Empty Promises: Miranda Warnings in Noncustodial Interrogations

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NOTE

EMPTY PROMISES: MIRANDA WARNINGS IN NONCUSTODIAL INTERROGATIONS

Aurora Maoz*

"You have the right to remain silent; anything you say can be used against you in a court of law. You have the right to an attorney: if you cannot afford an attorney, one will be provided to you at the state’s expense." In 2010, the Supreme Court declined an opportunity to resolve the question of what courts should do when officers administer Miranda warnings in a situation where a suspect is not already in custody—in other words, when officers are not constitutionally required to give or honor these warnings. While most courts have found a superfluous warning to be harmless, social science research suggests that this conclusion is misguided. This Note proposes that courts use a rebuttable presumption that a suspect is in custody once the warnings are read. This solution serves two functions. First, it prevents officers from using the promise of the warnings, coupled with a failure to honor the rights promised, as a method of coercing suspects into speaking. Second, it honors the reality that the vast majority of people believe that they are under arrest and therefore in custody once officers administer the Miranda warnings.

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INTRODUCTION

Miranda's familiar warnings have "become part of our national culture." Yet the limitations of the Miranda protections likely are not as well-known. The Supreme Court's revolutionary decision in Miranda v. Arizona requires a government officer to communicate the Miranda warnings to a suspect, but only under specific circumstances. Namely, the Constitution only requires that an officer read the warnings, and that a suspect agree to abandon, or "waive," her rights to silence or counsel, before an officer conducts an interrogation of the suspect in custody—defined as a physical environment akin to formal arrest. A person found not to be in custody—as defined by the Court—has no protection under Miranda. Developments in Supreme Court case law since Miranda have allowed police officers a significant end run


3. To prove a valid waiver, the government must demonstrate that a suspect made an informed, knowing, and voluntary relinquishment of her privilege against self-incrimination. Id. at 475; see also Berghuis v. Thompkins, 130 S. Ct. 2250, 2261 (2010) (finding an implied waiver of the right to silence). Furthermore, a person who initially waives her rights can reassert either her right to silence or her right to counsel—what is referred to as an "invocation." Miranda, 384 U.S. at 473–74. Once a suspect invokes either of these rights during custodial interrogation, officers must stop questioning for the time being or run afoul of Miranda. Id.

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around awarding suspects the *Miranda* protections.\(^5\) Such developments have allowed officers to take wide latitude in conducting interrogations in scenarios without formal restraint and that are only nominally noncustodial in order to avoid *Miranda*'s requirements.\(^6\) This alone is troubling given that officers pressure, trick, and intimidate suspects to speak,\(^7\) and elicit false confessions, even in situations where a person may not be in a physical environment like formal arrest.\(^8\)

But officers often read the warnings in noncustodial interrogations when the warnings are *not* required. For example, in one special victims unit, officers engaged in the practice of Mirandizing every interviewee, even when suspects were clearly not in custody.\(^9\) At best, officers might do this to be on the safe side when they are not sure if a person in custody.\(^10\) At worst, a gratuitous reading is an effort to falsely win the sympathy of the suspect.\(^11\) Regardless of the reason, problems arise when a person responds to unnecessary *Miranda* warnings with a request for counsel or to remain silent. While many courts have held that there are no constitutional problems when the police ignore such a request,\(^12\) this Note argues that this prevailing approach is misguided.

Exactly this situation arose in *Davis v. Allsbrooks*.\(^13\) A police officer went to James Davis's house and left him a note requesting that he go to the police station to speak with officers because they wanted to question him about a homicide.\(^14\) Davis went to the stationhouse two days later, where the police gave him *Miranda* warnings and where he signed a written waiver of his rights.\(^15\) Officers then questioned him for about two hours, and he offered information tending to show his innocence.\(^16\) The officers asked Davis to leave for two hours and then return.\(^17\) When Davis did not come back, officers

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10. Id.
12. See infra notes 33–36 and accompanying text.
13. 778 F.2d 168 (4th Cir. 1985).
15. Id. at 170.
16. Id.
17. Id.
found him walking near his house and drove him to the police station. At the stationhouse, officers again administered Miranda warnings, and Davis again waived his rights. He then told the officers he no longer wanted to talk about the case. Rather than cease questioning, the officers continued to interrogate Davis, placing bloody pictures of the crime scene in front of him. He began to cry, asked to use the restroom, and was accompanied there by officers. Finally, after using the restroom a second time, he confessed to the murder. His confession was admitted against him at trial despite the fact that he had clearly stated that he wanted to remain silent after receiving the Miranda warnings. The Fourth Circuit upheld the trial court's decision to admit the statement. Because Davis was not in custody, the Fourth Circuit concluded, the officers were not required to stop questioning him when he said he wished to remain silent. This reasoning was adopted in 2010 by the D.C. Court of Appeals.

This result is surprising given that Davis was told that it was his right to remain silent, but when he invoked that right, the police blatantly disregarded his request. Actions like those taken by the officers in Davis v. Allsbrooks have profound effects on suspects that must be acknowledged. The vast majority of people associate the reading of one's Miranda rights with the act of formal arrest, and so reasonably feel that their movement is restricted after an administration of the warnings. Furthermore, administering the warnings while failing to honor a request for an attorney or to remain silent carries a serious risk of coercion. Evidence shows that it is common for officers to exploit this coercive pressure by intentionally violating suspects' Miranda rights in custodial interrogations. After giving the warnings, they often continue to interrogate suspects after a suspect invokes a right to silence or to an attorney. This tactic—called "questioning outside Miranda"—is a powerful way to coerce suspects into speaking by violating an express promise of their rights.

18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. Id. at 172.
26. Id.
28. See infra text accompanying notes 122–127.
29. See Ex parte Comer, 591 So. 2d 13, 16 (Ala. 1991) (quoting Tukes v. Dugger, 911 F.2d 508, 516 n.11 (11th Cir. 1990)).
31. Id. at 132–40, 159.
Many federal and state jurisdictions have adjudicated disputes over the admission of statements taken from defendants after use of what will be termed the Davis v. Allsbrooks practice—where (1) officers administer the Miranda warnings when the warnings are not required, and then (2) continue to question suspects who respond by trying to exercise their right to remain silent or to counsel. However, many of these same courts fail to acknowledge any of the potential problems noted above. Some courts simply do not take into account the effect of gratuitous warnings when ruling on the admissibility of subsequent statements. Other courts explicitly state that the gratuitous reading of the Miranda warnings should have no bearing on the admissibility of a statement. Still, others purport to address the warnings in a totality-of-the-circumstances approach. The one outlier is a state court that has adopted a freestanding rule excluding any statements made after requests for counsel or silence because of the risk of coercion if a suspect invokes a promised right and officers continue questioning. Despite the number of jurisdictions where this problem has arisen, there is no clear answer to the controversy, given that noncustodial interrogation falls outside the realm of Miranda, and the voluntariness doctrine—which is also determinative of a statement’s admissibility in court—has gone underdeveloped since Miranda.

This Note argues that the Constitution requires a safeguard to ensure that once the warnings are read in an interrogation, officers secure a waiver and honor any subsequent invocations of the right to counsel or the right to silence. The best way to satisfy this demand is by putting in place a rebuttable presumption that once the warnings are administered, the suspect is in

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32. See Petition for Writ of Certiorari, Jenkins, No. 07-CF-488.
35. United States v. Bautista, 145 F.3d 1140, 1148–49 (10th Cir. 1998); Sprosty v. Buchler, 79 F.3d 635, 642–43 (7th Cir. 1996); Davis v. Allsbrooks, 778 F.2d 168, 172 & n.1 (4th Cir. 1985); Caldwell, 41 So. 3d at 202 (discussing custody under the Fourth Amendment); State v. Taillon, 470 N.W.2d 226, 229–30 (N.D. 1991).
38. See infra Section III.B.
custody absent proof to the contrary. Part I outlines the basics of the Supreme Court’s interrogation case law, highlighting the constitutional backdrop that prevents the government from admitting coerced statements against a criminal defendant. At the same time, Part I points out how the doctrine—including its applications in lower courts—currently falls short by allowing coercive police tactics in noncustodial interrogations to go largely unreviewed. Part II discusses the risk of coercion created by the Davis v. Allsbrooks practice. Part III presents remedies to this problem, concluding that the best solution is for courts to implement a rebuttable presumption of custody once the warnings are administered.

I. MIRANDA’S LEGACY: THE COURT ADDS SAFEGUARDS TO PREVENT COERCION IN POLICE INTERROGATIONS

To address the problems presented by the Davis v. Allsbrooks practice, it is necessary to first understand the constitutional protections that do exist to deter police from coercing suspects during interrogations. These are derived from the Self-Incrimination Clause and the Due Process Clause.

The Fifth Amendment to the Constitution guarantees that “[n]o person shall be . . . compelled in any criminal case to be a witness against himself.” The Self-Incrimination Clause is understood to protect an accusatorial system of justice, meaning that government officers are constitutionally required to obtain convictions by evidence “independently and freely secured.” To this end, the Fifth Amendment prohibits government officers from proving guilt by relying on statements of an accused about the allegations against her obtained by the use of compulsion or, as the Court generally terms it, coercion. It follows that statements obtained through coercion are generally not admissible against the accused at trial. Before Miranda came down in 1966, however, the Supreme Court mainly used a voluntariness test grounded in the Fourteenth Amendment’s Due Process Clause to determine whether a suspect’s statements during police interrogations had been freely given. The voluntariness inquiry examines the

41. Id. at 8.
42. Id. One scholar discusses the difference between compulsion and coercion:

While the self-incrimination clause . . . uses “compel” rather than “coerce,” the historical evidence suggests that the Framers were concerned about purposive, governmental coercion rather than compulsion . . . . The question in a self-incrimination case is not, after all, whether [the suspect] should be blamed for her act of confessing but is, instead, whether the government should be allowed to use the confession.

43. See Hogan, 378 U.S. at 8.
44. U.S. Const. amend. XIV.
totality of the circumstances, including the physical and mental characteristics and abilities of the suspect, to ask whether the interrogation methods were sufficient to “overbear the will” of the suspect. Miranda was prompted out of concern by scholars and jurists that the voluntariness approach did not provide sufficient guidance to law enforcement agencies and courts to protect adequately suspects’ rights against self-incrimination in interrogations.

A. The Miranda Doctrine

In Miranda v. Arizona, the Court issued three revolutionary holdings that changed the landscape of the law surrounding interrogations. First, the Court held that informal pressure to speak—that is, pressure not backed by legal process or any formal sanction—can constitute ‘compulsion’ within the meaning of the Fifth Amendment. Second, it held that this informal compulsion is automatically present during custodial interrogation. Third, it held that, before engaging in custodial interrogation without counsel present, police are required to inform suspects of their rights to silence and to counsel, and to obtain a knowing, voluntary, and informed waiver of those rights. To ensure governmental compliance with this requirement, it “conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights and obtaining a waiver. The warnings were intended ‘as a protective measure[,] placing the citizen on guard ‘that he is not in the presence of persons acting solely in his interest.’”

49. Id.; accord Miranda, 384 U.S. at 466; Welsh S. White, Miranda’s Waning Protections 4 (2001) (“In Miranda, the Court broke new constitutional ground by holding that the Fifth Amendment privilege against self-incrimination applied to the pretrial interrogation of suspects in custody.”). But see Chavez v. Martinez, 538 U.S. 760 (2003) (determining that the Fifth Amendment cannot be violated until a statement is used against an accused at trial).
50. Miranda, 384 U.S. at 467; Schulhofer, supra note 48, at 106.
51. Miranda, 384 U.S. at 475. The Sixth Amendment right to counsel may not attach at the point of an interrogation if the interrogation takes place before an accused has had an initial appearance before a judicial officer. See Rothgery v. Gillespie Cnty., 554 U.S. 191, 213 (2008). Miranda recognized a limited Fifth Amendment right to counsel during custodial interrogation to ensure that suspects exercise their free will to speak. Miranda, 384 U.S. at 469. However, waiving Fifth Amendment rights to counsel during custodial interrogation will generally suffice to waive Sixth Amendment rights during that interrogation. See Montejo v. Louisiana, 129 S. Ct. 2079, 2090-92 (2009).
52. Missouri v. Seibert, 542 U.S. 600, 608 (2004). It is immaterial whether the statement made is inculpatory or exculpatory. Miranda, 384 U.S. at 444.
53. Miranda, 384 U.S. at 476.
To prevent officers from persuading unwilling suspects into abandoning their rights, the Court continued to restrict police tactics after *Miranda*. Specifically, it held that the police must immediately stop questioning when an individual invokes a right to silence or to counsel after an initial decision to waive those rights. The Court held that "an accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." An invocation of the right to counsel is understood as the suspect indicating her inability to "deal with police pressures without legal assistance." The Court also held that although interrogation must cease once a suspect invokes the right to silence after an initial waiver, the police are permitted to return two hours later, re-Mirandize the suspect, and continue questioning under limited circumstances.

B. *Miranda* and Custody

The Court made clear in *Miranda* that the "inherently compelling pressures" giving rise to a duty to issue the warnings are only presumed to exist when the suspect is both in custody and subject to interrogation. The Court focused on these two conditions because of the impermissibly high risk of coerced confessions coming out of increasingly common "incommunicado interrogation[s]"—in which suspects were questioned alone by law enforcement officers trained in using tactics to "persuade, trick, or cajole [the suspect] out of exercising [her] constitutional rights." The concern was that these interrogations would produce a large number of coerced confessions that would escape detection under the malleable, post hoc voluntariness


58. *Mosley*, 423 U.S. at 105–06 (stating that if the second interrogation is restricted to a crime different from the one discussed in the previous interrogation, re-Mirandizing the suspect may allow continued interrogation). The Court recently decided that the invocation of a right to silence must also be unambiguous. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010).

59. See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). The Court later defined interrogation as "express questioning or its functional equivalent," meaning "any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980).

60. See *Miranda*, 384 U.S. at 457–58.

61. *Id.* at 455.
One integral premise underlying *Miranda* is that the presence of the custodial element distinguishes those interrogations that are inherently coercive from those that are not. This assumption may have been prompted by interrogation manuals’ emphasis on “isolating suspects and depriving them of outside support.” Thus, taking its cue from the tactics that interrogators found the most successful at getting suspects to talk, the Court used the term “custody” to identify those interrogations where the tactics being used were also those most likely to compel a suspect to speak.

The Court later refined the custody inquiry to ask, under the circumstances of a particular interrogation, the following: “Would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave?” Ultimately, a reviewing court must take into account the relevant circumstances to objectively determine whether there was “formal arrest or restraint on freedom of movement” of the degree associated with a formal arrest. The voluntariness inquiry before it, the custody inquiry has become very fact intensive. Relevant factors include the location of questioning, the length of the interrogation, the accusatory tone of officers, the use of subterfuge to induce a suspect to speak, the presence or absence of physical restraints on a suspect’s movement, the ability of the suspect to leave at the end, and the age of the suspect in some circumstances.

The Court’s restriction of *Miranda* only to custodial interrogations has important consequences for the permissibility of the *Davis v. Allsbrooks* practice. Since *Miranda*, the Court has suggested that when a suspect invokes her rights outside the context of custodial interrogation, officers do not have to cease questioning. In *California v. Beheler*, the Court

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63. Weisselberg, supra note 6, at 1527–28.
64. Id.
65. Id.
67. California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (citing Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam)); see also Miranda v. Arizona, 384 U.S. 436, 461 (“An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described ... cannot be otherwise than under compulsion to speak.”).
68. The Court before *Miranda* identified “a long list of factors ranging from physical brutality to falsely aroused sympathy. The difficulty ... is that the Court’s list made ‘everything relevant and nothing determinative.’” Thomas, supra note 42, at 95 (footnote omitted) (quoting Joseph Grano, *Miranda v. Arizona and the Legal Mind: Formalism’s Triumph over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 243 (1986)).
70. J.D.B., 131 S. Ct. at 2406.
71. See, e.g., McNeil v. Wisconsin, 501 U.S. 171, 181 n.3 (1991) (“We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than ‘custodial interrogation’ ...”).
addressed whether *Miranda* applied during a brief stationhouse interrogation when officers asked a suspect to come to the police station for questioning.\footnote{72} Beheler, suspected of murder, appeared at the stationhouse on his own, after being called to come to the station, and then was allowed to leave after a twenty-minute period of questioning; he was also told that he was not under arrest.\footnote{73} The Court concluded that this setting was noncustodial, so that the *Miranda* warnings were not required.\footnote{74} The Court reasoned that all police interrogations involve some amount of coercive pressure.\footnote{75} This pressure only becomes a constitutional problem requiring officers to follow the *Miranda* obligations at the point when a reasonable person would not feel free to leave.\footnote{76} Arguably, officers do not have to cease questioning after a request for an attorney or to remain silent in a noncustodial interrogation because suspects can decide to leave when they no longer feel like speaking with the officers.\footnote{77}

C. Voluntariness Doctrine Post-Miranda

Given that the *Davis v. Allsbrooks* practice arises during noncustodial interrogations, the voluntariness doctrine and its underlying logic hold special significance.\footnote{78} Any statement obtained during police interrogation—custodial or not—cannot be admitted without a finding that the statement was made voluntarily. Additionally, the *Miranda* doctrine was meant to supplement, not supplant, the voluntariness inquiry in lower courts, which still have to decide whether a statement was voluntarily given regardless of whether the *Miranda* dictates were followed.\footnote{79} It appears, however, that rather than engage in both inquiries, some lower courts have used *Miranda* as

\footnote{72} *Beheler*, 463 U.S. 1121.

\footnote{73} Id. at 1122.

\footnote{74} Id. at 1121.

\footnote{75} Id. at 1124.

\footnote{76} See id. at 1123–24. The reasoning in *Beheler* was imported from *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) (“Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a coercive environment.” (internal quotation marks omitted)).

\footnote{77} See *Montejo v. Louisiana*, 129 S. Ct. 2079, 2090 (2009) (“When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering.”); *Takes v. Dugger*, 911 F.2d 508, 515 (11th Cir. 1990).

\footnote{78} Further, violations of these standards carry different remedies. While a finding that a statement is involuntary requires exclusion of the statement for any purpose, a statement taken in violation of *Miranda* can be used to rebut the defendant’s case (“impeachment”) though it cannot be used in the prosecution’s main case against the defendant (“case-in-chief”). See *Mincey v. Arizona*, 437 U.S. 385, 397 & n.12, 398 (1978).

a substitute. The failure to conduct a voluntariness analysis is especially problematic in situations where the *Miranda* doctrine has no application—namely, during noncustodial questioning by the police and after suspects voluntarily waive their rights during custodial interrogation. In these situations, the voluntariness doctrine is currently the only line of inquiry governing the admissibility of an accused’s statement.

II. TRENDS IN POLICE PRACTICES: HOW OFFICERS MANIPULATE DELIVERY OF THE *MIRANDA* WARNINGS AND WITHHOLD PROMISED RIGHTS TO COERCE SUSPECTS

This Part presents social science research highlighting the problems that arise from the *Davis v. Allsbrooks* practice and similar practices. As discussed, noncustodial interrogations fall outside the realm of *Miranda* because the doctrine offers protections only when a suspect is subject to the compelling pressures that are thought to be specific to custodial interrogation. Police officers have used this technical distinction to design more sophisticated methods of coaxing suspects into speaking. Section II.A outlines the police tactics developed to conduct interrogations in noncustodial environments to circumvent *Miranda*, as well as police tactics that manipulate the meaning of the warnings as a method of coercing waivers. Section II.B discusses the psychological research suggesting that the *Davis v. Allsbrooks* practice can contribute to coercing a suspect into speaking, thus implicating the same concerns that motivated *Miranda* and the voluntariness doctrine.

80. *See* Klein, *supra* note 79, at 1070 & n.184; *see also* People v. Hicks, 438 N.Y.S.2d 964, 966–67 (N.Y. Sup. Ct. 1981) ("[T]he Supreme Court decided Mathiason despite the fact that the defendant was lured into making statements by the questioning officer’s false representations to him .... The [C]ourt found that the misrepresentations were irrelevant to the only question concerning the admissibility of his statement, i.e., his noncustodial status." (emphasis added)); People v. Kassim, No. 3247/03, 2004 WL 2852665, at *4–6 (N.Y. Sup. Ct. Apr. 28, 2004) ("To determine whether the People have met this burden, this court must consider two questions: (1) was the defendant in custody at the time the statement was made, and (2) was the statement made in response to an inquiry by law enforcement officers."); Weisselberg, *supra* note 30, at 166 ("In the overwhelming majority of cases, a court will find that a suspect who received proper warnings and waived his or her Fifth Amendment rights made a voluntary statement.").


A. Police Interrogators Often Deliberately Manipulate the Miranda Warnings and Boundaries of Custody to Avoid Constitutional Restraints

Officers often manipulate delivery of the warnings and conduct nominally noncustodial interviews in order to avoid constitutional restraints. The Davis v. Allbrooks practice is but one iteration of this phenomenon.

It is false that any administration of the warnings is beneficial to suspects in interrogations. Both before and after Miranda, officers have found ways to frame the warnings so as to convince suspects not to exercise their rights. As described in the Court’s Miranda opinion, a common tactic used in response to a suspect who was unwilling to talk was to remind the suspect of her right to remain silent in order to convince her to open up to the investigator. The hope was that, by informing the suspect of her rights, the concession would make the interrogator appear more sympathetic and increase the suspect’s willingness to speak. Then the interrogator was to follow the concession with an explanation that a suspect who refuses to talk assumedly “has something to hide.” This tactic continues in a post-Miranda world, where many interrogators deliver the warnings so as to deliberately downplay their significance. A researcher observed one interrogator state the following before issuing the warnings:

In order for me to talk to you . . . I need to advise you of your rights. It’s a formality. I’m sure you’ve watched television with the cop shows, right, and you hear them say their rights and so you can probably recite this better than I can, but it’s something I need to do and we can [get] this out of the way before we talk about what’s happened.

Arguably, the compulsion to talk oneself out of trouble is the most powerful in a pre-arrest interrogation—many of which occur in noncustodial settings—because the person can still secure release if she can convince the officer of her innocence. The distinction between an interrogation contemporaneous with arrest and a more limited noncustodial or custodial interrogation is that an “arrest constitutes an indefinite curtailment” of the suspect on the charged crime until the charge can be resolved through the judicial process. In an arrest-interrogation scenario, a suspect’s baseline

86. Id. at 454 (referencing Inbau and Reid’s techniques).
88. Id. at 272.
90. See Thomas, supra note 42, at 104.
91. Remember that the Court’s definition of custody is “a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” California v. Beheler,
understanding is that she will be held indefinitely absent judicial or prosecutorial intervention. By contrast, in a pre-arrest interview, whether custodial in nature or not, the suspect has the added threat of being arrested if she does not answer in an exculpatory manner.

Not surprisingly, the Beheler decision has also given law enforcement officers a powerful tool, allowing them to circumvent the Miranda protections by keeping interrogations nominally noncustodial. These types of noncustodial interrogations are common. Fred Inbau, who coauthored the initial police manuals advocating coercive interrogation techniques to which the Miranda Court reacted, has continued to instruct officers on interrogations and obtaining confessions. He counsels that whenever possible, officers should conduct formal interrogations in a “noncustodial environment” to avoid awarding suspects the increased rights that accompany custodial interrogations. Further, a study of police training materials in California reveals the development of a “Beheler admonishment.” Officers call suspects down to the stationhouse for interrogation, and then inform them that they are not under arrest and are free to leave, thereby obviating the need—as the training goes—to worry about following the mandates of Miranda.

Some trainings emphasize that Beheler allows officers to decide when giving the warnings would work strategically in their favor. For example, when a suspect who appears on her own at the stationhouse seems cooperative and ready to waive her rights, one prosecutor recommends administering the warnings and obtaining a waiver, “thus eliminating the issue altogether.” But when the suspect appears uncooperative, the “Beheler admonishment” without the Miranda warnings should be given to keep the interview noncustodial.


92. Thomas, supra note 42, at 104–05.

93. As far as noncustodial interviews are concerned, it has been persuasively argued that people in noncustodial interviews before arrest are “more likely to make an incriminating statement against their own interests as they try to convince the police of their own innocence.” Bradley, supra note 89, at 60.

94. See supra notes 72–76 and accompanying text.

95. See Weiselberg, supra note 6, at 1544.

96. Bretz, supra note 7, at 238–39 (gathering evidence of noncustodial interrogations in studies, scholarly works, and police interrogation manuals).


99. See id. at 89.

100. Weiselberg, supra note 6, at 1544.

101. Id.

102. Id. at 1542.

103. Id.

104. Id. at 1542–43.
In sum, police officers have incorporated the warnings into their interrogation tactics in a way that proves most advantageous to them, not to a suspect's rights. The Court's post-Miranda decisions have made room for these tactics to flourish by allowing officers to easily manipulate the distinction between custodial and noncustodial interrogations.

B. Officers Coerce Through Ignoring Requests for Counsel or Silence as Promised

There is evidence that a variation on the Davis v. Allsbrooks practice is used as a coercive tool during custodial interrogations.\(^{105}\) Deliberate questioning after required Miranda warnings but absent a waiver has been labeled as "questioning outside Miranda."\(^{106}\) When officers continue to interrogate a suspect absent a waiver or after an invocation of rights, they do violate Miranda and the accompanying protections. But generally the statement is only excluded from the prosecution's case-in-chief; the statement can still be used for other purposes—for example, for impeachment—and physical evidence obtained as a result of the statement need not be excluded.\(^{107}\) There is evidence from training manuals, observed interrogations, and case law that officers across a number of jurisdictions purposely employ this tactic as a method of exerting pressure on suspects.\(^{108}\) Interrogators are signaling their complete control over the interrogation: "Nothing communicates that message more powerfully than an officer's express statement that the right to remain silent and the right to counsel exist only in theory and that the officer will not respect them."\(^{109}\)

Furthermore, the Supreme Court expects and encourages suspects to rely on officers' representations of their rights, making the withholding of a promised right that much more problematic. The Court held in Doyle v. Ohio that it would be fundamentally unfair, and thus a violation of the Due Process Clause, to use a defendant's postarrest, post-Miranda silence against her in any capacity at trial.\(^{110}\) Yet in Fletcher v. Weir, the Court determined that a defendant's postarrest, pre-Miranda silence could be used to impeach her testimony on cross-examination.\(^{111}\) The Court reasoned that implicit in

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105. Cf. id. at 1537–38 (concluding that the Miranda Court relied on the most successful tactics to determine which were the most coercive).
107. See id. at 127–29. It has been convincingly argued that law enforcement officers are somewhat incentivized to question in clear violation of Miranda during interrogation because they can still use subsequent statements for impeachment purposes and they can still use any physical evidence obtained as a result of questioning in violation of Miranda even when the statement may be excluded. See Steven D. Clymer, Are Police Free to Disregard Miranda?, 112 YALE L.J. 447, 451 (2002). In addition, no violation occurs until a statement is actually used against the defendant at trial. See Chavez v. Martinez, 538 U.S. 760, 760–61 (2003).
109. Id. at 159 (emphasis added).
111. 455 U.S 603, 603 (1982) (per curiam) (finding pre-Miranda silence admissible).
warning a person that she has the “right to remain silent and that anything stated can be used . . . against [her]” is the assumption that the decision to remain silent cannot be used against her. Thus, a suspect cannot fairly be punished for refusing to speak, after assurances induced her to exercise that privilege without penalty. The Court made it clear that this rationale depended on the administration of the warnings. Silence was admissible only when, and because, the warnings had not been administered. The Court has not addressed whether post-warning silence in a noncustodial situation is admissible. The Connecticut Supreme Court, however, addressed this absence in the U.S. Supreme Court case law; it relied on Doyle and Fletcher when it held inadmissible a suspect's silence after the administration of Miranda warnings, regardless of whether the suspect was in custody. In doing so, the Connecticut Supreme Court showed how the Supreme Court's jurisprudence in this area indicates an expectation that suspects rely on the warnings as administered, regardless of custodial status.

As for the Davis v. Allsbrooks practice specifically, the case law shows that officers in at least twenty-six local law enforcement agencies across twenty-two states have administered Miranda warnings before interrogating individuals in noncustodial settings or in settings where the question of custody was not clear. Although at least one officer reported to a researcher that the officer had concerns that gratuitous warnings could create inadvertently custodial settings, the issue is not prominently featured in the police training materials where the strategic uses of Beheler are emphasized, at least in California. Given the orchestrated use of noncustodial interrogations and the strategic employment of the Miranda warnings, there is strong evidence that the Davis v. Allsbrooks practice is purposeful.

The next Sections present social science research in combination with a general framework of coercion to suggest that the warnings communicate formal arrest in situations that may otherwise appear to lack signs of formal restraint, and thus increase the tendency for a reasonable suspect to feel that

113. Doyle, 426 U.S. at 618.
114. Id.
115. Fletcher, 455 U.S. at 607.
117. I compiled a listing of these agencies for a case I worked on while interning with the Public Defender Service for D.C. during the summer of 2011. For this listing of agencies, with citations to the cases discussing the practice at these agencies of giving Miranda warnings in noncustodial and other contexts, see Petition for Writ of Certiorari, Jenkins v. United States, Nos. 07-CF-488 & 07-CF-1353 (D.C. July 9, 2010). It should also be noted that in one special victims unit, the officers Mirandize all noncustodial interviewees. Cassell & Hayman, supra note 9, at 882. The local prosecutor in the jurisdiction where this unit operates opined that law enforcement followed this practice in order to accommodate a broader definition of custody at the state level in Utah. Id.
118. Weisselberg, supra note 6, at 1545.
119. See id. at 1542–45.
120. See supra Section II.A.
she cannot leave. In addition, there is a high risk of coercion that arises when a suspect invokes her right to remain silent or her right to counsel, and that request is not respected despite promises to the contrary. The evidence strongly suggests that, from the suspect’s point of view, being given the *Miranda* warnings in noncustodial settings when they are not required likely produces a worse outcome than not reading the warnings.

1. Issuing the Warnings Signifies Arrest

Most people enter an interrogation with law enforcement with the idea that the warnings signify arrest. Even as far back as 1984, 93 percent of participants in a national survey pool knew they had a right to an attorney if arrested, and a national poll in 1991 found that 80 percent of those surveyed knew that they had a right to remain silent if arrested. Thus, an overwhelming majority of people associate the *Miranda* rights with the public “spectacle” of formal arrest. In one case where the controversy at issue in this Note was litigated, the defendant expressed exactly this sentiment at her suppression hearing. She testified that after she voluntarily appeared at a police stationhouse, an officer administered the warnings, and her first response after refusing to waive her rights was to ask the officer, “Why am I being arrested?”

Given the strength of the association between the *Miranda* warnings and formal arrest, a person likely would not feel the increased level of freedom associated with noncustodial interrogation—for example, being able to get up and leave the interrogation or make a phone call to a lawyer—after the warnings have been administered.

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123. *Id.* (citing SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990, at 51 (1993)).

124. Caldwell v. State, 41 So. 3d 188, 201–02 (Fla. 2010); see also supra notes 122–123.


126. *Id.* at 3.

127. See *id.*; contra Estrada v. State, 313 S.W.3d 274, 296 n.26 (Tex. Crim. App. 2010) (“We believe that the defendant’s remedy in a noncustodial setting where the police continue questioning the defendant after the defendant has unambiguously invoked his right to silence is simply to get up and leave.”).
2. Denying Suspects' Invocations of Promised Miranda Rights Coerces

There is an arguably greater risk that arises during the second crucial moment of a noncustodial interrogation—when a suspect refuses to wave or invokes the right to an attorney or to remain silent and officers deny a clear request after making promises to the contrary. Returning to the case example in the Introduction, because the Fourth Circuit found that Davis was not in custody, the court was unperturbed by the officers’ failure to honor Davis’ invocation of his right to remain silent.\(^{128}\) It explained the reasoning behind its decision:

To hold that the giving of Miranda warnings automatically disables police from further questioning upon a suspect’s slightest indication to discontinue a dialogue would operate as a substantial disincentive to police to inform suspects of their constitutional protections. It would convert admirable precautionary measures on the part of officers into an investigatory obstruction.\(^{129}\)

In reality, the holding of the Fourth Circuit in *Davis* condones a practice with a high risk of coercion.\(^{130}\) It is also difficult to understand why courts would encourage officers to relay constitutional protections that are illusory. Nevertheless, this reasoning is pervasive across jurisdictions.\(^{131}\)

Examining the Supreme Court’s confession cases from the pre-Warren Court era to the present sheds light on the type of coercion the Court has sought, and continues to seek, to prevent.\(^{132}\) An account of coercion that one scholar tracks as closely resembling the Supreme Court’s jurisprudence follows five steps: (1) the officer or the government threatens to do something to the suspect if the suspect does not answer the questions in a satisfactory way, and the officer is cognizant that he is making the threat; (2) not answering the questions is rendered “substantially less eligible as a course of conduct” than without the threat;\(^{133}\) (3) the officer makes the threat in order to get the suspect to answer the officer’s questions in a satisfactory way, intending that the suspect understand the threat; (4) the suspect actually

\(^{128}\) See *Davis v. Allsbrooks*, 778 F.2d 168, 172 (4th Cir. 1985).

\(^{129}\) Id. at 172.

\(^{130}\) See *Ex parte Comer*, 591 So. 2d 13, 16 (Ala. 1991) (quoting *Tukes v. Dugger*, 911 F.2d 508, 516 n.11 (11th Cir. 1990)).


\(^{132}\) See *Thomas*, supra note 42, at 79–80.

\(^{133}\) See id. at 83.
answers the officer's questions; and (5) a suspect answers, in part, to avoid the threat.  

In modern interrogation, in which officers rely mainly on psychological rather than physical tactics, the first condition—an officer's threat—is satisfied by the implicit threat of continued interrogation.  

"[An officer] implies that he will continue the interrogation if [the suspect] does not answer to his satisfaction." But not all questioning by a law enforcement officer carries the implicit threat of continued interrogation. The presence of an implicit threat depends on a number of factors, such as the number of questions asked, the location of the questioning, whether the suspect is under arrest, and the officer's tone of voice. These are similar to the factors that courts have considered when looking at the question of custody—not surprising given that custody stands as a proxy for the type of environment in which confessions are presumptively coerced.

In the controversy at hand, an interview has to surpass some threshold level to satisfy the implicit threat standard. Almost all the cases in which controversies related to the Davis v. Allsbrooks practice have been litigated, however, have involved formal but noncustodial stationhouse interviews where the implicit threat is likely present. The second condition is satisfied in modern interrogation because the threat renders remaining silent substantially less eligible as a course of action; the officer is an "authority figure who asks questions while expecting an answer." The third condition is met because the officer threatens continued interrogation in order to get the suspect to answer. And as long as the suspect answers the officer's questions, the fourth condition is satisfied. Arguably, the only controversial condition in the context of modern interrogation is the fifth: causation.

What Miranda imposed was a presumption regarding the fifth condition: part of the suspect's reason for answering the questions must be to avoid the threat. "[I]n effect, [Miranda] held that condition 5 is satisfied in every case involving custodial interrogation unless [the officer] gives the prescribed warnings and obtains a waiver." In Miranda, a major shift in the Court's understanding of coercion occurred: the mere knowledge of the

134. See id. (discussing all five steps).
135. Id. at 93.
136. Id.
137. Id.
138. See supra note 69 and accompanying text.
139. See supra notes 63–65 and accompanying text.
140. For a deeper treatment, see the cases cited supra notes 32–36.
141. Thomas, supra note 42, at 97.
142. Id. at 93.
143. Id. at 96.
144. Id. at 96–97.
145. Id. at 101.
146. Id. (emphasis added).
right to resist interrogation became sufficient to rebut the presumption that the suspect answers, at least in part, to avoid the threat of continued interrogation. In turn, the knowledge of her rights signifies that the suspect speaks in the absence of coercion. We see from this account of coercion why custody is crucial to the Court’s analysis in *Miranda* and later cases. For example, a suspect who is among bystanders at the scene of a crime (noncustodial) likely does not answer questions out of fear of continued interrogation, negating causation. Thus, the causation element that is by definition present in a custodial interview may not be present in a noncustodial one.

The element of causation can be fulfilled by a coercive element other than custody. In this case, the promise of the right to an attorney or the right to remain silent, followed by a failure to stop questioning when either of those rights is invoked, can be sufficient to fulfill the causation requirement. For this to be true, the suspect must detect that the officer fails to do as promised. As addressed above, when a person is promised the right to an attorney and the right to remain silent, the Court works from the assumption that she both understands the substance of those rights and relies on them in her decisionmaking process. Empirically speaking, this is true for most participants in two psychological surveys. One study conducted in 2001 found that most suspects recognized the warnings as communicating that they have a right to remain silent (around 81%) and a right to an attorney (around 95%). Further, a 2010 study consisting of a *Miranda* quiz administered to 149 pretrial defendants and 119 college students elaborated on the depth of knowledge suspects have about the scope of these rights. As far as the right to counsel is concerned, most participants understood “that their request for an attorney should stop police questioning.” However, about 30% inaccurately believed that after they ask for an attorney, questioning may continue until a lawyer is physically present. As far as asserting their rights after an initial agreement to talk, about 37% mistakenly believed that

147. *Id.* at 102.
148. *See id.; see also id.* at 97 (“It is not obvious that every [suspect] confesses during interrogation in part to avoid (or lessen the likelihood of) continued interrogation. [The suspect] might confess to clear her conscience, to save someone else from suspicion, or because she is proud of what she has done.”).
149. *See id.* at 101.
150. *Id.*
151. *See id.*
152. *See supra* notes 110–116 and accompanying text.
153. *See Rogers et al., supra* note 121, at 302–03 (citing Richard Rogers et al., *Miranda Rights...and Wrongs: Myths, Methods, and Model Solutions*, 23 *Crim. Just.* 4, 4–9 (2008)).
155. *Id.* at 307–11.
156. *Id.* at 311.
157. *Id.*
they cannot reassert a right to silence, whereas only 12% believed that they cannot reassert their right to legal counsel.\textsuperscript{158} It appears, then, that the substantial majority of survey participants understand that police questioning should cease immediately after rights are asserted.\textsuperscript{159} This population comprises the suspects who believe that they have a right because they have been informed that they do, attempt to exercise that right—either at the outset or later on in the interview—and are ignored. They are the suspects who may speak because they believe that the police have no intention of honoring any of the guarantees promised.\textsuperscript{160} The other population, those who are not sure how the police are required to respond to an assertion of their rights,\textsuperscript{161} may not be as affected by this tactic. The risk is nevertheless palpable that the vast majority of suspects, who understand that the police are required to cut off questioning, will believe that they have no choice but to talk. The continued use of this tactic in custodial interrogation to induce suspects to speak is a testament to its success.\textsuperscript{162} For example, the Mirandized noncustodial suspect who is denied an exercise of her right to counsel was also informed of her right to silence. But given her earlier attempts to exercise her right to an attorney, she believes the officer will continue to question her regardless of her right. As was the impetus for the imposition of \textit{Miranda},\textsuperscript{163} it will be almost impossible to tell after the fact who spoke because of the coercive element just identified, and who spoke as a result of her own free will to do so.

In sum, an overwhelming majority of suspects feel that they are in custody once the warnings are read. Further, when officers ignore suspects who try to invoke an expressly promised right, they are creating a high risk of coercion. The constitutional protections must respond accordingly.

\section*{III. Strategies for Practitioners and Courts: Advocating a Rebuttable Presumption of Custody}

The problems outlined in Part II suggest that courts should fashion remedies to deter the police from administering warnings that they do not intend to honor during interrogations that lack formal restraint. Courts addressing admissibility under federal standards must ground their reasoning in the Supreme Court’s interpretation of constitutional requirements.\textsuperscript{164} Conse-

\begin{itemize}
  \item \textsuperscript{158} See \textit{id.}
  \item \textsuperscript{159} See \textit{id. at 308–10 tbl.1, 311.}
  \item \textsuperscript{160} See \textit{supra} note 158 and accompanying text.
  \item \textsuperscript{161} See \textit{supra} note 158 and accompanying text.
  \item \textsuperscript{162} See \textit{supra} Section II.A.
  \item \textsuperscript{163} See Missouri \textit{v. Seibert}, 542 U.S. 600, 608 (2004) (describing the historical development of the \textit{Miranda} doctrine as it relates to the voluntariness standard that preceded it); see also \textit{supra} text accompanying note 62.
  \item \textsuperscript{164} See David A. Strauss, \textit{The Ubiquity of Prophylactic Rules}, 55 U. CHI. L. REV. 190, 197 (1988). State courts, on the other hand, have the freedom to impose rules that are more protective than Supreme Court precedent as long as they clearly rely on an adequate and independent state ground. See Michigan \textit{v. Long}, 463 U.S. 1032, 1040–41 (1983); see also
\end{itemize}
quently, these courts have two options: they can either couch their arguments in terms of the *Miranda* doctrine or the voluntariness doctrine.\(^{165}\) Ultimately, however, the solution that most closely aligns with the Court’s current approach and the evidence indicating a strong association between the *Miranda* warnings and formal arrest is a rebuttable presumption that a suspect is in custody for *Miranda* purposes once the warnings are administered. This solution guarantees that the promises contained in the warnings are honored, dispelling the potential for coercion outlined in Section II.B. This Part applies this solution in light of the doctrinal considerations and offers additional, though less desirable, possibilities.

### A. Adding a Rebuttable Presumption to the Custodial Analysis

#### 1. The *Seibert* Decision

A fairly recent case, *Missouri v. Seibert*, suggests a simple solution that sounds in *Miranda*.\(^{166}\) In *Seibert*, the Supreme Court found that a police interrogation tactic, which technically did not violate *Miranda*, was nevertheless unconstitutional because it rendered the warnings entirely ineffective.\(^{167}\) The “question-first” tactic at issue consisted of officers extracting unwarned confessions during custodial interrogations, reading the warnings midinterrogation, and then extracting the same confessions anew in the same sitting.\(^{168}\) While the first confession was inadmissible as a violation of *Miranda*,\(^{169}\) courts were split over whether the second confession could be admitted.\(^{170}\) The Supreme Court determined that it could not.\(^{171}\) No rationale in this opinion, however, carried a clear majority.

The Court’s holding was limited by its earlier opinion in *Oregon v. Elstad*.\(^{172}\) In *Elstad*, police arrested a burglary suspect at his home.\(^{173}\) An officer, before administering *Miranda* warnings, explained to the suspect that he was under suspicion of burglary, to which the suspect responded that he had been at the scene.\(^{174}\) Then, at the beginning of a later interview conducted at the stationhouse, different officers administered the warnings and

\begin{footnotesize}
\begin{enumerate}
\item[165.] See supra Section I.A.
\item[166.] 542 U.S. 600 (2004). The analogies drawn to the *Missouri v. Seibert* case were brought to my attention in email conversation with Professor David Moran on April 14, 2011 (on file with author).
\item[167.] *Seibert*, 542 U.S. at 611.
\item[168.] See id. at 609–11.
\item[169.] Id. at 604.
\item[170.] Id. at 607.
\item[171.] Id.
\item[172.] 470 U.S. 298 (1985).
\item[173.] *Elstad*, 470 U.S. at 301.
\item[174.] Id.
\end{enumerate}
\end{footnotesize}
obtained a full confession. The Court held that the connection between the unwarned and warned statements was "speculative and attenuated at best," and thus the second statement did not need to be excluded.

Three of the five majority votes in Seibert, supplied by Justices Souter, Ginsburg, and Breyer, found that "when Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" In distinguishing Seibert from Elstad, the Justices distilled a number of relevant factors from the cases to be used to determine whether the warnings are effective: (1) the "completeness and detail" of the unwarned interrogation; (2) the "overlapping content"; (3) the "timing and setting" of the first statement as compared to the second; (4) the "continuity of police personnel"; and (5) "the degree to which the interrogator's questions treated the second round as continuous with the first." While in Elstad these factors pointed against extending Miranda to exclude the statement, in Seibert these factors rendered the confession inadmissible: the warnings were given after a full, unwarned confession that took place in the same setting with the same officers, and which covered the same ground as the first interrogation, rendering it continuous with the first.

Justices Breyer and Kennedy, who each wrote opinions concurring in the judgment, supplied the last two votes of the majority. Justice Breyer wrote separately to emphasize his ideal resolution: that the subsequent confession should be excluded unless "the failure to warn was in good faith." Justice Kennedy took Breyer's approach even further. He wanted a rule whereby only deliberate attempts to circumvent Miranda would carry a presumption of exclusion. Even given a deliberate circumvention, exclusion under Justice Kennedy's approach could be avoided by curative measures—such as an admonition that the unwarned statement could not be used, a large break in time, or a change in officers or context. Balancing legitimate law enforcement interests in conducting investigations against the purposes of Miranda, Justice Kennedy concluded that the question-first technique was one such deliberate attempt to circumvent Miranda. But he found Elstad

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175. *Id.* at 314–15.
176. *Id.* at 313–14.
178. *Id.* at 615.
179. *Id.* at 617. As even Justice Kennedy commented, the second interrogation in Seibert resembled a cross-examination where the suspect was confronted with inconsistencies in her earlier prewarning statement. *Id.* at 621 (Kennedy, J., concurring).
180. *Id.* at 617 (Breyer, J., concurring).
181. *Id.* at 622 (Kennedy, J., concurring).
182. *Id.*
183. *Id.* at 619–20.
184. *Id.* at 620–21.
controlling absent proof that the technique was deliberately used to evade *Miranda*.

2. Extending *Seibert* to Create a Rebuttable Presumption

Both the logic of the plurality in *Seibert* and the logic of Justice Kennedy's concurrence counsel in favor of adopting a rebuttable presumption of custody in response to the *Davis v. Allsbrooks* practice. Once a person has been read the warnings, a court should presume that that person is in custody for purposes of *Miranda* absent proof to the contrary. This solution has been termed a "'transformation' argument," in which the "reading of the *Miranda* rights transform[s] an otherwise noncustodial interrogation into a custodial interrogation, one in which a suspect deserves *Miranda*’s protections." Effectively, the Justices in *Seibert* extended the *Miranda* doctrine to exclude a statement when the technical requirements of *Miranda* were not met, and the suggested presumption would so extend *Miranda* to the controversy at issue in this Note. The plurality in *Seibert* found that the question-first tactic contravened the purposes of *Miranda* because it effectively "misle[d] and deprive[d]" a suspect of her choice to speak.

Similarly, the problems outlined in Part II demonstrate that administering the *Miranda* warnings without honoring them contravenes the purposes of *Miranda* by leaving suspects vulnerable to coercion. In the same vein, courts should extend *Miranda*’s protections to suspects who are given *Miranda* warnings, whether officers are required to read the warnings or not.

Justice Kennedy's approach adds another consideration before extending *Miranda*: he requires a balancing of the legitimate interests of the state against the risks that the practice will coerce the suspect into speaking. In this case, the balancing of factors favors the proposed presumption. While the risks have been discussed at length, the possibility of a countervailing, legitimate interest has not. For example, statements obtained in violation of *Miranda* can be used for impeachment purposes but not in the prosecution's case-in-chief, because the "truth-finding" function of the trial wins out over the *Miranda* violation. There is also an exception to *Miranda* to protect the public safety in cases where extreme swiftness is required to prevent further violence or to save a life. Finally, physical evidence obtained because of *Miranda* violations is also admissible, because the probative use of the evidence is considered more important to the fact-finder than the possible deterrent effect of enforcing *Miranda*.

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185. *Id.* at 622.
186. United States v. Harris, 221 F.3d 1048, 1051 n.3 (8th Cir. 2000).
188. *See id.* at 619 (Kennedy, J., concurring).
189. *Id.* (citing Harris v. New York, 401 U.S. 222 (1971)).
190. *See id.* (citing New York v. Quarles, 467 U.S. 649 (1984)).
191. *See id.* (citing United States v. Patane, 542 U.S. 630 (2004)).
In this case, the only legitimate, countervailing interest offered has been that of incentivizing officers to be overly protective in reading the warnings.\textsuperscript{92} That interest, however, is not actually present here. The following set of factual considerations also demonstrates how even Justice Kennedy’s more stringent “deliberate circumvention” test can be met. As the preceding discussions in this Note have highlighted, there are many circumstances in which determining whether a person is in custody proves to be a difficult task, unpredictable at the time of interrogation. In situations where custody is unclear, courts want officers to err on the side of caution and administer the warnings.\textsuperscript{93} In these situations where officers are in fact being benevolent, they will likely also carry through with obtaining a valid waiver and honoring an invocation. Thus, it will be simple for the government to satisfy its burden of showing a valid waiver. But this controversy only arises as a legal issue when the suspect refuses to waive or invokes her rights and is then ignored. In these scenarios, if an officer gives the warnings and then ignores a request because the person was not in custody, that same officer had to know the warnings were superfluous.\textsuperscript{94} This knowledge is proof of a strong likelihood that the officer is engaged in the kind of bad faith trends reviewed in Part II, the same sort of actions which both the plurality and Justice Kennedy in \textit{Seibert} found violative of \textit{Miranda}. The \textit{Davis v. Allsbrooks} practice is similar to and derivative of the studied, documented, and purposefully employed tactics designed to undermine \textit{Miranda}: for example, orchestrating nominally noncustodial interrogations;\textsuperscript{95} giving the warnings only when the officer thinks she has a cooperative witness;\textsuperscript{96} and intentional “questioning outside \textit{Miranda”).\textsuperscript{97}

Additionally, the potential loss of trustworthy confession evidence always works against exclusion.\textsuperscript{98} But because of a high risk of coercion, the balance here, as in \textit{Seibert}, favors exclusion to deter use of the \textit{Davis v. Allsbrooks} practice.

A rebuttable presumption serves multiple goals.\textsuperscript{99} Most importantly, it prevents officers from ignoring promised rights, which is the moment when

\textsuperscript{92} See supra notes 128–131 and accompanying text.
\textsuperscript{93} See supra notes 129–131 and accompanying text.
\textsuperscript{94} A change in personnel could add another wrinkle to the question of whether an officer made a deliberate attempt to circumvent \textit{Miranda}. However, this factor would come into play during the rebuttal stage and so would not be necessary to factor into the question of deliberate circumvention.
\textsuperscript{95} See supra notes 95–101 and accompanying text.
\textsuperscript{96} See supra notes 102–105 and accompanying text.
\textsuperscript{97} See supra notes 105–109 and accompanying text.
\textsuperscript{99} The general rationale for rebuttable presumptions, more common in civil litigation, is fourfold: to serve policy interests, to recognize what is most probably true across a wide range of cases, to place the burden of proof on the party most likely to have access to the information, and to assist in cases where definitive proof is not available. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 686–87 (7th ed. 2011).
the serious risk of coercion arises, since officers will not be able to legally question a suspect after a clear request for counsel or to remain silent.\textsuperscript{200} Imposing a presumption would serve the goal of recognizing what is most probably true throughout a range of cases: given that the\textit{Miranda} warnings are widely associated with the spectacle of formal arrest, a reasonable person would assume that she is under arrest, and therefore in custody, upon hearing the warnings.\textsuperscript{201} In addition, the determination of when a person is in custody is heavily litigated, with similar factual scenarios in interrogations producing different results across jurisdictions.\textsuperscript{202} It follows that employing some easy-to-identify standards could alleviate problems in case resolution. Finally, and most importantly, a presumption would maintain the robust nature of the Fifth Amendment as it applies to statements made during police interrogation generally.

A rebuttable presumption would also give a reviewing court proper flexibility. It would be difficult to argue that, without any of the other formalities of arrest, a person would feel as if she were in custody based solely on the administration of the warnings, making a rebuttable presumption more appropriate. For example, it would be too hard to predict without knowing more surrounding facts how a reasonable person might react to an officer who states both the\textit{Miranda} warnings and the\textit{Beheler} admonishment—which includes reminding the suspect she is free to leave to avoid a custodial situation.\textsuperscript{203} In\textit{State v. Daughtry}, officers informed Daughtry that he was not under arrest and could leave—the\textit{Beheler} admonition—but also instructed him that he had the right to an attorney and the right to remain silent.\textsuperscript{204} Daughtry agreed to waive his rights.\textsuperscript{205} He later stated “I think I need to speak to a lawyer,” but officers did not cease questioning and he confessed to murder.\textsuperscript{206} Importantly, in his suppression hearing, Daughtry testified that he knew he was free to leave, demonstrating that the hypothetical reasonable person in his position may not be in custody.\textsuperscript{207} In essence, a

\begin{enumerate}
\item See supra Section II.B.1.
\item Blum, supra note 121, at 1.
\item See supra notes 100–104 and accompanying text; see also\textit{State v. Daughtry}, 459 S.E.2d 747, 754–56 (N.C. 1995).
\item \textit{Daughtry}, 459 S.E.2d at 754–56.
\item \textit{Id.} at 754.
\item \textit{Id.} (internal quotation marks omitted).
\item \textit{Id.} at 754–55.
\item \textit{Id.} at 755.
\end{enumerate}
rebuttable presumption rebuffs the potential complaint that no one factor should be determinative of custody under Miranda.\textsuperscript{209}

The types of counterproof would draw from the other circumstances that already bear on a determination of custody and the curative measures mentioned in Justice Kennedy's approach in Seibert.\textsuperscript{210} First is the use of the Beheler admonition.\textsuperscript{211} The Court made clear that failing to tell a suspect she is free to leave—the Beheler admonition—would not conclusively indicate that a suspect is in custody; however, it is a significant factor in the Court's estimation.\textsuperscript{212} The admonition here could communicate the exact opposite of what most people understand when they hear the warnings—i.e., that they are under arrest. In addition, time, setting, and officer personnel could come into play during rebuttal. After a personnel change, the suspect may no longer rely on the same promises as earlier. A gap in time or a change in setting may make the warnings less present in a suspect's mind. In sum, the presence of these factors could lessen the effect of the warnings, which favors a rebuttable presumption.\textsuperscript{213}

## B. Alternative Solutions

There are a number of alternative though less desirable solutions that courts have employed. First, as discussed in Section III.B.1, there is the possibility of crafting a new rule for ease of administration: regardless of a finding of custody or voluntariness, any invocation must be honored after officers give the warnings.\textsuperscript{214} Section III.B.2 introduces another approach, which examines the administration of the warnings as just one factor among many that contributes to the circumstances of whether someone is in custody—the "factor approach."\textsuperscript{215} Finally, Section III.B.3 shows that the voluntariness doctrine could be extended to include a presumption analogous to the one proposed under custody.\textsuperscript{216}

### 1. Freestanding Exclusionary Rule

A freestanding exclusionary rule lacks a place in any already cognizable doctrinal framework, making it difficult for courts using a federal standard

\begin{itemize}
\item \textsuperscript{209} See, e.g., California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam) (referring to the "'totality of circumstances' in determining whether a suspect is 'in custody'").
\item \textsuperscript{210} See supra notes 69–70, 180 and accompanying text.
\item \textsuperscript{211} See supra note 101 and accompanying text.
\item \textsuperscript{212} See, e.g., Yarborough v. Alvarado, 541 U.S. 652, 665 (2004) (finding that it was reasonable for the state court of appeals to conclude that the suspect was not in custody even though he had not been informed directly he was free to leave, but also weighing the failure to tell the suspect as pointing toward a finding that he was in custody).
\item \textsuperscript{213} See supra note 178 and accompanying text.
\item \textsuperscript{214} E.g., Ex parte Comer, 591 So. 2d 13, 15–16, 16 n.2 (Ala. 1991).
\item \textsuperscript{215} E.g., Sprosty v. Buchler, 79 F.3d 635, 642 (7th Cir. 1996).
\item \textsuperscript{216} At least one state court has approved weighing the reading of the Miranda factors in a voluntariness inquiry. State v. Taillon, 470 N.W.2d 226, 229 (N.D. 1991).
\end{itemize}
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to adopt. This rule would exclude any statement made as a result of continued interrogation after a suspect requests an attorney or to remain silent under the circumstances, regardless of a finding of custody. Thus far, only the Alabama Supreme Court has adopted such a remedy.\textsuperscript{217} In \textit{Ex parte Comer}, the petitioner was convicted of arson and appealed the use at trial of a statement she made to officers.\textsuperscript{218} An officer had interrogated Comer at the local fire department the day after a fire had occurred at her business.\textsuperscript{219} Comer was read her \textit{Miranda} rights, and when asked if she wanted to speak with the officers, she stated, "I really don't care to."\textsuperscript{220} Officers continued to question her, and she gave a statement that was later used to impeach her testimony at trial.\textsuperscript{221} The Alabama Supreme Court determined that the record on appeal was not sufficient to decide whether Comer was in custody at the time of her interrogation,\textsuperscript{222} but it found that she had clearly invoked her right to remain silent\textsuperscript{223} and that continued questioning was therefore improper because of the risk of coercion.\textsuperscript{224} The court stated that custody was not crucial to its holding: "[O]nce a police officer informs a person of his or her rights under \textit{Miranda}, the police must honor that person's exercise of those rights even if the individual is not in custody."\textsuperscript{225}

There are two problems with this approach. The same concerns about adopting a conclusive presumption apply here. While simple, it fails to account for many other circumstances that could obviate the need to exclude the statement.\textsuperscript{226} But it also departs from the frameworks already established by abandoning the question of custody. In other words, it is less desirable because it requires a larger doctrinal shift than necessary to reach a solution.

2. Factor Approach

A more flexible approach would factor the administration of the warnings into a totality-of-the-circumstances determination of what constitutes custody—the "factor approach." While this seems to be similar to the solution advocated above, courts that have used this mechanism tend to overlook the actual significance of administering the warnings, making this a less-than-adequate solution to the problems outlined in Part II. The Seventh Circuit highlighted an application of the factor approach in a state conviction on habeas review.\textsuperscript{227} In \textit{Sprosty v. Buchler}, the issue arose during the execution of

\begin{itemize}
  \item \textsuperscript{217} \textit{Comer}, 591 So. 2d at 15–16, 16 n.2.
  \item \textsuperscript{218} \textit{Id.} at 14.
  \item \textsuperscript{219} \textit{Id.}
  \item \textsuperscript{220} \textit{Id.} (internal quotations omitted).
  \item \textsuperscript{221} \textit{Id.}
  \item \textsuperscript{222} \textit{Id.} at 15.
  \item \textsuperscript{223} \textit{Id.} at 16.
  \item \textsuperscript{224} \textit{Id.}
  \item \textsuperscript{225} \textit{Id.} at 15–16 (emphasis added).
  \item \textsuperscript{226} \textit{See supra} notes 203–213 and accompanying text.
  \item \textsuperscript{227} \textit{Sprosty v. Buchler}, 79 F.3d 635 (7th Cir. 1996).
\end{itemize}
a search warrant at Sprosty's home. Officers arrived as Sprosty was sitting in a car in his driveway; they blocked his car in, read him the terms of the search warrant, accompanied him into the house, and then informed him of his Miranda rights; he signed a paper stating that he had read and understood them, although it is not clear whether he waived his rights. An officer remained with Sprosty during the three-hour search warrant execution; Sprosty only left the officer's presence when accompanied by two other officers to his bedroom. The appellate court affirmed the determination that Sprosty was in custody, because officers initially barred his path upon arrival, an armed officer exclusively guarded Sprosty for three hours during the search, officers made persistent requests for Sprosty to lead them to incriminating evidence, and officers formally administered the Miranda warnings at the initiation of the encounter.

The main problem with this approach is that it fails to provide specific guidance, allowing courts to simply overlook the relevance of the warnings altogether. Many courts at the state and federal level agree that the warnings should factor into a determination of custody. In practice, however, these same courts fail to actually analyze the warnings as part of the determination of custody in a significant way. The Davis v. Allsbrooks case discussed in the Introduction presents a particularly egregious example of this problem. The Fourth Circuit in Davis relied heavily on the apparent cooperation of the defendant with the police when it found that Davis was not in custody. Although Davis appeared at the stationhouse voluntarily, the Fourth Circuit may have reached a different conclusion had it focused on the following facts: Davis underwent two two-hour interrogation sessions in one evening at the stationhouse; officers went to pick him up at night after he did not return; officers escorted Davis to the bathroom; and officers never informed him that he was not under arrest. Most damaging in Davis was that the court analyzed the reading of the warnings separately from the other circumstances—despite purporting to use a totality-of-the-circumstances

228. Id. at 638.
229. Id.
230. Id.
231. Id. at 643 (distinguishing the facts of this case from United States v. Bums, 37 F.3d 276 (7th Cir. 1994)).
232. Id.
234. See, e.g., Sprosty, 79 F.3d at 642 (emphasizing that where the issue of custody is not clear, the reading of Miranda warnings should factor into a totality-of-the-circumstances determination as to whether an individual should be considered in custody for purposes of Miranda); Davis, 778 F.2d at 172 & n.1; see also United States v. Bautista, 145 F.3d 1140, 1149 (10th Cir. 1998); Caldwell v. State, 41 So. 3d 188, 202 (Fla. 2010) (relating to a similar determination of custody under the Fourth Amendment).
235. See supra note 234.
236. See supra Introduction.
237. Davis, 778 F.2d at 171.
238. See id. at 171–72.
inquiry—when it asked “whether the reading of Miranda warnings to a suspect should by itself create custody.” This approach effectively allowed the court to avoid properly weighing the warnings as a factor in its totality-of-the-circumstances analysis.

In a rebuttable presumption, however, the Miranda warnings as a factor cannot be ignored, and countercircumstances can be presented. This takes care of the issue of deciding whether the reading of the warnings alone creates custody. Thus, if custody is the avenue of resolution, a presumption needs to be employed in order to prevent courts from giving lip service to, but actually ignoring, the reading of the warnings in these contexts.

3. Solution Under Voluntariness

Finally, courts could implement a presumption of involuntariness when interrogation continues after a request for counsel or to remain silent under the circumstances. This approach is attractive given the current state of the Miranda case law, which allows officers to engage in practices that “undermine Miranda’s goals.” It is unsurprising, then, that some scholars have generally advocated imposing standards for police behavior under the voluntariness doctrine rather than further developing Miranda.

At least one court has applied a voluntariness analysis to the problem at issue in this Note, while another has alluded to its efficacy. The North Dakota Supreme Court determined that in a noncustodial interrogation in which the Miranda warnings are administered, an officer’s disregard for invocations of a right to counsel or a right to remain silent is a “relevant factor[] in evaluating the voluntariness of any incriminating statements.” In the pre-Miranda landscape, actual requests for an attorney or to remain silent were important points of inquiry in the voluntariness analysis. And “by the end of the pre-Miranda era, the police were essentially required to honor a suspect’s decision to refuse to submit to police interrogation, a position consistent with Miranda’s subsequent recognition of the suspect’s right to remain silent.”

Since Miranda, the Supreme Court has heard few interrogation cases under the voluntariness standard. In one such case, Mincey v. Arizona, the

239. See id. at 172 (emphasis added).
240. Weisellberg, supra note 6, at 1541; see Clymer, supra note 107; White, supra note 45, at 2004 n.19, 2056–57; supra text accompanying notes 71–77.
241. See generally White, supra note 45.
242. State v. Taillon, 470 N.W.2d 226, 229 (N.D. 1991); see also Davis, 778 F.2d at 171–72, 172 n.1 (borrowing from the language of voluntariness in its custodial analysis and finding that after officers repeatedly deny requests, the “clash of wills” over a suspect’s desire to remain silent could create a custodial situation).
243. Taillon, 470 N.W.2d at 229.
244. White, supra note 45, at 2010.
245. Id. at 2011.
246. Id. at 2014–15 (noting three cases). Since White’s article, the Court decided Chavez v. Martinez, 538 U.S. 760 (2003).
Court held a confession involuntary where detectives interrogated a suspect who was seriously wounded and in the intensive care unit over the suspect's written objection that he did not want to say more without a lawyer.\textsuperscript{247} The Court found that “Mincey was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, and his will was simply overborne. Due process of law requires that statements obtained as these were cannot be used in any way against a defendant at his trial."\textsuperscript{248} In \textit{Colorado v. Connelly}, the Court clarified that the voluntariness inquiry is concerned with curtailing “certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, [that] are so offensive to a civilized system of justice that they must be condemned.”\textsuperscript{249}

Because the post-\textit{Miranda} voluntariness landscape has remained relatively undeveloped by the Supreme Court,\textsuperscript{250} lower courts have room to adopt rules that offer more protection than a variable totality-of-the-circumstances approach.\textsuperscript{251} The rules should be aimed at the police practices that are most likely to induce false confessions.\textsuperscript{252} First, involuntary confession cases at common law excluded confessions stemming from the police methods likely to produce false or untrustworthy confessions.\textsuperscript{253} Second, this interpretation comports with the modern understanding of the Due Process Clause, which “has been interpreted to require that the government employ procedures that will protect the innocent.”\textsuperscript{254} Because jurors tend “to regard confessions as the most . . . damning evidence of guilt,” statements obtained as a result of police methods that are known to produce untrustworthy statements could be excluded to prevent fact-finders from according improper weight to unreliable yet highly damaging evidence.\textsuperscript{255}

It is, however, difficult to pinpoint the exact factors in a given confession that lead an innocent person to incriminate herself, but patterns have emerged, allowing scholars to identify problematic interrogation techniques.\textsuperscript{256} One study gathered sixty confessions that shared the common characteristic that “an individual was arrested primarily because police obtained an inculpatory statement that later turned out to be a proven, or highly likely, false confession.”\textsuperscript{257} The police tactics leading to these false

\textsuperscript{247} 437 U.S. 385, 396, 399, 401 (1978).
\textsuperscript{248} Id. at 401–02.
\textsuperscript{251} Id. (adopting a rule making the use of fabricated evidence a \textit{per se} voluntariness violation).
\textsuperscript{252} White, \textit{supra} note 45.
\textsuperscript{253} Id. at 2039.
\textsuperscript{254} Id. at 2013.
\textsuperscript{255} Id. (quoting Leo & Ofshe, \textit{supra} note 8, at 476) (internal quotation marks omitted).
\textsuperscript{256} Id. at 2042.
\textsuperscript{257} Leo & Ofshe, \textit{supra} note 8, at 436.
confessions were lengthy interrogations,\textsuperscript{258} confessions induced by promises of leniency or threats of harsher punishment for remaining silent,\textsuperscript{259} and trickery designed to "misrepresent evidence of [a] suspect's guilt."\textsuperscript{260} Police promises of leniency and threats of harsher punishment are most applicable to the controversy at hand. There are three notable cases in this category from the sixty-case study:\textsuperscript{261} a threat of the death penalty to coerce a confession,\textsuperscript{262} a threat of the electric chair,\textsuperscript{263} and a threat of sending the suspect's girlfriend to prison for murder instead.\textsuperscript{264}

As discussed, the Davis v. Allsbrooks practice is an implicit threat: by expressly promising a right and then denying it, the officer communicates that the suspect must answer or questioning will continue.\textsuperscript{265} The tactic is different in kind from the threats discussed above, and it has yet to generate any empirical studies of its potential to elicit false confessions.\textsuperscript{266} But the concern over respecting a suspect's desire to remain silent has a foundation in the pre-Miranda voluntariness cases,\textsuperscript{267} a concern which continues post-Miranda.\textsuperscript{268} Furthermore, some courts have suggested that interrogation techniques that overbear a suspect's desire to remain silent or to speak only through the presence of counsel do present voluntariness problems that can occur even in noncustodial scenarios.\textsuperscript{269} Here, the risk of overbearing a suspect's will is high. Judging from the coercive pressure formed by denying an expressly promised right, the practice could easily form the basis for a rule of exclusion under voluntariness. Again, the totality-of-the-circumstances voluntariness inquiry is too weak for the same reasons that a similar holistic approach fails under a custody analysis.\textsuperscript{270} So a presumption could be employed here, as under a custodial solution, to avoid the latter problem.\textsuperscript{271}

The difficulty with the voluntariness approach is that it would require major shifts in the Court's jurisprudence. First, imposing a voluntariness bar would exclude the statement from use for any purpose, whereas continued interrogation in custodial interrogation (after a suspect refuses to waive her rights or later invokes a right after the warnings are read) generally only

\begin{thebibliography}{99}
\bibitem{258} White, \textit{supra} note 45, at 2046–49.
\bibitem{259} \textit{Id.} at 2050–53.
\bibitem{260} \textit{Id.} at 2053–56.
\bibitem{261} White, \textit{supra} note 45, at 2050 n.276 (citing Leo & Ofshe, \textit{supra} note 8, at 466, 470–71, 475–76).
\bibitem{262} \textit{Id.} (citing Leo & Ofshe, \textit{supra} note 8, at 475–76).
\bibitem{263} \textit{Id.} (citing Leo & Ofshe, \textit{supra} note 8, at 466).
\bibitem{264} \textit{Id.} (citing Leo & Ofshe, \textit{supra} note 8, at 470–71).
\bibitem{265} \textit{See supra} Section II.B.1.
\bibitem{266} \textit{See} White, \textit{supra} note 45, at 2041.
\bibitem{267} \textit{See supra} note 245 and accompanying text.
\bibitem{268} \textit{See}, \textit{e.g.}, Mincey v. Arizona, 437 U.S. 385, 401–02 (1978).
\bibitem{269} \textit{See supra} note 242.
\bibitem{270} \textit{See supra} Section II.A.
\bibitem{271} \textit{See supra} Section III.A.2.
\end{thebibliography}
excludes a statement from the prosecution’s case-in-chief. The voluntariness approach would necessarily apply to custodial interrogations as well, meaning the invocation rules in custodial interrogations would have to change accordingly. Second, it would require extending voluntariness to cover situations in which officers use less egregious tactics than the Court has previously proscribed under a voluntariness framework.

On a positive note, this approach could be more efficient since it would require addressing the effect of gratuitous warnings only at the point when a suspect clearly tries to exercise a promised right. Additionally, a voluntariness rule that transcends the boundaries of custodial and noncustodial interrogations would not only resolve the controversy over the Davis v. Allsbrooks practice but would also deter the undesirable tactic of intentional questioning outside Miranda.

CONCLUSION

This Note offers a few solutions to the problems presented by the Davis v. Allsbrooks practice, solutions that would reverse the current course of inaction and satisfactorily preserve a suspect’s rights against self-incrimination under the circumstances. It may be better in the long run for courts to expand the boundaries of the voluntariness doctrine. But using a rebuttable presumption that a person is in custody once the warnings are administered is the solution advocated here. It requires little retooling and stands on strong empirical ground. Courts must look beyond the presumption that gratuitous warnings only serve to benefit suspects by dispelling compulsion. In fact, courts must first recognize that the warnings strongly signify formal arrest. And second, that failing to implement a safeguard against officers administering warnings that they do not intend to honor leaves suspects at risk of coercion. In a broader sense, the warnings could be reduced to meaningless formalities if courts continue to allow officers to recite their words in situations where they have no obligation to honor them. Surely, the use of the warnings as empty promises is contrary to the purposes of Miranda.

273. See supra notes 246–249.
274. Available studies show that upwards of 80 percent of those given the Miranda warnings maintain a valid waiver throughout the interrogation. Cassell & Hayman, supra note 9, at 858–60.
275. There has been a call to roll back the decisions allowing for use of statements obtained through “questioning outside Miranda” for impeachment and other purposes based on the fact that the limited exclusion of statements from the prosecution’s case-in-chief has led to “deliberate disregard” for Miranda. See Weisselberg, supra note 30, at 139–40.