennedy, J., concurring).

160. *See Seibert*, 542 U.S. at 628 (O'Connor, J., dissenting). Justice O'Connor authored the

also rejected an intent-based test, and argued that Justice Kennedy's approach was "ill advised."<sup>161</sup>

On the same day *Seibert* was decided, the Court issued its opinion in *United States v. Patane*. Samuel Patane was given incomplete *Miranda* warnings before he told officers the location of a gun.<sup>162</sup> Five justices found that the gun should not be suppressed, saying that the Fifth Amendment is not implicated by admitting into evidence "the physical fruit of a voluntary statement."<sup>163</sup> *Dickerson's* "re-constitutionalization" of *Miranda* did not change the outcome.<sup>164</sup> In an opinion joined by Chief Justice Rehnquist and Justice Scalia, Justice Thomas wrote that "a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule."<sup>165</sup> Justices O'Connor and Kennedy concurred in the judgment but found it "unnecessary to decide whether the detective's failure to give Patane the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself" or whether there is any unconstitutional conduct to deter "so long as the unwarned statements are not later introduced at trial."<sup>166</sup> Dissenting, Justice Souter said that "[t]here is no way to read this case except as an unjustifiable invitation to law enforcement officers to flout *Miranda* when there may be physical evidence to be gained. The incentive is an odd one, coming from the Court on the same day it decides *Missouri v. Seibert*."<sup>167</sup>

I believe that Justice Souter correctly framed the question in *Seibert* as whether warnings are effective in advising suspects that they have a real choice about whether to give a statement. His opinion for the plurality returns to the touchstone of *Miranda*. *Miranda's* safeguards only make sense if they are capable of countering the compulsion inherent in a custodial interrogation.<sup>168</sup> Justice Kennedy's intent-based test was rejected by at least seven justices, and his positions appear inconsistent.<sup>169</sup> It is difficult to see how Justice Kennedy could fault the officer in *Seibert* for deliberately failing to give *Miranda*

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majority opinion in *Elstad*.

161. *Id.* at 624, 626.

162. *United States v. Patane*, 542 U.S. 630, 635 (2004) (Thomas, J.). The defendant interrupted officers as they were advising him, saying that he knew his rights. *Id.*

163. *Id.* at 636.

164. *Id.* at 641.

165. *Id.*

166. *Id.* at 645 (O'Connor, J., concurring).

167. *Id.* at 647 (Souter, J., dissenting).

168. I co-authored an amicus brief in *Seibert*, arguing in part for a test that would examine officers' intent objectively. See Brief of Former Prosecutors, Judges and Law Enforcement Officials as Amici Curiae Supporting Respondent, *Missouri v. Seibert*, 542 U.S. 600 (2004) (No. 02-1371). Speaking only for myself and not my former clients, I have come to believe that the plurality's position is better-reasoned.

169. Justice Breyer's position is not clear on this point, as he joined both the plurality opinion and concurred with Justice Kennedy "insofar as it is consistent [with a "fruits" analysis] and makes clear that a good-faith exception applies." *Missouri v. Seibert*, 542 U.S. 600, 618 (2004) (Breyer, J., concurring).

warnings but then not expressly disagree with the three justices in *Patane* as to whether police have a duty to give the warnings at all.

Lower courts have struggled to extract a rule for future cases from the conflicting opinions in *Seibert*. There were five votes for the view that the “two-step” interrogation made *Seibert*’s second statement inadmissible. But on what basis? Ordinarily, when five justices do not agree on the rationale for a decision, the views of the justice who decides the case on the narrowest grounds represent the holding of the Court.<sup>170</sup> Here, however, there is doubt whether Justice Kennedy’s concurrence could be characterized as “narrower” since it is premised upon the officer’s intent, a position expressly rejected by seven or more justices.<sup>171</sup> Nevertheless, at least six federal circuits follow Justice Kennedy’s view and ask whether the violation was deliberate.<sup>172</sup> Five circuits either apply both tests, combine aspects of the two, or have declined to decide which controls.<sup>173</sup> Some state courts have applied the plurality’s multifactor test to determine if warnings were effective.<sup>174</sup> At least one state focuses on officers’ intent<sup>175</sup> and others have formulated mixed tests or standards that draw from both.<sup>176</sup>

## 2. “Two-step” interrogations, questioning “outside Miranda” and officer training after *Seibert* and *Patane*

I began this research as a study of officer training in the wake of the

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170. See *Marks v. United States*, 430 U.S. 188, 193 (1977).

171. See *United States v. Rodriguez-Preciado*, No. 03-30285, 2005 U.S. App. LEXIS 15601, at \*52-62 (9th Cir. Jul. 29, 2005) (Berzon, J., dissenting) (arguing that Justice Kennedy’s opinion is not narrower and therefore does not represent the holding of the Court).

172. See *United States v. Carter*, 489 F.3d 528, 535-36 (2d Cir. 2007); *United States v. Naranjo*, 426 F.3d 221, 231-32 (3d Cir. 2005) (panel includes Judge Alito); *United States v. Mashburn*, 406 F.3d 303, 308-09 (4th Cir. 2005); *United States v. Courtney*, 463 F.3d 333, 338-39 (5th Cir. 2006); *United States v. Ollie*, 442 F.3d 1135, 1142-43 (8th Cir. 2006); *United States v. Street*, 472 F.3d 1298, 1313-14 (11th Cir. 2006).

173. See *United States v. Materas*, 483 F.3d 27, 33 (1st Cir. 2007) (noting the officer acted in good faith, and discussing the plurality’s test); *United States v. Pacheco-Lopez*, 531 F.3d 420, 427 n.11 (6th Cir. 2008) (declining to resolve the issue because the statement would be suppressed under any applicable framework); *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004) (“at least as to *deliberate* two-step interrogations,” there is a “presumptive rule of exclusion, subject to a multifactor test”); *United States v. Williams*, 435 F.3d 1148, 1158 (9th Cir. 2006) (combining the tests; confessions will be excluded if made after “a deliberate, objectively ineffective mid-stream warning”); *United States v. Carrizales-Toledo*, 454 F.3d 1142, 1151 (10th Cir. 2006) (no need to decide because statement is admissible under either test).

174. See *Wilkerson v. State*, 229 S.W.3d 896, 901-02 (Ark. 2006); *Sutherland v. State*, No. 222, 2006 Del. LEXIS 644, at \*6-8 (Del. Dec. 11, 2006); *State v. Farris*, 849 N.E.2d 985, 992-94 (Ohio 2006); *Vermont v. Yoh*, 910 A.2d 853, 861-62 (Vt. 2006); see also *State v. O’Neill*, 936 A.2d 438, 453-54, 456-58 (N.J. 2007) (adopting the plurality’s test as a matter of state law because the “shifting sands of federal jurisprudence provide no certainty”).

175. See *Jackson v. Commonwealth*, 187 S.W.3d 300, 308-09 (Ky. 2006).

176. See *Edwards v. United States*, 923 A.2d 840, 848 (D.C. 2007) (suppression warranted under both tests); *People v. Paulman*, 833 N.E.2d 239, 246-47 (N.Y. 2005) (applying aspects of both tests, as well as a broader test based in state law).

mixed messages of *Seibert* and *Patane*. In a 2001 article, I noted that training on questioning “outside *Miranda*” seemed on the wane after *Dickerson* and a few other cases, though law enforcement instruction was not consistent.<sup>177</sup> In the Court’s discussion of the “question-first” technique in *Seibert*, the plurality expressly referenced the “outside *Miranda*” training offered by POST and others.<sup>178</sup> This section of the Article addresses training with respect to both tactics, though the “outside *Miranda*” technique typically relates to failure to honor an invocation, rather than failure to give warnings.

Training has been generally consistent and straightforward in the wake of *Seibert* and *Patane*. A *Case Law Today* broadcast describes *Seibert* and distinguishes it from *Elstad*. The trainer says that the Court did not like the officers’ efforts to circumvent *Miranda* by tricking *Seibert* into waiving her rights. When officers deliberately attempt to evade *Miranda*, as opposed to making what was a good faith mistake in *Elstad*, the statements will be suppressed.<sup>179</sup> In a later video segment, the same trainer reports on a Ninth Circuit case construing *Seibert*. There, he states more clearly that the “two-step” approach used by police in *Seibert* has been officially disapproved and should no longer be used.<sup>180</sup>

Written training also appears to be firm in instructing officers not to conduct “two-step” interrogations. For example, the *California Peace Officers Legal Sourcebook*, in reviewing both *Seibert* and *Patane*,<sup>181</sup> says unequivocally that “[o]fficers should *not* attempt to exploit the *Elstad* rule.”<sup>182</sup> There is no suggestion that police should violate *Miranda* in order to obtain the fruits of a statement. Other written materials are generally in accord.<sup>183</sup> A notable aspect of these resources is that, like the POST videos, they tend to emphasize the deliberate conduct of the officers in *Seibert*, distinguishing *Elstad* as a good-faith mistake.<sup>184</sup>

177. See Weisselberg, *In the Stationhouse after Dickerson*, *supra* note 12, at 1136-54.

178. *Missouri v. Seibert*, 542 U.S. 600, 610 n.2 (2004).

179. See DVD: *Case Law Today: Miranda: The Question-First Technique* (POST Dec. 2004). The trainer notes that as discussed in other *Case Law Today* broadcasts, courts have more recently been critical of police tactics or techniques that are viewed as efforts to get around constitutional rights. This is presumably a reference to California decisions critical of questioning “outside *Miranda*.”

180. See DVD: *Case Law Today: Miranda: “Midstream” Miranda Warnings* (POST Apr. 2006) (discussing *United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006)). The trainer also notes that simply giving advisements after statements have been obtained is not necessarily going to cure the defect. He points out the deliberate conduct in *Seibert*.

181. See CAL. DEP’T OF JUSTICE, CALIFORNIA PEACE OFFICERS LEGAL SOURCEBOOK § 7.48c (Rev. Sept. 2007), § 7.48d (Rev. Sept. 2007) [hereinafter LEGAL SOURCEBOOK].

182. *Id.* at § 7.48c (Rev. Sept. 2007).

183. See, e.g., CRIMINAL INVESTIGATION, *supra* note 139, at 197 (describing the “two step” as “unlawful” because it effectively undermines *Miranda*); *Miranda Waivers and Invocations*, *supra* note 110, at 16 (same); Tia Quick, *Legal Update News* (San Diego County Dist. Attorney’s Office, Cal.) Aug. 2004, at 1-3 (reviewing both *Seibert* and *Patane* and advising officers to complete the advisal even when a suspect interrupts, as in *Patane*.)

184. See, e.g., Phillips, *supra* note 110, at 30 (explaining that *Elstad* was limited to its facts

I have also found that, in general, training now discourages the practice of questioning “outside *Miranda*.” In 2003, the California Supreme Court decided *People v. Neal*, finding a statement to be involuntary and inadmissible for any purpose where, among other things, police repeatedly ignored the suspect’s invocations of the right to remain silent and the right to counsel.<sup>185</sup> The court was sharply critical of this tactic.<sup>186</sup> In the wake of *Neal*, the condemnation of questioning “outside *Miranda*” became more consistent in California. A *Case Law Today* broadcast firmly tells officers to stop the practice.<sup>187</sup> Written training materials with wide circulation are clear and unequivocal<sup>188</sup> and the POST telecourses have also changed. POST’s 1995 telecourse, *Interrogations/Confessions: Legal Issues*, contained a section on questioning “outside *Miranda*,” describing it as a legitimate though controversial tactic. By

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as an unintentional *Miranda* violation); Quick, *supra* note 183, at 3 (“The real problem here is the intentional use of a technique designed to undermine *Miranda* . . . . Thankfully, the Court did not overrule *Elstad* and continues to allow us to correct unintentional *Miranda* mistakes.”); LEGAL SOURCEBOOK, *supra* note 181, at § 7.48c (Rev. Sept. 2007) (noting that the officer “deliberately violated *Miranda*” and admitted as such in testimony, in contrast to the “good faith mistake” of the officers in *Elstad*).

185. 31 Cal. 4th 63, 68 (2003). The Court ruled the defendant’s statements involuntary in light of all of the surrounding circumstances, including the *Miranda* violations, the accused’s youth, inexperience, education and intelligence, and other circumstances of the interrogation. *See id.*

186. *See id.* at 81-83 (noting also that the interrogator was trained in this practice); *id.* at 92 (Baxter, J., concurring) (“[O]ur community should never be subjected to cynical efforts by police agencies, or the supervisors they employ, to exploit perceived legal loopholes by encouraging deliberately improper interrogation tactics. Such practices tarnish the badge most officers respect and honor.”).

187. DVD: Case Law Today: Purposeful Violations of *Miranda*—Slammed (POST Sept. 2003).

188. *See, e.g.*, LEGAL SOURCEBOOK, *supra* note 181, at § 7.36 (rev. Mar. 2006) (saying that officers “should not intentionally violate *Miranda*” and noting the holding in *Neal* and other cases); CRIMINAL INVESTIGATION, *supra* note 139, at 208 (describing “going outside *Miranda*” as “a tactical *Miranda* violation”); *Recent Cases, People v. Neal*, POINT OF VIEW (Alameda Co. Dist. Attorney’s Office, Cal.), 2003, available at [http://le.alcoda.org/publications/point\\_of\\_view/2003\\_articles\\_cases](http://le.alcoda.org/publications/point_of_view/2003_articles_cases) (discussing *Neal* in detail, including its strong condemnation of the officers); *see also* Phillips, *supra* note 110, at 6-7 (discussing *Neal* but not expressly referring to the practice of questioning “outside *Miranda*”).

Training in the wake of a recent case also shows that responsible members of law enforcement have rejected questioning “outside *Miranda*.” In *People v. DePriest*, 42 Cal. 4th 1, 32-33 (2007), the California Supreme Court affirmed a capital conviction where a statement taken “outside *Miranda*” was used for impeachment. The court discussed the issue briefly, but did not expressly condemn the officers’ tactic. A training bulletin provides: “Given the usual negative reaction” by both the California and the United States Supreme Courts to police officers “purposely ignoring suspects’ attempted *Miranda* invocations, there are those of us who strongly believe that police officers and prosecutors, being bound by . . . dictates not to engage in such conduct, should not be doing this. The failure of the Court in this case to discuss the issue does not alter this conclusion.” Cal. Peace Officers’ Assoc., *Miranda: Ignoring an Attempted Invocation: People v. DePriest (Aug. 9, 2007) 42 Cal. 4th 1*, TRAINING BULL. SERVICE, Mar. 2008, at 6 (reprinting bulletin provided by Robert C. Phillips). A *Case Law Today* segment also reports the decision but emphasizes only the Sixth Amendment aspects of the case. *See* DVD: Case Law Today: Talking to Suspect Before/After Charging (POST Nov. 2007).

contrast, POST's 2003 telecourse, *Interrogation Law*, clearly tells police to respect suspects' invocations.

There is at least one outlier. One training resource from the Los Angeles County District Attorney's Office emphasizes *Patane* and implicitly encourages the practice of questioning without waivers or "outside *Miranda*." The document, "*Secret Passages, The TRUTH About Miranda*," quotes Justice Thomas's opinion in *Patane* but does not cite either *Seibert* or *Neal*.<sup>189</sup> It states:

If the *truth* is that custodial interrogation without *Miranda* waivers does *not* violate the Constitution, does *not* violate the *Miranda* evidentiary rule, and does *not* constitute deterrable misconduct, any statements thus obtained have legitimate investigative and evidentiary uses:

- Neutralize safety threats . . .
- Locate weapons and evidence . . .
- Identify witnesses . . .
- Incriminate accomplices . . .
- PC for search warrant . . .
- PC for arrest . . .
- Impeach inconsistent trial testimony . . .

Might knowledge of the *truth* about *Miranda* sometimes cause an interrogating officer to conclude that s/he might have something to gain through custodial interrogation without waivers?<sup>190</sup>

### 3. *Seibert and the legal principles of "softening up"*

While the officer in *Seibert* deliberately conducted a complete interrogation without warnings, issues about the timing of warnings often arise in the context of claims of "softening up," with some conversation occurring pre-warning or with warnings delivered in a way that minimizes their importance. Yet these tactics may not constitute interrogation for *Miranda* purposes unless officers pose a direct question or indirectly seek an incriminating response. For this reason, questions about "softening up" or tactics prior to express questioning have, at least prior to *Seibert*, been addressed primarily under the waiver doctrine.

The *Miranda* Court held that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege."<sup>191</sup> Since then, however, this principle has been substantially eroded. Professor Robert Mosteller writes that the suggestion "of special scrutiny of 'any evidence' that deception contributed

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189. L.A. COUNTY DIST. ATTORNEY'S OFFICE, SECRET PASSAGES, THE TRUTH ABOUT *Miranda* 10 (2005).

190. *Id.* at 11-12 (citations omitted).

191. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

to waiver, is a relic of a different and no longer followed mindset.”<sup>192</sup> California provides an example of this shift in mindset. In *People v. Honeycutt*, the California Supreme Court criticized officers for convincing a person to talk before giving him warnings.<sup>193</sup> The decision has been so little followed that, as one trainer reports, “*Honeycutt* is likely a dead letter.”<sup>194</sup> This is an oversimplification, but courts generally appear to tolerate conversations occurring prior to waiver, so long as police do not (a) pose direct and incriminating questions or act in a way that clearly seems to elicit an incriminating response;<sup>195</sup> (b) make express threats or promises;<sup>196</sup> or (c) engage in clearly inappropriate conduct that directly undercuts the warnings.<sup>197</sup>

These cases leave room for investigator-suspect conversations, including a degree of “softening up,” prior to issuing warnings and seeking waivers. Professor Mosteller helpfully divides these “softening up” practices into two camps. The “mild version” includes tactics such as establishing rapport and acts that reduce the chance that suspects will invoke their rights. Courts generally do not closely scrutinize these techniques.<sup>198</sup> As some federal courts have remarked, “[t]here is nothing inherently wrong with efforts to create a favorable climate for confession.”<sup>199</sup> Mosteller describes another type of softening up as “bold but honest,” and this includes the “more challenging” tactic of confronting suspects with the evidence against them before giving warnings and obtaining waivers.<sup>200</sup> This latter tactic requires a closer look. If this strategy is permitted, it would clearly relocate the warning and waiver regime to the heart of the interrogation process, as that process is understood by police.

Although one trainer has professed uncertainty about whether softening up is permissible after *Seibert*,<sup>201</sup> four recent post-*Seibert* decisions have affirmed the admission of statements obtained with “bold” softening up

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192. Robert P. Mosteller, *Police Deception Before Miranda Warnings: The Case for Per Se Prohibition of an Entirely Unjustified Practice at the Most Critical Moment*, 39 TEX. TECH L. REV. 1239, 1264 (2007). For a detailed description of lower courts’ treatment of claims that waivers should be invalidated due to deception or other “softening up” tactics, see *id.* at 1254-66.

193. 20 Cal. 3d 150, 158-61 (1977).

194. CRIMINAL INVESTIGATION, *supra* note 139, at 593-94 n.2213.

195. Police can ask routine booking questions without *Miranda* warnings and waivers, see *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), but questions or actions seeking incriminating responses amount to interrogation under *Innis*. These must be preceded by warnings and waivers.

196. See, e.g., *United States v. Glover*, 104 F.3d 1570, 1582 (10th Cir. 1997) (statements by officers about possibility that defendant might be released by a magistrate on his own recognizance if he cooperated were not express promises that invalidate a waiver).

197. See, e.g., *Missouri v. Seibert*, 542 U.S. 600, 613-14 (2004); *Collazo v. Estelle*, 940 F.2d 411, 417-19 (9th Cir. 1991) (en banc) (*Miranda* waiver and resulting statement not voluntary where officer demeaned the pre-trial role of counsel and sought to talk suspect out of seeking counsel).

198. See Mosteller, *supra* note 192, at 1260.

199. *Hawkins v. Lynaugh*, 844 F.2d 1132, 1140 (5th Cir. 1988); see also *Clark v. Murphy*, 317 F.3d 1038, 1049 (9th Cir. 2003) (quoting *Hawkins*).

200. Mosteller, *supra* note 192, at 1261.

201. See CRIMINAL INVESTIGATION, *supra* note 139, at 198, 593 n. 2213.

strategies. In *United States v. Washington*, FBI agents described the charges and told the suspect about his opportunity to cooperate. Officers then gave *Miranda* warnings. Washington said he was “willing to listen” without an attorney present and subsequently made incriminating statements.<sup>202</sup> The court of appeals found that “even when a defendant has invoked his *Miranda* rights, this does not preclude officers from informing the defendant about evidence against him or about other information that may help him make decisions about how to proceed with his case.”<sup>203</sup>

The other three cases push the envelope still further by delaying the warnings until after the confrontation step of an interrogation. In *United States v. Peterson*, agents described the evidence against the defendant in a fifty-minute post-arrest narration, telling him to be silent every time he tried to speak. Then they gave warnings and obtained a waiver.<sup>204</sup> The court of appeals affirmed the decision to admit the confession principally because Peterson had not made pre-warning statements, though the opinion also says that the agents’ tactic “does not undermine *Miranda*.”<sup>205</sup> Similarly, in *United States v. Gonzalez-Lauzan*, agents instructed the defendant to listen and described the evidence against him in a two-and-a-half hour session. After he said “Okay, you got me,” agents gave warnings and obtained a waiver.<sup>206</sup> The Eleventh Circuit upheld the waiver in part because the defendant had not been asked questions prior to the warnings and had not provided detailed information. “[T]he prewarning interaction did not render the *Miranda* warning ineffective to a reasonable suspect, and Gonzalez-Lauzan’s waiver . . . was voluntary . . . .”<sup>207</sup> Finally, in *Hairston v. United States*, the interrogating detective also told the suspect to listen as he described the evidence. The officer showed a videotape of another suspect, with the sound turned down. Then the detective asked the defendant if he wanted to “tell . . . his side of the story,” and Hairston said “yes.” Only then did the officer administer warnings and obtain a waiver.<sup>208</sup> As in *Gonzalez-Lauzan*, the reviewing court was persuaded by the fact that Hairston had been told to listen and had not made a statement prior to his *Miranda* waiver.<sup>209</sup> “[T]he administration of the *Miranda* warnings in phase two of [the interrogation] . . . still could achieve the objective of *Miranda*,” that the defendant be able to make a free and rational choice whether to speak.<sup>210</sup>

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202. *United States v. Washington*, 462 F.3d 1124, 1129 (9th Cir. 2006).

203. *Id.* at 1134 (citation omitted).

204. *United States v. Peterson*, 414 F.3d 825, 827-28 (7th Cir. 2005).

205. *Id.* at 828.

206. 437 F.3d 1128, 1137-39 (11th Cir. 2006).

207. *Id.* at 1139 (footnote omitted). The Eleventh Circuit would later hold in *Street* that Justice Kennedy’s opinion is controlling. See *United States v. Street*, 472 F.3d 1298, 1313-14 (11th Cir. 2006).

208. *Hairston v. United States*, 905 A.2d 765, 770-72 (D.C. 2006).

209. *Id.* at 779-82.

210. *Id.* at 782 (citations omitted).

#### 4. "Softening up" and the social science literature

There is a modest social science literature about "softening up" tactics and *Miranda* waivers. The most extensive writing is by Professors Richard Leo, Welsh White, and Barry Feld. While they describe different techniques and the ways in which the techniques operate, the articles provide only limited information with respect to the prevalence of these tactics.

Based upon his observations of interrogations in three police departments, Leo reported that officers employed several overlapping strategies to obtain *Miranda* waivers. Investigators in one department were taught to use "conditioning" strategies to structure the environment so that the suspect would respond favorably to the questions and, hopefully, give an automatic waiver to the *Miranda* admonition.<sup>211</sup> A second approach was to de-emphasize *Miranda*'s potential significance by blending the warnings into the conversation or by calling attention to the formality of the warnings in a way that understated their importance.<sup>212</sup> Third, officers sometimes sought to persuade suspects to waive their rights by explaining, for example, "that there are two sides to every story and that they will only be able to hear the suspect's side of the story if he waives his rights and chooses to speak to them."<sup>213</sup> Another part of the strategy "is to tell the suspect that the purpose of interrogation is to inform the suspect of the existing evidence against him and what is going to happen to him, but that the detective can only do so if the suspect waives his rights."<sup>214</sup> Leo does not provide information with respect to the frequency of these tactics.

Several years later, Professors Leo and White followed up with a more detailed exploration of these strategies. They provide excerpts of interrogation transcripts showing a variety of approaches, including those previously described by Leo.<sup>215</sup> Leo and White explain how interrogators may communicate that giving a statement benefits suspects. For example, officers may suggest that a person would be viewed more favorably (and thus, implicitly, receive more lenient punishment) if she speaks with investigators. Officers might also suggest that the "why" question is paramount.<sup>216</sup> Another tactic "is to create the appearance of a non-adversarial relationship" between the suspect and the interrogator, so that the suspect may regard the officer as a neutral problem solver who is trying to work things out.<sup>217</sup>

Professor Barry Feld observed a number of these same tactics in the

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211. Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 661 (1996).

212. *Id.* at 662-63.

213. *Id.* at 664.

214. *Id.*

215. 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, 432-47 (1999).

216. *Id.* at 440-47.

217. *Id.* at 438.

interrogations of juveniles in Minnesota. He provides examples, such as an officer suggesting to a juvenile “the value of talking” before administering warnings.<sup>218</sup> He also notes that some officers characterized the warnings and waivers as formalities that must be completed before the officers can talk with the suspects, or as bureaucratic rituals.<sup>219</sup> In most cases (56%), police asked booking questions prior to giving *Miranda* warnings, sometimes to build rapport with the juveniles.<sup>220</sup> Feld reports that “in about one-fifth (17%) of cases, officers described their roles as neutral, objective fact finders trying to determine what happened, rather than as adversaries.”<sup>221</sup>

Apart from these observational studies and the survey results, there is no substantial research directly on “softening up” tactics and *Miranda* waivers. In the most important study of the psychology of waivers, researchers created an experiment with subjects who were either innocent or guilty of a mock crime. They were given *Miranda* warnings under one of three conditions, “neutral,” “sympathetic” and “hostile.” The “sympathetic” condition included some “mild” “softening up” tactics, and the “hostile” condition was preceded by a short statement that the officer knew the suspect committed the offense.<sup>222</sup> Fifty-eight percent of subjects waived their rights. The interrogation condition did not significantly predict the likelihood of waiver; however, innocent suspects were significantly more likely to waive their rights under any of the three conditions.<sup>223</sup>

##### 5. “Softening up” and officer training

In my review of police training materials in California, I found training resources that tend to encourage or facilitate the “mild” type of “softening up.” I also reviewed materials that may encourage police to engage in a limited amount of the “bold” type of “softening up,” principally in telling suspects the evidence against them before administering *Miranda* warnings. None of the training resources that I reviewed advocate tactics as aggressive or extensive as reported in *Hairston* and *Gonzalez-Lauzan*, though officers have been instructed about *Washington* (the “agreement to listen” case).

With respect to the “mild” tactics, officers are trained that it is essential to establish rapport with suspects.<sup>224</sup> In the 2005 POST telecourse, *Interview Techniques*, an expert cautions that police commonly—but erroneously—give

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218. Feld, *Juveniles’ Competence*, *supra* note 95, at 74.

219. *See id.* at 75-77.

220. Feld, *Police Interrogation*, *supra* note 95, at 256-57.

221. *Id.* at 258.

222. Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 *LAW & HUM. BEHAV.* 211, 213-14 (2004).

223. *See id.* at 215.

224. This begins from the first contact with a suspect. In the POST 2005 *Interview Techniques* telecourse, for example, trainers note that if a team of officers arrests a suspect, the officer who will likely interview the suspect later should not be the person to put on the handcuffs.

*Miranda* warnings too early and consequently lose a chance to obtain a statement. The other 2005 POST telecourse, *Interrogation Techniques*, instructs that personal history questions can be very good vehicles to build rapport.<sup>225</sup> Training materials from the core course at POST's Robert Presley Institute of Criminal Investigation give a sequence of steps for investigators who are preparing for an interrogation. The first step is "Personal History Questions: Establish Rapport and Truth Telling Style," which is listed prior to "Legal Issues: Miranda or Behler [sic]; Verbal, Written, Signed, Recorded."<sup>226</sup> These materials contrast with a 1993 telecourse that simply describes the interrogation process as occurring after the *Miranda* warnings.<sup>227</sup>

Officers are also routinely instructed about questions that may not amount to interrogation within the meaning of *Miranda*. In the 2003 POST telecourse, *Interrogation Law*, trainers give examples of inquiries that will not usually amount to "interrogation," such as basic questions about name, residence, what kind of sports a person enjoys, or what kind of car he or she drives. And there is widespread training, beginning at the academy, that basic booking or other "neutral" questions ordinarily do not need to be preceded by *Miranda* warnings.<sup>228</sup> One widely used resource notes that "[o]fficers do not violate *Miranda* by having a brief and casual pre-waiver conversation with a suspect to calm him down or soften the atmosphere."<sup>229</sup>

A manual written by a current FBI agent and a former agent clearly explains the importance of establishing rapport before giving warnings: "Miranda warnings, when presented properly, enhance the interview environment and the probability of a successful interview outcome. Presenting Miranda warnings after establishing rapport with the interviewee provides the necessary time for the fight or flight reaction to dissipate."<sup>230</sup> Further, "[p]eople who feel in control of their physical and emotional environment tend to communicate more than those people who feel they lack control . . . ."<sup>231</sup> Thus, although a suspect who has been given *Miranda* warnings understands that he or she can stop the interview, "establishing good rapport makes that option less

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225. Though the dramatizations in the telecourse generally show officers asking only rudimentary booking questions before giving warnings.

226. See ROBERT PRESLEY INST. OF CRIMINAL INVESTIGATION, *supra* note 87. These two steps are under the heading "Preparation." They are followed by "Behavior Analysis Interview," "Free Format Interview," and "Bait Question." After the "Preparation" section comes "9 Phase Interrogation," which is the "Confrontation Interrogation Technique." *Id.*

227. Videotape: Interview and Interrogation Techniques Telecourse, Part II (POST Apr. 1993).

228. See, e.g., POST, *Laws of Arrest*, *supra* note 128, at 5-4 (stating that "routine booking questions are not interrogation"); Phillips, *supra* note 110, at 25 (noting that neutral questions, such as booking questions and inquiries about residence and identity, do not normally amount to interrogation); LEGAL SOURCEBOOK, *supra* note 181, at §§ 7.21-7.22 (Rev. Jan. 2007) (describing "non-interrogation" questions, including those pertaining to booking and identification).

229. CRIMINAL INVESTIGATION, *supra* note 139, at 197 (footnote omitted).

230. SCHAFFER & NAVARRO, *supra* note 60, at 55.

231. *Id.* at 56.

probable because the suspect will likely avoid taking any actions that would jeopardize his or her relationship with the interviewer.”<sup>232</sup>

Seminar materials developed by a private training institute, produced to me by a local police department, also show how police may give *Miranda* warnings in a way that signals that they are a barrier to communicating important information to a suspect. Officers might say the following as a preface to the warnings: “As you know, we are investigating . . . (issue) . . . I want to fill you in on what’s going on with . . . (issue) . . . , but before we go on I want you to know that . . . .”<sup>233</sup> Reid & Associates advise a similar approach, telling officers to “[i]ntroduce *Miranda* casually.”<sup>234</sup>

The training in “bold” tactics is more uneven. One resource acknowledges the practice by noting that, prior to seeking a waiver, “An officer’s statement of facts will seldom constitute de facto interrogation” if it is accurate, brief, and informational, “as opposed to provocative or goading.”<sup>235</sup> The *California Peace Officers Legal Sourcebook* takes a cautious approach, acknowledging the *Washington* decision but stating: “If you confront a suspect who is in custody with incriminating evidence, you are probably ‘interrogating’ him, because your action is likely to elicit an incriminating response.”<sup>236</sup>

Some of the telecourses include dramatizations of officers describing evidence against suspects before administering *Miranda* warnings. In POST’s 2005 *Interrogation Techniques* telecourse, a detective tells a custodial suspect that officers are investigating a rape. The investigator asks if the suspect was at a party (where the victim met her assailant) the previous night. When the suspect admits he was there, the detective says that is the reason he needs to talk with him, but before they can speak the officer needs to advise the suspect of his *Miranda* rights. This is an example of informing the suspect of a crime prior to warnings, mildly describing *Miranda* as a barrier to further discussion, as well as obtaining a key admission prior to *Miranda* warnings.<sup>237</sup>

There is more substantial training on this tactic in the *Case Law Today* series. In one program from September 2005, the trainer discusses *People v. Haley*, a California Supreme Court case in which an officer allegedly told the

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232. *Id.* at 57.

233. BEHAVIOR ANALYSIS TRAINING INST., CREDIBILITY ASSESSMENT INTERVIEW 28 (2001) (on file with author).

234. John E. Reid & Associates, Inc., *Conducting a Custodial Behavior Analysis Interview*, INVESTIGATOR TIPS, Jan.-Feb. 2008, [http://www.reid.com/educational\\_info/r\\_tips.html](http://www.reid.com/educational_info/r_tips.html).

235. CRIMINAL INVESTIGATION, *supra* note 139, at 189 (footnote omitted). The manual also warns: “When officers discuss or explain incriminating information to a suspect in custody, the courts are especially interested in whether they did so in a provocative or goading manner, or straightforwardly.” *Id.*

236. See LEGAL SOURCEBOOK, *supra* note 181, at § 7.21 (Rev. Jan. 2007).

237. In other scenarios in the telecourse, officers ask only very preliminary background questions before giving warnings and obtaining waivers. See DVD: Interrogation Law Telecourse (POST Aug. 2003) (in subsequent custodial interrogation of “Sam McRoy,” “Detective Stewart” tells Sam that they found evidence inside his house before giving warnings).

suspect that detectives knew he committed a murder because his fingerprints were found at the crime scene.<sup>238</sup> The Court held that a “brief statement informing an in-custody defendant about the evidence that is against him is not the functional equivalent of interrogation because it is not the type of statement likely to elicit an incriminating response.”<sup>239</sup> The trainer reports the holding, though he also cautions police to be careful because the line between permissible comments and indirect questioning can be fuzzy.

Another program from *Case Law Today* provides a more extensive discussion. In a segment from December 2006, the trainer addresses the ruling in *United States v. Washington*, where agents had obtained the “agreement to listen.”<sup>240</sup> The trainer says that “[n]ormally it’s . . . perfectly appropriate for officers before they give the *Miranda* warnings to give a very brief or concise statement of the evidence against a suspect” prior to warnings.<sup>241</sup> However, the evidence has to be brief and police must not goad a suspect into talking. The trainer notes that if the suspect agrees to listen, then the presentation of the evidence may be more extensive.

There is one additional indication that police sometimes administer *Miranda* warnings after they have described evidence to a suspect. Officers in California are trained to use standard language in giving warnings and obtaining waivers. This article reproduces a POST-issued “*Miranda* card” that has been in use for over ten years. It has three recommended waiver questions.<sup>242</sup> Two of the three questions—“Do you want to talk about what happened?” and “Do you want to tell me your side of the story?”—are exactly the questions that officers would ask if they have already told the suspect about the crime or someone else’s side of the story.

#### 6. *The lack of separation between interrogation tactics and warnings today*

We do not today have a clean separation between administration of *Miranda* warnings and the use of interrogation tactics, at least not in the way the *Miranda* Court envisioned. Observational studies and my review of training materials provide significant evidence that the warnings and waiver regime has moved at least partway into the interrogation process, contrary to the “time out” from the pressures of interrogation the Court imagined. Officers may use pre-*Miranda* conversation to build rapport, which is important to obtaining a *Miranda* waiver and—eventually—a statement. Officers may also downplay the significance of the warning or portray it as a bureaucratic step to be satisfied before a conversation may occur. There is also evidence that police

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238. DVD: *Case Law Today: Miranda: ‘Indirect’ Questioning* (POST Sept. 2005) (discussing *People v. Haley*, 34 Cal. 4th 283, 300 (2004)).

239. *Haley*, 34 Cal. 4th at 301.

240. DVD: *Case Law Today: Miranda Rule and Agreements to Listen* (POST Dec. 2006).

241. *Id.*

242. *See infra* at note 380, and accompanying text.

often describe some of the evidence against suspects before seeking waivers. A few cases have approved extreme versions of this tactic.

I am unsure of the full extent to which the “mild” version of “softening up” undermines *Miranda*. Professor Yale Kamisar forcefully argues that these tactics are intended to circumvent *Miranda*’s safeguards.<sup>243</sup> But I can say that courts appear quite deaf to defendants’ claims based upon “mild” “softening up” tactics. Courts are accustomed to defense arguments that waivers or statements are involuntary when they are induced by express threats or promises, or other palpable forms of coercion. For judges on the lookout for this sort of overt conduct, it is easy to mistake the significance of officers’ friendly behavior with suspects. Courts are more likely to cite officers’ rapport-building acts as evidence that a waiver is voluntary, rather than understand it as part of a strategic and well-structured interrogation sequence.<sup>244</sup> While the importance of establishing rapport through such conduct is well known to police, it appears lost on judges. Nor are courts seemingly able to draw a connection between friendly “small talk” and officers’ ability to try out interrogation themes that resonate with suspects, using information gathered from pre-*Miranda* conversations.

I am more confident of the adverse effect of the “bolder” forms of “softening up.”<sup>245</sup> Yet there seems to be little criticism of officers describing the evidence against suspects prior to giving warnings and seeking waivers, at least so long as that description is not too extensive. Then we have the more extreme tactics tolerated (if not tacitly approved) in *Washington*, *Peterson*, *Gonzalez-Lauzan*, and *Hairston*. There has already been one video training segment in California based on *Washington*. If more police seek “agreements to listen” or give warnings only after making a confrontation statement, then we may truly say that *Miranda*’s safeguards have been relocated to the heart of the psychological process of interrogation. Under these circumstances, it would be difficult to continue to assume that warnings and waivers take place in an atmosphere where compelling pressures are minimized.

*C. The Third Assumption: Suspects Will Be Able to Understand their Rights and Make Reasoned Choices to Speak or Remain Silent*

The *Miranda* Court established two principles in tension with each other.

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243. See Yale Kamisar, *On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—And What Happened to It*, 5 OHIO ST. J. OF CRIM. L. 163, 184-88 (2007).

244. See, e.g., *United States v. Scarpa*, 897 F.2d 63, 68 (2d Cir. 1990) (“The questioning occurred during a two-hour car ride found to be ‘relaxed and friendly.’”); cf. *Quadrini v. Clusen*, 864 F.2d 577, 584 (7th Cir. 1989) (the detective’s casual post-waiver conversation with defendant before asking him about involvement in the victim’s death “was neither deceitful nor unfair, but rather normal and accepted police investigative procedure”).

245. I acknowledge a lack of psychological research on this point. In the laboratory experiment about *Miranda* waivers, the “hostile” condition produced more waivers by guilty suspects and fewer waivers by innocent suspects, but the differences were not statistically significant. See Kassin & Norwick, *supra* note 222, at 215.

On the one hand, the justices suggested language for standardized warnings, making the critical assumption that suspects who read or who are read form warnings would be able to understand and act on them.<sup>246</sup> On the other hand, the Court determined that the prosecution must prove that waivers are knowing, intelligent, and voluntary, which theoretically leaves room for individualized determinations of suspects' abilities to understand their rights and to waive them.<sup>247</sup> The extent to which courts make extensive, individualized assessments undermines the utility of a system that purports to give bright-line rules to police.

This Part of the Article explores this tension. The first section briefly reviews the law relating to the content of warnings and some aspects of waiver. Next I review the growing body of literature about suspects' abilities to understand the warnings. After that, I examine training resources that appear to gloss over these concerns about suspects' abilities. I conclude that we cannot continue to pledge our faith in the Supreme Court's most basic assumption about the efficacy of *Miranda* warnings. The best evidence is now that a significant percentage of suspects simply cannot comprehend the warnings or the rights they are intended to convey.

### 1. *Legal requirements for warnings*

The requirement that waivers be knowing, intelligent, and voluntary incorporates two distinct inquiries. The voluntariness of waivers, which is different from the voluntariness of any resulting statements, depends on whether suspects make "free and deliberate choice[s]," rather than respond to "intimidation, coercion, or deception."<sup>248</sup> By contrast, whether waivers are knowing and intelligent depends on whether suspects are given sufficient information and can make informed decisions. In formulating standardized warnings in *Miranda*, the Supreme Court sought to specify the minimum information necessary to make these decisions.

Though the *Miranda* Court suggested wording for the required warnings, the Supreme Court later disavowed any implication that "the 'rigidity' of *Miranda* extends to the precise formulation of the warnings given a criminal defendant."<sup>249</sup> In *Duckworth v. Eagan*, the Court demonstrated its tolerance for substantial deviations from standard language. In that case, officers informed a suspect that he had a right to talk to a lawyer and have counsel present, though officers also said that they had "no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court."<sup>250</sup> This, the Court

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246. See *Miranda v. Arizona*, 384 U.S. 436, 467-73, 478-79 (1966).

247. See *id.* at 475-76.

248. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

249. *California v. Prysock*, 453 U.S. 355, 359 (1981) (per curiam).

250. *Duckworth v. Eagan*, 492 U.S. 195, 198 (1988).

held, “touched all the bases required by *Miranda*.”<sup>251</sup> The test is whether the warnings “reasonably convey” the requisite rights.<sup>252</sup>

This coheres with another aspect of the *Miranda* warning jurisprudence. The Supreme Court has made clear that officers are not required to provide additional information that might enable suspects to make a more informed choice. Police do not have to tell a suspect the subject matter of an investigation<sup>253</sup> or even that an attorney is trying to reach the suspect at that very moment.<sup>254</sup> The net effect is to create a minimum though not necessarily sufficient condition for an informed decision.

In allowing departures from the standardized language of the *Miranda* opinion, the Supreme Court must have anticipated future challenges to the adequacy of the warnings, as well as claims that resulting waivers were neither knowing nor intelligent. However, *Eagan* instructs the lower courts to resolve issues about the language of the warnings by asking if the admonitions reference key rights, not whether officers phrased them in language that defendants can really understand. Thus, with respect to information that must be provided to suspects, courts seem to assume that any warnings that “touch the bases” manage to do the work that *Miranda* requires. Courts then often take claims by defendants that they did not understand the warnings and lump them together with arguments about voluntariness. Both are assessed under a test that considers the “totality of the circumstances,” a standard that is quite generous to the prosecution and police.<sup>255</sup>

## 2. *Miranda* warnings and the social science literature

For several decades, researchers have examined the ability of individuals to understand *Miranda* warnings. Perhaps the most important early work was by Professor Thomas Grisso, who focused on juveniles. Psychologists Grisso, Richard Rogers, Bruce Frumkin, and others have developed assessment instruments and protocols for professionals to evaluate the competency of suspects to understand and waive their *Miranda* rights.<sup>256</sup> In the last five years,

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251. *Id.* at 203.

252. *Id.* at 203 (citing *Prysock*, 453 U.S. at 361).

253. *See* *Colorado v. Spring*, 479 U.S. 564, 577 (1987).

254. *See* *Moran v. Burbine*, 475 U.S. 412, 427 (1986).

255. *See, e.g.,* *Fare v. Michael C.*, 442 U.S. 707, 724-27 (1979) (totality of the circumstances approach is adequate to consider a juvenile’s waiver of *Miranda* rights; the Court analyzes knowing and intelligent standard and voluntariness under same test and using essentially the same facts and circumstances).

256. For an overview, *see* THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* 149-92 (2d ed. 2003); Virginia G. Cooper & Patricia A. Zapf, *Psychiatric Patients’ Comprehension of Miranda Rights*, 32 *LAW & HUM. BEHAV.* 390 (2008); I. Bruce Frumkin, *Psychological Evaluation in Miranda Waiver and Confession Cases*, in *CLINICAL NEUROPSYCHOLOGY IN THE CRIMINAL FORENSIC CONTEXT* (Denney, R.L. & Sullivan, J.P., eds.), 135, 140-49 (2008). There has been significant disagreement about the validation, reliability, and documentation of the Grisso instruments. *See* Frumkin, *supra*, at 162-66; Richard Rogers, Mandy J. Jordan & Kimberly S. Harrison, *A Critical Review of Published Competency-to-*

there has been very significant research about variations in *Miranda* warnings, as well as the way in which warnings are understood by populations of suspects, including juveniles, persons with mental disabilities or mental disorders, and non-English speakers. I will begin with an introduction to the more general research, and then review briefly the scholarship with respect to specific population groups.

Several researchers have noted a proliferation of versions of warnings, which one might expect post-*Eagan*.<sup>257</sup> Professor Rogers and his colleagues have recently completed two studies that collect *Miranda* warnings and evaluate them for comprehension and content. In the first study, the researchers collected 560 non-redundant sets of *Miranda* warnings from 448 jurisdictions.<sup>258</sup> Of these 560 sets, 532 were unique in their wording.<sup>259</sup> In the second study, researchers focused on states with low response rates from the first study. They received 385 sets of warnings from 190 jurisdictions, of which 356 sets were unique.<sup>260</sup>

In both studies, researchers examined the length and understandability of the individual components of *Miranda* as well as the language as a whole. Taking both studies together, the warning portions varied in length from 21 to 231 words. Total words for both warnings and waiver portions varied from 49 to 547.<sup>261</sup> All of the warnings included the first four admonitions: right to remain silent; evidence can be used against a suspect; right to counsel; and right to appointment of counsel. Eighty percent of the jurisdictions included a fifth admonition, that suspects could assert their rights at any time. Six states, primarily in the western United States, included the fifth prong less than half of the time. Researchers reported that California was an outlier, including the fifth

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*Confess Measures*, 28 LAW & HUM. BEHAV. 707 (2004) [hereinafter Rogers et al., *Competency-to-Confess Measures*].

257. See, e.g., Jeffrey L. Helms, *Analysis of Miranda Reading Levels Across Jurisdictions: Implications for Evaluating Waiver Competency*, 3 J. FORENSIC PSYCHOL. PRAC. 25, 29-33 (2003) (analyzing warning language of *Miranda* cards issued by the state police or highway patrol in forty-eight states and several federal agencies); Rachel Kahn, Patricia A. Zapf & Virginia G. Cooper, *Readability of Miranda Warnings and Waivers: Implications for Evaluating Miranda Comprehension*, 30 LAW & PSYCHOL. REV. 119, 131 (2006) (collecting warnings and waivers from forty-seven counties in Alabama).

258. Richard Rogers, Kimberly S. Harrison, Daniel W. Shuman, Kenneth W. Sewell, Lisa L. Hazelwood, *An Analysis of Miranda Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177, 180-81 (2007) [hereinafter Rogers et al., *Comprehension and Coverage*]; E-mail from Richard Rogers to Charles Weisselberg (Oct. 1, 2007) (on file with author) (noting 448 jurisdictions).

259. Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, Kimberly S. Harrison & Daniel W. Shuman, *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124, 125 (2008) [hereinafter Rogers et al., *Vocabulary Analysis*].

260. *Id.* at 126. The responses from prosecutors were supplemented with warnings provided by public defenders who had responded too late to be included in the initial survey. *Id.* See also E-mail from Richard Rogers to Charles Weisselberg (Sept. 30, 2007) (on file with author) (noting 190 jurisdictions).

261. See Rogers et al., *Vocabulary Analysis*, *supra* note 259, at 128 tbl.2.

admonition in only three percent of the warnings they collected.<sup>262</sup> Table 1, below, reproduces the researchers' findings on the length of warnings and waiver language in the two studies. I have added a column to compare California's POST-approved warnings and waiver language. The findings from the original and replication surveys are quite similar. In most respects, California's form warnings and waivers are shorter than the average across jurisdictions. The comparative brevity of California's full admonitions can be explained in part by the omission of the fifth warning.

**Table 1**

*Length of Miranda Warnings: Rogers, et al, Original and Replication Surveys, and California's Form Warnings*<sup>263</sup>

Miranda component	Length (number of words)						
	Original survey			Replication survey			Calif.
	Mean	SD	Range	Mean	SD	Range	
1. Silence	9.41	5.20	4-43	8.92	4.98	4-30	7
2. Evidence against you	14.98	4.51	8-35	14.25	3.92	8-39	10
3. Attorney	21.51	4.30	7-44	23.06	5.71	7-60	15
4. Free legal services	21.94	6.26	9-72	22.69	7.76	11-67	21
5. Continuing rights	24.95	11.24	7-69	28.63	10.99	8-59	N/A
6. Waiver	42.38	27.39	6-184	46.13	23.89	4-141	8-10
Total warning	92.64	22.90	34-227	99.10	24.50	21-231	53
Total <i>Miranda</i>	146.16	60.14	49-547	148.17	43.28	55-374	61-63

The researchers also measured the understandability of *Miranda* warnings and waivers using, as one primary measure, the Flesch-Kincaid estimate of

262. See *id.* at 131.

263. The source for the data is Rogers et al., *Vocabulary Analysis*, *supra* note 259, at 128 tbl.2. I acknowledge that the survey findings are not independent of the California form warnings, as the surveys included responses from jurisdictions within California. The California form warnings are taken from the POST-approved *Miranda* card, reprinted *infra*. Because the waiver language on the flip side of the POST card is phrased as three alternative questions, I have reported the waiver and total language as a range depending upon which alternative is chosen. Further, consistent with the Rogers studies, I have omitted the question "Do you understand?" that follows each right on the POST-approved card. See E-mail from Lisa Hazelwood to Charles Weisselberg (Sept. 30, 2007) (on file with author) (study co-author, describing methodology).

grade-equivalent reading ability.<sup>264</sup> To classify language at a specific grade level, readers at that level must be able to understand seventy-five percent of the material.<sup>265</sup> Table 2, below, reproduces the researchers' findings from the two studies. Once again, I have added a column analyzing California's form warnings and waivers. As the data show, the Flesch-Kincaid grade-level estimates vary dramatically among the components of Miranda warnings. Advice regarding the right to counsel and the appointment of counsel typically requires a much higher level of ability for substantial understanding than other components. The mean grade level for understanding the right to counsel is above an eighth-grade level of education. The mean grade level for understanding the right to the appointment of counsel is above a tenth-grade reading level. For both of these warnings, California's form admonition is quite close to the mean in both surveys. The reading grade level for the entire warning component of the California admonition is 6.4, which is less than a grade level below the means of the warning components of the original and replication surveys. It is also similarly below the mean reading grade levels of warnings collected in a study of counties in Alabama.<sup>266</sup>

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264. The researchers employed a number of other measures including one test (SMOG) that assesses reading levels required for full comprehension (90-100%) of written materials. For the components of the *Miranda* admonition, full comprehension generally required a higher education level (up to four additional grade levels for full understanding of the concept that evidence can be used against a suspect.). See Rogers et al., *Comprehension and Coverage*, *supra* note 258, at 185 tbl.3. I am using a single measure for comparison, though I recognize that all are important.

265. See WILLIAM H. DUBAY, *THE PRINCIPLES OF READABILITY* 54 (2004), available at <http://www.nald.ca/fulltext/readab/readab.pdf>. One difficulty with using this measure is that while some suspects may be given written admonitions of their rights, the practice in many or most jurisdictions is to give a verbal admonition. The researchers acknowledge this issue, but also note that the task of listening comprehension places additional demands on people to process information. See Rogers et al., *Comprehension and Coverage*, *supra* note 258, at 189.

266. See Kahn et al., *supra* note 257, at 132 (warnings collected from 47 counties had mean Flesch-Kincaid grade levels of 7.12).

**Table 2**

*Reading Comprehension Levels for Miranda Warnings:  
Rogers, et al., Original and Replication Surveys, and California's Form  
Warnings*<sup>267</sup>

<i>Miranda</i> component	Flesch-Kincaid Grade Levels						
	Original survey			Replication survey			California
	Mean	SD	Range	Mean	SD	Range	
1. Silence	3.15	1.94	1-13	3.16	2.16	1-15	2.3
2. Evidence against you	4.95	1.74	4-15	4.76	1.67	3-18	3.6
3. Attorney	8.38	2.13	1-15	8.85	2.34	1-16	8.3
4. Free legal services	10.22	2.04	4-18	10.16	2.23	4-18	10.0
5. Continuing rights	9.42	3.03	3-18	9.58	2.20	3-18	N/A
6. Waiver	6.09	3.60	1-18	6.35	3.44	1-18	1.2-2.2
Total warning	7.16	1.96	3-18	6.80	2.08	2-18	6.4
Total <i>Miranda</i>	6.20	1.95	3-18	6.24	1.94	3-18	5.6-5.8

Criminal defendants are not as well educated as the general population. A 2002 survey of jail inmates, which included convicted and unconvicted inmates, reported that 12.3% had at most an eighth-grade education, and 31.6% had some high school education but did not graduate.<sup>268</sup> An earlier survey of federal and state prison populations showed that approximately 40% of the state inmates and 27% of the federal inmates did not have a high-school degree or its equivalent, compared with about 18% of the general population.<sup>269</sup> Literacy levels for inmates are also significantly lower than the general population.<sup>270</sup>

267. The source for the data is Rogers et al., *Vocabulary Analysis*, *supra* note 259, at 129 tbl.3. For caveats with respect to the California data, *see supra*, note 263. I calculated the Flesch-Kincaid grade levels for California using the statistics function of the Microsoft Word program.

268. BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PROFILE OF JAIL INMATES, 2002 2 tbl.1 (2004), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf>.

269. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, EDUC. AND CORR. POPULATIONS 2 (2003), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf>.

270. Following a survey of 1200 inmates, the U.S. Department of Education reported that prison inmates had lower-than-average prose, document, and quantitative literacy than adults living in households. *See* NAT'L CTR. FOR EDUC. STATISTICS, LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY 29 (2007), *available at* <http://nces.ed.gov/pubs2007/2007473.pdf>. The survey classified literacy by category on three scales. For prose, 16% of inmates had below basic literacy levels. The percentages for below basic document and quantitative literacy were 15% and 39%, respectively. *Id.* at 13 fig.2-2.

Turning to specific categories of suspects, the most significant study of *Miranda* warnings and mental disability was completed by Professor Cloud and colleagues in 2002.<sup>271</sup> They tested the ability of subjects with varying degrees of mental disability to understand (1) the vocabulary of *Miranda*, (2) each of the four required warnings, and (3) the concepts that the *Miranda* rights embody.<sup>272</sup> The study was modeled on Professor Thomas Grisso's previous work with juveniles.<sup>273</sup> The language of the four warnings was taken verbatim from Grisso's "Comprehension of Miranda Rights" ("CMR") instrument.<sup>274</sup> Researchers evaluated the abilities of forty-nine disabled people, including thirty-eight individuals with Intelligence Quotients (IQs) of seventy or less and eleven subjects with IQs from seventy-one to eighty-eight.<sup>275</sup> Researchers considered this latter group to be borderline disabled even though their IQs were over seventy, which is typically considered the upper end for mental retardation. They compared the abilities of these forty-nine people to a control group of twenty-two non-disabled subjects.<sup>276</sup>

Cloud and his colleagues found that the disabled subjects understood only about 20% of the critical words comprising the *Miranda* vocabulary, compared with the non-disabled subjects who understood 83% of the words.<sup>277</sup> The ability of disabled subjects to understand the four *Miranda* warnings was likewise severely impaired. Researchers read warnings to the subjects and then asked a series of questions. On average, disabled subjects correctly answered 22% of the questions on the right to remain silent (control group, 87%), 31% on the warning that anything said can be used against you (control group, 95%), 31% on the right to consult with counsel (control group, 86%), and 25% on the right to appointment of counsel (control group, 90%).<sup>278</sup> One of the most provocative

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"Below basic" means having "no more than the most simple and concrete literacy skills." *Id.* at 2 tbl.1-3.

271. See Cloud et al., *Words Without Meaning*, *supra* note 31. For a less comprehensive study (but one which is consistent with Cloud et al.), see Solomon M. Fulero & Caroline Everington, *Assessing Competency to Waiver Miranda Rights in Defendants with Mental Retardation*, 19 LAW & HUM. BEHAV. 533 (1995).

272. See Cloud et al., *Words Without Meaning*, *supra* note 31, at 532-34.

273. See *id.* at 531-33, 533 n.182.

274. See THOMAS GRISSO, INSTRUMENTS FOR ASSESSING UNDERSTANDING AND APPRECIATION OF *Miranda* RIGHTS 19-29 (1998) [hereinafter GRISSO, INSTRUMENTS]. The CMR in turn took the warnings from a form used for juveniles by officers in St. Louis, Missouri prior to 1980. See Thomas Grisso, *Juveniles' Capacities to Waive Miranda Rights: An Empirical Analysis*, 68 CALIF. L. REV. 1134, 1144 n.57 (1980) [hereinafter Grisso, *Juvenile's Capacities*].

275. See Cloud et al., *Words Without Meaning*, *supra* note 31, at 609 tbl.1.

276. See *id.* at 535-37. The control subjects were not tested, but researchers assumed an average IQ of approximately 100. See *id.* at 537 n.189.

277. See *id.* at 540-41. The vocabulary words tested were "consult," "attorney," "interrogation," "appoint," "entitled," "right," and "statement." *Id.* at 532. All but "statement" derived from Grisso's "Comprehension of Miranda Vocabulary" instrument. See GRISSO, INSTRUMENTS, *supra* note 274, at 35-44.

278. See Cloud et al., *Words Without Meaning*, *supra* note 31, at 545 fig.5; *id.* at 548 fig.6; *id.* at 550 fig.7; *id.* at 552 fig.8.

findings was that the subjects with IQs ranging from seventy-one to eighty-eight (the borderline group) also scored far below the control group, answering an average of 45% of the warning questions correctly.<sup>279</sup>

Cloud and his colleagues tested their subjects using warnings from Grisso's CMR. I have compared the language of the CMR to the mean length and reading grade levels of the warnings in the studies by Rogers *et al.*, and the California *Miranda* card.<sup>280</sup>

**Table 3**

*Length and Reading Grade Levels of Miranda Warnings: Rogers, et al., Original and Replication Surveys, California's Form Warnings, and the CMR*

<i>Miranda</i> component	Length (number of words)				Flesch-Kincaid Grade Levels			
	Orig.	Repl.	Calif.	CMR	Orig.	Repl.	Calif.	CMR
1. Silence	9.41	8.92	7	15	3.15	3.16	2.3	5.2
2. Evidence against you	14.98	14.25	10	15	4.95	4.76	3.6	4.4
3. Attorney	21.51	23.06	15	22	8.38	8.85	8.3	13.9
4. Free legal services	21.94	22.69	21	12	10.22	10.16	10	6.7

Two of the CMR components, the right to silence and the right to an attorney, are relatively complex compared to the average warnings now in use, as reflected in the studies by Rogers *et al.* The CMR was developed approximately twenty-five years ago, and research now shows that many departments use simpler warnings. But the disabled subjects in the Cloud study showed a lack of understanding of all four warnings, including two that have reading grade levels below the mean grade level of the warnings more currently in use. Interestingly, the disabled subjects had, on average, completed more than ten years of education. The control group, which did show an adequate understanding of *Miranda* rights, had an average education level of two years of college.<sup>281</sup> One of the Cloud/CMR components, the right to free legal services, is shorter and less complex than its California counterpart, yet

279. *See id.* at 571.

280. I report the four components separately. Cloud and colleagues did not test subjects with the warnings as a whole, nor did they ask waiver questions. As with the California warnings, I calculated the Flesch-Kincaid grade levels for the Cloud study warnings using the statistics function of Microsoft Word.

281. *See* Cloud *et al.*, *Words Without Meaning*, *supra* note 31, at 609 tbl.1 (mean years of education of disabled subjects = 10.7; standard deviation = 3.3); *id.* at 610 tbl.2 (mean years of education of control group = 14.1; standard deviation = 2.3).

subjects still lacked an ability to understand it.

There is also significant research about the ability of mentally disordered suspects to comprehend *Miranda* warnings. Psychologists Virginia Cooper and Patricia Zapf recently assessed the understanding of seventy-five psychiatric inpatients using instruments developed by Grisso and others.<sup>282</sup> The researchers found that approximately 60% of the sample of patients failed to understand at least one *Miranda* right.<sup>283</sup> Patients with psychoses had impaired comprehension compared to patients without psychotic diagnoses.<sup>284</sup> Professor Rogers and colleagues also recently completed a study of 107 inpatients from competency-to-stand-trial units of a Texas facility. They tested patients with respect to their understanding of different samples of warnings, grouped by grade levels.<sup>285</sup> Researchers found that “representative *Miranda* warnings with Flesch-Kincaid estimates at or above the sixth-grade level are only well understood by approximately 10% of the mentally disordered defendants, even though they tended to be only in the midrange of impairment . . . for clinical populations.”<sup>286</sup>

The most extensive research has focused on juveniles. In one of Grisso’s early works, he tested several samples of juveniles and adults with a battery of instruments he developed, including the CMR and vocabulary tests.<sup>287</sup> Grisso reported that “juveniles younger than fifteen manifest poorer comprehension [of their rights] than young adults of comparable intelligence.”<sup>288</sup> “The vast majority of these juveniles misunderstood at least one of the four standard *Miranda* statements . . . .”<sup>289</sup> Further, fifteen- and sixteen-year-olds with IQ scores below eighty also failed to perform well.<sup>290</sup>

More recently, psychologist Jodi Viljoen and colleagues tested 152 pretrial defendants ages eleven to seventeen with Grisso’s and others’ *Miranda* instruments.<sup>291</sup> Using Grisso’s instruments to assess the juveniles’

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282. See Cooper & Zapf, *supra* note 256, at 392-97.

283. See *id.* at 400.

284. See *id.* at 398, 401 tbl.6 (noting negative correlation, though the correlation was not statistically significant for all instruments). The negative correlation was statistically significant for the CMR instrument. *Id.*

285. See Richard Rogers, Kimberly S. Harrison, Lisa L. Hazelwood & Kenneth W. Sewell, *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 LAW & HUM. BEHAV. 401, 403-07 (2007).

286. *Id.* at 408.

287. See Grisso, *Juvenile’s Capacities*, *supra* note 274, at 1149-51. The subjects included recent admittees to a juvenile detention facility, residents of a boys’ town, and residents of a correctional boys’ school. The adult subjects included parolees and nonoffender volunteers. See *id.* Eleven percent of the juveniles had IQ scores of seventy or below; 22% had scores over 100. Of the adults, 14% had scores of seventy or below; 18% had scores over 100. See *id.* at 1149, n. 68, 69.

288. *Id.* at 1157.

289. *Id.* at 1160.

290. See *id.*

291. Jodi L. Viljoen, Patricia A. Zapf & Ronald Roesch, *Adjudicative Competence and Comprehension of Miranda Rights in Adolescent Defendants: A Comparison of Legal Standards*,

understanding of *Miranda* rights only, researchers found impairments in 58% of the eleven- to thirteen-year olds, 33.3% of the fourteen- to fifteen-year-olds, and 7.8% of the sixteen- to seventeen-year-olds. When researchers used a broader set of instruments to assess the juveniles' understanding and appreciation of the significance of their rights, they found impairments in 78.0% of the eleven- to thirteen-year olds, 62.7% of the fourteen- to fifteen-year-olds, and 35.3% of the sixteen- to seventeen-year-olds. In both tests, researchers classified juveniles as impaired if the juveniles' scores were two or more standard deviations below adult mean scores for the same instruments.<sup>292</sup>

In addition, some jurisdictions use *Miranda* warnings specifically written for juveniles. A recent study by Professor Rogers and colleagues shows that, paradoxically, juvenile *Miranda* warnings may be *less* understandable than general warnings. The researchers collected 122 juvenile *Miranda* warnings from 109 counties in 29 states, as well as 11 sets of statewide warnings.<sup>293</sup> The warning component of the juvenile admonitions ranged from 52 to 526 words, with a mean length of 149 words. The total *Miranda* admonishments, including warning and waiver language, ranged from 64 to 1020 words, with a mean of 214 words. Juvenile warnings and waivers exceeded general warnings by an average of more than sixty words.<sup>294</sup> With respect to understandability, the mean Flesch-Kincaid reading grade levels were *higher* than the general warnings for every *Miranda* component except the fifth prong (relating to continuing rights). The mean Flesch-Kincaid scores were: right to remain silent (3.55; general = 3.15); evidence against you (6.24; general = 4.87); right to an attorney (8.81; general = 8.57); free legal services (10.36; general = 10.22); continuing rights (8.83; general = 9.49); total warnings (7.25; general = 7.02).<sup>295</sup> As the authors write, "[t]hese findings are especially problematic for younger adolescents, ages 13 to 15, who lack sufficient reading comprehension even when their academic attainment is at the expected levels."<sup>296</sup>

Finally, as Professor Floralynn Einesman has noted, non-native speakers, as well as people raised in countries with different justice systems, may have particular difficulty understanding the language of warnings and the role of

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25 BEHAV. SCI. LAW 1 (2007). The subjects' average IQ score was 82.57, with a standard deviation of 13.91. *See id.* at 4.

292. *See id.* at 9; *see also* Ellen Marrus, *Can I Talk Now? Why Miranda Does Not Offer Adolescents Adequate Protections*, 79 TEMP. L. REV. 515 (2006) (discussing research of Grisso and others).

293. *See* Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, Daniel W. Shuman & Hayley L. Blackwood, *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCHOL. PUB. POL'Y & LAW 63, 70 (2008).

294. *See id.* at 71 tbl.1.

295. *See id.* at 73 tbl. 2. The option of consulting with a parent or guardian was included in twelve versions of the attorney component and in seven versions of the continuing rights warning. *See id.* Full comprehension (90-100%) required one to three additional grade levels. *See id.* at 70, 73 tbl.2.

296. *Id.* at 72.

lawyers and others in our criminal justice system.<sup>297</sup> More recently, Rogers and his colleagues also collected 121 sets of *Miranda* warnings in Spanish. They found that warnings in Spanish were on average five words shorter than warnings in English, and the waiver language contained an average of eleven fewer words.<sup>298</sup> For the most part, the Spanish language warnings were easier to understand but conveyed less information.<sup>299</sup> Additionally, a substantial number of warnings contained errors, such as discrepancies from English-language warnings or—more seriously—missing components of the *Miranda* admonishments.<sup>300</sup> The researchers stressed the importance of preserving a full record of any warning and commentary provided by officers, even when interrogations are conducted by officers who claim fluency in Spanish.<sup>301</sup>

### 3. Warnings and officer training

Three points emerge from my review of police training in California. First, officers are trained to read warnings from the POST-approved card, which should theoretically reduce the variations in warnings observed by Rogers and his colleagues. Second, the training about the ability of mentally disabled, mentally disordered, or juvenile suspects to understand the *Miranda* warnings is generally focused on the factors that allow prosecution to defeat a suppression motion. For the most part, it is assumed that all suspects can understand the admonitions and are capable of waving their rights. Third, there is no differentiation in the application of interrogation techniques for juveniles and people with mental disabilities, apart from a brief recognition that they may be suggestible, and there is training about a statutory warning for juveniles in California.

Training about reading from the card begins in the academy.<sup>302</sup> The point is re-emphasized in advanced training through POST telecourses,<sup>303</sup> *Case Law*

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297. See Floralynn Einesman, *Confessions and Culture: The Interaction of Miranda and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1, 39-43 (1999) (collecting cases and discussing the issue).

298. See Richard Rogers, Amor A. Correa, Lisa L. Hazelwood, Daniel W. Shuman, Raquel C. Hoersting & Hayley L. Blackwood, *Spanish Translations of Miranda Warnings and the Totality of the Circumstances*, LAW & HUM. BEHAV. (forthcoming; published online Mar. 4, 2008), available at <http://www.springerlink.com/content/p08w3153g38711th/fulltext.pdf> (manuscript at 4, tbl.1).

299. See *id.* at 3, 5.

300. The researchers reported an average of 2.92 minor variations in translation, as well as instances of awkward language use. See *id.* at 3-4. They found missing components in 2.7% of warnings, dissimilar content in 21.4%, and substantive errors in 5.5%. See *id.* at 5 tbl.3.

301. See *id.* at 5.

302. See POST, *Laws of Arrest*, *supra* note 128, at 5-3 (reprinting POST-approved warnings and stating that laminated card is available from POST).

303. See, e.g., DVD: Interrogation Law Telecourse (POST Aug. 2003); Videotape: Interrogations/Confessions: Legal Issues (POST Aug. 1995); Videotape: Interview and Interrogation Techniques Telecourse, Part II (POST Apr. 1993).

Today videos,<sup>304</sup> and written materials.<sup>305</sup> These resources instruct officers that reading from the card avoids an inadvertent omission of one of the warnings during either interrogation or testimony in court. Another reason to rely on the printed card is aptly stated in a training bulletin: "Recommended wording on the advice-of-rights card issued by [POST] has been carefully designed to comply fully with *Miranda*, without overkill, and to maximize opportunities for waiver."<sup>306</sup>

With respect to the second point, ensuring that groups with lower comprehension levels understand the warnings, the training does not appear to admit the genuine possibility that suspects might be fundamentally incapable of understanding form warnings. There is no advice about administering different warnings for suspects who are barely literate. Officers are told that *Miranda* warnings are the same for mentally disabled suspects, suspects with mental disorders, and juveniles,<sup>307</sup> though there is training about a specific warning required for juveniles under state law.<sup>308</sup> Police are also told that they might need to lower their pitch or reading rate for juveniles, but they are to use the same warning card as for adults.<sup>309</sup> The training also emphasizes that the same overall legal standards apply to all suspects.<sup>310</sup> One manual notes: "Being mentally slow, uneducated, drunk, injured and/or criminally unsophisticated does not mean we cannot get a valid waiver out of a person if the problem is

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304. See, e.g., DVD: Case Law Today: *Miranda*: How Precise Must the Advisement Be? (POST Mar. 2002); DVD: Case Law Today: *Miranda*: Lost in Translation (POST June 2004).

305. See, e.g., Phillips, *supra* note 110, at 28 ("While it is risky to play with *the wording* of the admonishment, *the manner and method of delivery* may be altered, particularly if it serves to simplify and make it more understandable.").

306. Cal. Peace Officers' Assoc., *Issue: Why should law enforcement officers be discouraged from reciting Miranda warnings from memory, instead of reading from a printed card?*, TRAINING BULL. SERVICE, Jan. 2006, at 7 (reprinting bulletin provided by the Los Angeles District Attorney's Office).

307. See, e.g., CRIMINAL INVESTIGATION, *supra* note 139, at 194 ("Minors have the same *Miranda* rights as adults and need not be given any special information or advice.") (footnote omitted); Phillips, *supra* note 110, at 38 ("As a general rule, juveniles, in respect to *Miranda*, are treated the same as adults."). The POST telecourses and *Case Law Today* videos also do not suggest any different warnings for these suspects, except to urge care in translating warnings for suspects whose first language is not English. See DVD: Case Law Today: *Miranda*: Lost in Translation (POST June 2004).

308. See, e.g., DVD: Case Law Today: Interrogation Law Telecourse (POST Aug. 2003) (discussing CAL. WELF. & INST. CODE § 625, which requires prompt advice of certain rights when a minor is taken into custody); Cal. Peace Officers' Assoc., *Juveniles & Miranda*, TRAINING BULL. SERVICE, Dec. 2006, at 2 (discussing statutory obligations and noting that because they are imposed only by California Law, "no evidence or statement should be suppressed for failure to admonish, absent a violation of the standard requirements of *Miranda*").

309. See *id.* Some reports of *Miranda* warnings being read to juveniles are heart-wrenching. See Dennis O'Brien, *10-Year-Old Boy Faces Adult Trial in Killing*, NEWSDAY, Aug. 14, 1989, at 2 (warnings read to a 10-year-old as he sat on his mother's lap).

310. See, e.g., CRIMINAL INVESTIGATION, *supra* note 139, at 195 ("Minors are fully capable of understanding their rights. In determining whether a minor understood his rights, the courts examine the same circumstances that are considered when the suspect is an adult.") (footnotes omitted); DVD: Interrogation Law Telecourse (POST Aug. 2003).

recognized and extra precautions are made to insure the suspect understands what it is he is giving up.”<sup>311</sup> However, the manual does not indicate what those extra precautions might be. Another publication provides that although judges may consider suspects’ age, experience, background, education and intelligence, “[t]he courts almost always reject ‘I didn’t understand’ arguments if, (1) the suspect told officers that he understood his rights, and (2) his answers to their questions were responsive and coherent.”<sup>312</sup> This does not seem to recognize the tendency of some suspects, particularly those with disabilities, to mask their limitations.<sup>313</sup>

A number of training resources collect appellate decisions for law enforcement agencies, generally for use in opposing suppression motions. To give a sense of the genre, one list of opinions begins with this quote from a California case: “Appellant was a worldly 12-year-old.”<sup>314</sup> To the extent such lists are written for prosecuting attorneys, they are aids in arguing for the admission of statements that have already been obtained by police. However, to the extent that investigators review these lists, the lists may communicate that there are few if any instances in which suspects cannot give admissible statements.

Similarly, the POST materials do not suggest that, as a general matter, it is inappropriate to apply standard tactics to juveniles, people with mental disabilities, or those with mental illnesses. To be sure, there are occasional cautions in the POST telecourses. For example, in one course, instructors note that it is important to be patient and to allay fears or misconceptions when interviewing children.<sup>315</sup> In another, a Sheriff’s Department psychologist warns that juveniles under fourteen may simply try to please the investigator by telling her what she wishes to hear.<sup>316</sup> And one trainer says that there are people with “room temperature IQs” who can be easily led, which is undesirable.<sup>317</sup> The videos also repeat a caution that runs through other materials on the Reid

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311. Phillips, *supra* note 110, at 40.

312. CRIMINAL INVESTIGATION, *supra* note 139, at 195 (footnote omitted). *See also* PHILLIPS, MIRANDA AND THE LAW 103 (Prosecutor’s Notebook Volume XXII, 1999) (factors to consider under the totality of the circumstances include, but are not limited to, whether the defendant: signed a written waiver, was admonished in his native language, appeared to understand his rights, had the assistance of a translator, had prior experience with the system, and whether the rights were individually and repeatedly explained).

313. *See* Cloud et al., *Words Without Meaning*, *supra* note 31, at 513-14; James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430-31 (1985).

314. CRIMINAL INVESTIGATION, *supra* note 139, at 589 n. 2187; *see also* *Miranda Waivers and Invocations*, *supra* note 110, at 28 (containing appendix titled “Minors and impaired suspects: Proving they understand their rights”).

315. *See* Videotape: Interview and Interrogation Techniques Telecourse, Part II (POST Apr. 1993). This occurs primarily in the context of interviewing witnesses who are not suspects, but interviews are also commonly performed on people who are or may become suspects.

316. *See* DVD: Interview Techniques Telecourse (POST Mar. 2005).

317. *See id.*

method: officers should ask themselves if a tactic is likely to lead an innocent person to confess.<sup>318</sup>

Finally, the limited literature on this topic seems to confirm that police do in fact use standard interrogation tactics on juveniles. In his study of interrogations in Minnesota, Professor Feld notes that officers used Reid strategies to question juveniles.<sup>319</sup> In addition, psychologists Jessica Meyer and Dickon Reppucci recently surveyed 332 law enforcement officers in the Baltimore County Police Department. Their responses indicated “that police use the same techniques with young children, older youth, and adult suspects. Depending on the particular technique, 17-87% of the police indicated that they use various Reid techniques.”<sup>320</sup>

#### 4. *The Miranda Court’s assumption about the effect of warnings today*

A central assumption of the *Miranda* Court was that suspects would understand the warnings and be able to act on them. The hope was that standardized warnings, which police could readily administer, would provide a uniform solution. However, the Court also required that waivers be knowing, intelligent, and voluntary. At the time, that Court had no empirical evidence to suggest that standardized warnings would be effective. Today’s evidence strongly suggests the contrary, at least for a substantial number of suspects. We have also seen a remarkable proliferation in the variations of warnings, as Rogers and his colleagues have demonstrated, and as one might have anticipated post-*Eagan*.

Both of these circumstances cut against our continued and almost religious belief that any form of warning that “covers the bases” will indeed be effective in informing suspects of their rights. Because the warnings vary so widely, it is no longer possible to assume that suspects will understand just any warnings. The evidence shows that, to be understood, many warnings demand a greater educational background than many suspects possess. Studies also demonstrate that significant numbers of juveniles and people with disabilities simply do not understand the warnings. In general, reading form warnings to them does not effectively communicate rights or ensure that a waiver is knowing and intelligent. Nor is the problem confined to easily identifiable populations. The findings of Cloud and his colleagues suggest that many individuals who are not considered mentally retarded by traditional criteria are

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318. See Videotape: Interview and Interrogation Techniques Telecourse, Part II (POST Apr. 1993); see also INBAU ET AL., *supra* note 53, at 418 (“Our long-standing position has been that interrogation incentives that are apt to cause an innocent person to confess are improper.”).

319. See Feld, *Police Interrogation*, *supra* note 95, at 315.

320. Jessica R. Meyer & N. Dickon Reppucci, *Police Practices and Perceptions Regarding Juvenile Interrogation and Interrogation Suggestibility*, 25 BEHAV. SCI. LAW 757, 771 (2007). Meyer also attended a four-day Reid & Associates seminar. She reported that trainers devoted only ten minutes of instruction about juveniles, and that was to advocate the use of the same strategies employed for adults, including the use of adult language. See *id.* at 761.

nonetheless substantially impaired with respect to their ability to understand their *Miranda* rights. Consequently, this central assumption of *Miranda* no longer appears tenable.

*D. A Final Assumption: Officers Will Not Begin Questioning Unless Suspects Waive their Rights, and Questioning Will Stop if There is Any Later Indication that Suspects Wish to Invoke their Rights*

This Part of the Article examines the fourth assumption of the *Miranda* Court, the belief that officers will not begin to question suspects absent a clear and affirmative waiver of rights. This Part begins by reviewing current legal requirements for waivers and invocations. As the Article explains, the *Miranda* Court's high standards for waiver have largely been abrogated by *Davis v. United States*<sup>321</sup> and lower court cases extending *Davis*, as well as by decisions finding implied waivers of rights if suspects simply answer questions during interrogation. Next, the Article examines police training materials, which show that officers have taken advantage of these rulings, at least in California. This Part of the Article then concludes that the burden now appears to be on suspects to invoke their rights clearly and unequivocally, which may be difficult for suspects to do.

*1. Legal requirements for waivers and invocations*

The *Miranda* Court placed a "heavy burden" on prosecutors to establish that custodial suspects had waived their rights before statements could be admitted into evidence. Suspects could show "in any manner" that they did not wish to waive their rights. Without an initial waiver, questioning could not begin. Once questioning had legitimately begun, it could later be halted by an invocation made in any manner. In decisions issued soon after *Miranda*, the Court reiterated these principles.<sup>322</sup> But this would change.

In *Davis*, the defendant was arrested by Naval Investigative Service agents. He initially waived his rights orally and in writing. Later, during the interrogation, he said, "Maybe I should talk to a lawyer." Agents clarified that remark with Davis, who said that he did not want a lawyer. Eventually Davis made an unequivocal request for counsel and questioning ceased.<sup>323</sup> In the Supreme Court, Davis contended that interrogation should have stopped after he made what was concededly an ambiguous remark about a lawyer.<sup>324</sup> The government argued that the "proper response . . . to a suspect's ambiguous reference to counsel" is to ask clarifying questions, which the agents had

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321. 512 U.S. 452 (1994).

322. See, e.g., *Tague v. Louisiana*, 444 U.S. 469, 471 (1980) (per curiam) (finding that the court improperly admitted a statement where the prosecution did not introduce any evidence to establish that the defendant knowingly and intelligently waived his rights).

323. See *Davis*, 512 U.S. at 454-55.

324. See *id.* at 459.

done.<sup>325</sup>

Writing for the Court, Justice O'Connor adopted a more extreme position than sought by the government. She noted the particularly powerful protections that come into play under *Edwards v. Arizona* when a suspect asks for counsel.<sup>326</sup> Davis had already waived his rights; his comment about counsel came during the middle of interrogation. Said the Court:

A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although *Edwards* provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.<sup>327</sup>

Though the suspect need not speak “with the discrimination of an Oxford don,” unless the statement is “an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.”<sup>328</sup>

*Davis* involved an ambiguous reference to counsel, not the right to remain silent, and it came *after* the defendant already gave clear written and oral waivers. One might think that *Davis*'s “unambiguous or unequivocal” requirement would therefore apply only to post-waiver invocations and to requests for counsel. However, many jurisdictions have now extended *Davis* to the initial waiver stage and to the right to remain silent.

At least seven federal circuits have applied the *Davis* clear statement standard at the initial waiver stage. These courts have used *Davis* to measure the validity of an initial waiver either on direct appeal or on federal habeas corpus review of a state conviction (where they have found such an extension to be a reasonable application of clearly established federal law).<sup>329</sup> The highest courts of nineteen states have similarly applied *Davis* at the initial waiver stage.<sup>330</sup> Only one federal circuit, the Ninth, and the highest courts of only four

325. Brief for the United States at 29, 30, 45-56, *Davis*, 512 U.S. 452 (No. 92-1949).

326. *Davis*, 512 U.S. at 458 (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)).

327. *Id.* at 460-61.

328. *Id.* at 459 (quoting Souter, J., concurring); *id.* at 461-62. I note that the Court previously held that the same waiver/invocation tests for adults also apply to juveniles. See *Fare v. Michael C.*, 442 U.S. 709, 718, 724-27 (1979).

329. See *James v. Marshall*, 322 F.3d 103, 108-09 (1st Cir. 2003) (habeas corpus case); *United States v. Johnson*, 400 F.3d 187, 194-95 (4th Cir. 2005); *United States v. Suarez*, 263 F.3d 468, 482-84 (6th Cir. 2001); *United States v. Lee*, 413 F.3d 622, 625-27 (7th Cir. 2005); *United States v. Syslo*, 303 F.3d 860, 865-66 (8th Cir. 2002); *United States v. Brown*, 287 F.3d 965, 970-73 (10th Cir. 2002); *United States v. Acosta*, 363 F.3d 1141, 1151-54 (11th Cir. 2004).

330. See *Moore v. State*, 903 S.W.2d 154, 157-58 (Ark. 1995); *People v. Crittenden*, 885 P.2d 887, 911-13 (Cal. 1994); *People v. Adkins*, 113 P.3d 788, 791-92 (Colo. 2005); *State v. Rollins*, 714 A.2d 1217, 1219-20 (Conn. 1998); *McDougal v. State*, 591 S.E.2d 788, 793-94 (Ga. 2004); *People v. Christopher K.*, 841 N.E.2d 945, 962-65 (Ill. 2005); *Jolley v. State*, 684 N.E.2d 491, 493 (Ind. 1997); *State v. Jackson*, 19 P.3d 121, 124-25 (Kan. 2001); *Ragland v. Commonwealth*, 191 S.W.3d 569, 586-87 (Ky. 2006); *State v. Payne*, 833 So. 2d 927, 934-39 (La. 2002); *Kaczmarek v. State*, 91 P.3d 16, 27 (Nev. 2004); *State v. Barrera*, 22 P.3d 1177, 1184-86 (N.M. 2001); *State v. Williams*, 793 N.E.2d 446, 457-59 (Ohio 2003); *State v. Charboneau*, 913

states have expressly restricted *Davis* to the post-waiver invocation stage.<sup>331</sup> However, several other jurisdictions have limited *Davis* by placing different obligations on officers as a matter of state law.<sup>332</sup>

At least seven federal circuits have applied the *Davis* standard to the right to remain silent. Two of the circuits have utilized *Davis* to determine whether a defendant sufficiently invoked the right to remain silent to require officers to cease an ongoing interrogation.<sup>333</sup> Five circuits have gone so far as to apply *Davis* to the right to remain silent at the initial waiver stage.<sup>334</sup> Likewise, the highest courts in at least thirteen states have extended *Davis* to the invocation of the right to remain silent during an ongoing interrogation.<sup>335</sup> The highest courts of at least two other states have applied *Davis* to determine if suspects initially waived the right to remain silent.<sup>336</sup> I have not found any decision of a state high court or federal appellate court expressly refusing to extend *Davis* to the right to remain silent.<sup>337</sup>

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P.2d 308, 316-21 (Or. 1996); *State v. Saylor*, 117 S.W.3d 239, 244-47 (Tenn. 2003); *Tuttle v. State*, No. 72,387, 1997 Tex. Crim. App. LEXIS 87, at \*26-30 (Nov. 5, 1997); *Commonwealth v. Hilliard*, 613 S.E.2d 579, 584-86 (Va. 2005); *State v. Potter*, 478 S.E.2d 742, 750-51 (W. Va. 1996); *Monroe v. State*, 126 P.3d 97, 101-03 (Wyo. 2006).

331. See *United States v. Rodriguez*, 518 F.3d 1072 (9th Cir. 2008); *Cuervo v. State*, 967 So. 2d 155, 161-62 (Fla. 2007); *State v. Holloway*, 760 A.2d 223, 228 (Me. 2000); *State v. Tuttle*, 650 N.W.2d 20, 27-28 (N.D. 2002); *State v. Leyva*, 951 P.2d 738, 742-43 (Utah 1997).

332. See *State v. Hoey*, 881 P.2d 504, 520-25 (Haw. 1994); *State v. Spang*, 48 P.3d 727, 732-34 (Mont. 2002); *State v. Chew*, 695 A.2d 1301, 1316-18 (N.J. 1997).

333. See *Barnes v. Johnson*, 160 F.3d 218, 225 (5th Cir. 1998) (habeas corpus case); *Medina v. Singletary*, 59 F.3d 1095, 1100 (11th Cir. 1995) (habeas corpus case, but directly holding that *Davis* applies to the right to remain silent); see also *United States v. Barnes*, No. 98-4460, 1999 U.S. App. LEXIS 9367 (4th Cir. May 18, 1999) (unpublished decision).

334. See *James v. Marshall*, 322 F.3d 103, 108 (1st Cir. 2003) (habeas corpus case); *United States v. Hurst*, 228 F.3d 751, 759-60 (6th Cir. 2000); *United States v. Banks*, 78 F.3d 1190, 1197-98 (7th Cir. 1996), *rev'd on other grounds*, *Mills v. United States*, 519 U.S. 990 (1996); *United States v. Johnson*, 56 F.3d 947, 955 (8th Cir. 1995); *Thomas v. Lamarque*, 121 Fed.Appx. 220, 222 (9th Cir. 2005) (habeas corpus case; unpublished decision); *United States v. Nelson*, 450 F.3d 1201, 1212 (10th Cir. 2006); see also *United States v. Ramirez*, 79 F.3d 298, 305 (2d Cir. 1996) (assuming arguendo that *Davis* applies to the right to remain silent).

335. See *People v. Stitely*, 108 P.3d 182, 196 (Cal. 2005); *People v. Arroya*, 988 P.2d 1124, 1131 (Colo. 1999); *State v. Owen*, 696 So. 2d 715, 719-20 (Fla. 1997); *State v. Robertson*, 712 So. 2d 8, 31 (La. 1998); *State v. Lockhart*, 830 A.2d 433, 442-43 (Me. 2003); *State v. Williams*, 535 N.W.2d 277, 284-85 (Minn. 1995); *State v. Golphin*, 533 S.E.2d 168, 225 (N.C. 2000); *State v. Greybull*, 579 N.W.2d 161, 163-64 (N.D. 1998); *State v. Aleksey*, 538 S.E.2d 248, 253-54 (S.C. 2000); *State v. Tiedemann*, 162 P.2d 1106, 1110 (Utah 2007); *State v. Bacon*, 658 A.2d 54, 65-66 (Vt. 1995); *State v. Farley*, 452 S.E.2d 50, 59 (W. Va. 1994); *Dowthitt v. State*, 931 S.W.2d 244, 257 (Tex. Crim. App. 1996); see also *Draper v. State*, No. 147, 2002 Del. LEXIS 51, at \*7 (Del. Jan. 28, 2002) (applying *Davis* to right to remain silent as a matter of federal law, but requiring different procedures as a matter of state law).

336. See *Whitaker v. State*, 71 S.W.3d 567, 572 (Ark. 2002); *State v. Donesay*, 959 P.2d 862, 872 (Kan. 1998).

337. In *Soffar v. Johnson*, 300 F.3d 588, 594 n.5 (5th Cir. 2002) (en banc), the Fifth Circuit declined to address the point, but noted that it had already held that application of *Davis* to the right to remain silent is not contrary to clear Supreme Court authority (and so is not a basis for habeas corpus relief), and noted also that other circuits have extended *Davis* to the right to remain silent.

Though *Davis* provides that defendants need not speak with the precision of an “Oxford don,” courts tend to construe strictly the requirement of an unequivocal assertion of rights, thus narrowing the duty of officers to cease or refrain from questioning. Here are some statements made by defendants that courts have found not to be sufficient invocations under the *Davis* standard:

I think it’s about time for me to stop talking.<sup>338</sup>

I’m not saying shit to you no more, man. You, nothing personal man, but I don’t like you. You’re scaring the living shit out of me . . . . That’s it. I shut up.<sup>339</sup>

Get the f— out of my face. I don’t have nothing to say. I refuse to sign [the waiver form].<sup>340</sup>

I think I would like to talk to a lawyer.<sup>341</sup>

I think I need a lawyer.<sup>342</sup>

Do you think I need a lawyer?<sup>343</sup>

I can’t afford a lawyer but is there anyway I can get one?<sup>344</sup>

I called a lawyer. He wants—the lawyer wants to be here before I say anything.<sup>345</sup>

In *Anderson v. Terhune*, a panel of the Ninth Circuit went so far as to hold that “I plead the Fifth” could be an ambiguous assertion of the right to remain silent,<sup>346</sup> though the en banc Court reversed.<sup>347</sup> The State’s petition for a writ of certiorari was denied.<sup>348</sup>

Professor Marcy Strauss recently examined almost four hundred published state and federal decisions applying *Davis*.<sup>349</sup> She describes the types of statements that courts may routinely find to be ambiguous, such as questions or comments about counsel, as well as language that includes modifiers or hedges.<sup>350</sup> Strauss notes that while many jurisdictions had, prior to *Davis*, required officers to clarify ambiguous requests, it now “appears that most

338. *Stitely*, 108 P.3d at 195-96.

339. *People v. Jennings*, 760 P.2d 475, 482-84 (Cal. 1988).

340. *United States v. Banks*, 78 F.3d 1190, 1196-98 (7th Cir. 1996).

341. *Clark v. Murphy*, 331 F.3d 1062, 1069-72 (9th Cir. 2003).

342. *State v. Henness*, 679 N.E.2d 686, 695-96 (Ohio 1997); *see also* *Burket v. Angelone*, 208 F.3d 172, 197-98 (4th Cir. 2000).

343. *Diaz v. Senkowski*, 76 F.3d 61, 63-66 (2d Cir. 1996).

344. *Lord v. Duckworth*, 29 F.3d 1216, 1219-22 (7th Cir. 1994).

345. *State v. Baker*, No. 2004 CA 19, 2005 Ohio App. LEXIS 43, at \*7-10 (Ohio Ct. App. Jan 7, 2005).

346. 467 F.3d 1208, 1212-13 (9th Cir. 2006), *rev’d en banc*, 516 F.3d 781 (9th Cir. 2008). The panel majority ruled that the state court, which found the statement equivocal, did not unreasonably apply clearly established federal law and habeas corpus relief was unavailable. Disclosure: I submitted a brief supporting rehearing.

347. *Anderson v. Terhune*, 516 F.3d 781 (9th Cir. 2008).

348. *See Cate v. Anderson*, No. 07-1436, 2008 WL 4454264 (U.S. Oct. 6, 2008).

349. *See* Marcy Strauss, *Understanding Davis v. United States*, 40 LOY. L.A. L. REV. 1011, 1055 (2007).

350. *See id.* at 1035-47.

[officers] do not.”<sup>351</sup> Along the same lines, one interrogation trainer characterizes the cases and officers’ duties this way: “Wishy-washy qualifications such as ‘I think . . .’ or ‘Maybe I should . . .’ or ‘If this is going to go much further . . .’ would normally be ambiguous enough to come within the *Davis* rule that there is . . . no need to stop questioning.”<sup>352</sup>

Apart from *Davis* and its progeny, another important development in the waiver doctrine is the prevalence of implied waivers. In making clear the government’s “heavy burden” to demonstrate that suspects have knowingly and intelligently waived their rights, the *Miranda* Court emphasized that a valid waiver could not be presumed from silence or “from the fact that a confession was in fact eventually obtained.”<sup>353</sup> Thirteen years later, in *North Carolina v. Butler*, the justices held that at least in some cases waiver “can be clearly inferred from the actions and words of the person interrogated,”<sup>354</sup> thus permitting questioning without an express written or oral waiver. Professor George Thomas has written that “once the prosecutor proves that the warnings were given in a language that the suspect understands, courts find waiver in almost every case.”<sup>355</sup> My own research shows that every federal court of appeals has upheld the admission of a statement based upon an implied *Miranda* waiver,<sup>356</sup> as have appellate courts in at least forty-two states and the District of Columbia.<sup>357</sup>

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351. *Id.* at 1058-59.

352. Devallis Rutledge, *Davis Rules*, POLICE: THE LAW ENFORCEMENT MAGAZINE, Jan. 2006, at 72.

353. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

354. 441 U.S. 369, 373 (1979).

355. George C. Thomas III, *Separated at Birth but Siblings Nonetheless: Miranda and the Due Process Notice Cases*, 99 MICH. L. REV. 1081, 1082 (2001); *see also* Kamisar, *supra* note 243, at 180-82.

356. *See* *Bui v. DiPaolo*, 170 F.3d 232, 240-41 (1st Cir. 1999); *United States v. Scarpa*, 897 F.2d 63, 67-69 (2d Cir. 1990); *United States v. Velasquez*, 626 F.3d 314, 319-20 (3d Cir. 1980); *United States v. Cardwell*, 433 F.3d 378, 389-90 (4th Cir. 2005); *United States v. McKinney*, 758 F.2d 1036, 1044-45 (5th Cir. 1985); *United States v. Stark*, 609 F.2d 271, 273 (6th Cir. 1979); *United States v. Banks*, 78 F.3d 1190, 1199 (7th Cir. 1996); *Thai v. Mapes*, 412 F.3d 970, 976-77 (8th Cir. 2005); *United States v. Washington*, 462 F.3d 1124, 1133-34 (9th Cir. 2006); *United States v. Gell-Iren*, 146 F.3d 827, 830 (10th Cir. 1998); *United States v. Gonzalez*, 833 F.2d 1464, 1466 (11th Cir. 1987); *see also* *United States v. Manderson*, 904 F.2d 78, 78 (D.C. Cir. 1990) (unpublished disposition).

357. *See* *Love v. State*, 372 So. 2d 414, 415 (Ala. Crim. App. 1979); *Smith v. State*, No. 4849, 2004 Alas. App. LEXIS 62, at \*8-10 (Alaska Ct. App. Mar. 31, 2004) (memorandum decision); *State v. Montes*, 667 P.2d 191, 194-96 (Ariz. 1983); *Leshe v. State*, 803 S.W.2d 522, 526-27 (Ark. 1991); *People v. Whitson*, 949 P.2d 18, 30 (Cal. 1998); *State v. Gonzalez*, 537 A.2d 460, 463 (Conn. 1988); *Garvey v. State*, 873 A.2d 291, 298-99 (Del. 2005); *Kitt v. United States*, 904 A.2d 348, 357 (D.C. 2006); *Thomas v. State*, 894 So. 2d 126, 136 (Fla. 2004); *Williams v. State*, 260 S.E.2d 879, 882 (Ga. 1979); *State v. Wallace*, 94 P.3d 1275, 1286-88 (Haw. 2004); *State v. Law*, 39 P.3d 661, 665 (Idaho Ct. App. 2002); *People v. Cook*, 815 N.E.2d 879, 890-91 (Ill. App. Ct. 2004); *Cobb v. State*, 412 N.E.2d 728, 735-36 (Ind. 1980); *State v. Lamp*, 322 N.W.2d 48, 54 (Iowa 1982); *State v. Kirtdoll*, 136 P.3d 417, 422-25 (Kan. 2006); *Ragland v. Commonwealth*, 191 S.W.3d 569, 586 (Ky. 2006); *State v. Rebstock*, 418 So. 2d 1306, 1309 (La. 1982); *State v. Curtis*, 552 A.2d 530, 531-32 (Me. 1988); *Collins v. State*, 447 A.2d 1272, 1275-

As the next sections of this Article show, the combination of *Davis* and implied waivers has altered the contours of the *Miranda* doctrine.

## 2. Waivers, invocations, and officer training

I will begin with *Davis*. California training materials regularly instruct officers about *Davis* and cases applying that decision. There has been some uncertainty with respect to waivers of the right to remain silent, as opposed to counsel. This might reflect the fact that the California Supreme Court did not extend *Davis* to invocations of the right to remain silent until *People v. Stitely* in 2005.<sup>358</sup> Nevertheless, *Davis* and its progeny are emphasized in continuing training.

In basic academy training, recruits are instructed that after suspects receive and acknowledge that they understand their rights, suspects must either waive or invoke. They may invoke the right to silence by words or conduct reflecting an unwillingness to discuss the case. However, “[u]nlike the right to silence, a person’s invocation of the *Miranda* right to have an attorney present or to speak to an attorney can only be invoked by a *clear and express* request for an attorney.”<sup>359</sup> Recruits are thus taught that the *Davis* standard applies at the initial waiver stage to the right to counsel.

As one might expect, many of the advanced written training materials emphasize *Davis*, initially with respect to the right to counsel.<sup>360</sup> But more recent publications push *Davis*’s implications even more aggressively, applying the *Davis* rule to the right to remain silent.<sup>361</sup> One resource explains that courts

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76 (Md. Ct. Spec. App. 1982); *Commonwealth v. Mandeville*, 436 N.E.2d 912, 918-20 (Mass. 1982); *Johnson v. State*, No. A03-934, 2004 Minn. App. LEXIS 450, at \*8-10 (Minn. Ct. App. Apr. 27, 2004) (unpublished opinion); *State v. Brosseit*, 958 S.W.2d 615, 618-19 (Mo. Ct. App. 1998); *State v. Walker*, 724 N.W.2d 552, 560-61 (Neb. 2006); *Mendoza v. State*, 130 P.3d 176, 181-82 (Nev. 2006); *State v. Wambrun*, 648 A.2d 1153, 1158-59 (N.J. Super. Ct. App. Div. 1984); *State v. Martinez*, 979 P.2d 718, 723-25 (N.M. 1999); *People v. Sirno*, 565 N.E.2d 479, 480 (N.Y. 1990); *State v. Connley*, 256 S.E.2d 234, 235-37 (N.C. 1979); *State v. Lather*, 853 N.E.2d 279, 280-83 (Ohio 2006); *Hammer v. State*, 760 P.2d 200, 202-03 (Okla. Crim. App. 1988); *State ex rel. Juvenile Dep’t v. Cook*, 909 P.2d 202, 203-04 (Or. Ct. App. 1996); *Commonwealth v. Bomar*, 826 A.2d 831, 843 (Pa. 2003); *State v. Torres*, 787 A.2d 1214, 1225 (R.I. 2002); *State v. Tyson*, 323 S.E.2d 770, 771-72 (S.C. 1984); *State v. Bult*, 351 N.W.2d 731, 735 (S.D. 1984); *State v. Crawford*, No. E2005-02018-CCA-R3, 2007 Tenn. Crim. App. LEXIS 83, at \*25-27 (Tenn. Ct. Crim. App. Feb 1, 2007); *Garcia v. State*, 919 S.W.2d 370, 387, 404 (Tex. Ct. Crim. App. 1996); *State v. Leyva*, 951 P.2d 738, 744-45 (Utah 1997); *Cheng v. Commonwealth*, 393 S.E.2d 599, 604 (Va. 1990); *State v. Smith*, 624 S.E.2d 474, 478-81 (W. Va. 2005); *State v. Woods*, 345 N.W.2d 457, 464-68 (Wis. 1984); *Cheatham v. State*, 719 P.2d 612, 618-20 (Wyo. 1986).

358. See *People v. Stitely*, 108 P.3d 182, 196 (extending *Davis* to invocation of the right to remain silent after an initial waiver of rights).

359. POST, *Laws of Arrest*, *supra* note 128, at 5-12.

360. See LEGAL SOURCEBOOK, *supra* note 181, at § 7.30 (Rev. Nov. 2005), § 7.31 (Rev. Jan. 2007), § 7.32 (Rev. May 2007), § 7.33 (Rev. Jan. 2006) (same, and collecting cases); PHILLIPS, *supra* note 312, at 57 (noting the different tests for invocation of the rights to silence and counsel).

361. See, e.g., LEGAL SOURCEBOOK, *supra* note 181, at §§ 7.30a-7.32 (Rev. May 2008). For

previously interpreted “invocations” too liberally, but a “dramatic change” came when the Court decided *Davis*.<sup>362</sup> Further, “[t]his made sense. After all, if a suspect has been advised of his rights and says he understands them, it is not asking too much to require that he clearly and unambiguously inform officers if and when he wants to invoke them.”<sup>363</sup> A suspect invokes the right to remain silent “if he says something that clearly demonstrates either, (1) a present unwillingness to submit to an interview or, (2) an unequivocal desire to terminate an interview in progress.”<sup>364</sup>

Of the POST resources, the *Case Law Today* series has been the most vigorous in its training about *Davis* and its progeny. I reviewed *Case Law Today* videos for a six-and-a-half year period. During that time, eight of the fifty-three segments on statements were devoted to ambiguous invocations, including *Davis* and its applications.<sup>365</sup> Due to the sheer number of segments as well as their content, officers could scarcely mistake either the importance of *Davis* or their freedom to continue questioning absent an affirmative and quite pristine invocation.

It is uncertain whether the Ninth Circuit’s recent decision in *United States v. Rodriguez*,<sup>366</sup> limiting *Davis* to the post-waiver invocation stage, will alter the conduct of state and local police in California. Training in the immediate wake of the March 2008 decision has not been uniform. POST and the *California Peace Officers’ Legal Sourcebook* report the decision, but seek to limit its impact to federal investigations and prosecutions.<sup>367</sup> Another prominent trainer has stated his initial impression that the Ninth Circuit “is

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an example of how to deal with a suspect’s question about counsel, see SCHAFER & NAVARRO, *supra* note 60, at 57 (“If the suspect asks the question, ‘Do you think I need a lawyer?’ the investigator should simply state, ‘I think you need to tell the truth.’”).

362. *Miranda Waivers and Invocations*, *supra* note 110, at 17.

363. *Id.* at 17-18 (footnote omitted).

364. *Id.* at 18-19 (footnote omitted). This view is not unanimous among trainers. See Phillips, *supra* note 110, at 33 (although “the need for clarity when attempting to invoke one’s right to silence is presently subject to a difference of opinion, all authorities agree that the *right to counsel* can only be invoked by a clear, express, and *unambiguous* request for an attorney”).

365. See DVD: *Case Law Today: Miranda: Geez! Did He Invoke or What* (POST July 2003); DVD: *Case Law Today: Miranda: Right to Silence ‘Right Now’* (POST May 2004); DVD: *Case Law Today: Ambiguous Requests for Counsel* (POST Mar. 2005); DVD: *Case Law Today: Miranda: Unambiguous Invocation* (POST June 2005); DVD: *Case Law Today: Miranda: Unequivocal Invocation of Right to Counsel* (POST Oct. 2005); DVD: *Case Law Today: Miranda: More on Unequivocal Invocation of Right to Counsel* (POST Dec. 2005); DVD: *Case Law Today: Pushing the Miranda Envelope* (POST Mar. 2007); DVD: *Case Law Today: Initial Ambiguous Invocation of Miranda Rights* (POST June 2008).

366. 518 F.3d 1072.

367. See DVD: *Case Law Today, Initial Ambiguous Invocation of Miranda Rights*, *supra* note 365 (stating that the “bottom line” is “if you got a case that is going federal or is likely to end up in federal court, it is much safer if there is an ambiguous invocation when you first advise the person of their *Miranda* rights . . . to do the follow-up”); LEGAL SOURCEBOOK, *supra* note 181 at § 7.30a (Rev. May 2008) (“Although federal decisions are not binding on California state courts, the failure to follow this rule will result in suppression of the statements in a Ninth Circuit federal court.”).

‘spot on’ in this case,” and he notes that the ruling may be consistent with language in several California Supreme Court opinions.<sup>368</sup>

Training on implied waivers in California has also been pervasive. Recruits are told in the academy that *Miranda* waivers can be express, implied, or conditional. The recruits learn that an implied waiver exists when a suspect “acknowledges understanding the warnings and exhibits conduct indicating waiver of rights.”<sup>369</sup> With an implied waiver, the “peace officer starts asking questions and the person answers.”<sup>370</sup>

Advanced training on implied waivers is widespread. Leading written training resources uniformly state that express waivers are preferred for proof purposes, because prosecutors have an easier time defeating suppression motions when they are armed with express waivers. However, implied waivers—and resulting statements—are preferred to no waiver at all.<sup>371</sup> Officers are also commonly trained to seek a combination of express and implied waivers. A question such as “are you willing to talk to us now?” seeks an *express* waiver of the right to remain silent and an *implied* waiver of the right to counsel.<sup>372</sup> Many of the written materials caution that waivers will not be automatically implied by the mere fact that suspects respond to questioning; rather, courts must still determine by all of the circumstances that suspects intended to give up their rights.<sup>373</sup>

Since at least 1995, POST has been California’s most forceful law enforcement proponent of implied waivers. In POST’s August 1995 telecourse, *Interrogations/Confessions: Legal Issues*, the instructors roll out a new POST-approved *Miranda* card, which is contained in the materials accompanying the telecourse.<sup>374</sup> The card is described as “a slightly less formalistic but perfectly

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368. Cal. Peace Officers’ Assoc., *Miranda, Equivocal Invocations and an Officer’s Duty to Clarify: United States v. Rodriguez (9th Cir. Mar. 10, 2008) 2008 DJDAR 3402*, TRAINING BULL SERVICE, Apr. 2008, at 8 (reprinting bulletin by Robert C. Phillips). The trainer reflects that the ruling is inconsistent with his own past training and that he intends to review the case law and examine the issue further.

369. POST, *Laws of Arrest*, *supra* note 128, at 5-10.

370. *Id.*

371. See LEGAL SOURCEBOOK, *supra* note 181, at § 7.24a, § 7.24b (Rev. Nov. 2006); Phillips, *supra* note 110, at 43. A POST *Case Law Today* update makes this point as well. See DVD: *Case Law Today: Implied Miranda Waivers and Spontaneous Statements* (POST May 2005).

372. See CRIMINAL INVESTIGATION, *supra* note 139, at 196.

373. See, e.g., LEGAL SOURCEBOOK, *supra* note 181, at § 7.24b (Rev. Nov. 2006); Phillips, *supra* note 110, at 40-43; SACRAMENTO SHERIFF’S DEP’T TRAINING ACAD., *supra* note 59, at 15; Fermin, *supra* note 139, at 4.

374. See *Interrogation/Confessions: Legal Issues, Interrogation and Miranda*, POST TELECOURSE REFERENCE GUIDE, Aug. 10, 1995, available at <http://libcat.post.ca.gov/dbtw-wpd/documents/POST/55607143.pdf>.

It appears that the basic academy curriculum was also changed around 1995 to include training on implied *Miranda* waivers. The 1994 POST instructors’ materials do not reference implied waivers, but implied waivers appear in the 1997 materials. Compare CAL. COMM’N ON PEACE OFFICER STANDARDS AND TRAINING, BASIC COURSE INSTRUCTOR UNIT GUIDE 15, LAWS

legal version of *Miranda*.” The trainers emphasize the legality and strategic advantages of implied waivers. As they point out, every prosecutor prefers an express waiver, but it is not always possible to obtain one. Whether to seek an express waiver depends on the investigator’s judgment as to whether the suspect will waive or not. One trainer notes that if he is interviewing someone with a criminal record who has experience with police questioning, he would seek an implied waiver and avoid the risk that the suspect will invoke.

Fast-forward eight years. In POST’s 2003 *Interrogation Law* telecourse, instructors emphasize implied waivers, but do so without any caution or qualification. They appear to equate waiver with the fact that a suspect answers questions following *Miranda* warnings. Says one trainer:

An implied waiver happens if an officer admonishes the suspect, the suspect understands so he knows he has the right not to say anything, and then he answers questions. If he just goes ahead and answers questions the officer asks him, he’s given up that right implicitly, so there’s a valid implied waiver.

Another telecourse instructor adds: “The fact that he’s talking to the officer is an implied waiver of his right to remain silent.”

After POST began emphasizing implied waivers in 1995, it appeared that not all law enforcement officials agreed with this practice.<sup>375</sup> Regardless, the approach spread,<sup>376</sup> fueled in part by a California Supreme Court case approving the practice.<sup>377</sup> There is no empirical evidence indicating the frequency with which officers in California obtain implied waivers. However, a 2004 training document from the Los Angeles County District Attorney’s office states that while express waivers are preferred, a “problem” is that “most police do not use” them.<sup>378</sup>

Perhaps the best way to understand the development of implied waivers is

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OF ARREST 46-52 (1994), available at <http://libcat.post.ca.gov/dbtw-wpd/documents/POST/32645626.pdf> with CAL. COMM’N ON PEACE OFFICER STANDARDS AND TRAINING, BASIC COURSE INSTRUCTOR UNIT GUIDE 15, LAWS OF ARREST 47-49 (Rev. 1997), available at <http://libcat.post.ca.gov/dbtw-wpd/documents/POST/173621265.pdf>.

375. See, e.g., Robert C. Phillips, *Express vs. Implied Miranda Waivers*, LEGAL UPDATE (Deputy Dist. Attorney & Law Enforcement Liaison Deputy, San Diego, Cal.), June 5, 1998, at 1 (criticizing “the misleading teachings of P.O.S.T.” on this point, and noting that officers who obtain implied waivers “run a serious risk” of losing a confession because a judge will have to examine all of the surrounding circumstances to decide if a suspect has validly waived *Miranda* rights).

376. For example, a 1999 memorandum from the Chief of Police in San Jose orders officers to use the new POST warning card. The memorandum recommends that officers obtain an express waiver “wherever possible,” but says that officers may “at their discretion” seek an implied waiver. Memorandum from William M. Lansdowne, Chief of Police, City of San Jose to Sworn Personnel, Subject: New *Miranda* Cards 2 (June 23, 1999) (on file with author). The memorandum notes that “the Santa Clara County Police Chiefs’ Association agreed to follow District Attorney George Kennedy’s recommendation to adopt the new cards.” *Id.* at 1.

377. *People v. Whitson*, 949 P.2d 18, 30 (Cal. 1998).

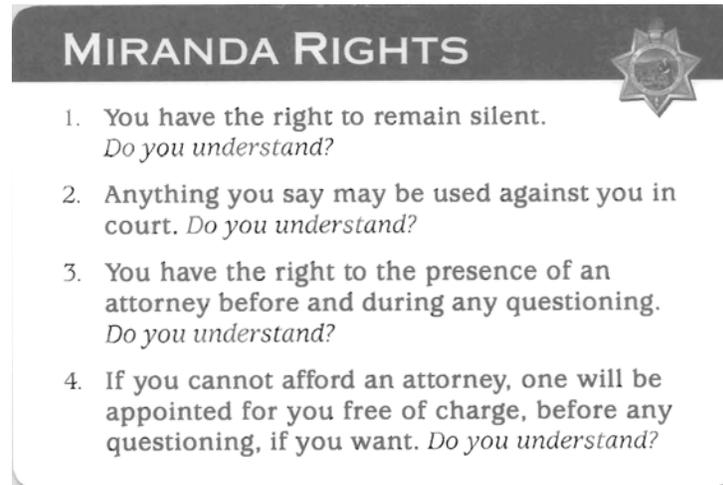
378. HYATT SELIGMAN, LOS ANGELES DIST. ATTORNEY’S OFFICE TRAINING DIVISION, *Miranda* AND MORE 8 (2004) (on file with author).

to compare the current *Miranda* card with prior versions. Here is a version of the warnings and waivers from a 1980 training manual published by a private organization:<sup>379</sup>

ADMONITION AND WAIVER OF RIGHTS

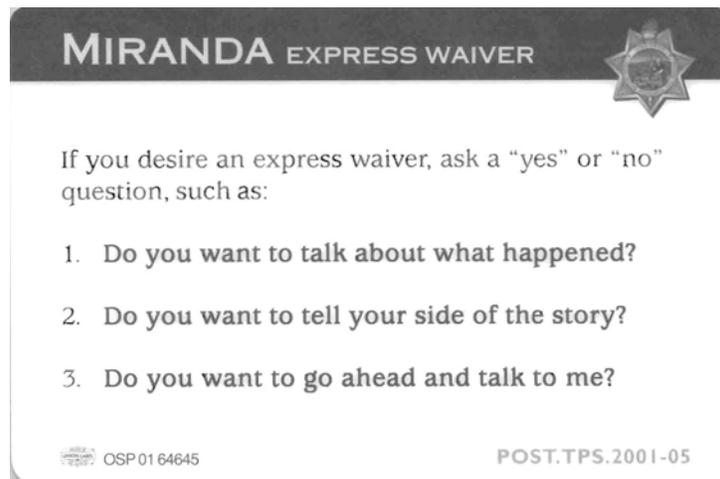
1. You have a right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to consult a lawyer before we talk to you and to have him with you while we talk to you.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, free of charge.
5. Do you understand each of the rights explained to you?
6. Do you want to talk about this case or not?
7. Do you want a lawyer or not?

Here is the front and back of POST's current *Miranda* card:<sup>380</sup>



379. JOSEPH D. SCHLOSS, SR., HANDBOOK OF ARREST, SEARCH AND SEIZURE 62 (Police Science Associates, 1980 rev. ed.).

380. The card was provided to me by POST. With only one minor word variation, these are the same warnings that have been in use since 1995.



One might note the simpler language of the warnings, the interspersing of “Do you understand?” with each warning and, of course, that obtaining express waivers is optional. The suggested waiver questions also seek a “mixed” waiver; that is, an express waiver of the right to remain silent and an implied waiver of the right to counsel.

### 3. *The Miranda Court’s assumption about waivers and invocations today*

The evidence now seems contrary to the *Miranda* Court’s belief that warnings and waivers would create an unpressured “time out” prior to questioning, and that suspects would have to articulate waivers clearly before questioning could begin. We also can no longer indulge in the assumption that questioning will take place only with suspects who have decided that they are willing to speak, or that suspects are easily able to stop questioning once it has begun.

In large part, *Davis* undermined the *Miranda* Court’s assumption. The *Davis* majority could not have mistaken the import of its ruling, for as the justices themselves said, “We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present.”<sup>381</sup> Legal scholars have heavily criticized *Davis* even as many courts have extended it to the right to remain silent and to the initial waiver stage.<sup>382</sup> The full impact of *Davis* is best understood in conjunction with implied waiver practices, a development that has received somewhat modest

381. *Davis*, 512 U.S. at 460.

382. See, e.g., WELSH WHITE, *Miranda’s WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER Dickerson* 117-18 (2001); Thomas, *supra* note 143, at 1969; Sandra Guerra Thompson, *Evading Miranda: How Seibert and Patane Failed to “Save” Miranda*, 40 VAL. U. L. REV. 645, 663-65 (2006).

attention from scholars.

In jurisdictions that use implied waivers, the distinction between initial waivers and subsequent invocations is entirely erased. Once officers begin questioning, the burden is placed on suspects to (a) come forward with an assertion, and (b) make that assertion with the requisite level of clarity. Any potential comments about silence or counsel are then assessed under the standards that apply to subsequent invocations as opposed to initial waivers; the issue becomes whether suspects have said enough to halt ongoing questioning rather than allowing it to start. Even in jurisdictions that theoretically seek to limit the application of *Davis* to subsequent invocations, *Davis* would appear to apply uniformly to all stages of interrogations so long as suspects have not invoked their rights in response to the very first post-warning question. The combination of *Davis* and the implied waiver doctrine thus remakes both the standard of proof and the burden of proof. In places that use implied waivers, we no longer require a suspect's clear articulation of waiver as the "green light" that permits interrogation to go forward. Rather we require a suspect's clear and firm articulation of invocation as the "red light" to stop it.

This raises two questions. If the combination of the *Davis* standard and the implied waiver doctrine is so powerful, it is important to determine how prevalent the combination has become. *Davis* is of course a Supreme Court case, applicable across the United States. As already noted, it has been extended in many places to the right to remain silent as well as to the initial waiver stage. Further study is needed with respect to practices in those jurisdictions whose highest courts have not yet approved such extensions. As for implied waivers, they are also permitted under the Supreme Court's ruling in *Butler*. I suspect that they are widely used nationally, though I have only studied California. The language of a number of appellate decisions is so matter-of-fact that it seems such use has become routine.<sup>383</sup> However, I do note that express waivers were sought in all interrogations in Professor Feld's study of juveniles in Ramsey County, Minnesota.<sup>384</sup>

The second question is the extent to which suspects are actually able to invoke their rights in a way that will be understood and acknowledged by investigating officers and the courts. Suspects are in a position of powerlessness in the stationhouse. Certainly the most common interrogation techniques operate by instilling this belief. To avoid offending those in power and for other reasons, suspects may articulate their positions in tentative ways;

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383. See, e.g., *United States v. Washington*, 462 F.3d 1124, 1134 (9th Cir. 2006) ("A person waives the right to remain silent if, after being informed of that right, the person does not invoke that right."); *People v. Sirno*, 565 N.E.2d 479, 480 (N.Y. 1990) (where "a defendant clearly understands his *Miranda* rights and promptly after having been administered those rights willingly proceeds to make a statement or answer questions during interrogation, no other indication prior to the commencement of interrogation is necessary to support a conclusion that the defendant implicitly waived those rights.").

384. Telephone Interview with Barry Feld (Sept. 17, 2007).

but tentative assertions of rights will not be recognized as invocations under an “unambiguous or unequivocal” standard.<sup>385</sup> Studies on this point, as well as articles documenting indirect and hedging speech patterns, were cited in briefing to the *Davis* Court,<sup>386</sup> though this did not appear to matter to the majority. In her recent review of *Davis* cases, Professor Strauss found “some evidence to support the theory that women and minorities often phrase requests for counsel in ways that the courts interpret as ambiguous,” though she did not reach any conclusions about women and ethnic minorities compared with males and Caucasians.<sup>387</sup> Additional research would be useful to illuminate the real-world impact of *Davis* and implied waivers, and assess the efficacy of a warning and waiver regime. Since the focus will be upon suspects’ behavior during interrogation, I believe that the research must also consider the way in which suspects respond to the Reid method and other tactics described in Parts II and III of this Article.

Given the holdings in *Davis* and *Butler* and the practices they permit, surely the burden must now be on proponents of *Miranda* to show that suspects are generally able to communicate to officers that they want counsel or do not wish to speak. I would welcome research on this point, but I am deeply skeptical that proponents of *Miranda* can prove their case.

#### IV

#### THE ROAD AHEAD

This Part of the Article seeks a way forward. I first ask whether, as a protective device, *Miranda* is really dead. I then explain why the courts are unlikely to fix *Miranda*. Next, I turn to law enforcement’s interests and ask whether these justify retaining *Miranda*’s safeguards. I end with a discussion of the legislative regulation of police conduct and the development of legal doctrines in a world without *Miranda*’s required protections.

##### *A. Are Miranda’s Safeguards Really Dead?*

I have suggested that the *Miranda* Court made four assumptions as to how warnings and waivers would operate to protect the Fifth Amendment privilege. Are these assumptions essential conditions for a system of warnings and waivers that truly protects the privilege? And if they are necessary conditions, how well does the system now fare? Let me start with the most important assumptions—the last two.

There can be no legitimate justification for a warning and waiver regime

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385. See, e.g., Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L. J. 259 (1993) (particularly addressing female speech patterns and power asymmetry).

386. See generally Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Petitioner, *Davis v. United States*, 512 U.S. 452 (1994) (No. 92-1949).

387. Strauss, *supra* note 349, at 1056.

unless we administer warnings in a way that suspects understand, and unless we provide a meaningful opportunity for suspects to exercise free will in the stationhouse. These must be considered necessary conditions for a system of warnings and waivers that effectively protects the Fifth Amendment privilege. But the best available evidence indicates that these two assumptions do not fare well under modern practices.

The *Eagan* decision has led to an unconstrained proliferation of warnings. Given the variations among the warnings—and the demonstrated inability of significant subsets of suspects to understand them—we cannot continue to assume that any admonition that “covers the bases” is in fact effective in conveying rights.

As for the ability of suspects to decline to waive their rights at the outset of questioning, or to affirmatively invoke them later, the effectiveness of *Miranda*'s regime has been greatly reduced by practices that the Supreme Court has tolerated if not openly encouraged. In *Davis*, the majority recognized that many suspects might not be able to articulate their rights with sufficient precision, but the Court adopted its rule nonetheless. *Davis* has been extended in many jurisdictions to the right to remain silent and to the initial waiver stage. The impact of *Davis* is magnified by implied waiver practices. The net result is to shift the burden to suspects to invoke their rights affirmatively at the outset of interrogation, and to do so with a very high degree of precision. While more research would be welcome on this point, I do not believe we can continue to assume that these procedures counter the “inherently compelling pressures” of custodial interrogation, at least not in the majority of jurisdictions.

The assumption that officers will give warnings and obtain waivers before the application of interrogation tactics is also important once we appreciate the power of modern interrogation techniques. In his dissent in *Miranda*, Justice White asked a critical question. If we conclude that custodial interrogation contains inherently compelling pressures, how can we assume that waivers are not tainted by those same pressures?<sup>388</sup> The Court initially answered this question by concluding that while custody inevitably supplies some pressures, at least the warnings will be given and waivers obtained in an atmosphere that is free of additional pressures. I do not see how we can answer Justice White's question unless warnings are given and waivers obtained before interrogation tactics are employed in earnest; there must be a separation between the two.

The evidence on the status of this assumption is mixed. The use of “bold” softening up tactics surely undermines the effectiveness of warnings and waivers. If we seek to separate the warnings and waivers from interrogation tactics, we cannot permit officers to give the warnings late in the game, such as after a confrontation statement. The milder tactics are more difficult to assess. Officers need to do their jobs. We cannot forbid all pre-warning

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388. See *Miranda v. Arizona*, 384 U.S. 436, 536 (1966) (White, J., dissenting).

communications between officers and suspects, nor should we want to, but we must understand that even “mild” softening up tactics can reduce the efficacy of a system of warnings and waivers.

Finally, I am less sure about the Court’s assumptions as to the element of custody. This element identifies a core group of interrogations—those that occur after a full custodial arrest—that generally (but not always) contain inherently compelling pressures. The evidence is inconclusive as to whether “custody” sufficiently captures interrogations performed at the stationhouse with *Beheler* warnings. I think it is important to acknowledge this latter category of interrogations and to understand that the margins of *Miranda* may be manipulated. We could have a workable *Miranda* rule that excludes these non-custodial interrogations from its reach, though courts should then evaluate the admissibility of any resulting confessions with a full understanding of the way in which *Beheler* warnings and the like cohere with interrogation techniques.

So how well do *Miranda*’s safeguards fare overall? I believe that we have a *Miranda* rule that is somewhat limited in reach, which sometimes locates warnings and waivers within the heart of a highly structured interrogation process, provides admonitions that many suspects do not understand, and appears not to afford many suspects a meaningful way to assert their Fifth Amendment rights. As a prophylactic device to protect suspects’ privilege against self-incrimination, I believe that *Miranda* is largely dead. I would welcome compelling evidence to the contrary or proof that California is a complete outlier, but I do not believe such evidence exists.

#### *B. Why the Courts Can’t Fix Miranda*

Some may ask whether a system of warnings and waivers can be made effective in protecting Fifth Amendment rights. Surely we should try to repair *Miranda*, rather than abandon a decades-old precedent that has “become part of our national culture.”<sup>389</sup> A uniform repair would have to come from the Supreme Court and I do not believe that there is a reasonable possibility of a meaningful fix, though some individual state courts may make some headway.<sup>390</sup>

To begin with, the evidence no longer supports the per se aspect of *Miranda*’s safeguards. Standardized warnings simply do not work in large numbers of cases. If we are honest about this, we cannot avoid making individualized assessments of voluntariness or of the validity of waivers.

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

390. By rooting its holding in the Fifth Amendment, the Supreme Court made *Miranda*’s rules applicable to all federal and state prosecutions. Other actors have more limited powers. Congress could pass a statute regulating the conduct of federal law enforcement agencies or governing the admission of evidence in federal criminal cases. The state legislatures can do the same for state agencies and prosecutions. Some state courts, as a matter of state law, have afforded suspects greater protection than *Miranda* provides. *See supra* note 332.

However, a primary virtue of *Miranda* is, in theory, its ability to give clear guidance and bright line rules to police, judges, and prosecutors, thus avoiding difficult individualized assessments. It is not so much that the Court has retreated from *Miranda* but rather that the one-size-fits-all safeguards put in place by the *Miranda* Court could never have functioned as intended. Or perhaps it would be more accurate to say that the Court failed to anticipate the proportion of suspects who would be uninformed and unempowered by form warnings.

Other deficiencies of *Miranda* are of more recent making, and pose different challenges. The problem is not how to end practices that are contrary to rulings of the Supreme Court, such as questioning “outside *Miranda*” or the “Missouri two-step.” Rather, the Court has issued decisions that tolerate tactics that diminish *Miranda*’s effectiveness, and officers have predictably been trained to use these tactics. The training that I have described is generally faithful to Supreme Court and lower court rulings.<sup>391</sup> The Supreme Court would have to refashion several different lines of cases, including those that affect the timing and content of warnings, as well as the implied waiver and invocation doctrines. This is a tall order. I do not see any appetite on the Court for engaging in a wholesale revision of the *Miranda* doctrine, or even for restricting *Davis*. Nor, given the justices’ deep divisions and their quite tepid support for *Miranda*—as revealed most recently in *Seibert* and *Patane*—does there seem to be any consensus for any different outcomes.

Moreover, members of the Court do not agree on the appropriate metric by which to measure various components of *Miranda*’s safeguards. The *Seibert* plurality would look to determine if the warnings and, by implication, other aspects of the procedures “could function ‘effectively’ as *Miranda* requires.”<sup>392</sup> I think that this is the appropriate test. Yet it does not command five votes. Without agreement on the test, it will be difficult to revisit the contours of the doctrine itself. In October 2007, the Court denied review in *Hairston*, declining an opportunity to clarify how *Seibert* should be applied.<sup>393</sup>

Finally, because of the restrictions on the reach of federal habeas corpus, the lower federal courts—for the most part—cannot play a meaningful role in reviewing the application of *Miranda* in state courts.<sup>394</sup> The federal courts’

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391. Some of the training on *Davis*’s unambiguous invocation rule goes well beyond the four corners of that decision, but the training is generally consistent with rulings of lower courts that have extended *Davis* to the right to remain silent and the initial waiver stage.

392. *Missouri v. Seibert*, 542 U.S. 600, 611-12 (2004) (plurality opinion).

393. See *Hairston v. United States*, 128 S.Ct. 491 (2007) (denying petition for writ of certiorari). *Hairston* was represented by Professor Peter Rutledge and former Solicitor General Seth Waxman. The petition extensively addressed the split in authority following *Seibert*. See *Petition for Writ of Certiorari at 8-19, Hairston*, 128 S. Ct. 491 (No. 07-5587).

394. In the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218 1996, Congress amended the federal habeas corpus statute. It now prohibits granting habeas corpus relief unless the state court’s adjudication of the claim was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the

experience with *Davis* claims shows why. During interrogations, suspects ask about counsel using a variety of phrases. However, there is little Supreme Court authority directly holding that specific language is unequivocal or unambiguous. With this paucity of authority, habeas corpus petitioners have great difficulty establishing that state court rulings are contrary to or are unreasonable applications of specific Supreme Court decisions.<sup>395</sup> As a result, we get cases like *Anderson v. Terhune*, where a federal court of appeals first deferred to a state finding that “I plead the Fifth” was ambiguous. Though the three-judge panel’s ruling was ultimately reversed, that the issue required the attention of an en banc court itself illustrates the weak role of the federal judiciary.

While courts seem unlikely to retool *Miranda* directly, there is one way in which the judiciary may spark reform. A better understanding of interrogation practices and the realities of *Miranda* might cause judges to take claims disputing the voluntariness of a statement more seriously and lead to more robust litigation of the issue. If judges then became more willing to find statements involuntary under the Due Process Clause, even after warnings are given and waivers obtained, there might be some enthusiasm for fixing *Miranda*.

### C. Law Enforcement Interests and *Miranda*’s Safeguards

The article has thus far addressed only the extent to which *Miranda* protects suspects’ Fifth Amendment privilege. The Court has itself described *Miranda* as “striking the proper balance between society’s legitimate law enforcement interests and the protection of the defendant’s Fifth Amendment rights . . . .”<sup>396</sup> Here I briefly consider the other side of the ledger. In my view, the interests of the law enforcement community are not sufficiently strong to require us to retain *Miranda*’s safeguards.

The law enforcement community is split about the advantages and disadvantages of *Miranda*.<sup>397</sup> Many police officers would welcome an end to

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Supreme Court,” or was based on “an unreasonable determination of the facts in light of the evidence” presented in state court. 28 U.S.C. § 2254(d) (2000).

395. See, e.g., *Obershaw v. Lanman*, 453 F.3d 56, 64-65 (1st Cir. 2006) (state court not clearly unreasonable in finding that “Can I talk to a lawyer first?” is ambiguous); *Clark v. Murphy*, 331 F.3d 1062, 1069-72 (9th Cir. 2003) (holding that the state court was not clearly unreasonable in finding that “I think I would like to talk to a lawyer” is ambiguous); but see *Abela v. Martin*, 380 F.3d 915, 925-27 (6th Cir. 2004) (granting habeas corpus relief where the defendant unequivocally asked for counsel by giving the officer the lawyer’s card and the officer left the room after agreeing to call counsel).

396. *Moran v. Burbine*, 475 U.S. 412, 424 (1986). For a discussion of the balance in *Miranda*, see Kamisar, *supra* note 243, at 169-75.

397. One can get a sense of the split from the amicus curiae briefs by law enforcement agencies and supporters on both sides of *Dickerson*. Compare, e.g., Brief of Amicus Curiae Fraternal Order of Police Urging Affirmance, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525) (arguing that law enforcement has not learned to “live with” *Miranda* because *Miranda* interferes with the ability of officers to solve violent crimes and take dangerous criminals

*Miranda*. However, there is no doubt that many officers support the system of warnings and waivers and the principles it embodies. Former Attorney General Griffin Bell and others filed an amicus brief in *Dickerson v. United States*, raising law enforcement's pro-*Miranda* arguments. They wrote that "our views concerning the effects of *Miranda* reflect a widely shared view among those in institutions responsible for enforcing the criminal laws that *Miranda* promotes effective law enforcement."<sup>398</sup> Among other points, *Miranda* makes the police "more professional" and overruling *Miranda* would put officers' credibility at risk.<sup>399</sup> They further contended that it is relatively simple for a court to assess the admissibility of a statement under *Miranda*'s bright line rules. "This is in stark contrast to pre-*Miranda* law . . . . The pre-*Miranda* 'voluntariness' standard has none of the virtues of the bright-line rule, and imposed significant burdens on law enforcement."<sup>400</sup>

Of course, since the voluntariness doctrine theoretically exists alongside *Miranda*, the reason *Miranda* is advantageous is that it has practically displaced voluntariness determinations. Former Solicitor General Charles Fried has written that police organizations have "learned to live with *Miranda*, and even to love it, to the extent that it provided them with a safe harbor: if they followed the rules, they had a fair assurance that a confession would be admissible and a conviction built on it would stick."<sup>401</sup> Justice Souter noted the displacement of voluntariness determinations in *Seibert*: "[G]iving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver."<sup>402</sup> Or as the justices

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off the streets) with Brief of Griffin B. Bell, et al. as Amici Curiae in Support of Petitioner, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525) (contending that *Miranda* promotes effective law enforcement practices and helps prosecutors secure convictions of the guilty).

398. Brief of Griffin B. Bell, et al., *supra* note 397, at 7-8.

399. *Id.* at 9-10 (quoting a former Boston Police Commissioner and a Missouri prosecutor).

400. *Id.* at 13. I once co-authored a brief making some of the same points. See Brief of Former Prosecutors, Judges and Law Enforcement Officials as Amici Curiae Supporting Respondent, at 5-11, *Missouri v. Seibert*, 542 U.S. 600 (2004) (No. 02-1371).

401. CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 45 (1991). Professor Rosenthal argues that *Miranda*'s "safe harbor" is best viewed as existing within the law of waiver, instead of being based on an absence of compulsion. He writes: "The warnings do not eliminate the compulsion inherent in custodial interrogation by creating a safe harbor of voluntariness; if they did, then the Court would have held that the warnings without more could produce an admissible statement." Rosenthal, *supra* note 109, at 598 n.88. Rather, "the Court made plain that even with the requisite warnings, a statement is inadmissible" unless the government proves a valid waiver. *Id.* I agree with him in theory, though my sense of the voluntariness cases is that it does not work that way in practice. For another view of *Miranda* and safe harbors, see Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001) (describing *Miranda* as a constitutional prophylactic rule, in comparison to a constitutional safe harbor rule).

402. *Missouri v. Seibert*, 542 U.S. 600, 608-09 (plurality opinion).

proclaimed in another case: “[I]t seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled.”<sup>403</sup>

But if *Miranda*'s system of warnings and waivers is not effective in protecting the Fifth Amendment privilege for many suspects, this wholesale displacement of the voluntariness doctrine is a sleight-of-hand; it is bottomed on a falsehood. I am not against warnings and waivers per se, just the assumed effect of them. For me, the main problem with *Miranda* is the judiciary's unjustified confidence in *Miranda*'s safeguards. There is an almost religious belief that the warnings and waivers actually work, and an apparent deafness to claims that they do not. I am not the first to observe that *Miranda* can be an obstacle to the more important assessment of voluntariness; Professor Alfredo Garcia has made the point with particular force.<sup>404</sup> I once was a proponent of *Miranda*, but I now believe that its critics are right.

Professor Yale Kamisar has been *Miranda*'s most prominent and steadfast supporter. On *Miranda*'s fortieth anniversary, he reflected on the decision. Professor Kamisar began part of his article with the question, “What good does *Miranda* do?” He later said that “[p]erhaps a more appropriate question would be: ‘At this point in time, what good would it do (and how much harm would it cause) to *abolish Miranda*?’”<sup>405</sup> A colleague, Professor Diane Amann, asked me whether *Miranda* is “our least worst system?”

To try to answer Kamisar's second question, I believe that it would do some good to abolish *Miranda*'s warning and waiver requirements. At a minimum, it could clear the way for full assessments of voluntariness, without false reliance on warnings and waivers, and could promote candid discussions of police practices and the Fifth Amendment. To my colleague, I would say that a system of ineffective warnings and waivers is worse than no such system at all.

I take seriously the issues of police professionalism and credibility, and I am concerned about the signal that may be sent to law enforcement and the community if *Miranda*'s rules are overruled or replaced. In the next Part of the Article, I briefly address some of these issues as well as the future of the voluntariness doctrine and Fifth Amendment.

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403. *Colorado v. Spring*, 479 U.S. 564, 576 (1987) (quoting *United States v. Washington*, 431 U.S. 181, 188 (1977)).

404. See Alfredo Garcia, *Is Miranda Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461, 496-502 (1988); see also Steven B. Duke, *Does Miranda Protect the Innocent or the Guilty?*, 10 CHAP. L. REV. 551, 562 (2007); Richard A. Leo, *Miranda and the Problem of False Confessions*, in *THE MIRANDA DEBATE: LAW, JUSTICE AND POLICING* 276-77 (Richard A. Leo & George C. Thomas, III, eds., 1998); Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 309-12 (2003); Thompson, *supra* note 382, at 649.

405. Kamisar, *supra* note 243, at 197.

*D. Miranda and the Legislature*

We should also consider the possible role of state and federal legislatures. A legislative solution may seem problematic after *Dickerson*. I believe it is an open question, though there may be room for such a solution if it is based on legislative findings about the current operation of *Miranda*'s procedures.

In *Dickerson*, the Supreme Court addressed the application of 18 U.S.C. § 3501, which would have replaced warnings and waivers with a variant of the voluntariness test.<sup>406</sup> The justices found that *Miranda* was a "constitutional rule that Congress may not supersede legislatively."<sup>407</sup> Even as it so held, the Court repeated *Miranda*'s refrain about permitting legislative alternatives that are "at least as effective" in protecting the Fifth Amendment (though section 3501 proved to be no such alternative).<sup>408</sup> The Court may well have viewed section 3501 as a naked attack on *Miranda*'s holdings rather than a legitimate search for an effective alternative. When Congress considered section 3501 in 1968, the legislature heard testimony from witnesses who decried the impact of *Miranda* on law enforcement. There did not appear to be any real assessment whether the statutory procedures would adequately protect the Fifth Amendment.<sup>409</sup> I suggest that a legislative solution based upon a rich factual record may be viewed differently,<sup>410</sup> and we of course now have much more social science data than was available to Congress in 1968.

Imagine legislative hearings exploring the contemporary process of interrogation, with findings that only a moderate percentage of suspects understand form warnings. Imagine a legislature determining that many individuals in a position of powerlessness, such as those in a police station, assert their rights in tentative language because they are afraid. Imagine further findings that implied waivers are prevalent, and that many suspects do not feel free to assert their rights unless they are expressly asked if they wish to do so.

406. *Dickerson v. United States*, 530 U.S. 428, 442-43 (2000).

407. *Id.* at 444; *see also id.* at 437 (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

408. *Id.* at 440, 442.

409. *See* S. REP. NO. 90-1097, reprinted in 1968 U.S.C.C.A.N. 2112, 2127-40, 2209-15; *see also* Yale Kamisar, *Can (Did) Congress "Overrule" Miranda*, 85 CORNELL L. REV. 883, 887-906 (2000) (describing the legislative process that led to § 3501); Brief for the United States at 18-20, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525) (reviewing legislative history); *but see* Michael Edmund O'Neill, *Undoing Miranda*, 2000 B.Y.U. L. REV. 185, 232 (arguing that Congress sought to craft a reasoned, balanced approach).

410. Professor Kamisar explored this issue in an article pre-dating *Dickerson*. He wrote that *Miranda*'s holdings rest more on interpretations of the Constitution and a judgment about the relative needs of law enforcement and suspects than on any factual determinations or assumptions. Moreover, if Congress could overturn a ruling "by removing or correcting what it calls the unsound factual determination or factual assumption," Congress would have the power to determine what constitutes a constitutional violation. *See* Kamisar, *supra* note 409, at 918-19. I agree. Nevertheless, factual findings based upon forty years of experience after a court decision should be treated differently than contrary legislative findings right on the heels of that court decision. At the least, I think the possibility of future legislative action remains an open question. *Cf.* Klein, *supra* note 401, at 1052-68 (suggesting room post-*Dickerson* for a dialogue between the Court and state and federal actors, as well as between the Court and social scientists).

What would be an appropriate legislative response? There are a number of interesting possibilities.

One possible outcome might be legislation that directly regulates the police and affords greater protection to suspects than *Miranda* currently provides. A legislature might, for example, require warnings in very simple language and instruct police to give them prior to any suspect interviews or interrogations. It might prohibit some forms of deception by officers during interrogation.<sup>411</sup> And most importantly, it might require videotaping, a movement that is gaining strength among the states.<sup>412</sup> While a requirement of videotaping would not directly impact a suspect's decision to speak or not, it would foster transparency in the interrogation process, give police supervisors a greater ability to review the actions of investigating officers, and establish an accurate factual record for an assessment of voluntariness. These sorts of reforms may counter some of the signaling and police professionalism concerns associated with replacing *Miranda*.

Another response might be recognition that the constitutional floor has been lowered. The legislature may substitute *Miranda*'s warnings and waivers with an alternative that is at least as effective in protecting the Fifth Amendment. If *Miranda*'s safeguards are shown to be ineffective, the bar for an alternative is quite low. While this might seem an unappealing prospect, it could open up a much greater range of possibilities for experimentation.<sup>413</sup>

Any of these legislative responses would at least begin a dialogue about interrogation practices, the value of the Fifth and Fourteenth Amendments, and the best ways to regulate the police. With *Miranda*'s current procedures in place, there is neither discussion nor experimentation. With courts doing the work of policing the police, there has been little incentive for legislators to act.

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411. For a discussion of "necessary" and "unnecessary" deception and its relationship to police coercion, see Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1280-91 (2007).

412. For discussions advocating videotaping, see LEO, *supra* note 3, at 291-305; Feld, *Juveniles' Competence*, *supra* note 95, at 90-98; Slobogin, *Toward Taping*, *supra* note 404, at 314-22; Thomas P. Sullivan, Andrew W. Vail & Howard W. Anderson III, *The Case for Recording Police Interrogations*, 34 LITIGATION 30 (2008). If videotaping is adopted, it is important that the entire interrogation be taped, not just some portion of it. See Mike McConville, *Videotaping Interrogations: Police Behaviour on and Off Camera*, 1992 CRIM. L. REV. 532. Professor Lisa Lewis advocates recording the entire police/suspect interaction, including beginning with conversations in the patrol car. See Lisa Lewis, *Rethinking Miranda: Truth, Lies, and Videotape*, 43 GONZ. L. REV. 199, 220-23, 227-33 (2007). There are also significant concerns to address with respect to biasing effects of camera focus on the suspect alone. See G. Daniel Lassiter, Jennifer J. Ratcliff, Lezlee J. Ware & Clinton R. Irvin, *Videotaped Confessions: Panacea or Pandora's Box*, 28 LAW & POL'Y 192, 193-201 (2006). For an argument that we should not expect videotaping to curb police excesses, see Rosenthal, *supra* note 109, at 606-08.

413. For some discussions of alternatives to *Miranda*, see, for example, Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 252-59 (1999); Cloud et al., *Words Without Meaning*, *supra* note 31, at 572-90; Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 556-61 (1996).

Moreover, as Professor Stephen Schulhofer has noted, the lack of legislative effort may be due to the “recognition that virtually any alternative that meets *Miranda*’s concerns about custodial pressure will impose infinitely greater burdens on law enforcement than do the *Miranda* rules themselves.”<sup>414</sup> That is certainly true if any alternative must truly protect the Fifth Amendment. If, on the other hand, any alternative need only be as effective as the current *Miranda* regime, there is much room for experimentation because there is much room for improvement.

Perhaps the most positive outcome may be the resurrection or even the reshaping of the voluntariness doctrine. If *Miranda*’s procedures do not adequately advise suspects of their rights and provide them with opportunities to assert those rights, law enforcement would presumably lose *Miranda* as a “safe harbor.” Courts would be required to assess the voluntariness of statements in light of all of the circumstances, including suspects’ age, education, the existence of any mental disabilities or disorders, the application of sophisticated interrogation tactics, express and implied promises, and other factors, shorn of the unwarranted assumption that all suspects somehow understand form warnings and are empowered thereby.

With greater understanding of police practices and the dynamics of interrogation, I would hope for meaningful development of the voluntariness doctrine, though I acknowledge and do not mean to sugarcoat the difficulties ahead.<sup>415</sup> It may turn out that courts, including the Supreme Court, will fail to facilitate the growth of the doctrine. Trial court judges may continue to make superficial judgments about voluntariness. Without *Miranda*’s purportedly bright-line test, appellate courts may find it more difficult to review interrogation cases and give clear guidance to the lower courts. It may also be that overburdened defense counsel will lack the resources to litigate the issue fully. And undoubtedly police will be trained in light of new developments. Nevertheless, there is at least a chance that we could see a voluntariness standard that looks carefully at the dynamics of police interrogation and asks whether a confession was elicited by offensive police conduct.<sup>416</sup> We might see a standard that places greater emphasis on reliability of a confession by looking at, among other things, the fit between the real facts of the offense and those contained in the suspect’s post-admission narrative.<sup>417</sup> Given the few

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414. Schulhofer, *supra* note 413, at 560.

415. For discussions of the history of the voluntariness doctrine and its shortcomings (especially before *Miranda*), see, for example, Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 745-55 (1987); Kamisar, *supra* note 243, at 163-69; Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 111-17 (1997).

416. See generally Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957 (1997) (arguing for a test that focuses on offensive conduct, regardless of the reliability of a confession).

417. Professors Ofshe and Leo have proposed such a test. See Ofshe & Leo, *supra* note

constraints on interrogation tactics after a *Miranda* waiver is obtained, that type of standard might do more to address concerns about false confessions. We would lose *Miranda*'s "bright lines" and courts would have to make many more individualized assessments of the voluntariness of a statement. But this surely is the right outcome.

#### CONCLUSION—MOURNING *MIRANDA*

It will not be easy for judges, officers, and lawyers to let go of *Miranda*. For over four decades, this icon has occupied the center of interrogation law and practice. Yet *Miranda*'s protections are more mythic than real. At some point myth must yield to reality.

*Miranda* launched a forty-year experiment in reforming police practices. I think the Court was right to try; sometimes there can be no progress without experimentation. Now, four decades later, we know that a set of bright-line rules is not a panacea for the issues endemic in police interrogation. I mourn the passing of *Miranda*. I deeply regret that the justices' ambitions and expectations were not met. However, I think that the best way to mourn the loss is to learn from the experiment called *Miranda*, acknowledge its failures, and move forward.

#### APPENDIX

##### *California POST'S Telecourses on Interviews, Interrogations and Interrogation Law, 1993 through June 2008*

1. *Interview and Interrogation Techniques, Part I* (Apr. 1993)
2. *Interview and Interrogation Techniques, Part II* (Apr. 1993)
3. *Interrogations/Confessions: Legal Issues* (Aug. 1995)
4. *Interrogation Law* (Aug. 2003)
5. *Interview Techniques* (Mar. 2005)
6. *Interrogation Techniques* (Mar. 2005)

##### *California POST'S Case Law Today Segments on Statements, January 2002 through June 2008*

1. *Miranda: How Precise Must the Advisement Be?* (Mar. 2002)
2. *Miranda and Interrogation by Police Psychologist* (May 2002)
3. *Voluntariness: Consumption of Drugs or Alcohol* (June 2002)
4. *Interrogation: Witness Coercion* (July 2002)
5. *Public Safety Exception to Miranda* (Nov. 2002)
6. *Miranda: How Much Must the Suspect Be Told?* (Feb. 2003)
7. *Custody: Different Standard for Minors* (May 2003)

8. *Miranda: Geez! Did he Invoke or What* (July 2003)
9. *Confession Following Illegal Arrest Will Usually Be Suppressed* (July 2003)
10. *Miranda: Invocation Prior to Custody* (Aug. 2003)
11. *Purposeful Violations of Miranda—Slammed* (Sept. 2003)
12. *Every Miranda Issue You Can Imagine* (Jan. 2004)
13. *Aranda/Bruton: Joint Suspect Interrogations* (Apr. 2004)
14. *Voluntariness: Put a Sock in Your Partner's Mouth* (Apr.2004)
15. *Miranda: Right to Silence 'Right Now'* (May 2004)
16. *Miranda: Questions Not Designed to Incriminate* (May 2004)
17. *Miranda: Lost in Translation* (June 2004)
18. *Miranda: 'Custody' Test Same for Adults/Minors* (Aug. 2004)
19. *Miranda: The Question-First Technique* (Dec. 2004)
20. *Miranda: Discussion of Possible Punishment* (Dec. 2004)
21. *Statements Taken After Illegal Arrest* (Feb. 2005)
22. *Ambiguous Requests for Counsel* (Mar. 2005)
23. *Implied Miranda Waivers and Spontaneous Statements* (May 2005)
24. *Miranda: Re-Advisement After Break in Interrogation* (June 2005)
25. *Miranda: Unambiguous Invocation* (June 2005)
26. *Miranda: Interviewing Co-Defendants* (Aug. 2005)
27. *Miranda: 'Indirect' Questioning* (Sept. 2005)
28. *Miranda: Unequivocal Invocation of Right to Counsel* (Oct. 2005)
29. *Miranda: Foreign Translation of Rights* (Oct. 2005)
30. *Limited Invocation of Miranda Rights* (Nov. 2005)
31. *Miranda: More on Unequivocal Invocation of Right to Counsel* (Dec.2005)
32. *Not All Stationhouse Interviews are Custodial Interrogation* (Jan. 2006)
33. *Miranda: Special Advisement for Foreigners* (Feb. 2006)
34. *No Miranda Necessary* (Mar. 2006)
35. *Miranda: "Midstream" Miranda Warnings* (Apr. 2006)
36. *Miranda Warnings for Non-Suspect* (May 2006)
37. *Miranda: Anticipatory Invocation* (June 2006)
38. *Interviewing Cuffed Suspect? Miranda Warnings Usually Necessary* (July 2006)
39. *Miranda: Advise First, Ask Questions Later* (Aug. 2006)
40. *Tainted Statements* (Oct. 2006)
41. *Miranda Rule and Agreements to Listen* (Dec. 2006)
42. *Pushing the Miranda Envelope* (Mar. 2007)

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43. *Miranda: Questioning an Injured Suspect* (May 2007)
44. *When "Custody" Occurs in Jails for Miranda Purposes* (July 2007)
45. *Detentions: Questioning Detainees About Other Matters* (Aug. 2007)
46. *Miranda: Custodial Interrogation* (Nov. 2007)
47. *Talking to Suspect Before/After Charging* (Nov. 2007)
48. *He Copped Out to Grandma* (Jan. 2008)
49. *Miranda: Statements to Jail Psychiatrist* (Feb. 2008)
50. *Miranda: Recording Co-Defendants' Conversation* (Apr. 2008)
51. *Miranda and Suspects' Calls to Police from Jail* (Apr. 2008)
52. *Miranda: Reinitiation by Suspect* (June 2008)
53. *Initial Ambiguous Invocation of Miranda Rights* (June 2008)

