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The Immigrant and Miranda

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ABSTRACT

The recent dramatic convergence of immigration and criminal law is transforming the immigration and criminal justice system. While scholars have begun to examine some of the structural implications of this convergence, this Article breaks new ground by examining judicial responses and specifically the lens of Miranda v. Arizona. *This Article examines the divergent and largely aberrant approaches that federal appellate courts have taken to determine whether* Miranda *warnings and rights apply to custodial inquiries about immigration status that have clear criminal and civil implications. Part I of this Article discusses the distinctions between civil and criminal immigration laws and the background principles of* Miranda. *Part II synthesizes the various and inconsistent tests courts have used to determine whether* Miranda *applies to dual civil and criminal immigration inquiries and examines how the failure of lower courts to apply* Miranda *consistently in the immigration context marks an unusual shift in the Supreme Court's jurisprudence. It then explores how the emerging doctrine for immigrants departs (1) from the Court's application of* Miranda *to dual civil and criminal interrogations in the tax context; (2) from precedent favoring objective tests; and (3) ultimately from the animating principles in* Miranda *to bring clarity to police, suspects, and courts on the admissibility of statements in custodial interrogations. Part III of this Article describes the broader implications of these doctrinal shifts in light of significantly increasing federal enforcement of criminal provisions of immigration laws and the increasing number of local law enforcement officials who are untrained in immigration law and yet are involved in these prosecutions. It also analyzes the incentive structure created by federal compensation programs for local law enforcement agencies to circumvent procedural protections for immigrants, relying on new data suggesting that the government's aggressive criminal enforcement policy has raised serious constitutional issues. Finally, Part IV explores the ways in which these trends reflect declin-*

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ing procedural protections in the realm of criminal prosecutions for immigration-related offenses and proposes some solutions to ensure that immigrants' rights are protected in criminal immigration enforcement.

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I. INTRODUCTION

IT is uncertain how Ernesto Miranda, born in Mesa, Arizona, became Mexican, yet that is precisely what happened in the landmark case *Miranda v. Arizona*.[1] Chief Justice Earl Warren, writing for a 5-4 majority, incorrectly describes Miranda as an "indigent Mexican defendant."[2] In the same paragraph where American-born Miranda becomes Mexican, Warren describes Roy Allen Stewart, a defendant in one of the companion cases decided with *Miranda*, as "an indigent Los Angeles Negro."[3] No racial or ethnic descriptors are provided for Michael Vignera or Carl Calvin Westover, the defendants in the other two companion cases consolidated with *Miranda*.

That Miranda was "Mexican," that Stewart was a "Los Angeles Negro," or that Vignera and Westover presumably were White,[4] made no doctrinal difference in the Court's decision, in which the Court held that a post-arrest warning was constitutionally required before a custodial interrogation.[5] That neither Mr. Miranda's ethnicity nor citizenship status—nor even Stewart's race—was considered by the Court is not surprising because the Court has held for more than a century that noncitizen criminal defendants are to be accorded the same panoply of constitutional rights and protections as citizens.[6] Yet, in order for race, ethnicity, and citizenship to be cognizable as legally irrelevant, difference must first be named.[7] Though *Miranda* is a criminal procedure case and not a formal

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

2. *Id.* We of course do not know what led Warren to ascribe "Mexican-ness" onto Miranda, but perhaps this attribution of foreignness reflects what Juan Perea has described as "symbolic deportation." Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 966 (1995). It is interesting to note that Harlan in his dissent does not include the adjective, "Mexican," in his description of Miranda. *See Miranda*, 384 U.S. at 518 (Harlan, J., dissenting) ("At this time Miranda was 23 years old, indigent, and educated to the extent of completing half the ninth grade."). Further, the Court has demonstrated that it is fully capable of correctly attributing ethnicity. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478, 482 (1964) ("petitioner, a 22-year-old of Mexican extraction"); Korematsu v. United States, 323 U.S. 214, 215 (1944) ("petitioner, an American citizen of Japanese descent"); Hirabayashi v. United States, 320 U.S. 81, 83 (1943) (same).

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

4. That Chief Justice Warren feels no need to attribute racial markers to Vignera and Westover reflects what Barbara Flagg has described as the transparency phenomenon: "Whites' 'consciousness' of whiteness is predominantly *unconsciousness* of whiteness. We perceive and interact with other whites as individuals who have no significant racial characteristics." Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 970 (1993).

5. *Miranda*, 384 U.S. at 498.

6. *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896).

7. Neil Gotanda describes constitutional colorblindness as relying on the technique of nonrecognition—"noticing but not considering race." Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 16 (1991). Described in more detail, "[n]onrecognition has three elements. First, there must be something which is cognizable as a racial characteristic or classification. Second, the characteristic must be recognized. Third, the characteristic must not be considered in a decision. For nonrecognition to make sense, it must be possible to recognize something while not including it in making a decision." *Id.* at 16–17.

"race case," the deployment of difference markers places *Miranda* within the Warren Court's equality jurisprudence, where race, ethnicity, national origin, and citizenship are irrelevant for determining constitutional criminal procedural safeguards.[8] Ernesto Miranda became "Mexican" so that it would be clear that the criminal justice system is meant to treat citizens and noncitizens alike.[9]

However, this long-established unitary criminal justice system has begun to unravel on a doctrinal and practical level, as seen in the following example. In Morristown, New Jersey, law enforcement officials from the Morris County Sheriff's Office ask every inmate in custody whether they were born in the United States.[10] If the individual answers "no," an official informs Immigration and Customs Enforcement ("ICE") under the State Criminal Alien Assistance Program ("SCAAP"), which compensates the county if the inmate is subject to civil or criminal immigration penalties.[11] Pursuant to a state-wide policy, the Morris County Sheriff's Department has taken the position that rights under *Miranda v. Arizona*[12] do not apply to this, or any other ICE referral questions it asks inmates about immigration status.[13] Thus, despite the fact that answering these questions could lead to prosecution for federal immigration crimes having sentences of up to twenty years, officials do not provide *Miranda* warnings to individuals before asking the ICE referral question, nor do they know or ascertain whether inmates have been Mirandized or have invoked their right to be silent or right to speak with an attorney prior to questioning.[14] Morris County law enforcement officials do not permit in-

8. *See* Eric J. Miller, *The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 3 (2010).

9. While individuals subject to civil deportation/removal proceedings are afforded a different set of protections because removal is a civil penalty, the Supreme Court has not only reaffirmed this doctrine of equality of constitutional protection for noncitizens, but in fact strengthened the criminal procedural protections afforded to noncitizens in recent years. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (holding that the right to the effective assistance of counsel can be violated by a criminal defense attorney's failure to warn about the immigration consequences of pleading guilty).

10. Interview with Ed Rochford, Sherriff, Morris Cnty. & Frank Corrente, Undersheriff, Morris Cnty., (May 14, 2010) (notes on file with author) [hereinafter Interview with Sheriff & Undersheriff]. In an official report, the Sheriff's Office stated that this question is asked pursuant to "instructions and directives from ICE." Sheriff Edward Rochford, Chief Ralph McGrane, Warden Frank Corrente, Staci Santucci, Esq., Morris County Sheriff's Office, *An Impact Review of the United States Bureau of Immigration and Customs Enforcement 287(g) Programs Upon the County of Morris*, Submitted to the Morris County Board of Chosen Freeholders (Oct. 19, 2007) [hereinafter Impact Review]. Although in previous interviews, Undersheriff Corrente stated that this question is asked based on state rules. Interview with Frank Corrente, Undersheriff, Morris Cnty., (Mar. 5, 2010) (notes on file with author) [hereinafter Undersheriff Interview].

11. 8 U.S.C. § 1231(i) (2006); Undersheriff Interview, *supra* note 10; Impact Review, *supra* note 10, at 1.

12. 384 U.S. 436, 467–69 (1966).

13. Interview with Sheriff & Undersheriff, *supra* note 10; Undersheriff Interview, *supra* note 10.

14. Interview with Sheriff & Undersheriff, *supra* note 10; Undersheriff Interview, *supra* note 10.

dividuals to contact an attorney before answering this question[15] and place individuals who remain silent into isolation until they respond.[16] According to county officials, all New Jersey jails follow this ICE referral system.[17]

Morris County's policies, which are similar to those throughout the country, reflect the views of local law enforcement officials nationwide who question hundreds of thousands of individuals a year about their immigration status, place of birth, or other facts that could lead to criminal and civil immigration sanctions but do not require the same procedural safeguards as other criminal law enforcement. Further, the failure or refusal to provide *Miranda* warnings in this context has been approved by a number of lower courts that have begun to tread dangerous new ground by developing a new doctrinal exceptionalism in *Miranda* jurisprudence for noncitizens. Although the Supreme Court in 1968 held in *Mathis v. United States*[18] that the distinction of whether an initial custodial interrogation is intended for a civil or criminal investigation does not control the analysis for *Miranda* purposes if the investigation could lead to criminal charges, this rule has not been applied in the immigration context. Instead, many lower courts have applied an unusual subjective analysis to determine whether *Miranda* rights apply to dual civil-criminal immigration questioning that diverges from the Court's focus on objective factors in analyzing *Miranda* rights. This aberration in immigrants' rights is occurring at a time when criminal immigration prosecutions are at a record high, comprising more than half of the federal criminal docket.[19] This Article explores the roots of this new doctrinal exceptionalism and argues that it runs counter to long-established *Miranda* jurisprudence and threatens to create dual-track criminal procedure safeguards where one's *Miranda* rights depend in part on one's status.[20] This Article argues that this exceptionalism is located in doctrinal confusion stemming from the dual civil and criminal investigation of immigration violations.[21] Courts, perhaps influenced by the plenary power doctrine's exceptional treatment of

15. Undersheriff Interview, *supra* note 10; Morris County Sheriff's Office May 12, 2010 Response to March 8, 2010 Open Records Act Request (on file with author) [hereinafter Office Response].

16. Office Response, *supra* note 15; Morris County Undersheriff Interview, *supra* note 10.

17. Interview with Sheriff & Undersheriff, *supra* note 10; Undersheriff Interview, *supra* note 10; see N.J. ADMIN. CODE § 10A:31-6.1 (2012) (providing an "inmate population accounting system" based on several factors).

18. 391 U.S. 1, 4–5 (1968).

19. *See* Transactional Records Access Clearinghouse, *FY 2009 Federal Prosecutions Sharply Higher: Surge Driven by Steep Jump in Immigration Filings* (2009) [hereinafter "TRAC"], *available at* trac.syr.edu; Joanna Jacobbi Lydgate, Comment, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 511 (2010).

20. That is, a system where *Miranda* rights are not affected when custodial interrogation relates to crimes such as robbery, etc., but are affected when custodial interrogation relates to immigration matters.

21. *See infra* text accompanying notes 118–130.

the border and its enforcement,[22] have improperly circumvented *Miranda*'s safeguards for certain immigrants, departing from a unitary criminal justice system.

The doctrinal confusion of courts on this issue compounds the already serious implications of the federal government's significant structural changes in immigration enforcement. Despite successfully challenging Arizona's immigration law empowering local law enforcement, the U.S. government has recently supported efforts to incentivize and enlist untrained state and local law enforcement officials throughout the country as a front line for criminal and civil enforcement of immigration laws.[23] The federal government has increased financial incentives in programs such as the SCAAP, which compensates local agencies to identify immigrants in violation of immigration laws and refer them to ICE.[24] Unlike federal immigration officers, however, these local law enforcement personnel receive no training in immigration law and immigrants' constitutional protections.[25] Such programs incentivize local law enforcement officers to abrogate noncitizens of their rights by providing compensation to local jails for pre- and post-trial incarceration of "criminal aliens."[26] In the last five years, local officials have questioned and referred to ICE some 1.65 million suspects under SCAAP[27] in hopes of identifying eligible individuals subject to civil or criminal immigration violations, thus obtaining a share of the $4.65 billion the federal government has allocated for SCAAP since 2007.[28] Consequently, courts are enabling and legitimizing practices and policies that are jeopardizing rights for noncitizen defendants. In light of the unprecedented rate at which the federal government is enforcing violations of immigration laws together with the help of untrained local law enforcement officials, the risks of losing longstanding procedural protections for immigrants is substantial.

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22. For a discussion of the plenary power doctrine, see Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853 (1987); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 546 (1990).

23. *See, e.g.*, Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1161–63 (2008) (describing increased role of state and local officials in enforcement of immigration laws); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557, 1557–58 (2008); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1084–88 (2004) (describing federal effort to enlist local police in immigration enforcement after September 11th).

24. DOJ, FY 2013 PERFORMANCE BUDGET 156–57 (2012), *available at* http://www.justice.gov/jmd/2013justification/office/fy13-ojp-justification.docx.

25. *See, e.g.*, INT'L ASS'N OF CHIEFS OF POLICE, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE, TRIBAL AND LOCAL LAW ENFORCEMENT (2004), *available at* http://www.theiacp.org/Portalslo/pdfs/Publications/immigrationEnforcementsconf.pdf.

26. DOJ, *supra* note 24, at 157.

27. *See* BJS, *FY 2007-2011 SCAAP Awards*, SCAAP Data Masterfile [hereinafter SCAAP AWARDS].

28. 8 U.S.C. § 1231(i)(5)(A)–(C) (2006) (setting SCAAP appropriations at $750 million for fiscal year 2006, $850 million for fiscal year 2007, and $950 million for fiscal years 2008–2011).

Surprisingly, while there is rich scholarly literature addressing the serious constitutional deficiencies in civil immigration proceedings[29] and the collateral consequences of criminal convictions on immigration status,[30] the developing doctrinal inequalities in immigrants' well-established constitutional protections and the resulting disproportionate impact on Latinos has received little scholarly attention. Scholars have only recently taken notice of the shifting landscape of immigration enforcement in the criminal sphere, but such analysis has focused more on policy and institutional shifts rather than on how courts are responding to these issues.[31] Much of the "crimmigration" scholarship has primarily addressed the convergence between immigration and local law enforcement of federal immigration laws and the collateral consequences of immigration laws for noncitizens.[32]

My goal is to add to the literature in two ways. First, I examine doctrinal dimensions of *Miranda* and how it treats immigrants. That is, I provide a sense of how federal courts are interpreting existing *Miranda* jurisprudence to address the merged system of immigration enforcement and criminal justice and, secondarily, the role local actors play as primary gatekeepers in civil and criminal enforcement of immigration laws. I address the question of how doctrine has shifted to create new rules for immigrants in a once-uniform criminal justice system. *Miranda* rights provide a good prism for understanding how rights and rules are changing for immigrants. Second, I provide a sense of the on-the-ground impact of the new and confusing *Miranda* rules that courts have developed in light of the unprecedented changes in criminal and civil immigration enforcement. I examine how the shift in *Miranda* jurisprudence operates and on what scale. In particular, I highlight the ways in which courts are compounding institutional structures that are already altering immigrants' rights in an unprecedented era of criminal immigration enforcement.

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29. Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1604–06 (2010); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472, 499–500, 505–07 (2007) (arguing that immigration law has "absorb[ed] the theories, methods, perceptions, and priorities" of criminal law enforcement); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) (arguing that the line between immigration law and criminal law "has grown indistinct").

30. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000) (discussing the changes to the law and critiquing reform proposals).

31. Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 135–36 (2009) (discussing scholarship on convergence of criminal justice and immigration control regimes); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1294 (2010); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 652 (2004) ("Deportation is now often a virtually automatic consequence of a noncitizen's criminal conviction for even a minor state misdemeanor."); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1845–46 (2011); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 167 (2012).

32. *See supra* note 31 and accompanying text.

Courts are redefining immigrants' rights, departing from long-established jurisprudence. This has significant implications on the substantive rights of both noncitizens and citizens in the criminal justice system, as well as for the institutional actors charged with enforcing immigration law.

Part I of this Article discusses the distinctions between civil and criminal immigration laws and systems and the background *Miranda* principles. Part II synthesizes the various and inconsistent tests courts have used to determine whether *Miranda* applies to dual civil and criminal inquiries and examines how the failure of lower courts to apply *Miranda* to dual civil and criminal inquiries marks an unusual departure from the Court's previous application of *Miranda* to civil-criminal inquiries in the tax context. Part II also examines how such application departs from the animating principles in *Miranda* that are meant to provide clarity to police, suspects, and courts on the admissibility of statements in custodial interrogations. This failure also departs from recent trends in the Supreme Court's *Miranda* jurisprudence favoring an objective inquiry. Part III of this Article describes the implications of these doctrinal shifts in light of the significantly increasing federal enforcement of criminal provisions of immigration laws and the increasing numbers of local law enforcement officials who are untrained in immigration law and are involved in these prosecutions. It also analyzes the incentive structure created by these federal compensation programs for officers to circumvent procedural protections for immigrants, relying on data that shows how the government's aggressive criminal enforcement policy raises serious constitutional issues.

Finally, Part IV explores the ways in which these proceedings reflect declining procedural protections in criminal prosecutions for immigration-related offenses and concludes by proposing ways that the criminal justice system and federal and local immigration enforcement partnerships must be reformed to effectively address these issues. Specifically, my proposals draw on strategies used by the IRS and the SEC to protect suspects' rights in dual civil and criminal investigations in the tax and securities context.

II. BACKGROUND

A. Civil and Criminal Enforcement of Immigration Laws

Federal immigration laws include both civil and criminal components, codified by the Immigration and Nationality Act (INA).[33] Until recently, immigration has long been regulated in the civil sphere.[34] Unlawful presence, alone, is a civil violation.[35] Although scholars have critiqued the removal system as essentially punitive,[36] the federal government uses a

33. *See, e.g.*, 8 U.S.C. §§ 1325–26, 1329 (2006).

34. Chacón, *supra* note 31, at 136; Sklansky, *supra* note 31, at 167–69.

35. 8 U.S.C. § 1182(a)(6)(A)(i).

36. Legomsky, *supra* note 29, at 511 (observing that Supreme Court has long considered deportation or removal to be a civil sanction); Peter L. Markowitz, *Straddling the*

civil regulatory process known as a "removal proceeding" to adjudicate whether an individual is deportable based on immigration status.[37] During the removal process, individuals are entitled to statutory rights, due process, and other constitutional protections that share some overlap with the criminal justice system, but not the full panoply of criminal procedural protections.[38]

The INA also contains criminal provisions for immigration violations. For example, a person who enters the country illegally can be charged and prosecuted for a misdemeanor, and reentry after deportation is punishable for up to twenty years.[39] The INA also contains criminal sanctions for entering the country without inspection or through false representations,[40] willful failure to register as an alien after thirty days following entry into the country,[41] illegal reentry following a deportation order,[42] and willful failure to depart or apply for travel documents after a deportation order.[43] Noncitizens facing criminal charges for immigration violations undergo identical criminal proceedings as citizens and are entitled to the same panoply of procedural protections as U.S. citizens in all phases of the criminal process.

To prosecute an immigration crime, federal prosecutors must follow the same procedures as all federal crimes: obtain a grand jury indictment of Federal charges, file those charges before an Article III court, and use jury trials or plea bargaining to determine guilt. The Supreme Court established a unitary criminal justice system for immigrants and citizens more than a century ago in *Wong Wing v. United States*.[44] There, the Court invalidated a federal law passed during Chinese exclusion that, in addition to civil deportation, imposed a criminal penalty of hard labor for Chinese workers who were adjudicated through a summary proceeding to be noncitizens or illegal residents.[45] According to the Court, the law violated the Fifth and Sixth Amendments by imposing criminal penalties for immigration violations without a judicial trial because "all persons within the territory of the United States are entitled to the protection."[46] Since *Wong Wing*, the Court has continued to reaffirm that noncitizen criminal defendants are entitled to all criminal rights and protections, including

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Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings, 43 HARV. C.R.-C.L. L. REV. 289, 345–46 (2008).

37. 8 U.S.C. §§ 1226, 1229.

38. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893); *see also* Chacón, *supra* note 29, at 1603–06; Stumpf, *supra* note 29, at 390–395.

39. 8 U.S.C. §§ 1325–26.

40. *Id.* § 1325(a)(2)–(3) (prohibiting entry into the country by eluding examination and entry by use of false or misleading representation).

41. *Id.* §§ 1302, 1306 (stating that any alien who willfully fails to register after thirty days can be guilty of a misdemeanor and fined up to $1000 or imprisoned up to six months or both).

42. *Id.* § 1326(a).

43. *Id.* § 1253.

44. *See* 163 U.S. 228, 237 (1896).

45. *Id.* at 230 (citing 27 Stat. 25, ch. 60, § 4 (1892), *invalidated by Wong Wing*, 163 U.S. 228).

46. *Id.* at 238.

Miranda warnings and the right against self-incrimination under the Fifth Amendment.[47] Although, as described below, an upsurge in federal criminal prosecutions and institutional shifts have recently blurred the boundaries between civil and criminal immigration laws,[48] Congress and the Supreme Court have formally maintained these distinctions.

B. *MIRANDA* WARNINGS IN THE CRIMINAL CONTEXT: THE RULE AND THE RATIONALE

The Fifth Amendment privilege against self-incrimination[49] prohibits the government from compelling any person to give testimonial statements that may subject her to criminal prosecution or penalties regardless of citizenship[50]—in civil or criminal proceedings or in informal settings.[51] In *Miranda v. Arizona*,[52] the Supreme Court held that the Fifth Amendment privilege requires the police to advise a suspect in custody, prior to questioning, of the now-famous warnings: that she has the right to remain silent and the right to the assistance of counsel during the interrogation, or the functional equivalent.[53] A failure to do so will ordinarily result in suppression unless the accused makes a voluntary, knowing, and intelligent waiver of her rights.[54] In so holding, the Court extended the constitutional safeguard against self-incrimination to informal settings, including jail.[55]

The *Miranda* Court believed these rules were necessary to counteract the "inherently coercive" nature of police interrogation, reflecting both the Court's experience in reviewing interrogation abuses that routinely took place at police stationhouses and its close review of the psychological ploys described in police manuals.[56] Recognizing that "custodial interrogation exacts a heavy toll on individual liberty and trades on the

47. *See id.*; *see also* United States v. Balsys, 524 U.S. 666, 671 (1998); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953).

48. *See, e.g.*, Eagly, *supra* note 31, at 1359 (noting that immigration enforcement and criminal justice have merged into "a single, intertwined regulatory bureaucracy . . . that blurs and reshapes law enforcement power, prosecutorial incentives, and the aims of the criminal law"); Sklansky, *supra* note 31, at 167.

49. U.S. CONST. AMEND. V. (stating that no one "shall be compelled in any criminal case to be a witness against himself.").

50. Matthews v. Diaz, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to . . . constitutional protection [under the Fifth Amendment].")

51. *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 7077 (1973) (holding that the Fifth Amendment privilege against self-incrimination allows an individual "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings").

52. 384 U.S. 436, 473 (1966).

53. *See* Duckworth v. Eagan, 492 U.S. 195, 202–03 (1989) (holding that warnings must be "'a fully effective equivalent'" of the *Miranda* language and "reasonably 'convey to [a suspect] his rights as required by *Miranda*'" (quoting *Miranda*, 384 U.S. at 476; California v. Prystock, 453 U.S. 355, 361 (1981) (alteration in original) (emphasis omitted))).

54. *Miranda*, 384 U.S. at 475.

55. Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 436–38 (1987).

56. *Miranda*, 384 U.S. at 448–59.

weakness of individuals,"[57] the Court held that the warnings would "dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgement of [a] suspect's Fifth Amendment rights."[58] The Court was also concerned about the unwieldy, fact-intensive due process voluntariness test that previously governed the admissibility of self-incriminating statements made during custodial interrogations, which was challenging for courts to administer[59] and for police to follow.[60] Thus, the *Miranda* rules provided a more objective and "concrete"[61] method for courts to presumptively identify coerced statements and to guide police in conducting constitutionally permissible custodial interrogations while protecting suspects.[62]

Guided by these concerns for clarity, *Miranda* and its progeny held that *Miranda* warnings and waivers are triggered before any custodial interrogation,[63] during a criminal investigation,[64] or during *a civil investigation that could result in a criminal prosecution.*[65] Government officials must clearly administer the four warnings under *Miranda* in a manner that is not misleading[66] and must provide suspects the "[o]pportunity to exercise these rights . . . throughout the interrogation."[67] Any waiver of these rights must be knowing and intelligent.[68] Once a suspect has invoked her "right to silence" or "right to counsel," government officials must cease all questioning of the suspect[69] until counsel is provided[70] or the suspect

57. *Id.* at 455.

58. Moran v. Burbine, 475 U.S. 412, 425 (1986).

59. Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 746–47 (1987).

60. *See infra* Part II.C.

61. The Court explained that it granted certiorari in *Miranda* to address the "problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Miranda*, 384 U.S. at 441–42.

62. *Id.*

63. The Court has subsequently required that "custody" and "interrogation" be defined by objective factors and not by the subjective intent of the police or the belief of the accused. *See, e.g.*, Stansbury v. California, 511 U.S. 318, 323–24 (1994) ("[T]he 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."); Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).

64. Specifically, an individual facing custodial investigation "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479.

65. *See, e.g.*, Mathis v. United States, 391 U.S. 1, 4–5 (1968) (requiring *Miranda* warnings where the petitioner was questioned by the IRS regarding a civil matter that immediately led to a criminal investigation for tax fraud); United States v. Mata-Abundiz, 717 F.2d 1277, 1279 (9th Cir. 1983).

66. *See* California v. Prysock, 453 U.S. 355, 360–61 (1981); United States v. Beale, 921 F.2d 1412, 1434–35 (11th Cir. 1991).

67. *Miranda*, 384 U.S. at 479.

68. *Id.*

69. Michigan v. Mosely, 423 U.S. 96, 100–01 (1975).

70. Edwards v. Arizona, 451 U.S. 477, 424–25 (1981).

reinitiates further communication.[71] These waiver rules apply to subsequent questioning of the suspect about any offense[72] by any government official who seeks to question the suspect.[73]

While the Court has opted for objective rules and clarity since *Miranda* was decided,[74] it has also carved out a number of exceptions[75] in circumstances where the underlying policy purposes for *Miranda* are absent.[76] One such exception is the "booking exception," which exempts *Miranda* warnings for questions essential to a police booking process, unless the official should have known that the question would elicit an incriminating response.[77] Because some of the dual civil and criminal immigration *Miranda* cases involve the booking process, the next section outlines the parameters of this exception and the Court's definition of interrogation under *Miranda.*

C. Interrogation, the Booking Exception, and Its Exception

Relevant to cases addressing dual civil and criminal immigration questioning, the Court has defined "interrogation" to mean questions, words, or actions that are likely to be incriminating, measured objectively from the perspective of the suspect.[78] The Court has also held that *Miranda* warnings generally do not need to be given prior to asking a suspect booking questions about routine identifying information "normally attendant to arrest and custody" because such questions do not usually elicit incriminating responses.[79] The Court, however, has made clear that *Miranda* applies to booking questions designed to elicit incriminating responses.[80] As some courts assess whether dual criminal-civil immigration custodial questioning constitutes "interrogation" and some analyze questions asked during booking, this section reviews the Court's decisions about interrogation and the booking exception.

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71. Minnick v. Mississippi, 498 U.S. 146, 149–56 (1990); *Edwards*, 451 U.S. at 424–25.

72. Arizona v. Roberson, 486 U.S. 675, 683–84 (1988).

73. *See id.* at 687 (holding that an officer initiating a custodial interrogation must "determine whether the suspect has previously requested counsel"); McNeil v. Wisconsin, 501 U.S. 171, 177 (1991).

74. *See infra* Part III.C.

75. *See, e.g.*, Maryland v. Shatzer, 130 S. Ct. 1213, 1223 (2010) (creating 14-day break in custody rule); United States v. Patane, 542 U.S. 630, 633–34 (2004) (applying exception to the fruit of the poisonous tree doctrine for physical evidence); New York v. Quarles, 467 U.S. 649, 655–56 (1984) (applying public safety exception to *Miranda*); Harris v. New York, 401 U.S. 222, 226 (1971) (allowing unwarned statements for impeachment purposes).

76. Scholars have criticized these exceptions as weakening *Miranda* protections and its impact. *See infra* note 117.

77. Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980); Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990) (Brennan, J., plurality opinion).

78. *Innis*, 446 U.S. at 301.

79. *Id.*; *see also* United States v. Parra, 2 F.3d 1058, 1068 (10th Cir. 1993) ("The underlying rationale for the exception is that routine booking questions do not constitute interrogation because they do not normally elicit incriminating responses.").

80. *Muniz*, 496 U.S. at 602 n.14 ("Without obtaining a waiver of the suspect's Miranda rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions." (quoting Brief for the United States as Amicus Curiae supporting Petitioner at 13, Pennsylvania v. Muniz, 496 U.S. 582 (1990) (No. 89-213))).

The Supreme Court provided guidance on both the definition of "interrogation" and the booking exception in *Rhode Island v. Innis*[81] and *Pennsylvania v. Muniz*.[82] In *Innis*, a suspect, made incriminating statements in response to a statement made by one of the police officers in a conversation with another officer.[83] The statements were made during the ride to the police station but after the suspect had invoked his *Miranda* right to counsel. In deciding whether the officer's statement violated the suspect's *Miranda* rights, the Supreme Court defined interrogation for purposes of *Miranda* to include both express questioning and its "functional equivalent," or "any words or actions on the part of police (other than those *normally attendant* to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[84] Reflecting the *Miranda* Court's concerns with safeguarding suspects from a coercive interrogation environment, the Court held that the interrogation inquiry turns on the perceptions of the suspect, measured by an objective standard.[85] While the Court made clear that interrogation does not turn on the actual intent of the police,[86] it observed in a footnote that the actual intent of the police may be relevant if there is "a police practice [that] is designed to elicit an incriminating response from the accused."[87] Read together, the Court in *Innis* used an objective test to define whether certain questions or their functional equivalent are an interrogation, allowing consideration of actual intent only as evidence of police tactics designed to incriminate.[88] This is consistent with *Miranda* both for its focus on the suspect and for its emphasis on a clear, objective inquiry. In dicta, it noted that an interrogation did not include questions "*normally* attendant to arrest and custody."[89]

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81. 446 U.S. 291, 301 (1980).

82. 496 U.S. 582, 601 (1990) (Brennan, J., plurality opinion).

83. *Innis*, 446 U.S. at 294–95. Innis was arrested in connection with a robbery with a sawed-off shot gun. During the ride to the police station, the two officers transporting him conversed among themselves when one officer stated, "there's a lot of handicapped children running around this area, and God forbid one of them might find a weapon with shells and they might hurt themselves." *Id.* at 294–95. Innis then asked the police to turn around so that he could show them where the gun that he used to kill the taxicab driver was located, which was later used to criminally convict him. *Id.* at 295–96.

84. *Id.* at 301 (emphasis added). The Court defined an "incriminating response" to mean "any response whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial." *Id.* at 302 n.5 (emphasis omitted).

85. *See id.* at 301; *see also* Welsh S. White, *Interrogation Without Questions:* Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209, 1232–33 (1980).

86. *Innis*, 445 U.S. at 301 (the definition of interrogation focuses on "the perceptions of the suspect, rather than the intent of the police . . . [to] reflect[ ] the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police").

87. *Id.* at 301 n.7.

88. *See id.* at 301. The Court's decision surprised scholars at the time for its broad definition of interrogation, its focus on the perspective of the suspect, and its clear objective standards. *See, e.g.*, Jesse C. Stewart, *The Untold Story of* Rhode Island v. Innis*: Justice Potter Steward and the Development of Modern Self-Incrimination Doctrine*, 97 VA. L. REV. 431, 439 (2011).

89. *Innis*, 446 U.S. at 300–01 (emphasis added).

Ten years later, the Court in *Pennsylvania v. Muniz*[90] reaffirmed the objective approach both in defining interrogation and in carving out the booking exception. In *Muniz*, the defendant was arrested for driving while intoxicated and was taken to the police station.[91] At the station, the booking officer asked Muniz, without providing *Miranda* warnings, for his name, address, height, weight, eye color, date of birth, age, and the date of his sixth birthday, which Muniz could not remember.[92] The Court held that the defendant's responses to basic identifying questions asked without *Miranda* warnings were custodial interrogations but exempt from *Miranda*; however, it held that Munre's response to the question about his sixth birthday was inadmissible under *Miranda*.[93] The Court reasoned that *Miranda* applied to this question because it called "for a response requiring him to communicate an express or implied assertion of fact or belief, confronted with the 'trilemma' of truth, falsity, or silence"—"the historical abuse[ ] against which the privilege against self-incrimination was aimed."[94]

A plurality of the Court held that the first six identifying questions were exempt from *Miranda* because they were "limited, focused inquiries" that were "for record-keeping purposes only" and designed to secure the "biographical data necessary to complete booking or pretrial services."[95] The Court reasoned that routine booking questions were "not likely to be perceived as calling for any incriminating purpose [by the suspect]."[96] The plurality underscored, however, that the police may not ask questions during booking that are "designed to elicit incriminatory admissions."[97] In recognizing the booking exception, the *Muniz* plurality cited to three courts of appeals cases, all of which carefully limited the exception to routine questions necessary to secure biographical data, where there was no objective evidence that the police used booking questions as a "guise" to gain incriminating evidence or to "subterfuge" suspects' rights under *Miranda*.[98] A fifth Justice, Justice Marshall, concurred

90. 496 U.S. 582, 601 (1990) (Brennan, J. plurality opinion).

91. *Id.* at 585.

92. *Id.* at 585–86.

93. *Id.* at 600–01.

94. *Id.* at 595, 597, 600.

95. *Id.* at 601, 605 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 12, Pennsylvania v. Muniz, 496 U.S. 582 (1990) (No. 89-213) (quoting United States v. Horton, 873 F.2d 180, 181 n.2 (8th Cir. 1989).

96. *Id.* at 605.

97. *Id.* at 602 n.14 (quoting Brief for United States as Amicus Curae Supporting Petitioner at 13, Pennsylvania v. Munis, 496 U.S. 582 (1990) (No. 89-213) (citing United States v. Avery, 717 F.2d 1020, 1024–25 (6th Cir. 1983); United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983); United States v. Glen-Archila, 677 F.2d 809, 816 n.18 (11th Cir. 1982))).

98. *Id.*; *Avery*, 717 F.2d at 1024–25 (holding that *Miranda* did not apply to a statement made in response to booking questions because they were "part of a routine procedure to secure biographical data . . . . [that] did not relate, even tangentially, to criminal activity," and "there is no evidence that the defendant was particularly susceptible to these questions, or that police somehow used the questions to elicit an incriminating response from the defendant"); *Mata-Abundiz*, 717 F.2d at 1279–80 (holding that the booking exception did not except INS agent from providing *Miranda* warnings before questioning suspect

that all booking questions constituted custodial interrogation for purposes of *Miranda*.[99]

When analyzed in light of the coercion concerns animating *Miranda*, the exception of routine booking questions does not increase the compulsion perceived by a suspect above the level inherent in custody. On the other hand, the Court made sure to maintain the fundamental purpose of *Miranda*—protection against police coercion—by holding that the exception does not apply to questions asked during booking that are designed to elicit incriminatory admissions.[100] Notably, in recognizing the limitation of the booking exception, the *Muniz* plurality cited to *United States v. Mata-Abundiz*, which held that "[c]ivil as well as criminal interrogation of in-custody defendants by INS investigators should generally be accompanied by the *Miranda* warnings."[101] Observing that the test for the booking exception to *Miranda* "is objective" and "[t]he subjective intent of the agent is relevant but not conclusive,"[102] the Court in *Mata-Abundiz* concluded that the officer's statements that the interview was meant to obtain biographical information for a "routine, civil investigation" was irrelevant in light of the objective factors suggesting that the questions were likely to elicit an incriminating response.[103]

As *Mata-Abundiz* and the facts of *Muniz* demonstrate, the Court defined the booking exception narrowly to include only routine biographical questions, and intended that this exception, like the definition of "interrogation" as an objective inquiry, should be analyzed from the perspective of the suspect.[104] In elaborating on the interrogation inquiry in *Innis* and *Muniz*, the Court continued to emphasize the importance of focusing on the suspect, reflecting *Miranda*'s purpose to counteract the coercion inherent in custodial interrogation.[105]

Following *Muniz*, all courts of appeals outside the immigration context recognized the booking exception, and most lower courts have generally adopted the same objective inquiry and suspect-focused principles that

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about biographical information concerning a suspect's immigration status because the questions did not relate to booking and the agent should have known that a civil investigation could turn criminal); *Glen-Archila*, 677 F.2d at 816 n.18 (holding that a routine booking question about a suspect's address was exempt from *Miranda* because the question was "routine, biographical, and not intended to induce an incriminating response").

99. Justice Marshall reasoned that instead of creating a new *Miranda* booking exception it would be better "to maintain the clarity of the doctrine by requiring police to preface all direct questioning of a suspect with *Miranda* warnings." *Muniz*, 496 U.S. at 610 (Marshall, J., concurring in part and dissenting in part).

100. *See id.* at 601.

101. *Mata-Abundiz*, 717 F.2d at 1279.

102. *Id.* at 1280.

103. *Id.* at 1278, 1280.

104. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.7(a), at 759 (3d ed. 2007) ("[I]t makes more sense to consider the objective purpose manifested by the police—that is, what an objective observer with the same knowledge as the suspect would conclude the police were up to."); White, supra note 85, at 1209; *accord Mata-Abundiz*, 717 F.2d at 1280.

105. *See, e.g.*, Illinois v. Perkins, 496 U.S. 292, 296 (1990) ("Coercion is determined from the perspective of the suspect."); Arizona v. Mauro, 481 U.S. 520, 528–30 (1987) (same).

the Court in *Innis* used to define "interrogation" and decide whether the booking exception applies.[106] While a minority of federal courts and some state courts have considered subjective factors related to the suspect[107] or the officer[108] in applying the booking exception,[109] the prevailing view is that the inquiry turns on an objective analysis of whether the interrogating officers *reasonably should have known* that the question would elicit an incriminating response.[110]

Reflecting the concerns animating *Miranda*, most courts have limited the booking exception[111] to apply only to questions essential for booking purposes that ask "simple identification information of the most basic sort."[112] To curb abuse of the booking exception, almost all courts of appeals have held that the police may not use routine biographical questioning as a guise for obtaining incriminating information.[113]

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106. *See, e.g.*, United States v. Cowan, 674 F.3d 947, 958 (8th Cir. 2012); United States v. Pacheco-Lopez, 531 F.3d 420, 423–424 (6th Cir. 2008); Rosa v. McCray, 396 F.3d 210, 222 (2d Cir. 2005); United States v. Reyes, 225 F.3d 71, 76–77 (1st Cir. 2000); United States v. Bogle, 114 F.3d 1271, 1275 (D.C. Cir. 1997), United States v. Brown, 101 F.3d 1272, 1274 (8th Cir. 1996); United States v. Ventura, 85 F.3d 708, 711 (1st Cir. 1996); United States v. Bishop, 66 F.3d 569, 572 (3d Cir. 1995); United States v. Henley, 984 F.2d 1040, 1043 (9th Cir. 1993); United States v. Disla, 805 F.2d 1340, 1347 (9th Cir. 1986); *Mata-Abundiz*, 717 F.2d at 1280; United States v. Booth, 669 F.2d 1231, 1238 (9th Cir. 1982); United States v. Hinckley, 672 F.2d 115, 122 (D.C. Cir. 1982). Some courts held prior to *Muniz* that the booking exception applied to all questions asked, even during booking. *See, e.g.*, United States v. Edwards, 885 F.2d 377, 384–85 (7th Cir. 1989).

107. The Sixth Circuit has considered subjective factors from the perspective of the suspect, United States v. Clark, 982 F.2d 965, 968 (6th Cir. 1993), but has also held that actual intent of the police is not relevant in applying the booking interrogation. United States v. Soto, 953 F.2d 263, 265 (6th Cir. 1992) ("Absence of intent to interrogate, while not irrelevant, is not determinative of whether police conduct constitutes interrogation.").

108. The Fourth and Fifth Circuit have both considered subjective factors from the perspective of both the suspect and the police. *See, e.g.*, United States v. Virgen-Moreno, 265 F.3d 276, 294 (5th Cir. 2001) (examining officer's intent to conclude booking exception did not apply); *see also* Meghan S. Skelton & James G. Connell, III, *The Routine Booking Question Exception to* Miranda, 34 U. BALT. L. REV. 55, 87–92 (2004) (collecting cases).

109. Some state courts examine only whether the police were exercising an administrative function without further inquiry. *See, e.g.*, Alford v. State, 358 S.W.3d 647, 569–60 (Tex. Crim. App. 2012). Whether this test is the appropriate one was recently raised in a petition for certiorari. *See* Petition for Writ of Certiorari at 14, Alford v. State, No. 11-1318, 2012 WL 1553057 (U.S. 2012).

110. *See, e.g.*, *Rosa*, 396 F.3d at 222; *Bogle*, 114 F.3d at 1275; *Ventura*, 85 F.3d at 711; *Henley*, 984 F.2d at 1043 n.3; United States v. Taylor, 985 F.2d 3, 7 (1st Cir. 1993); United States v. Soto, 953 F.2d 263, 265 (6th Cir. 1992); United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1046 (9th Cir. 1990); *Disla*, 805 F.2d at 1347; United States v. McLaughlin, 777 F.2d 388, 391–92 (8th Cir. 1985); *Mata-Abundiz*, 717 F.2d at 1280; United States v. Minkowitz, 889 F. Supp. 624, 627 (E.D.N.Y. 1995).

111. *See, e.g.*, Pennsylvania v. Muniz, 496 U.S. 582, 602 n.14 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 13) *Rosa*, 396 F.3d at 222; United States v. Downing, 665 F.2d 404, 406 (1st Cir. 1981).

112. United States v. LaValle, 521 F.2d 1109, 1113 n.2 (2d Cir. 1975); *see* United States v. Burns, 684 F.2d 1066, 1076 (2d Cir. 1982).

113. *See, e.g.*, Robinson v. Percy, 738 F.2d 214, 220 (7th Cir. 1984); United States v. Avery, 717 F.2d 1020, 1024–25 (6th Cir. 1983); United States v. Hinkley, 672 F.2d 115, 123–26 (D.C. Cir. 1982); *LaValle*, 521 F.2d at 1113 n.2; *Downing*, 665 F.2d at 407; United States v. Booth, 669 F.2d 1231, 1238 (9th Cir. 1981) ("[W]e recognize the potential for abuse by law enforcement officers who might, under the guise of seeking objective or neutral information, deliberately elicit an incriminating statement from a suspect.").

III. THE EROSION OF *MIRANDA* THROUGH THE EMERGENCE OF DOCTRINAL EXCEPTIONALISM IN THE IMMIGRATION CONTEXT

This Part explores how lower courts have created an aberration to *Miranda* jurisprudence in the immigration enforcement context by departing from well-settled principles. While the Supreme Court has long adopted an objective analysis to interpret the application of *Miranda*, the tests used by lower courts in immigration cases have largely been subjective, ambiguous, and in conflict with well-established Supreme Court authority regarding dual civil and criminal interrogations. In addition, this emerging doctrine further conflicts with the clear tests in *Miranda* and its underlying policies and principles. By subtle doctrinal manipulation, courts are backtracking from a century of equal treatment of citizens and noncitizens in the criminal justice system to exempt themselves from the well-established requirements of *Miranda*. The current subjective approach and misapplication of direct precedent diminishes immigrants' rights in a significant way: the government may be permitted to label its investigation as a civil matter or an officer may plead ignorance to criminal immigration laws to avoid the procedural guarantees of *Miranda* even when—by design—the intent of the investigation is criminal in nature.[114]

One theoretical caveat must be made. In the forty-five years since *Miranda* was decided, the Supreme Court has increasingly carved out exceptions to *Miranda*'s core principles.[115] While the conduct-regulating rules requiring warnings prior to custodial interrogation have largely remained the same, and while the Court has recently affirmed the constitutional underpinnings of *Miranda*,[116] the court has also effectively weakened the legal significance of the police's failure to follow the rules. There is an ongoing academic debate about the doctrine's protective value in light of the Court's recent decisions and the contemporary interrogation tactics police use to evade suspects' *Miranda* rights.[117] -However, even as the

114. Adam B. Cox & Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 N.Y.U. L. REV. 1403, 1414 (2009); Eagly, *supra* note 31, at 1294.

115. *See supra* note 75.

116. Dickerson v. United States, 530 U.S. 428, 444 (2000).

117. Scholars have critiqued the Court for gutting *Miranda* of its protective value. *See, e.g.*, Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona, 99 GEO. L.J. 1, 21–23 (2010) (arguing that recent precedent has effectively overruled *Miranda*); Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It—and What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 178, 184 (2007); Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1009–10, 1016–23 (2001) (observing that police have learned to evade *Miranda* by interrogating outside of custodial settings or through psychological manipulation). *But see* Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1061 (2001) (observing that most of the Supreme Court opinions creating exceptions to *Miranda* "involved a good faith or unintentional violation of the prophylactic rule, coupled with particularly high costs for implementing the rule"); Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1521, 1525 (2008) ("[T]he Supreme Court has effectively encouraged police practices that have gutted Miranda's safeguards.).

Court has made inroads into *Miranda* protections over the years, it has done so in a way that has continued to provide a functional approach and a test to guide law enforcement. The next Part discusses the development of multi-factored tests used by lower courts in immigration cases that depart from the first and central interpretive principles in *Miranda* and its progeny.

A. Lower Court Confusion on *Miranda* Warnings in Dual Criminal and Civil Immigration Inquiries

Though there is relative clarity regarding an objective definition of *Miranda* rights during custodial interrogation, with a carefully-drawn approach to the booking exception to protect against inculpatory booking questions, lower courts have been confounded when faced with custodial questioning in dual civil and criminal interrogations to obtain immigration status, both within and outside of the booking context. There is a circuit split on whether questioning detained suspects in dual civil-criminal immigration inquiries constitutes interrogation. The Second,[118] Fourth,[119] Eighth,[120] Tenth,[121] and Eleventh[122] Circuits, and at least one panel of the Ninth Circuit,[123] have adopted a highly-unusual subjective approach that analyzes the actual intent of the officer conducting the interrogation. Relying on direct evidence of an officer's intent, these courts look at a broad range of factors, including whether the officer (1) knew the distinctions of civil and criminal law, (2) suspected violations of criminal or civil immigration laws, or (3) had background facts about the suspect.[124] These courts largely ignore the rule in *Mathis*, and have relied on the plenary power doctrine to characterize dual criminal and civil interrogations as "civil."

The second approach, adopted by the First,[125] Third,[126] and several panels of the Ninth Circuit,[127] uses an objective multi-factor test based on

118. *See, e.g.*, United States v. Rodriguez, 356 F.3d 254, 259 (2d Cir. 2004).

119. *See, e.g.*, United States v. D'Anjou, 16 F.3d 604, 609 (4th Cir. 1994).

120. *See, e.g.*, United States v. Ochoa-Gonzalez, 598 F.3d 1033, 1038 (8th Cir. 2010).

121. *See, e.g.*, United States v. Medrano, 356 F. App'x 102, 107 (10th Cir. 2009); United States v. Parra, 2 F.3d 1058, 1068 (10th Cir. 1993).

122. *See, e.g.*, United States v. Lopez-Garcia, 565 F.3d 1306, 1316 (11th Cir. 2009).

123. *See, e.g.*, United States v. Salgado, 292 F.3d 1169, 1172 (9th Cir. 2002). *But see* United States v. Chen, 439 F.3d 1037, 1040 (9th Cir. 2006); United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1046–47 (9th Cir. 1990); United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983).

124. *See Ochoa-Gonzalez*, 598 F.3d at 1039; *Mendrano*, 356 F. App'x at 107; *Lopez-Garcia*, 556 F.3d at 1316; United States v. Rodriguez, 356 F.3d 254, 259 (2d Cir. 2004); *Salgado*, 292 F.3d at 1172; United States v. D'Anjou, 16 F.3d 604, 609 (4th Cir. 1994); *Parra*, 2 F.3d at 1068.

125. *See, e.g.*, United States v. Doe, 878 F.2d 1546, 1551 (1st Cir. 1989) (Breyer, J.) ("The question is an objective one; the officer's actual belief or intent is relevant, but it is not conclusive." (emphasis omitted)).

126. United States v. Carvajal-Garcia, 54 F. App'x 732, 733 (3d Cir. 2002). Notably, the Court expressed its agreement with a Ninth Circuit case that held that an officer need not suspect that an immigration inquiry would lead to a criminal charge. *Id.*

127. *See, e.g.*, *Chen*, 439 F.3d at 1040; *Gonzalez-Sandoval*, 894 F.2d at 1046–47; *Mata-Abundiz*, 717 F.2d at 1280.

Innis that is focused on the suspect to examine whether, based on the totality of the circumstances, the officer objectively should have known that questioning was likely to elicit incriminating information.[128] In this approach, the officer's intent is relevant but not determinative, and thus this approach is more consonant with the Court's guidance in *Miranda*, *Innis*, and *Muniz*.[129]

This is not to say that courts of appeals within these two categories consistently apply one approach to determine whether *Miranda* rights apply in dual civil and criminal inquiries, as there are variances in approaches between and within circuits and differences in the factors courts consider relevant to the analysis. For example, some courts hold that *Miranda* unequivocally applies to dual civil and criminal booking inquiries about information related to immigration status, because "while there is usually nothing objectionable about asking a detainee his place of birth, the same question assumes a completely different character when an INS agent asks it of a person he suspects is an illegal alien."[130] Other courts, even within the same circuit, have applied the booking exception to hold that *Miranda* does not cover immigration-status related inquiries, regardless of the officer's intent.[131] In deciding this issue, courts generally focus on factors not traditionally considered in defining interrogation, booking exceptions, and *Miranda* jurisprudence. As described below, the aberration in *Miranda* jurisprudence for immigrants raises some troubling issues for uniformity, guidance to law enforcement officers, and the unitary criminal justice system that has long protected immigrants and citizens equally.

1. Subjective Intent of Law Enforcement Officers

The Second, Fourth, Tenth, and Eleventh Circuits, as well as one panel of the Ninth Circuit, have adopted a subjective test to define interrogation and the booking exception for *Miranda* purposes in dual civil and criminal immigration inquiries. These courts focus on the actual criminal "investigative intent" of the government official to determine whether he subjectively intended to elicit an incriminating response for a criminal violation.[132] This highly fact-intensive analysis turns on factors including the officer's particular knowledge about the criminal immigration provi-

128. Rhode Island v. Innis, 446 U.S. 446, 301 (1980).

129. *See, e.g.*, *Chen*, 439 F.3d at 1040 ("The investigating officer's subjective intent is relevant but not determinative, because the focus is on the perception of the defendant."); *Doe*, 878 F.2d at 1551 ("The question is an objective one; the officer's actual belief or intent is relevant, but it is not conclusive." (emphasis omitted)).

130. *See, e.g.*, United Sates v. Henley, 984 F.2d 1040, 1042 (9th Cir. 1993); *see also Gonzalez-Sandoval*, 894 F.2d at 1046–47, United States v. Equihua-Juarez, 851 F.2d 1222, 1225–26 (9th Cir. 1988); *Mata-Abundiz*, 717 F.2d at 1280; United States v. Aragon-Ruiz, 551 F. Supp. 2d 904, 933 (D. Minn. 2008).

131. *Compare* United States v. Salgado, 292 F.3d 1169, 1172 (9th Cir. 2002), *and* United States v. Parra, 2 F.3d 1058, 1068 (10th Cir. 1993), *with* Mata-Abundiz, 717 F.2d at 1280, *and* United States v. Medrano, 356 F. App'x 102, 107 (10th Cir. 2009).

132. United States v. Rodriguez, 356 F.3d 254, 258 (2d Cir. 2004).

sions, the officer's intent or authority to charge the suspect with an immigration-related crime, and the officer's suspicions that the suspect has committed an immigration crime.[133]

In applying this test, courts often rely exclusively on an officer's sworn testimony to determine his intent to elicit criminal charges, despite objective evidence to the contrary, as well as the officer's authority to bring criminal charges. The Eleventh Circuit took this approach in *United States v. Lopez-Garcia*,[134] where a local police officer deputized to enforce immigration laws pursuant to a federal-local 287(g) agreement[135] questioned Jorge Lopez-Garcia about his immigration status one day after his arrest for driving without a valid driver's license and drug possession.[136] Without providing *Miranda* warnings, the officer asked Lopez-Garcia about his immigration status and informed him that if he did not have valid immigration papers, immigration proceedings would be initiated against him, he could see an immigration judge, or he could sign a waiver to have his removal expedited.[137] Lopez-Garcia responded by admitting he was born in Mexico and was in the U.S. illegally, which the government subsequently used as evidence to criminally convict him of reentering the country after previously being deported.[138]

The Eleventh Circuit held that the immigration questions did not constitute "interrogation" under *Miranda* based on the officer's personal intentions in questioning and his authority to prosecute immigration law.[139] While referencing the *Innis* objective standard, the court relied on the officer's sworn statement that he did not believe that Lopez-Garcia was undocumented and, in any event, that he did not have the authority to bring criminal charges against the suspect.[140] The court further reasoned that *Miranda* did not apply because the officer did not question the suspect for "law enforcement purposes," but rather to determine whether he should be subject to civil removal proceedings.[141]

In using a subjective test to analyze the officer's intent, the court ignored several hard, ascertainable facts that suggested the officer "should have known" his questions would elicit an incriminatory response and that Lopez-Garcia may have felt coerced.[142] The officer's intent could have been discerned by the fact that he selected Lopez-Garcia for an in-

133. *See, e.g.*, United States v. Lopez-Garcia, 565 F.3d 1306, 1317 (11th Cir. 2009); *Rodriguez*, 356 F.3d at 258; *Salgado*, 292 F.3d at 1172.

134. *Lopez-Garcia*, 565 F.3d at 1317.

135. *Id.*; *see also* 8 U.S.C. § 1357(g) (2006). Agreements pursuant to § 1357(g) or INA § 287(g) allow the federal government to delegate immigration enforcement authority to state and local police pursuant to a formal agreement between the agencies and the Department of Justice.

136. *Lopez-Garcia*, 565 F.3d at 1311.

137. *Id.*

138. *Id.* at 1311–12; *see* 8 U.S.C. § 1326(a), (b)(2) (2006).

139. *Lopez-Garcia*, 565 F.3d at 1317.

140. *Id.*

141. *Id.* ("[D]eciding whether to bring criminal charges was, as he put it, 'not his call.'").

142. Rhode Island v. Innis, 446 U.S. 291, 301–02 (1980).

terview about his immigration status and began the interview by describing the consequences of not having lawful status. The officer then provided the suspect with three options regarding his possible undocumented status before asking him his place of birth and whether he had any documentation in the United States.[143] Furthermore, as the court observed, the county's police procedures on immigration questioning provided that officers may only discuss deportation with suspects if they determine the individual is undocumented, which the officer did *prior* to asking the suspect about his status.[144] Viewed objectively, the officer's conduct during the interview and police procedures suggest he suspected Lopez-Garcia did not have legal status, which the officer knew was a criminal offense.[145]

Other courts adopting the subjective approach have also focused on the officer's knowledge of criminal immigration law and stated intent to investigate civil violations to determine whether the officer was personally aware that the questions could elicit incriminatory information.[146] For example, in *United States v. Rodriguez*,[147] the Second Circuit held that an ICE agent's questions to a prisoner in state custody about his immigration status did not warrant *Miranda* warnings,[148] even though the agent was aware that Mr. Rodriguez deliberately overstayed his visa, which is a criminal offense.[149] The Second Circuit, however, found that *Miranda* did not apply based on the agent's sworn statement because he asked the questions for a civil purpose and "did not know that the information that he elicited could be the basis for criminal prosecution."[150] As

143. Corrected Reply Brief of Appellant Jorge Lopez-Garcia at 7–8, United States v. Lopez-Garcia, 565 F.3d 1306 (11th Cir. 2009) (No. 03-12662); *see Lopez-Garcia*, 565 F.3d at 1311.

144. *Lopez-Garcia*, 565 F.3d at 1311.

145. *See id.*

146. United States v. Salgado, 292 F.3d 1169, 1172 (9th Cir. 2002).

147. 356 F.3d 254, 259 (2d Cir. 2004).

148. *Id.* at 256–57. The agent interviewed the suspect "pursuant to an INS policy of interviewing inmates whose national origin is listed as unknown or somewhere other than the United States." *Id.*

149. *Id.* at 259 ("Smith also testified that he was not aware that information that he elicited could be the basis for criminal prosecution. Indeed, the only information that Rodriguez gave Agent Smith that might have been relevant to a prosecution was that Rodriguez, having entered the United States legally, had deliberately overstayed his visa.").

150. *Id.* The Second Circuit also reasoned that the ICE agent could not have possibly known the statements were incriminating for Rodriguez's subsequent illegal reentry charges because he did not illegally reenter the country until after the interview in question. *Id.* Several district courts applying the subjective "actual criminal intent" test in *Rodriguez* have acknowledged the problems in relying on an officer's knowledge about the civil and criminal distinctions in immigration law, and thus have held that it is sufficient if officers engage in questioning to uncover a civil immigration violation. *See, e.g.*, United States v. Fnu Lnu, No. 09CR1207 (RPP), 2010 WL 1686199, at *9 (S.D.N.Y. Apr. 22, 2010) ("Those investigating a situation with possible criminal aspects rarely make the decision whether to charge a suspect [and] . . . may have their own opinions about whether the individual should be charged. But only the prosecutors will, generally speaking, have a true understanding of the likelihood that a suspect will be charged."); United States v. Adoni-Pena, No. 1:09-CR-28, 2009 WL 3568488 (D. Vt. 2009) (suppressing responses to officer's questions place of nationality, citizenship, and immigration status in illegal reentry prosecution where officer testified that he was "primarily concerned with administrative depor-

in *Lopez-Garcia*, the Second Circuit relied on the officer's sworn statements about his subjective intent and knowledge of criminal immigration law to hold that *Miranda* did not apply. This approach is also problematic, as one court that rejected this formulation of the subjective test found, because only prosecutors have a true understanding of the likelihood that a suspect will be charged—"an immigration agent's testimony that he or she did not think prosecution likely is of minimal significance in determining whether the agent had investigative intent during the interview."[151]

Courts have also used a subjective test in applying the booking exception to exempt questions about immigration status, without regard to objective factors that suggest an investigatory intent.[152] For example, in *United States v. Salgado*, the Ninth Circuit applied the booking exception to a police officer's questioning of a suspect about alienage, relying on the officer's testimony that he asked the question for a "true booking" purpose and the fact that he was not an ICE criminal investigator.[153] However, by focusing on the officer's stated purpose and role, the Court disregarded the fact that the officer asked the questions "as part of a cooperative arrangement between the ICE and the Jail to identify Jail detainees who were in the United States illegally and facilitate the initiation of civil and criminal INS proceedings against them."[154]

The appellate courts using the subjective inquiry to determine whether dual civil and criminal questioning constitutes interrogation are departing from the clear mandates of *Innis* and *Muniz*, which establish that the analysis of whether questions are considered interrogation is objective. Subjective views are only relevant to this inquiry if there is "a police practice [that] is designed to elicit an incriminating response from the accused."[155] The subjective approach in the criminal immigration context turns the Court's clear rule on its head by focusing on officers' statements that they did not intend to elicit an incriminating response and by ignor-

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tation"); United States v. Toribio-Toribio, No. 09-cr-161, 2009 WL 2426015 (N.D.N.Y. Aug. 6, 2009) (suppressing responses to agents' questions related to place of birth due to agent's failure to administer *Miranda* warnings because "although the [officer] was primarily looking into administrative deportation, he had ample reason to believe that Defendant was falsely representing his citizenship and knew that such a false representation could give rise to criminal charges").

151. *Fnu Lnu*, 2010 WL 1686199, at *9.

152. *See* United States v. Medrano, 356 F. App'x 102, 107 (10th Cir. 2009) (holding that *Miranda* warnings were not required where ICE agent's booking questions about suspect's name were not an attempt to elicit incriminatory statements because the agent already knew the suspect's name and immigration status); United States v. Valdez-Martinez, 267 F. App'x 571 (9th Cir. 2008) (holding booking exception applied to ICE agent's biographical questions because agent testified that he questioned the suspect for civil and not criminal purposes and did not learn about facts supporting criminal charges until the un-Mirandized interview); United States v. Salgado, 242 F.3d 1169, 1172 (9th Cir. 2002); United States v. D'Anjou, 16 F.3d 604, 609 (4th Cir. 1994). *But see* United States v. Parra, 2 F.3d 1058, 1067–68 (10th Cir. 1993).

153. *Salgado*, 292 F.3d at 1174.

154. *Id.* at 1179 (Pregerson, J., dissenting).

155. Rhode Island v. Innis, 446 U.S. 291, 301 n.7 (1980).

ing affirmative police practices designed to elicit information for "civil and criminal"[156] immigration purposes. This approach has also ignored the Court's mandate that the interrogation inquiry focus on the perspective of the suspect to counteract the effects of suspect coercion.[157] None of the courts using the subjective approach considered the perspective of the suspect.

By ignoring these rules, these courts permitted questioning that could obviously be self-incriminating in light of the criminal and civil immigration laws of the United States. The test yields a subjective test that is unworkable and leads, at best, to a guessing game where judges have to ascertain what a police officer was thinking. At worst, it allows courts to rely on a sworn statement and makes *Miranda* turn on what an officer says he intended, believed about the suspect, and knew about the law. Both approaches result in an unstable body of law and undercut the clarity of *Miranda* rules and immigrant suspects' constitutional protections.

2. *Objective Test in Immigration Inquiries*

The First, Third, Sixth, and a majority of panels in the Ninth Circuit apply a more objective test to determine whether an officer's attempt to elicit incriminating remarks invokes *Miranda*.[158] Generally, this approach has been more protective and straightforward, but it has also resulted in case-by-case multi-factored adjudication. Following *Innis*, these courts assess the totality of the circumstances to determine whether *police should have known* that questioning could produce an incriminating response from the perspective of the suspect.[159] In contrast to the subjective test, the officer's intent is relevant, but it is not determinative.[160]

The central factors these courts consider are the nature of the information sought, the objective purpose of the questions, the content and circumstances of the questioning, and the relationship between the crime and the immigration information. Under this approach, courts can independently analyze the facts and evidence to determine what the officer should have anticipated from a question, and can rely less on the stated

156. *Salgado*, 292 F.3d at 1179 (Pregerson, J., dissenting).

157. *Innis*, 446 U.S. at 301 (stating that the definition of interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police," and that "[t]his focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices").

158. *See, e.g.*, United States v. Pacheco-Lopez, 531 F.3d 420 (6th Cir. 2008); United States v. Chen, 439 F.3d 1037, 1040 (9th Cir. 2006); United States v. Carvajal-Garcia, 54 F. App'x 732, 734 (3d Cir. 2002); United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1046–47 (9th Cir. 1990); United States v. Doe, 878 F.2d 1546, 1551 (1st Cir. 1989); United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983).

159. *Innis*, 446 U.S. at 301.

160. *See, e.g.*, *Chen*, 439 F.3d at 104 ("The investigating officer's subjective intent is relevant but not determinative, because the focus is on the perception of the defendant."); *Doe*, 878 F.2d at 1551 ("The question is an objective one; the officer's actual belief or intent is relevant, but it is not conclusive.").

intent of the police.[161] In using this approach, courts generally find that dual civil and criminal immigration booking inquiries constitute interrogation for *Miranda* purposes, and questions about "a detainee's place of birth take[ ] on new meaning if the officer . . . suspects that the individual is an illegal alien."[162]

In applying the objective test to determine whether civil and criminal questions about immigration status constitute interrogation or are subject to the booking exception, courts examine the "content and context"[163] of questions about immigration status, regardless of the officer's stated intent. The Third and Ninth Circuits, for example, have held that an immigration agent's questions about a suspect's place of birth and immigration status are designed to elicit incriminatory evidence when the officer had objective reasons to believe that the suspect had violated a criminal immigration law.[164] Unlike the subjective test, the officer's sworn testimony and knowledge of criminal law is irrelevant to the analysis.[165]

Similarly, courts also look to the relationship of a suspect's actual or possible criminal charges and his immigration status if the officer knew or should have known that the question would lead to an incriminating response.[166] Under this approach, the closer the connection between the

161. *See, e.g.*, United States v. Medina, No. 07-20166-JWL, 2008 WL 2039013 (D. Kan. May 12, 2008) ("While Agent Spake's subjective intent may have been an administrative inquiry, the court finds that an objective view of the evidence shows that Agent Spake knew or, at the very least should have known, that his questions were reasonably likely to elicit incriminating responses both based on the NCIC information and the nature of the questions asked.").

162. *Gonzalez-Sandoval*, 894 F.2d at 1048.

163. *Id.* at 1047; *see also* United States v. Equihua-Juarez, 851 F.2d 1222, 1226–27 (9th Cir. 1988), *abrogated by* Brogan v. United States, 522 U.S. 398 (1998) (holding that an immigration agent's questions about a suspect's biographical information constituted an "interrogation" when it could be used to determine whether the suspect should be deported or criminally prosecuted because it was linked to an offense with which he was eventually charged).

164. United States v. Carvajal-Garcia, 54 F. App'x 732, 738 (3d Cir. 2002) (suggesting that a suspect's *Miranda* rights were violated when immigration agents questioned the suspect about his full name, date and place of birth for the purposes of determining if he had been previously deported after the suspect had already invoked his right to counsel under *Miranda*); *Gonzalez-Sandoval*, 894 F.2d at 1046 (holding that *Miranda* applied to a Border Patrol agent's questioning of a suspect about his immigration status when the suspect was referred to CBP by a parole officer who believed the suspect had been previously deported).

165. *See Carvajal-Garcia*, 54 F. App'x at 732; *Gonzalez-Sandoval*, 894 F.2d at 1043.

166. *See, e.g.*, United States v. Doe, 878 F.2d 1277, 1551–52 (1st Cir. 1989) ("[Q]uestions about citizenship, asked on the high seas, of a person present on a foreign vessel with drugs aboard," constituted improper interrogation, since U.S. citizenship was an element of the offense."); United States v. Mata-Abundiz, 717 F.2d 1277, 1279 (9th Cir. 1983) (holding that an INS agent had reason to know that an admission regarding alienage, "coupled with the evidence of firearms possession, could lead to federal prosecution"); *Gonzalez-Sandoval*, 894 F.2d at 1046–47 (statements elicited by border patrol agents about detainee's immigration status and place of birth constituted improper interrogation because he suspected detainee of illegal reentry); United States v. Sepulveda-Sandoval, 729 F. Supp. 2d 1078, 1101 (D.S.D. 2010) (holding that *Miranda* warnings were required before questioning suspect about immigration status because his answer provided incriminating evidence for his criminal firearms charges); United States v. Lopez-Chamu, 373 F. Supp. 2d 1014, 1021 (C.D. Cal. 2005) (holding that *Miranda* warnings were required for questions

crime in question and the information sought, the stronger the inference that the agent should have known that his inquiry was "reasonably likely to elicit an incriminating response from the suspect."[167]

Several courts have held that *Miranda* applies where there is objective evidence that an arresting officer[168] or state or federal prosecutor[169] suspects that an individual has violated civil immigration laws or is foreign-born,[170] without requiring evidence that the civil violation would lead to a criminal charge.[171] In the booking context, some courts examine whether the relevant booking question was *essential* for administrative purposes, recognizing that questions asked during a routine booking process about place of birth constitute interrogation because such questions can lead to illegal reentry charges or misdemeanor illegal entry offenses.[172] This approach seeks to deter abuse of the civil process to circumvent *Miranda* warnings.[173]

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regarding nationality and citizenship where officer was aware that the suspect was previously deported and later charged with three counts of illegal re-entry following deportation); Thompson v. United States, 821 F. Supp. 110, 121 (W.D.N.Y. 1993) (holding that questions regarding citizenship were not exempt from Miranda during the booking of suspects of "an undercover drug operation targeting illegal alien Jamaican nationals").

167. *Mata-Abundiz*, 717 F.2d at 1279.

168. *See, e.g.*, United States v. Villa-Gonzalez, No. 8:08CR242, 2009 WL 703682 (D. Neb. Mar. 16, 2009) (holding that *Miranda* warnings were required prior to ICE officers' interviews with detainees about immigration status because it was based on local police officers' hunch that they were undocumented immigrants).

169. *See, e.g.*, United States v. Vasquez-Martinez, No. 6:05CR60016-001, 2006 WL 376474 (W.D. Ark. Feb. 9, 2006) (suppressing statements made in response to ICE agents' questions about name and place of birth under *Miranda* and holding that questioning constituted interrogation when based on state prosecutor's suspicion that the suspect was an undocumented immigrant).

170. *See, e.g.*, United States v. Equiha-Juarez, 851 F.2d 1222, 1225 n.7, *abrogated by* Brogan v. United States, 522 U.S. 393 (1998) (9th Cir. 1988) ("The [a]gent's questions were directed at eliciting information which could be used in a criminal investigation and potential prosecution of [the defendant] on charges of felony illegal entry."); Thompson v. United States, 821 F. Supp. 110 (W.D.N.Y. 1993), *aff'd*, 35 F.3d 100 (2d Cir. 1994) (holding that the booking exception was inapplicable where immigration agent's question about citizenship was designed to elicit information for deportation purposes); United States v. Hernandez-Ruiz, 808 F. Supp. 717, 718 (D. Ariz. 1992).

171. *See, e.g.*, United States v. Mellado-Enguallista, Crim. No. 08–307(1) (RHK/JKK), 2009 WL 161240, at *9 (D. Minn. Jan. 22, 2009) (holding that an ICE investigator should know his questions could produce incriminating responses because his purpose was to gather information for deportation proceeding).

172. *See, e.g.*, United States v. Arango-Chairez, 875 F. Supp. 609, 611, 616 (D. Neb. 1994), *aff'd*, 66 F.3d 330 (8th Cir. 1995) (finding that unwarned statements made to an ICE officer who interviewed the defendant shortly after he was taken into custody at a state correctional center for traffic violations constituted "interrogation" and was not exempt under booking exception because the immigration officer should have known that his questions were reasonably likely to elicit an incriminating response); *Mellado-Evanguelista*, 2009 WL 161240, at *6 ("While the nature of the violation of the immigration laws—which could range from the civil/administrative charge of deportation to felony criminal charges for illegal reentry—remained to be seen at the time of the September 4 interview, no penalty was ruled out."); *Thompson*, 821 F. Supp. at 120–121 (holding that the booking exception was inapplicable where immigration agent's question about citizenship was designed to elicit information for deportation purposes); *Hernandez-Ruiz*, 808 F. Supp. at 718.

173. *See, e.g.*, United States v. Mata-Abundiz, 717 F.2d 1277, 1279 (9th Cir. 1983) ("If civil investigations by the INS were excluded from the *Miranda* rule, INS agents could evade that rule by labeling all investigations as civil. Civil as well as criminal interrogation

Finally, the Ninth Circuit has also found a federal jurisdiction's pattern of federal immigration prosecutions and the timing of criminal charges[174] after conducting a civil investigation relevant to whether questions about immigration status are likely to elicit an incriminating response for *Miranda* purposes.[175]

B. Departure from Supreme Court Precedent on *Miranda* Protections and Fifth Amendment Rights in Dual Civil and Criminal Inquiries

Despite the variances among the circuits in the tests employed to determine whether *Miranda* applies to dual civil and criminal immigration questioning, almost all courts that have considered the issue have departed from the Supreme Court's well-established rule in *Mathis v. United States*[176] that *Miranda* rights apply to custodial questioning during a civil investigation that could lead to criminal charges. In almost every case to consider this issue in the immigration context, there was no dispute that the officer sought and elicited information as part of a civil investigation that was later used to criminally convict the suspect of immigration-related charges. However, courts largely ignored or misapplied the rule in *Mathis* by focusing the *Miranda* inquiry on the officer's stated or objective intent to elicit information for a criminal purpose instead on whether the officer asked the questions to elicit information as part of a civil investigation, and whether it was likely that the investigation could result in criminal charges.

The Supreme Court held in *Mathis v. United States* that the distinction of whether an initial custodial interrogation is intended to elicit information for a civil or criminal investigation does not control the analysis for *Miranda* purposes if the investigation could lead to criminal charges.[177] In *Mathis*, a civil IRS agent conducted two un-Mirandized interviews of an inmate while he was incarcerated on unrelated state criminal charges as part of a civil investigation that the government characterized as a "routine tax investigation where no criminal proceedings might be brought."[178] At the time of the interviews, the IRS had not initiated a criminal investigation and the agent followed protocol for a civil tax investigation.[179] More than one year after the inmate's initial interview, the IRS brought criminal federal tax fraud charges against him based on

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of in-custody defendants by INS investigators should generally be accompanied by the *Miranda* warnings."); *Mellado-Evanguelista*, 2009 WL 161240, at *4 ("[The] Government cannot avoid the requirements of *Miranda* simply by labeling immigration investigations 'civil' or 'administrative' when its agents know or reasonably should know that the questions they ask in the course of such investigations are likely to elicit incriminating responses.").

174. *See, e.g.*, *Mata-Abundiz*, 717 F.2d at 1280.

175. 439 F.3d 1037, 1040 (9th Cir. 2006)

176. *See* 391 U.S. 1 (1967).

177. *Id.* at 3.

178. *Id.* at 4–5.

179. *Id.*

statements he made during the un-Mirandized custodial interrogations.[180] The government argued that *Miranda* did not apply to the IRS agent's questions because the inmate was questioned as part of a civil, and not criminal, investigation, and also because he was being held on a separate state criminal charge at the time of his interview.[181] The *Mathis* Court rejected both contentions, holding that it was irrelevant that he was questioned about conduct unrelated to the state criminal offense for which he was incarcerated. The Court further held that *Miranda* warnings were required since there was a *possibility* during the investigation that the inmate's responses could result in a criminal prosecution, observing that "tax investigations frequently lead to criminal prosecutions, just as the one here did."[182] The Court concluded that the un-Mirandized statements made by the defendant should have been suppressed, and it reversed the tax fraud conviction.

The Court in *Mathis* intentionally adopted a clear rule[183] that applied *Miranda* rights to civil investigations that could result in criminal charges, finding the differences between the two types of investigations "too minor and shadowy to justify a departure from the well-considered conclusions of *Miranda*."[184] The only factors the Court found relevant in adopting this rule in the tax context were that the suspect was questioned while in custody, and that there was a possibility that criminal charges could result from the civil investigation. The Court based its latter finding on a general observation of the frequency with which civil tax investigations lead to criminal investigations and the short timeframe between the initiation of criminal charges and the suspect's last interview, although neither of these factors appear to be dispositive.[185] To understand the full import and clarity of the Court's holding in *Mathis*, it is important to consider what the Court expressly held was irrelevant to its decision: no criminal investigation had been commenced at the time of either of the interviews; there was no certainty that criminal proceedings would be

180. *Id.* at 2.

181. *Id.* at 4.

182. *Id.* at 4–5.

183. *Mathis* has been viewed as a literal and accurate extension of *Miranda* that reflects the decision's rationale. *See, e.g.*, Daniel Yeager, *Rethinking Custodial Interrogation*, 28 AM. CRIM. L. REV. 1, 65 (1991); Mary Crossley, *Miranda and the State Constitutions: State Courts Take a Stand*, 39 VAND. L. REV. 1693, 1708 n.8 (1986).

184. *Mathis*, 391 U.S. at 3–4.

185. As the dissent in *Mathis* and subsequent commentators have pointed out, the Court's premise that civil tax investigations frequently lead to criminal charges appears to be overstated, as civil tax investigations are "widespread," and around the time *Mathis* was decided only about 1 in 2,000 IRS civil investigations led to criminal charges. *See, e.g.*, *Mathis*, 391 U.S. at 7 (White, J., dissenting) (noting that civil tax liability investigations are "widespread," and noting "the thousands of inquiries into tax liability made annually . . . whose goal is only to settle fairly the civil accounts between the United States and its citizens."); Gregory L. Diskant, *Exclusion of Confessions Obtained Without Miranda Warnings in Civil Tax Fraud. Proceedings*, 73 COLUM. L. REV. 1288, 1291–92 & n.42 (1973). In addition, the Court's observation of the proximity of timing between the last civil and criminal interview does not appear to be controlling, as the Court also found that *Miranda* applied to the IRS agent's first interview, which occurred more than a year prior to the IRS's initiation of criminal charges. *Mathis*, 391 U.S. at 4.

brought against the suspect;[186] the suspect was questioned about conduct unrelated to the offense for which he was incarcerated; the agent only asked the suspect two questions;[187] the agent's stated purpose of the interview was to elicit information for a civil, and not criminal, investigation; and the IRS agent was a civil investigator. In announcing a clear rule with limited exceptions, the *Mathis* Court reflected the concerns in *Miranda* for clarity[188] and for protecting suspects against police abuse and also against the ability for government officials to engage in subterfuge by using civil investigations to obtain evidence for criminal charges.[189]

Consistent with the rule in *Mathis*, the Supreme Court has never required certainty of a criminal prosecution as a predicate for *Miranda* warnings or the ability of a suspect to invoke her Fifth Amendment privilege against self-incrimination.[190] The Fifth Amendment privilege against self-incrimination applies not only at criminal trials, but also in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate the defendant in future criminal proceedings.[191] The Court has held that the Fifth Amendment privilege extends to any questions and "not only extend[s] 'to answers that would in themselves support a conviction . . . but likewise embraces those which would *furnish a link in the chain of evidence* needed to prosecute the claimant.'"[192] Likewise, in *Innis*, the Court noted that the Fifth Amendment privilege against self-

186. The government characterized the interview as a "routine tax investigation where no criminal proceedings might be brought." *Mathis*, 391 U.S. at 5.

187. *Id.* at 3 n.2.

188. *Id.* The Court stated in full:

> It is true that a 'routine tax investigation' may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent tax investigations differ from investigations of murder, robbery, and other crimes. But tax investigations frequently lead to criminal prosecutions, just as the one here did. *Id.* at 4.

189. Milton Handler, *Some Practical Problems In Current Antitrust Litigation*, 45 F.R.D. 293, 323 (1968) (citing *Mathis*, 391 U.S. at 1).

190. Maness v. Meyers, 419 U.S. 449, 461–62 (1975); *cf.* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165 (1963) (Fifth and Sixth Amendment criminal procedural rights required for federal civil divestiture action to deprive individual of American citizenship as penalty for divestment action). *See generally* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325 (1991).

191. United States v. Lee, 315 F.3d 206, 214–15 (3rd Cir. 2003). The Supreme Court has a straightforward definition of an "incriminating response": it encompasses "any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial." Rhode Island v. Innis, 446 U.S. 291, 301 n.5 (1980).

192. Ohio v. Reiner, 532 U.S. 17, 20 (2001) (emphasis added) (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951); *see also* United States v. Hubbell, 530 U.S. 27, 38 (2000). The Supreme Court has made clear that any witness may invoke the Fifth Amendment privilege against self-incrimination "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory" when his compelled testimony would create a real danger of domestic criminal prosecution. Kastigar v. United States, 406 U.S. 441, 444 (1972); *see also* Allen v. Illinois, 478 U.S. 364, 368 (1986); Minnesota v. Murphy, 465 U.S. 420, 426 (1984); Leftkowitz v. Turley, 414 U.S. 70, 77–79 (1973). During a removal proceeding, an individual can invoke the Fifth Amendment, so long as his answers would not subject him to prosecution in the United States, *see, e.g.*, Garcia-Quintero v. Gonzales, 455 F.3d 1006, 1019 (9th Cir. 2006); Valeros v. INS, 387 F.2d 921, 921 (7th Cir. 1967), but silence may be used as the basis for drawing certain adverse inferences at least with respect

incrimination does not "distinguish degrees of incrimination."[193]

The Court's holding in *Mathis* should be binding in the immigration context given recent trends in civil and criminal immigration enforcement and the similarities in the immigration and tax enforcement systems. The Court's observation in *Mathis*—that civil "tax investigations frequently lead to criminal prosecutions"—holds equally true in the immigration context, and perhaps even more acutely than in the tax context, even when *Mathis* was decided. As described in more detail in Part III.A, the recent adoption in certain jurisdictions of "zero tolerance" programs designed to criminally prosecute all apprehended undocumented migrants has dramatically increased the sheer number of immigrant projections and the odds that immigrants will be referred for criminal prosecution by civil immigration authorities.[194] In 2011, civil immigration enforcement agents referred 89,874 cases for federal criminal prosecution,[195] and the Customs and Border Patrol referred one in five of all individuals it arrested to the DOJ for criminal prosecution, or about 69,080 people.[196] In contrast, around the time *Mathis* was decided, the IRS recommended 1,067 cases for criminal tax fraud prosecution, and about 1 in 2,000 IRS civil investigations led to criminal charges.[197] Since *Mathis*, criminal tax prosecutions have increased slightly; in 2010, the IRS referred 1,507 individuals for prosecution of criminal tax fraud.[198] Civil compliance officers referred about one-third (or 539) of these cases[199] to the IRS Criminal Unit out of 1,581,394 routine civil examinations.[200]

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to non-incriminatory matters. *See. e.g.*, Chavez-Raya v. INS, 519 F.2d 397, 401 (7th Cir. 1975).

193. *Innis*, 446 U.S. at 301 n.5.

194. *Compare infra* Part III.A, *and* Lydgate, *supra* note 19, at 511 (analyzing Operation Streamline, a federal enforcement initiative that requires the criminal prosecution of unlawful border crossers on the U.S.-Mexico border), *and* Daniel Kanstroom, *Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L.J. 599, 603 (1990) ("Deportation proceedings frequently raise the possibility of collateral criminal proceedings. For example, INA section 275 authorizes criminal prosecution for entry without inspection, which is perhaps the most common basis for deportation of aliens in the United States."), *with* Boris I. Bittker & Lawrence Lokken, FEDERAL TAX & INCOME, ESTATE & GIFTS, § 114.9, at *1 (2012) ("In the audit process, the IRS unearths far more cases exuding an aroma of tax evasion than can be prosecuted, given the limited funds earmarked for the extensive investigations and prosecutorial efforts required to establish guilt beyond a reasonable doubt.").

195. TRAC Immigration, *Decline in Federal Criminal Immigration Prosecutions* (2012), http://trac.syr.edu/immigration/reports/283/. During the same period, the IRS referred 1,583 criminal tax cases to the DOJ. TRAC Reports, *Prosecutions for 2012 Referring Agency: Internal Revenue Service* (2012), http://tracfed.syr.edu.

196. TRAC Immigration, *supra* note 195.

197. Diskant, *supra* note 185, at 1291–92.

198. *Enforcement Statistics*, IRS, http://www.irs.gov/uac/Enforcement-Statistics-Criminal-Investigation-(CI)-Enforcement-Strategy. The Criminal Investigations Unit initiated 2,889 criminal tax investigations. *Id.*

199. Treasury Inspector General For Tax Administration, *Trends in Criminal Investigation's Enforcement Activities Showed Improvements for Fiscal Year 2010, With Gains in Most Performance Indicators* (Ref: 2011-30-068) 12 (2011).

200. IRS, INTERNAL REVENUE SERVICE DATA BOOK 2010, at 22 (2010). Direct interviews by civil agents accounted for 342,762, or 17% of all civil examinations. *Id.* In 2010, the IRS recorded 3,039,087 abated civil penalties. *Id.* at 42.

The structure and practice of federal immigration and tax enforcement also share a number of similar features which make the concerns articulated in *Mathis* equally relevant in the immigration context. Similar to the tax context, where "civil and criminal sanctions apply to the same conduct,"[201] there is considerable overlap in criminal and civil provisions of immigration laws.[202] For example, illegal entry and reentry after removal carry both criminal and civil penalties and accounted for 90% (72,000) of all immigration convictions last year—due in large part to referrals from agents conducting civil investigations.[203] In addition, civil IRS agents, like civil immigration authorities, are the most common catalyst for criminal tax investigations,[204] and similar to tax, the point at which a civil immigration investigation turns criminal is ambiguous.[205] Furthermore, in both tax and criminal immigration cases, the typical process of criminal investigations is inverted: in non-tax and non-immigration criminal cases, the government seeks to identify the perpetrator of an alleged crime; while in tax and immigration cases, the government knows the identity of the alleged perpetrator and seeks to amass incriminating information.[206] This makes a suspect's custodial statements of paramount importance, and in practice both agencies rely primarily on a suspect's admissions to establish both civil and criminal violations.[207] This inverted process raises concerns that agencies or officials could exert undue pressure on suspects to obtain information, or circumvent a suspect's rights in the criminal process by labeling the investigation as civil. Given the increasing criminal penalties and rising criminal prosecutions for immigration violations,

201. Steven Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1, 3 (1966); *see, e.g.*, IRC §§ 6662, 6663, 7201, 7203, 7206, 7207 (2006); *see also* Bittker & Lokken, *supra* note 194, at *2 ("[C]riminal [tax] fraud provisions cover much of the same ground as the civil penalty").

202. *See, e.g.*, Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1828–30 (2011) (estimating that approximately 6.7 million non-citizens are subject to both criminal and civil penalties for entering the United States illegally). *Compare* 8 U.S.C. § 1325(a) (2006) (criminal unlawful entry misdemeanor offense), *with* 8 U.S.C. § 1182(a)(6)(A)(i) (unlawful entry constitutes grounds for inadmissibility); *compare* 18 U.S.C. § 1546(a) (2006) (possession or use of a false immigration document a removal ground), *with* 42 U.S.C. § 408(a)(7) (2006) (providing criminal penalties for false representation of a Social Security number).

203. GRASSROOTS LEADERSHIP, OPERATION STREAMLINE: DROWNING JUSTICE AND DRAINING DOLLARS ALONG THE RIO GRANDE 3 (2010), TRAC Immigration, *Illegal Reentry Becomes Top Criminal Charge* (2011), http://trac.syr.edu/immigration/reports/251/.

204. Amanda Cochran, *Evidence Handed to the IRS Criminal Division on a 'Civil' Platter: Constitutional Infringements on Taxpayers*, 91 J. CRIM. L. & CRIMINOLOGY 699, 711 (2001).

205. *Compare id.* at 759 n.3 (citing United States v. McKee, 192 F.3d 535 (6th Cir. 1999)) (stating that many civil tax investigations are "covert criminal tax investigations"), *with* Eagly, *supra* note 31, at 1294.

206. Cochran, *supra* note 204, at 707–08.

207. *Compare* Duke, supra note 201, at 18 ("The Government's use of the taxpayer's statements to build up a net worth case, moreover, is not limited to statements obtained by the agents from the defendant."), *and* Cochran, *supra* note 204, at 708, *with* Cuevas-Ortega v. INS, 588 F.2d 1274, 1278 (9th Cir. 1979) (in immigration context, "it is more likely than not that the alien will freely answer the government agent's question").

Mathis should directly control the analysis and application of *Miranda* warnings in the immigration context. The structural similarities between civil and criminal immigration laws and enforcement practices highlight the need for courts to apply *Mathis* correctly in the immigration context.

Although the *Mathis* rule is binding on civil custodial interrogatories about immigration status that could lead to criminal charges, most courts of appeals have failed to apply this clear rule in the immigration context, although courts adopting the objective test have been more faithful to the *Mathis* inquiry.[208] Both approaches have generally overlooked the core holding in *Mathis* by focusing exclusively on the officer's intent to elicit information for a criminal offense, instead of examining whether the questioning was for a civil violation that could result in criminal charges.

Courts adopting the subjective test in the Tenth, Eleventh, and some panels of the Ninth Circuit did not even acknowledge or reference the Court's straightforward holding in *Mathis* that *Miranda* applies to civil investigations where criminal charges could result. In each of these cases, the courts recognized that the officer had a civil investigatory purpose in questioning the suspect about his immigration status, but did not consider whether the officer intended to elicit information as part of a civil investigation that could lead to criminal charges. Rather, the courts examined whether the officers questioned the suspects with specific, actual intent to bring criminal charges; had the authority to criminally charge the suspect; or knew the distinctions between civil and criminal immigration law.[209] These factors were all rejected by the Court in *Mathis*, where it held that *Miranda* applies to "routine" civil investigations if they could lead to a criminal investigation even if the IRS agent had a civil investigatory purpose and "no criminal proceedings might even be brought,"[210] a result

208. *See, e.g.*, United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983) (applying *Mathis* to hold that both civil and criminal interrogations of in-custody defendants by INS investigators should generally be accompanied by *Miranda* warnings). ICE training materials also do not reference *Mathis* rule. *See, e.g.*, *ICE Academy Master Powerpoint*, ICE, 75, 79 (Spring 2008) (requiring Miranda rights prior to arrests for felonies or crimes committed in the presence of the officers); ICE Academy, Workbook: Statutory Authority, 28–29 (Fall 2007) (stating that an officer is only required to warn a suspect when there is specific probable cause to believe that the individual being questioned is in violation of criminal or civil of immigration laws).

209. United States v. Lopez-Garcia, 565 F.3d 1306, 1317 (11th Cir. 2009) (holding that *Miranda* warnings are not required for identity questions where officer was "simply tasked with facilitating the removal of individuals illegally present in the country" and officer had no basis to believe that suspect would be prosecuted for the offense or would admit to illegal reentry); United States v. Rodriguez, 356 F.3d 254, 289 (2d. Cir. 2004) (finding that *Miranda* did not apply during immigration officer's questions about place of birth where the interview "was conducted solely for the purpose of determining whether Rodriguez would be subject to administrative deportation after his release"); United States v. Salgado, 292 F.3d 1169, 1172 (9th Cir. 2002) (holding that *Miranda* warnings are not required before a civil immigration agent's "routine" questions about place of birth and citizenship because the interview "was solely for the administrative purpose of determining whether Salgado was deportable when he got out of jail" where there was no evidence the officer intended to bring criminal charges, and the immigrant was not in jail for an offense related to immigration laws).

210. Mathis v. United States, 391 U.S. 1, 4 (1968).

the Court reached without any reference to the subjective intent of the IRS agent.[211]

The Second Circuit in *Rodriguez*[212] did address *Mathis*, but misread the holding to require that a civil agent have certainty that criminal charges would result from the civil investigation underway.[213] Based on this reading, the court distinguished *Mathis* by finding that the officer could not possibly have known at the time of the interview that the suspect would be criminally charged because the crime for which the suspect was actually prosecuted—illegal reentry after being deported—had yet to occur at the time of the interview.[214] However, the investigating agent testified that he questioned Rodriguez to "determine whether Rodriguez was subject to administrative deportation proceedings,"[215] and the suspect admitted to visa fraud, which carries both criminal and civil penalties.[216] The court disregarded these similarities to *Mathis* by relying on the immigration agent's testimony that "he was not aware that information that he elicited could be the basis for criminal prosecution."[217]

While courts' use of the objective test generally resulted in an outcome more faithful to *Mathis* by not considering an officer's subjective intent or knowledge of immigration law,[218] the focus of this test also conflicts with *Mathis*. As in these subjective cases, in the cases adopting the objective approach, the officials questioned suspects to uncover civil immigration violations.[219] Instead of assessing the likelihood that criminal charges could result from the investigation, most courts examined whether there were objective facts to suggest that the official had a criminal investigatory purpose, despite *Mathis*'s clear holding that criminal intent does not control the analysis.[220]

In theory, an objective inquiry into an officer's intent could be consistent with *Mathis* if it focused on the categorical and institutional likelihood that civil immigration interrogations could result in criminal

211. Yeager, *supra* note 183, at 11.

212. *Rodriguez*, 356 F.3d at 260.

213. *Id.* ("It is clear from the [*Mathis*] Court's recitation of the facts of the case that the purpose of the investigation under consideration was, inter alia, to obtain evidence in connection with a possible subsequent civil or criminal prosecution, criminal prosecution of the defendant being a likely outcome." (citing *Mathis*, 391 U.S. at 2–3)).

214. *Id.*

215. *Id.* at 256.

216. *Id.* at 259 ("Indeed, the only information that Rodriguez gave Agent Smith that might have been relevant to a prosecution was that Rodriguez, having entered the United State legally, had deliberately overstayed his visa. This is not a crime for which Rodriguez was ever prosecuted.").

217. *Id.*

218. United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983).

219. *See, e.g.*, United States v. Gonzales-Sandoval, 894 F.2d 1043, 1046 (9th Cir. 1990).

220. *See, e.g.*, United States v. Gomez-DeLaCruz, No. 8:10CR336, 2011 WL 883962, at *9–10 (D. Neb. Mar. 11, 2011). These courts conflated the *Mathis* and *Innis* inquiry with the *Muniz* rule by framing the test as whether the officer should have believed that the interrogation would result in criminal charges instead of whether the officer should have believed the interrogation would yield civil violations that were likely to result in criminal charges.

charges; in some cases, there was overlap between the two inquiries.[221] However, most courts following the objective approach relied on factors expressly or implicitly held irrelevant under *Mathis* to determine whether *Miranda* applied, such as the relationship between the criminal charges that the suspect was facing at the time of the interview and the suspect's immigration status.[222] But *Mathis* expressly rejected the government's argument that *Miranda* did not apply because the civil investigation was unrelated to the suspect's underlying state criminal offense.[223] In other cases, courts considered the officer's knowledge about the suspect's background that could give rise to an inference of an immigration crime, or the content of the questions in the civil interview.[224] While the existence of some of these facts could give rise to the likelihood that an individual could face a criminal proceeding, *Mathis* did not consider the IRS agent's intent or knowledge.[225] Rather, *Mathis* examined only the institutional conduct—that civil IRS investigations "frequently lead" to criminal charges and that the civil investigation at issue led the IRS to initiate criminal charges shortly after the suspect's last custodial interview.[226]

Notably, some courts considered factors that were present but not dispositive in *Mathis*, including the timing of criminal charges initiated after a civil interrogation[227] and whether criminal charges resulted from the civil investigation.[228]

Several district courts have used an objective approach to apply *Mathis* correctly in the immigration context,[229] and at the appellate level one

221. *See, e.g.*, *Mata-Abundiz*, 717 F.2d at 1279.

222. *See, e.g.*, *Gonzalez-Sandoval*, 894 F.2d at 1047 (considering relevant officer's knowledge that suspect may have previously been deported); United States v. Carvajal-Garcia, 54 F. App'x 732, 737–38 (3d Cir. 2002); United States v. Equihua-Juarez, 851 F.2d 1222, 1226–27 (9th Cir. 1988), *abrogated by* Brogan v. United States, 522 U.S. 398 (1998); *Gomez-De la Cruz*, 2011 WL 883692, at *8–10 (noting when requested information is so clearly linked to the suspected offense, a reasonable officer should be able to foresee his questions might elicit an incriminating response from the individual being questioned); United States v. Bernal, No. 8:1 0 CR 338, 2011 WL 1103360, at *9 (D. Neb. Mar. 23, 2011) (finding Fourth and Fifth Amendment protections applied because the immigration officers were investigating identity theft, as opposed to immigration offenses).

223. Mathis v. United States, 391 U.S. 1, 4–5 (1968) (holding that *Miranda* applies even when a suspect is in custody for a crime unrelated to the purpose of an investigation).

224. *See, e.g.*, *Gonzalez-Sandoval*, 894 F.2d at 1047.

225. *See Mathis*, 391 U.S. at 3–4.

226. *Id.* at 4.

227. *See, e.g.*, United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983) (questioning conducted by an immigration agent constituted an "interrogation" when agent initiated criminal investigation three hours after civil immigration investigation).

228. *See Gonzalez-Sandoval*, 894 F.2d at 1047 (suppressing un-Mirandized statements elicited by border patrol officers when the statements were actually "used to help prove the charges of illegal entry and being a deported alien found in the United States"); United States v. Equihua-Juarez, 851 F.2d 1222, 1226–27 (9th Cir. 1988) (holding that an INS agent's questions about a defendant's biographical information constituted an "interrogation" when the information was used to determine whether the alien should be deported or criminally prosecuted), *abrogated by* Brogan v. United States, 522 U.S. 398 (1998); United States v. Solano-Godines, 120 F.3d 957, 961–62 (9th Cir. 1997).

229. *See, e.g.*, United States v. Mellado-Evangelista, No. 08-2307(1) (RHK/JJK), 2009 WL 161240, at *5 (D. Minn. Jan. 22, 2009) (holding that *Miranda* was required for an ICE agent's routine civil investigatory questions to gather information for deportation proceed-

court has correctly analyzed *Mathis* in the immigration context.[230] In *United States v. Chen*, the Ninth Circuit held that *Miranda* applied to a civil interrogation of a detained suspect's immigration status because he faced a "heightened risk" of criminal prosecution in light of the government's record of prosecuting misdemeanor reentry under 8 U.S.C. § 1325 in that particular jurisdiction.[231] Although the court navigated through Ninth Circuit precedent to reach this conclusion and relied on other factors to follow court precedent, its focus on the "practice of prosecuting § 1325 violations" was in line with the central inquiry in *Mathis*.[232] Notably, in dicta, the court observed that the "inherent threat" of criminal prosecution under § 1325 could potentially "render INS questioning [about alienage] an interrogation" if the interviewing officer had reason to suspect the defendant was foreign born.[233]

As several of the courts applying *Mathis* to the immigration context have reasoned, the correct application of the *Mathis* holding is necessary to prevent police abuse and preserve the privilege against self-incrimination for immigrants. As one court stated, "If civil investigations by the INS were excluded from the *Miranda* rule, INS agents could evade that rule by labeling all investigations as civil."[234] *Mathis*, then, serves as a critical protection for suspects questioned about civil and criminal charges by effectively holding "that the investigator cannot control the constitutional question by placing a 'civil' label on the investigation."[235]

By dismissing the weight and relevance of *Mathis*, lower courts are allowing government officials to circumvent immigrants' core constitutional protections and threaten the once-unitary criminal justice system. As in the tax context, the absence of full protections in the immigration context directly implicates the coercion concerns animating *Miranda*.[236] The Court in *Illinois v. Perkins* reasoned that warnings and clear rules were needed because "[q]uestioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will."[237] This protection holds especially true in dual civil and criminal interrogations about immigration status, as discussed in Part III.B. Because the distinction between civil and criminal investigations is difficult for police, much less courts, to classify—courts ignore the critical role that the *Mathis* rule serves in ensuring "meaningful protection to Fifth Amendment rights" that was the "whole

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ings because "[i]t follows from the Court's decision in *Mathis* that even if Agent Carey's investigation was aimed at gathering information for a deportation hearing rather than for prosecution of a specific crime, his questioning could still amount to interrogation for *Miranda* purposes").

230. United States v. Chen, 439 F.3d 1037, 1042 (9th Cir. 2006).

231. *Id.* at 1040.

232. *Id.* at 1040–42.

233. *Id.* at 1042.

234. United States v. Mata-Abundiz, 717 F.2d 1277, 1279 (9th Cir. 1983).

235. *Id.* at 1280.

236. *See* Mathis v. United States, 391 U.S. 1, 4 (1986).

237. Illinois v. Perkins, 496 U.S. 292, 297 (1990).

purpose of the *Miranda* decision."[238]

C. Reversal to a Bygone Era: Courts are Departing from the History Animating *Miranda* that Continues to Animate Contemporary *Miranda* Jurisprudence

This section describes how the lower court decisions about *Miranda* rights in dual civil and criminal immigration inquiries are also at odds with two additional foundational principles of *Miranda* that continue to underlie the Court's *Miranda* jurisprudence today: the use of objective criteria, which the Court has favored to create clarity and workable rules for police and courts considering the admissibility of custodial statements, and the centrality of *Miranda* warnings to guide police and protect suspects.

The central doctrinal import of *Miranda* was to reshape the previous Fifth Amendment inquiry into the admissibility of statements obtained in jailhouse interrogations,[239] which was previously governed by a fact-specific voluntariness analysis under the Due Process Clause of the Fifth Amendment.[240] In the face of a constitutional standard that was unwieldy both for courts to administer and for law enforcement agents to comprehend effectively, the Court attempted "to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[241] Even as the Court has made inroads into *Miranda* protections in recent years by diminishing the remedies for law enforcement's failure to adhere to the rules announced in *Miranda*,[242] the Court has left the warnings and the use of objective criteria intact in its contemporary jurisprudence.[243]

1. Return to Doctrinal Confusion

The new subjective and multi-factored tests that courts have adopted to analyze whether immigrants' *Miranda* rights were violated represents a

238. *Mathis*, 391 U.S. at 4.

239. *See* Miranda v. Arizona, 384 U.S. 436, 441–42 (1966).

240. The Court first held that the Due Process Clause of the Fourteenth Amendment requires suppression of a coerced confession in *Brown v. Mississippi*, 297 U.S. 278 (1936), which reversed a conviction based on a torture-induced confession.

241. *Miranda*, 384 U.S. at 441–42; *see* Brown v. Mississippi, 297 U.S. 278, 287 (1936).

242. *See* Chavez v. Martinez, 538 U.S. 760, 772–73 (2003) (rejecting civil rights claim by suspect subjected to abusive interrogation without *Miranda* warnings and holding that "core" *Miranda* violations occur only when coerced statements are entered into evidence, not when the coercion occurs); Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 Harv. L. Rev. 1826, 1839–46 (1987).

243. *See, e.g.*, J.D.B. v. North Carolina, 131 S. Ct. 2394, 2402 (2011) ("By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind."); Thompson v. Keohane, 516 U.S. 99, 112 (1995) ("Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': '[was] there a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'") (alteration in original) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

return to the doctrinal confusion that the Supreme Court sought to avoid when it decided *Miranda*. While *Miranda* sought to establish safeguards to protect suspects from coerced confessions, it was also premised on the rejection of a subjective and highly fact-specific approach to the admissibility of confessions that preceded *Miranda*, which caused confusion for courts and law enforcement officials.[244]

Prior to the Court's decision in *Miranda*, courts used a "totality of the circumstances" test to determine whether a confession was voluntary or obtained through police misconduct or coercion in violation of the Due Process Clause and the privilege against self-incrimination.[245] There was no single test or approach that governed the admissibility of confessions.[246] Essentially, the voluntariness test required courts to assess whether the police deprived a suspect of his free will, resulting in deep inconsistencies in the law.[247] The weaknesses of the totality-of-the-circumstances test have been acknowledged by supporters of *Miranda*,[248] as well as its critics.[249] As the Court described, "The voluntariness rubric [that preceded *Miranda*] has been variously condemned as useless, perplexing, and legal double-talk."[250]

In its many decisions on voluntariness prior to *Miranda*, the Court adopted a test that was avowedly flexible and case-specific and that took into account an expansive range of factors, with no single factor being determinative.[251] The "totality of the circumstances" included an assessment of the personal characteristics of the suspect in an effort to determine retrospectively whether the particular suspect had the ability to withstand interrogation without breaking down.[252] In other cases, the personal characteristics of the suspect were (with the analysis focusing on various aspects of police conduct, including the specific words used in the interrogation) whether the suspect had been allowed to consult with family members or counsel or had been advised of his right against self-incrimination.[253] The Court also developed, as a matter of due process, a

244. Dickerson v. United States, 530 U.S. 428, 444 (2000).

245. *See* Herman, *supra* note 59, at 745; Yale Kamisar, *A Dissent from the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 62 (1966); Ogletree, *supra* note 241, at 1837–38.

246. *See* Herman, *supra* note 59, at 745.

247. The test was a two-pronged inquiry directed at assessing whether the police used coercion, and whether the coercion overcame the will of the suspect. *See, e.g.*, Yeager, *supra* note 183, at 4–7.

248. *See, e.g.*, Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 471–72 (1999).

249. *See* Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979) (noting "the intolerable uncertainty that characterized the thirty-year reign of the due process voluntariness doctrine").

250. Miller v. Fenton, 474 U.S. 104, 116 n.4 (1985) (internal quotations and citations omitted).

251. *See* Herman, *supra* note 59, at 745.

252. *See, e.g.*, Reck v. Pate, 367 U.S. 433, 441–42 (1961); Spany v. New York, 360 U.S. 315, 321–22, 322 n.3 (1959); Fikes v. Alabama, 352 U.S. 191, 193 (1957).

253. *See, e.g.*, Leyra v. Denno, 347 U.S. 556, 559–61 (1954); Turner v. Pennsylvania, 338 U.S. 62, 64 (1949); Harris v. South Carolina, 338 U.S. 68, 69–70 (1949); Malinski v. New York, 324 U.S. 401, 404–07 (1945).

number of disjointed rules that held confessions inadmissible, regardless of other circumstances[254] such as physical force.[255]

Because there are unlimited ways that police and suspects could interact, courts expended substantial resources in parsing out the dynamics of custodial interrogations.[256] With no clear test, courts found it challenging to determine when an individual's will was overborne in a constitutionally-impermissible manner.[257] Furthermore, because interrogations were conducted out of the sight of third parties or judicial officers, determining whether statements were coerced often involved a "'swearing contest'" between police and suspects, causing courts to often err on the side of law enforcement.[258]

At the same time, the evolving values underlying the voluntariness test changed over time, resulting in a "cornucopia of Due Process tests" among lower courts, which the Supreme Court never effectively resolved.[259] As a result, the analysis varied by jurisdiction without any uniform rules to guide it, making the standard an unwieldy one for the Supreme Court and lower courts to administer effectively.[260] As Justice Hugo Black remarked during oral argument in *Miranda*, "no court in the land can ever know [whether the confession is admissible] until [the case] comes to us."[261] The result was a conflicting body of law about what practices or circumstances the Court would find consistent with due process,[262] preventing effective appellate guidance and control of trial court

254. *See* Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195, 2237 (1996).

255. The Court explained that where there is "[p]hysical violence or threat of it by the custodian of a prisoner during detention," there "is no need to weigh or measure its effects on the will of the individual victim," because such confessions are "too untrustworthy to be received as evidence of guilt." Stein v. New York, 346 U.S. 156, 182 (1953), *overruled in part by* Jackson v. Denno, 378 U.S. 368 (1964); *see also* White v. Texas, 310 U.S. 530, 532–33 (1940); Brown v. Mississippi, 297 U.S. 278, 285–86 (1936).

256. *See, e.g.*, Culombe v. Connecticut, 367 U.S. 568, 571–73, 636 (1961) (Warren, J., concurring) (warning that general principles are of little help in resolving the voluntariness issue, and suggesting that the nature of the issue effectively compels "a case-by-case approach"); New York v. Quarles, 467 U.S. 649, 683 (1984) (same).

257. *See Quarles*, 467 U.S. at 683.

258. *See* Ogletree, *supra* note 242, at 1834 (quoting Steven J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 870–71 (1981)). In his dissent to *Miranda*, Justice Harlan acknowledged the difficulties courts experienced in attempting to apply the former Due Process Clause totality of the circumstances test for voluntariness. *See* Miranda v. Arizona, 384 U.S. 436, 507 (1966) (Harlan, J., dissenting) ("[In] more than 30 full opinions . . . . the voluntariness rubric was . . . never pinned . . . down to a single meaning but on the contrary [the Court] infused it with a number of different values. . . . The outcome was a continuing re-evaluation on the facts of each case of how much pressure on the suspect was permissible." (citations omitted)).

259. Hancock, *supra* note 254, at 2237 ("[T]he Court usually never overruled a Due Process precedent, and simply ignored inconsistent cases, or distinguished them when necessary or convenient.").

260. *See* Kamisar, *supra* note 117, at 168. (stating that the test became "too amorphous, too perplexing, too subjective and too time-consuming to administer effectively").

261. 63 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 894 (Phillip B. Kurland & Gerhard Casper eds., 1966).

262. *See* Herman, *supra* note 59, at 752.

application of the test.[263] On a practical level, the inherent ambiguities of the standard provided little guidance for police on how to conduct interviews.[264] As one commentator noted, "[u]nder the 'totality of the circumstances approach, virtually everything is relevant and nothing is determinative. If you place a premium on clarity, this is not a good sign."[265]

In the face of this vague and inconsistent body of law, the *Miranda* Court sought to resolve these contradictions and provide clear guidance to law enforcement by creating a "concrete," objective, and easily-applied rule for courts to assess the admissibility of custodial statements.[266] The Court explicitly rejected the previous case-by-case approach for determining voluntariness due to the inherent problems in discerning what occurred during an interrogation and determining whether the suspect's will had been overcome.[267] As the Court observed recently in upholding the constitutional underpinnings in *Miranda*, it may sometimes be the case that "a guilty defendant go[es] free," but the Court deemed that a lesser disadvantage than trying to operate under a totality-of-the-circumstances test, which "is more difficult than Miranda for law enforcement officers to conform to, and for courts to apply in a consistent manner."[268] Without clear guidance, lower courts often upheld confessions that involved clearly improper and abusive tactics.[269]

Of course, *Miranda*, at its core, was also a way to protect suspects by addressing the gaps created in the previous due process analysis, which posed an "unacceptably great" risk that involuntary custodial confessions would escape detection.[270] *Miranda* thus represents a "carefully drawn approach,"[271] acknowledging that the "'principal advantage'" of the rules announced in *Miranda* is their "ease and clarity of application."[272] *Miranda*'s requirements have "the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances state-

263. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 683 (1984) (recounting some history of pre-*Miranda* analysis: "Difficulties of proof and subtleties of interrogation technique made it impossible . . . for the judiciary to decide with confidence whether the defendant had voluntarily confessed his guilt or whether his testimony had been unconstitutionally compelled. Courts . . . [nationwide] were spending countless hours reviewing the facts of individual custodial interrogations.").

264. *See id.*

265. Herman, *supra* note 59, at 745.

266. In *Miranda*, the Court explained that it granted certiorari to address the "problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give *concrete constitutional guidelines* for law enforcement agencies and courts to follow." Miranda v. Arizona, 384 U.S. 436, 441–42 (1966) (emphasis added); *see also* Florida v. Powell, 130 S. Ct. 1195, 1203 (2010) ("Intent on 'giv[ing] concrete constitutional guidelines for law enforcement agencies and courts to follow,' *Miranda* prescribed the following four now-familiar warnings." (citing *Miranda*, 384 U.S. at 441–42) (citation omitted)).

267. *See Miranda*, 384 U.S. at 468–69.

268. Dickerson v. United States, 530 U.S. 428, 444 (2000).

269. *See* Schulhofer, *supra* note 258, at 869–70.

270. *Dickerson*, 530 U.S. at 442.

271. Moran v. Burbine, 475 U.S. 412, 427 (1986).

272. *Id.* at 425 (quoting Berkemer v. McCarty, 468 U.S. 420, 430 (1934)).

ments obtained during such interrogation are not admissible."[273]

The highly subjective approach and the multi-factored objective tests used by courts to decide whether *Miranda* applies to dual civil and criminal immigration interrogations returns immigrants to the pre-*Miranda* interrogation rooms and courts of forty-five years ago. The difficulty of the case-by-case analysis of immigrants' *Miranda* rights is made apparent by the inconsistent results and disjointed rules. As in the pre-*Miranda* era, the multiplicity of factors considered by these courts render "the test [ ] too amorphous, too perplexing, too subjective and too time-consuming to administer effectively."[274] Reliance on the government's subjective intent is rife with the same proof difficulties that were pervasive in the pre-*Miranda* jurisprudence case law that turned on a "'swearing contest,'"[275] which, as in the due process cases, has been routinely won by law enforcement officials.[276] The refusal of most courts to apply binding Supreme Court precedent from *Mathis* reflected the pre-*Miranda* era tendency of courts to "simply ignore[ ] inconsistent cases, or distinguish[ ] them when necessary or convenient."[277] Without clear guidance, lower courts are expending considerable resources to decide these cases and are frequently upholding statements made by immigrants in violation of their *Miranda* rights, thereby creating a substantial risk that officials will circumvent immigrants' *Miranda* rights.[278]

2. *Departing from the Trend in Current* Miranda *Jurisprudence*

In the years since *Miranda* was decided, the Supreme Court has reaffirmed its rejection of unpredictable and inconsistent subjective tests in favor of the more consistent approach and objective test established in *Miranda*,[279] as described above, regarding the Court's rules about interrogation. This has held true even as the Court has developed a number of exceptions that effectively weaken *Miranda*'s protective power and impact on law enforcement.[280] While the Court has shifted the overall rationale toward law enforcement interests rather than a concern for suspects, it has consistently reasoned that objective tests are necessary to effectively guide courts and police in the admissibility of confessions and has rejected subjective multi-factored tests.[281] These decisions represent a marked contrast to the approach lower courts have taken in the immigration context.

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273. Fare v. Michael C., 442 U.S. 707, 718 (1979).
274. Kamisar, *Fortieth Anniversary of the Miranda Case*, *supra* note 117, at 168.
275. Ogletree, *supra* note 241, at 1834 (quoting Schulhofer, *supra* note 258).
276. *See id.*
277. Hancock, *supra* note 254, at 2237.
278. *See* Schulhofer, *supra* note 258.
279. *See* Dickerson v. United States, 530 U.S. 428, 444 (2000).
280. *See* Ogletree, *supra* note 242, at 1839–40.
281. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 718 (1979) (defining rigidity to be the core virtue of *Miranda* because it "inform[s] police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and inform[s] courts under what circumstances statements obtained during such interrogation are not admissible").

a. Custody

Because *Miranda* is designed to guard against the inherently compelling pressures of compulsive interrogation, *Miranda* rights attach only when a person is in custody or deprived of her freedom of action in any significant way.[282] The Supreme Court has long held that this test is evaluated by *two levels* of objective criteria: first, an objective determination of the circumstances surrounding the interrogation, and second, whether a "reasonable person" would have felt she was free to leave.[283] Since *Miranda* was decided, the Court has continued to explicitly reject the use of subjective factors in this analysis, making clear that the question of custody "depends on the objective circumstances of the interrogation, [and] not on the subjective views harbored by either the interrogating officers or the person being questioned."[284] In recent decisions, the Court has taken great care to focus on objective criteria in analyzing custody to promote ease of administrability for police and judges, fairness to the suspect and police, and stability in the law.[285]

In the 1990s, the Court in *Stansbury v. California*[286] explicitly rejected analyzing the subjective intent of law enforcement officers on the ground that it would create the irrational situation of forcing suspects to "probe the officer's innermost thoughts."[287] Because the inquiry focuses on how a reasonable person would perceive her circumstances, the Court emphasized that "an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or interview, and thus cannot affect the *Miranda* custody inquiry."[288] In *Thompson v. Keohane*,[289] the Court held that judges should make the determination of whether a suspect is in custody to advance uniformity and consistency, observing that the "law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law."[290]

Recently, in *Howes v. Fields*,[291] the Court reaffirmed that the custody determination also requires an objective analysis of the *suspect's* and *officer's* perspectives. In *Howe*, the Court examined whether a suspect was in custody when he was questioned after he was escorted from his prison cell to a conference room by sheriff's deputies, he was told he was free to

282. Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam) (holding *Miranda* warnings attach "only where there has been such a restriction on a person's freedom as to render him 'in custody'"); *see also* Illinois v. Perkins, 496 U.S. 292, 296 (1990).

283. Thompson v. Keohane, 516 U.S. 99, 112 (1995).

284. Stansbury v. California, 511 U.S. 318, 323–24 (1994).

285. *See* Yarborough v. Alvarado, 541 U.S. 562, 668–69 (2004).

286. 511 U.S. 318, 324–26 (1994).

287. *Id.* at 324–25.

288. Id. (citing Berkemer v. McCarty, 468 U.S. 420, 435 n.22 (1984)).

289. 516 U.S. 99 (1995).

290. *Id.* at 115 (citing *Berkemer*, 468 U.S. at 436–39 (1984)); Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 273–76 (1985) (stating that "norm elaboration occurs best when the Court has power to consider fully a series of closely related situations"; case-by-case elaboration, when a constitutional right is implicated, may more accurately be described as law declaration than as law application).

291. 132 S. Ct. 1181 (2012).

leave, he remained unrestrained, and the door to the conference room remained open.[292] The Court held that the inquiry involved analyzing whether, under "the objective circumstances of the interrogation," a "reasonable person" would have felt free to leave.[293] Analyzing the general perspective of a suspect in his position, the Court concluded that the objective facts of the interview were "consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave."[294]

In 2011, the Court again underscored the salience and rationale of an objective approach to determining custody in *J.D.B. v. North Carolina*.[295] In *J.D.B.*, the Court considered whether a 13-year-old student was in custody when a uniformed police officer took him from his classroom to a closed-door school conference room and, with school administrators present, questioned him about a theft for thirty minutes without providing him with *Miranda* warnings.[296] The student was criminally charged based on statements he made during the interrogation.[297] Noting that the Court has "repeatedly emphasized [that] whether a suspect is 'in custody' is an objective inquiry,"[298] the court held that a child's age is an objective factor relevant to the custody analysis so long as her age was known to the officer or would have been objectively apparent to a reasonable officer. The *J.D.B.* Court was careful to define age as an objective criterion based on scientific evidence and its recent precedent to provide clear guidance to the police, who make "in-the-moment judgments as to when to administer *Miranda* warnings."[299] Limiting the analysis to objective criteria and a "reasonable person" standard, the Court held, "avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind."[300]

While custody focuses on a separate, albeit interrelated, aspect of *Miranda* jurisprudence, the Court's focus on objective criteria to provide clarity for police, uniform precedent, and stability in the law is equally applicable to the concerns raised by the varying tests lower courts have developed for immigrants in the *Miranda* context. Most courts in the immigration context focus specifically on the actual suspicions and knowledge of the agent, without regard to uniformity; the right to *Miranda* warnings in dual criminal and civil immigration interrogations now turns primarily on jurisdiction.[301] The failure of courts to provide consistent, objective factors for this inquiry has resulted in unworkable rules and

292. *See id.* at 1186.
293. *Id.* at 1189.
294. *Id.* at 1193 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664–65 (2004)).
295. 131 S. Ct. 2394, 2398–400 (2011).
296. *Id.* at 2399–400.
297. *Id.* at 2400.
298. *Id.* at 2402.
299. *Id.* at 2402.
300. *Id.*
301. *See, e.g.*, Mantejo v. Louisiana, 556 U.S. 778 (2009).

confusion for law enforcement agents and courts, and leaves immigrants vulnerable to abuse.

b. Waiver

Under *Miranda*, a knowing and intelligent waiver is a condition precedent to interrogation; a suspect must be read his Miranda rights, and must waive them, before interrogation can begin.[302] Once a suspect has invoked her rights unambiguously, all questioning must cease. This "rigid requirement" in *Miranda* has "the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible."[303] While the Court has made inroads into the definition of a valid waiver in recent years, it has continued to emphasize the need for clear rules to guide this inquiry.[304]

For example, in February 2010, in *Maryland v. Shatzer*,[305] the Court held that a fourteen-day break in custody ends the *Edwards v. Arizona*[306] presumption that statements made by suspects after invoking their right to counsel are involuntary. In *Shatzer*, the Court addressed a case where law enforcement agents questioned a suspect held on separate state charges without counsel two years after he had invoked his right to counsel in a previous interrogation.[307] In the second interview, the suspect waived his right to counsel and made incriminating statements, which were subsequently used to obtain a conviction against him.[308] The Court held that his statements were admissible and set a new rule that the presumption of involuntariness under *Edwards* lasts for only fourteen days, reasoning that two weeks provided "plenty of time for the suspect to get acclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."[309] In establishing the fourteen-day rule, the Court rejected a fact-specific inquiry in order to provide clear rules to law enforcement officers, observing that "[i]t is impractical to leave the answer to that question for clarification in future case-by-case adjudication; law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful."[310]

In 2010, in *Berghuis v. Thompkins*,[311] the Court similarly adopted a

302. Miranda v. Arizona, 354 U.S. 436, 479 (1966) ("After . . . warnings have been given, and such opportunity [to invoke the Miranda rights] afforded . . . the [suspect] may knowingly and intelligently waive these rights and agree to answer questions or make a statement.").
303. Fare v. Michael C., 442 U.S. 707, 718 (1979).
304. *See, e.g.*, Maryland v. Shatzer, 130 S. Ct. 1213, 1219–24 (2010).
305. *Id.* at 1227.
306. *See* 451 U.S. 477 (1981).
307. *Shatzer*, 130 S. Ct. at 1217–18.
308. *Id.* at 1218.
309. *Id.* at 1223.
310. *Id.* at 1222–23.
311. 130 S. Ct. 2250, 2264 (2010).

new bright line in the waiver context by requiring that a suspect who wishes to invoke her right to be silent make a statement that indicates a clear and unambiguous waiver. The Court rejected the previous fact-specific inquiry in favor of a clear rule requiring an unambiguous invocation of the right to silence.[312] The Court relied on its previous decision in *Davis v. United States*,[313] which similarly held that a suspect must clearly invoke her right to counsel during an interrogation for it to be valid under *Miranda*. In *Berghuis*, the Court reasoned that the old rule that allowed a waiver through an "ambiguous act, omission, or statement," would require police "to make difficult decisions about an accused's unclear intent."[314] By contrast, the Court held that an unambiguous waiver aids courts and law enforcement because it "'avoid[s] difficulties of proof and . . . provide[s] guidance to officers on how to precede in the face of ambiguity'"[315] and it avoids requiring police to engage in a guessing game.

The Court's concerns for clarity in the waiver context, like the objective approach to custody rules, run counter to the emerging law about *Miranda* rights in dual civil and criminal immigration interrogations. The updated *Miranda-Edward* waiver rights also highlight an important issue regarding the *Miranda* safeguards in dual civil and criminal immigration context: the Court's rule requires that if a suspect asserts his right to counsel or silence, not only must the current interrogation cease, but the suspect may not be approached for further interrogation "until counsel has been made available to him."[316] These rules apply to any subsequent officer; knowledge about a suspect's invocation of counsel is imputed to any subsequent official who interrogates the suspect, as every official is required to respect any invocation.[317] If Courts are inconsistent in whether *Miranda* applies, it sends a mixed message to law enforcement officials about whether they are required to ascertain and respect the rights of an inmate who has invoked the right to counsel or to remain silent when questioned about immigration status.[318] With the current inconsistencies, immigrants' protections under the *Miranda-Edwards* rules are at risk.

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312. *Id.*

313. 512 U.S. 452, 461–62 (1994).

314. *Berghuis*, 130 S. Ct. at 2260.

315. *Id.* (internal citation and quotations omitted).

316. Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

317. Arizona v. Roberson, 486 U.S. 675, 687–88 (1988) (suppressing statements suspect made in second interrogation about separate crime without counsel following his invocation of his right to counsel in initial interrogation where second officer was unaware that suspect had invoked his right to counsel).

318. Moran v. Burbine, 475 U.S. 412, 420 (1986) (quoting Miranda v. Arizona, 384 U.S. 436 (1966)) ("Beyond this duty to inform, *Miranda* requires that the police respect the accused's decision to exercise the rights outlined in the warnings. 'If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, [or if he] states that he wants an attorney, the interrogation must cease.'").

3. Eliminating the Right and the Centrality of Warnings

The strongest and most lasting import of the Court's decision in *Miranda* is that warnings are required prior to custodial interrogation to ensure that suspects are not coerced into confessing and that fair notice is given so that suspects can exercise their rights.[319] Absent other fully effective procedures, police are required to provide the suspect four warnings prior to any custodial questioning: she has the right to remain silent, anything she says can be used against her in a court of law; she has the right to the presence of an attorney; and if she cannot afford an attorney, one will be appointed for her prior to any questioning if she so desires.[320] Since *Miranda*, the Court has underscored the centrality of warnings as the core protection in custodial interrogation that maintains clarity and protects suspects' Fifth Amendment rights.[321] By not mandating warnings in the immigration context or conditioning them on subjective factors, lower courts are undermining a fundamental protection designed to protect individuals from police overreaching.

The *Miranda* warnings are designed to counteract the coercive pressures inherent[322] in custodial interrogation and to give individuals some measure of control by providing information about their Fifth and Sixth Amendment rights.[323] The warnings ensure that a suspect's decision to submit to custodial interrogation is an intentional relinquishment of known rights to silence and to counsel, and to inform her that she is not obliged to participate in an interrogation that can incriminate her, and make her aware that she may waive her rights.[324] Thus, *Miranda* warnings allow suspects the "right to choose between silence and speech . . . throughout the interrogation process."[325] Warnings are also intended "to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interests."[326] The "per se" rules in *Miranda* requiring warnings and requiring that interrogation cease once a suspect invokes his right to an attorney are also "based on [the Supreme] Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client un-

319. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 434–35 (1984); U.S. v. Henry, 447 U.S. 264, 273–74 (1980).

320. *Miranda*, 384 U.S. at 479.

321. *See Berkemer*, 468 U.S. at 434–35.

322. *Miranda* and its progeny accept as a basic premise that "the compelling influence of the interrogation" could eventually "force[ ]" a suspect to make a statement even if he never intended "voluntary relinquishment of the privilege." *Id.* at 476.

323. *See* Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010).

324. *See, e.g.*, Connecticut v. Barrett, 479 U.S. 523, 528 (1987) ("[*Miranda*'s] fundamental purpose [is] to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process."); Moran v. Burbine, 475 U.S. 412, 426 (1986) ("*Miranda* . . . giv[es] the *defendant* the power to exert some control over the . . . interrogation.").

325. *Miranda*, 384 U.S. at 469.

326. *Id.*

dergoing custodial interrogation."[327] As the *Miranda* Court recognized, lawyers have a special role once a suspect "becomes enmeshed in the adversary process."[328] Indeed, the Court noted that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system"[329] and "helps guard against overreaching by the police."[330] While this mechanism does not per se eliminate coercion, it is the central safeguard that ensures a suspect has made his own assessment of the risks and benefits of submitting to a custodial interrogation without the assistance of counsel.

Whether expanding or limiting the rights of suspects, the right to warnings has been the most persistent legacy of the Court's decision partly because of the clarity of its rule.[331] In *Berkemer v. McCarty*,[332] the Court relied on this principle to unanimously invalidate a state law allowing a misdemeanor exception to *Miranda* because it would result in "byzantine" unclear rules and "doctrinal complexities," which the Supreme Court sought to avoid in deciding *Miranda*.[333] The Court also reasoned that a misdemeanor exception "would substantially undermine th[e] crucial advantage"[334] of the "clarity" of the *Miranda* warnings, because it is unreasonable to expect "police to make guesses as to the nature of the criminal conduct at issue before deciding how they may interrogate the suspect."[335] And by invalidating state law in *Berghuis*, the Court observed that allowing a suspect to invoke his right to silence by a more equivocal act may "add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation," but found its less-protective ruling was appropriate because "as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process."[336]

The centrality of warnings has been reflected in the Court's recent decisions. In upholding the constitutional underpinnings of *Miranda* in *Dickerson v. United States*[337] in 2000, the Court made clear that a principal purpose of the *Miranda* warnings is to permit the suspect to make an intelligent decision about whether to answer a government agent's questions.[338] There the Court recognized that the *Miranda* warnings have "be-

327. Fare v. Michael C., 442 U.S. 707, 719 (1979).
328. *Id.*
329. *Miranda*, 384 U.S. at 469.
330. *Fare*, 442 U.S. at 719.
331. *See, e.g., id.*; Berkemer v. McCarty, 468 U.S. 420, 430 (1954) ("One of the principal advantages of the [*Miranda*] doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule.").
332. 468 U.S. at 430.
333. *Id.* at 431.
334. *Id.* at 430.
335. *Id.* at 431.
336. Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010).
337. 530 U.S. 428, 432 (2000).
338. Miranda v. Arizona, 384 U.S. 436, 467 (1966) (stating that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored"); *see also* Missouri v. Seibert, 542 U.S. 600, 611 (2004) (plurality opinion) (explaining that the *Miranda* Court was concerned with interrogation tactics that would

come embedded in routine police practice to the point where the warnings have become part of our national culture."[339] And in 2001, the Court emphasized in *Texas v. Cobb*[340] that " there can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation."[341] Thus, while the warnings do not require police, to disclose all of the information that a person might want before choosing between speech and silence,[342] nor do they require police to be precise,[343] the Court has consistently held that without warnings no waiver of the privilege can be deemed informed.[344]

Lower court decisions in the dual civil and criminal immigration context depart from the Court's consistent rule that warnings remain central for suspects in an adversarial setting to understand their rights. Without warnings, suspects have no knowledge that they are being asked a question that could incriminate them and are unable to make an intelligent or informed decision regarding how to answer a government agent's questions, which is a prerequisite to the rights safeguarded under *Miranda*.[345] The absence of warnings denies individuals the benefit of the important purpose of *Miranda* warnings: "to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interests."[346] When police and jail officials ask inmates about their nationality or immigration status, they do so for the express purpose of referring the inmate to ICE, which, as described below, can and frequently does result in criminal prosecutions related to violations of immigration laws. Nationality, immigration status, and place of birth all have a direct bearing on potential federal prosecution for immigration crimes. Given the broad scale and systematic levels of criminal prosecutions for immigration crimes, as discussed in the next section, courts' analyses that the answers to such questions are not "reasonably likely to elicit an incriminating response,"[347] or that officers obtain a "knowing and voluntary"[348] waiver of these rights, is inconsistent with *Miranda* and its progeny.

The new exceptionalism in immigrants' *Miranda* rights has implications for immigrants in the criminal context beyond the Fifth Amendment. This was most recently reflected by the Court's 2009 decision in *Montejo v.*

"disable [an individual] from making a free and rational choice" when deciding whether to speak to the police during an interrogation (quoting *Miranda*, 384 U.S. at 464–65)).

339. *Dickerson*, 530 U.S. at 443.

340. 532 U.S. 162 (2001).

341. *Id.* at 171.

342. *See, e.g.*, Colorado v. Spring, 479 U.S. 564, 573–77 (1987) (holding that officers do not have to divulge the subject matter of the interrogation).

343. Duckworth v. Eagan, 492 U.S. 195, 203 (1989).

344. *See* Miranda v. Arizona, 384 U.S. 436, 468–72 (1966).

345. Estelle v. Smith, 451 U.S. 454, 467 (1981).

346. *Miranda*, 384 U.S. at 469.

347. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

348. *Miranda*, 384 U.S. at 474.

Louisiana,[349] which made *Miranda* warnings and waivers relevant to the application of the Sixth Amendment right to counsel in criminal proceedings. The transformation of *Miranda* rules for immigrants in the criminal context marks a new inroad into an already-weakened *Miranda* jurisprudence that risks eroding mechanisms the Court has left intact in *Miranda* and undermines the balance the Court has achieved to protect against coerced confessions. Courts are developing an entirely distinct jurisprudence for immigrants at odds with fundamental principles established in *Miranda* that threatens to back-pedal to an era of judicial inconsistency and confusion among courts, institutional actors, and suspects alike.

IV. BROADER IMPLICATIONS FOR NONCITIZENS, LOCAL LAW ENFORCEMENT, AND IMMIGRANT PROTECTIONS

As described above, *Miranda* represented an attempt by the Court to protect individual rights by "providing guidance to primary actors (law enforcement personnel) in terms" that were "sufficiently specific" to generate "self applying regulation."[350] By departing from well-established *Miranda* principles for immigrants, courts are compounding institutional structures that are incentivizing these primary actors to deprive noncitizen suspects of their criminal procedural protections on a broad scale. This section describes two trends that exacerbate the confusion among lower courts. First, there has been an unprecedented increase in federal prosecution of immigration crimes.[351] Second, while local law enforcement officials are authorized, but are not required, to arrest and detain persons suspected of violating the criminal provisions of federal immigration law, they have been doing so recently in record numbers. Untrained local law enforcement serve as the new front line in criminal and civil immigration enforcement. The federal government has institutionalized this arrangement by providing substantial financial incentives for local law enforcement to identify criminal aliens subject to dual civil and criminal penalties; almost every jurisdiction in the country participates in criminal and civil immigration interrogations of individuals for purposes of identifying and referring "criminal aliens" to ICE for prosecution and deportation.

A. Unprecedented Changes in Criminal Immigration Enforcement

Historically, the federal government has not used criminal provisions of the INA in its immigration enforcement efforts.[352] In 1972, scholars noted the "de minimis policy" of U.S. criminal immigration enforcement,

349. Montejo v. Louisiana, 556 U.S. 778, 789–92 (2009).

350. Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 20–21 (1975).

351. *See* Sklansky, *supra* note 31, at 166–167.

352. Robert L. Robin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 Stan. L. Rev. 1036, 1057 (1972).

which was characterized by a period when U.S. Attorneys would "prosecute smugglers, but not the illegal entrants themselves."[353] However, the number of federal prosecutions of immigration crimes has grown significantly since the 1980s.[354] In addition, since the 1980s, Congress has increased the number and scope of immigration-related crimes, and in the 1990s, Congress increased the penalties for immigration crimes.[355]

Since Congress began expanding the scope and penalties of criminal provisions in the INA, federal prosecution of immigration-related crimes has grown significantly.[356] However, it is only since 2005 that the government has sharply increased its focus on criminally prosecuting immigrants for immigration violations.[357] Beginning with the Bush Administration in 2005, federal immigration-related prosecutions spiked, and are now at record highs.[358] By 2008, President Bush's last year in office, federal prosecution of immigration crimes had doubled over the previous year to more than 70,000 prosecutions, and has continued to rise with the Obama administration through 2011.[359] In all, from 1997 to 2009, immigration prosecutions grew more than ten-fold.[360]

Today, more than half of the federal docket is now comprised of prosecutions for immigration-related crimes, with 54% of all federal criminal cases ending in convictions, up from 24% of all federal convictions in 2007 and just 7% in 1991.[361] While federal immigration prosecutions declined slightly in 2010, the most recent data available indicate that immigration prosecutions accounted for 59% of all federal criminal charges in

353. Regarding immigration offenses, where the major violation is illegal entry into the country, a de minimus policy of prosecuting only repeat violators is used in combination with the administrative remedy of deportation to help keep the caseload within manageable proportions. *Id.*

354. Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 No. 33 Interpreter Releases 1317, 1317–18 (1997).

355. Chacón, *supra* note 29, at 137 ("Since the 1980s, Congress has passed legislation subjecting more and more acts associated with migration to criminal penalties, or increasing the severity of criminal sanctions imposed for the commission of those acts."); Stumpf, *supra* note 23, at 376.

356. Morris, *supra* note 354, at 1318.

357. Sklansky, *supra* note 31, at 177–78.

358. Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2088, 2094 (2008) ("Starting around 2005, federal prosecutors have prosecuted immigration-related crimes more frequently, to the point that immigration-related prosecutions accounted in February 2008 for the majority of new federal criminal cases."). From August 2003 to August 2009, the number of immigration-related prosecutions went up by five times. *Id.*

359. TRAC Immigration, *Immigration Prosecution at Record Levels in FY 2009* (2009), http://trac.syr.edu/immigration/reports/218.

360. Mark Motivans, Federal Justice Statistics Program—Immigration Offenders in the Federal Justice System (2012), 8–10, July 2012, http://bjs.ojp.wdoj.gov/index.cfm?Fy+pbdetail+iid=4392 (last visited Nov. 8, 2012); *see also*, Sklansky, *supra* note 31, at 223.

361. TRAC Reports, *FY 2009 Federal Prosecutions Sharply Higher* (2009), http://trac.syr.edu/tracreports/crim/223/; TRAC Immigration, *Immigration Prosecutions at Record Levels in FY 2009*, *supra* note 359. Notably, the prosecution of almost all other major crime categories, including crimes involving drugs, weapons, and white-collar crime, increased only slightly or in some cases actually declined. *See supra* TRAC Reports; Daphne Eviatar, *Sharp Rise in Immigration Filings Drives Criminal Prosecution Stats*, WASH. INDEP. (Dec. 21, 2009).

April 2012.[362] Last year, the federal government filed 89,000 criminal immigration charges, an average of 7,088 a month.[363]

The overlap between civil and criminal immigration enforcement is substantial.[364] The most commonly prosecuted immigration crimes are those for which immigrants can also be deported: improper entry; illegal reentry after a removal order; and felony reentry, which carries a sentence of up to twenty years if a previous conviction was for an aggravated felony. In 2011, improper reentry was the most frequently recorded lead charge.[365] In total, more than 90% of all immigration convictions, or 72,000 individuals, were convicted of illegal entry or reentry—more prosecutions than all other federal crimes combined.[366]

As a result, the likelihood that an immigrant who has a status-related issue will be criminally prosecuted has increased sharply. In 2011, for example, around twenty percent of all apprehensions by the Customs and Border Patrol (CBP) resulted in a criminal immigration prosecution—up from 2% in 2006.[367] During this same period, the total number of CBP apprehensions fell by more than half, while CBP-referred criminal prosecutions tripled.[368] Immigrants are now more likely than ever to face criminal charges.

This unprecedented increase in criminal immigration prosecutions has been due in part to "zero tolerance" programs adopted under the Bush administration designed to criminally prosecute all apprehended undocumented immigrants in the southwest border area.[369] To implement this strategy, in about 2004 DHS directed and provided funds to federal and local agencies through a program called "Operation Streamline."[370] Streamline has involved expedited and consolidated processing of illegal entry and reentry cases, which has resulted in mass criminal proceedings and guilty pleas. In some jurisdictions, this federal mass-prosecution program has resulted in fifty to one hundred defendants being prosecuted for illegal entry every single day.[371] As a result, between 2002 and 2008, prosecutions for first-time illegal entry in border district courts increased 330%.[372]

The rapid growth in federal immigration prosecutions has also resulted from increased law enforcement efforts away from the southwest border. In his rich analysis of criminal immigration enforcement, Professor David

362. TRAC Immigration, *supra* note 195; TRAC, *Federal Prosecution Data for April 2012 Released* (July 9, 2012), http://trac.syr.edu/whatsnew/email.120709.html.

363. . Eagly, *supra* note 31, at 1294; Lydgate, *supra* note 19, at 511.

364. *See, e.g.*, Kanstroom, *supra* note 194, at 599–600.

365. TRAC Immigration, *supra* note 203.

366. GRASSROOTS LEADERSHIP, *supra* note 203, at 3; TRAC Immigration, *supra* note 203.

367. TRAC Immigration, *supra* note 195.

368. *Id.*

369. GRASSROOTS LEADERSHIP, *supra* note 203, at 4.

370. *Id.*; Chacón, *supra* note 31, at 142–43.

371. Chacón, *supra* note 31, at 142–43.

372. *Id.*

Alan Sklansky found that a quarter of all federal prosecutions in Arkansas, Idaho, North Dakota, Oregon, Utah, Vermont, and Washington, Vermont, are immigration cases.[373] From 2007 to 2010, criminal immigration prosecutions in non-border states increased by 31%.[374]

The rise in prosecutions of federal immigration crimes has led scholars to voice significant concerns that the government has entered into a new era of using criminal law to regulate immigration, similar to the concerns raised in the emerging *Miranda* jurisprudence for immigrants.[375] While immigration and criminal law have long operated as separate systems, their convergence has resulted in the disruption of the rule of law for immigrants and the disruption of a unitary criminal justice system.[376] The federal government has been able to borrow law enforcement tools from the civil system in an ad hoc manner, despite the fact that the immigration system operates with different objectives and under different constitutional rules.[377] The ability of the government to choose between civil or criminal laws has resulted in the absence of accountability and ultimately in an unequal criminal justice system for immigrants. On the ground, the convergence of immigration and criminal law enforcement has resulted in reports of systemic criminal procedural violations of immigrants' rights by law enforcement agents, prosecutors, and judges, including mass guilty pleas.[378]

Significantly, the growth in federally prosecuted crimes has also had a disproportionate impact on Latino communities, which in 1991 accounted for 24% of federal criminal convictions, compared to 40% in 2007.[379] "Among those sentenced for immigration offenses in 2007, 80% were Hispanic."[380] According to the Pew Research Center, much of the increase in the number of Hispanics sentenced in federal courts is the result of the rise in the number of offenders sentenced for immigration offenses between 1991 and 2007.[381] Since 1991, "the number of sentenced offenders who were Hispanic nearly quadrupled and accounted for more than half (54%) of the growth in the total number of sentenced offenders."[382] In 2007, 75% of Latino offenders sentenced for immigration crimes were convicted of entering the U.S. unlawfully or residing in the country without authorization, and among sentenced noncitizen Latino immigration offenders, more than 81% were convicted of entering unlawfully or resid-

373. Sklansky, *supra* note 31, at 167.

374. TRAC, *Federal Criminal Enforcement and Staffing: How Do the Obama and Bush Administrations Compare?* (2011), http://trac.syr.edu/tracreports/crim/245/.

375. Eagly, *supra* note 31, at 1358.

376. *Id.* at 1285–1304.

377. *Id.* at 1288–89; Sklansky, *supra* note 31, at 167.

378. *See, e.g.*, United States v. Roblero-Solis, 588 F.3d 692 (9th Cir. 2009) (describing one particular mass plea agreement and noting that "in twelve months' time the court has handled 25,000" of these pleas).

379. MARK LOPEZ & MICHAEL LIGHT, A RISING SHARE: HISPANICS AND FEDERAL CRIME 1 (2009), *available at* http://pewhispanic.org/files/reports/104.pdf.

380. *Id.*

381. *Id.* at ii.

382. *Id.*

ing in the U.S. without authorization.[383]

B. New Actors: Devolution of Power to Local Law Enforcement Agencies through Financial Incentives

There has been another significant shift in immigration regulation affected by the emerging immigration exceptionalism in *Miranda* jurisprudence: the federal government's increased reliance on local law enforcement to enforce both civil and criminal immigration laws.[384] Prior to September 11th, criminal and civil immigration laws were primarily enforced by federal immigration officials trained in immigration law and procedure, with limited assistance from local police.[385] However, in the last decade, the federal government has developed a number of programs and has strengthened old ones to effectively enlist state and local actors to be the front line of both civil and criminal immigration enforcement. Scholars have provided thoughtful analysis to the scope and questions raised by the state and local officials involved in civil immigration enforcement, but until recently, there has been less attention paid to the role local law enforcement agents play in criminal immigration enforcement.[386] In this section, I describe the scope of changing federal institutional structures that have incentivized and promoted the role of state and local actors in criminal immigration enforcement by using new data obtained from the Department of Justice and ICE. I then examine the implication of these shifts in light of the doctrinal transformation of *Miranda* for immigrants. As a result of these changes, almost every local law enforcement agency in the nation is involved with criminal and civil immigration enforcement[387] through substantial financial incentives, totaling $2.85 billion dollars over the last three years.

The federal government has been simultaneously proactive in involving local law enforcement officials in immigration enforcement and deeply critical of and aggressive in challenging the involvement of local actors in immigration enforcement. On the one hand, the U.S. government recently filed suit against Arizona and five other states that passed state immigration laws, arguing that local law enforcement was preempted because increasing local enforcement of immigration would distort and un-

383. *Id.*

384. *See, e.g.*, Kalhan, *supra* note 23, at 1161–63; Wishnie, *supra* note 23, at 1084–88.

385. Wishie, *supra* note 23, at 1085–87. The power to regulate admission, exclusion, and removal (deportation) lies exclusively with the federal government. *See* DeCanas v. Bica, 424 U.S. 351, 354 (1976).

386. Professor Hiroshi Motomura recently broke new ground in this area by exploring the allocation of authority between local and state police officials to make federal criminal arrests and the broader implications for immigration enforcement. *See* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. Rev. 1819, 1848–49 (2011).

387. State and local government officials often work with the federal government to assist criminal enforcement of immigration laws. *See, e.g.*, Michael Van Cassell, *Wyoming Illegal Immigration Cases Triple*, Wyoming Trib. Eagle, Feb. 14, 2010; Valerie Brown, *Cases of Illegal Re-entry after Deportation Still on the Rise in Oklahoma City Court*, The Oklahoman, Jan. 30, 2011.

dermine federal immigration priorities and raise civil rights issues. At the same time, since September 11th, the federal government has launched numerous federal-local partnership programs to strengthen and leverage ICE's enforcement capacity under a "force multiplier theory."[388] As Professor Motomura has described, the federal government has effectively conceded its authority and enforcement discretion to state and local actors.[389] These programs, including Secure Communities, 287(g) partnerships, and the Criminal Alien Program have formally and informally put local law enforcement officials on the front lines of civil and criminal immigration enforcement.[390]

One such federal-state partnership that has both incentivized and conscripted local officials into criminal and civil immigration enforcement—and is at the forefront of conducting dual civil and criminal custodial interrogations about immigration status—is the little-known State Criminal Alien Assistance Program ("SCAAP").[391] Originally designed in 1994 to provide federal funds to local jurisdictions to defray the cost of detaining "undocumented criminal aliens," it has evolved into the central referral tool for incorporating local law enforcement agencies into civil and criminal immigration enforcement.[392] The SCAAP program provides federal funds to states and localities for detaining, identifying, and referring to ICE certain "undocumented criminal aliens."[393] The authorizing statute defines eligible aliens to include individuals who are expressly subject to both criminal and civil immigration charges, i.e., undocumented individuals who entered the U.S. without inspection or who failed to maintain their immigration status.[394] Notably, SCAAP does not compensate local agencies for detaining individuals for federal immigration charges, but rather for all the pre-trial and post-conviction time that eligible inmates serve on their *state criminal sentences*—detention costs that local agencies would normally pay for inmates, regardless of immigration status.[395]

388. MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONGRESSIONAL RESEARCH SERV., INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 27 (2011), *available at* http://www.fas.org/sgp/crs/homesec/R42057.pdf ("[B]ecause there are about 150 times more state and local law enforcement officers in the United States . . . any policies that gorge connections between state and local law enforcement agents and ICE have the potential to increase ICE's presence in U.S. communities and may be substantial force multipliers for ICE.").

389. Motomura, *supra* note 31, at 1845, 1851.

390. *Id.* at 1850, 1855; Wishnie, *supra* note 23, at 1084–88.

391. BUREAU OF JUSTICE ASSISTANCE, FY 2011 SCAPP GUIDELINES AND APPLICATION 1 (2011), *available at* https://www.bja.gov/Funding/11SCAAP_Guidelines.pdf.

392. The State Criminal Alien Assistance Program was created by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1823–24 (codified as amended at 8 U.S.C. § 1231(i) (2006)); BUREAU OF JUSTICE ASSISTANCE, *supra* note 391, at 1–2.

393. 8 U.S.C. § 1231(i) (2006).

394. *Id.*; Bureau of Justice Assistance, *State Criminal Alien Assistance Program (SCAAP)*, http://www.bja.gov/ProgramDetails.aspx?Program_ID=86 (last visited June 8, 2013). SCAAP also requires that eligible aliens are (1) convicted of a felony or two misdemeanors, and (2) detained four or more consecutive days. *Id.*

395. Until last year, BJA also reimbursed jurisdictions for incarcerating "unknown" criminal aliens. *Id.*

Participation in SCAAP is conditioned on local law enforcement officials using "due diligence" to identify and report eligible undocumented individuals to ICE for processing.[396] Once ICE receives information from local agencies, it categorizes inmates into three categories: SCAAP eligible; unknown; or not eligible, meaning the individual is a U.S. citizen or legal resident.[397] The DOJ then reimburses the agency for correctional officer costs associated with all pre-trial and post-conviction time served incarcerating all SCAAP-eligible inmates on a per diem rate.[398]

By conditioning funding on identifying immigrants who could be subject to civil or criminal violations, SCAAP has effectively delegated front-line authority to local actors to interrogate suspects for information that can be used for both criminal and civil prosecutions. The inclusion of federal crimes involving illegal entry ensures that some of the eligible individuals referred to ICE through SCAAP are at risk of facing civil and criminal penalties; as described Part III.A, illegal entry and reentry are currently the highest recorded federal criminal charges.[399] While SCAAP was enacted to be a "reimbursement program," as government officials have acknowledged, it operates as one of the largest enforcement mechanisms to identify criminal aliens.[400]

A review of government reports and SCAAP data obtained through FOIA reveals several trends relevant to local criminal immigration enforcement and the emerging *Miranda* jurisprudence. First, the scope of local participation and federal investment in this program is substantial. According to an audit by the Inspector General of the Department of Justice (OIG), the rate of local agencies participating in SCAAP appears to be 100%.[401] This is a substantial increase from the 1990s, when a 1997 Government Accounting Office (GAO) study indicated that INS—ICE's

396. BUREAU OF JUSTICE ASSISTANCE, *supra* note 391, at 2–3. To be reimbursed, state and local agencies must provide "required information on undocumented criminal aliens," which includes the alien registration number, name, and the date of and country of birth. *Id.* at 4.

397. U.S. OFFICE OF MGMT. & BUDGET, DETAILED INFORMATION ON THE STATE CRIMINAL ALIEN ASSISTANCE PROGRAM ASSESSMENT § 1.4 (2008), *available at* http://georgewbush-whitehouse.archives.gov/omb/expectmore/detail/10001096.2003.html. According to the OMB, "many of the 'unknowns' also are U.S. citizens or lawfully in the U.S." *Id.*

398. Until last year, BJA also reimbursed jurisdictions for incarcerating "unknown" criminal aliens. BUREAU OF JUSTICE ASSISTANCE, *supra* note 391.

399. TRAC Immigration, *supra* note 203; Sklansky, *supra* note 31, at 167–68.

400. *See, e.g.*, Jonathan Clark, *Immigration Overhaul Bill Dead, So What is Next?*, DOUGLAS DISPATCH, July 5, 2007 (reporting County Sheriff is interested in more SCAAP money, but "would prefer to focus on local problems like methamphetamine and domestic abuse and leave border enforcement up to the federal government"); Chris Rizo, *AG Criticizes Obama over Proposed Budget Cuts*, LEGAL NEWSLINE, May 8, 2009 (quoting Colorado Attorney General John Suthers as stating: "The State Criminal Assistance Program is one of the important ways the federal government helps states pay for enforcing federal immigration law and incarcerating illegal immigrants."); Isaac Wolf, *U.S. Program Pays Municipalities to Identify Illegal Immigrants*, SCRIPPS NEWS, July 30, 2010, http://www.scrippsnews.com/node/55518.

401. DOJ, OFFICE OF THE INSPECTOR GEN., AUDIT DIVISION, COOPERATION OF SCAAP RECIPIENTS IN THE REMOVAL OF CRIMINAL ALIENS FROM THE UNITED STATES 11 (January 2007).

predecessor—screened only one-third of foreign-born prisoners.[402] Similarly, the number of agencies participating in the program has more than doubled since September 11th, increasing from 412 local law enforcement agencies in 2000 to 929 in 2011.[403]

Second, local law enforcement officials frequently directly question arrestees about their immigration status to comply with SCAAP, although the circumstances and content of questioning varies. The OIG audit found that a majority of the participating agencies comply with SCAAP by directly asking arrestees about their immigration status.[404] Other agencies indicated that they asked suspects about their country of birth or nationality, or only inquired about immigration status upon suspicion that a detainee was undocumented or arrested for a felony.[405] Some agencies reported that they interrogated suspects about their immigration status upon arrest, while others indicated they interrogated the suspect during booking.[406] While almost all jurisdictions were "cooperative" with ICE, a number of local agencies expressed discomfort with questioning individuals about their immigration status and enforcing immigration law, prompting some to limit immigration-related inquiries as part of the jail booking process.[407]

Third, there has been a sharp increase in local SCAAP referrals to ICE that tracks the increase in federal immigration prosecutions. Between 2005 and 2010, the number of SCAAP referrals increased by almost 30%, from 270,807 to 350,197.[408] During this same period, federal payments to local jurisdictions for SCAAP referrals grew from $287 million in 2005 to $324 million in 2010. In total, the federal government allocated $4.65 billion for SCAAP payments to local jurisdictions,[409] and local agencies identified and referred 1.65 million arrestees to ICE in the last five years.[410]

Data from ICE also confirms that local law enforcement agencies have become involved in the immigration enforcement process at unprecedented rates during this period. The ICE Local Law Enforcement Center (LESC), which is primarily used by "state and local law enforcement of-

402. *See* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 662 n.242 (2011).

403. *See* DOJ, BUREAU OF JUSTICE ASSISTANCE, FY 2011 SCAAP AWARDS, https://www.bja.gov/Funding/11SCAAPAwards.xls; DOJ, BUREAU OF JUSTICE ASSISTANCE, SCAAP AWARDS.00.01.02, https://www.bja.gov/Funding/SCAAP.Awards.00.01.02.xls.

404. DOJ, *supra* note 401, at 11.

405. *Id.* at vi, 11–12, 19.

406. *Id.* In Shelby County, TN, every inmate is interviewed about their immigration status upon booking. *See, e.g.*, Kristina Goetz, *Shelby County Jail Screens Inmates' Immigration Statuses*, COM. APPEAL, Aug. 1, 2010, http://www.commercialappeal.com/news/2010/aug/01/jail-screens-inmates-statuses/.

407. DOJ, *supra* note 401, at 19.

408. *See* SCAAP AWARDS, *supra* note 27.

409. 8 U.S.C. § 1231(i)(5)(A)–(C) (2006) (setting SCAAP appropriations at $750 million for fiscal year 2006, $850 million for fiscal year 2007, and $950 million for fiscal years 2008–2011).

410. *See* SCAAP AWARDS, *supra* note 27.

ficers seeking information about aliens encountered in the course of their daily enforcement activities," reported receiving 1,278,219 electronic requests for information in 2011, more than twice the number of inquiries it received in 2004.[411]

Significantly, local law enforcement agencies have had a low accuracy rate in referring eligible individuals to ICE for SCAAP reimbursement, and has referred to ICE a substantial number of legal residents and U.S. citizens. Only about one-third of the 1.8 million local agency referrals made for SCAAP purposes from 2005 to 2010 were deemed to be SCAAP-eligible.[412] Despite federal rules instructing that U.S. citizens should not be reported through SCAAP,[413] in the last five years local actors referred close to 1.2 million individuals who were not verified to be criminal aliens, including more than 300,000 U.S. citizens and legal permanent residents.[414]

Despite these errors, SCAAP and ICE statistics suggest that local agencies are referring large numbers of individuals that could be subject to civil or criminal violations through SCAAP. In the last five years, local agencies referred more than 660,000 eligible criminal alien inmates to ICE, a 60% increase from 2004 to 2011.[415] A 2011 GAO Criminal Aliens study found that 65% (or 161,850) of the 249,000 criminal aliens in a study population comprised primarily of SCAAP-eligible detainees had been previously arrested at least once for a criminal or civil immigration offense prior to their referral.[416] These figures suggest that a large number of individuals could be subject to an illegal entry or reentry offense.[417]

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411. ICE, *Fact Sheet: Law Enforcement Support Center* (May 29, 2012), http://www.ice.gov/news/library/factsheets/lesc.htm. The LESC provides immigration status information and assistance to local, state, and federal law enforcement agencies on noncitizens suspected, arrested or convicted of criminal activity. *Id.*; MICHAEL GARCIA, ASSISTANT SEC'Y ICE, STATEMENT BEFORE SENATE APPROPRIATIONS COMMITTEE, SUBCOMMITTEE ON HOMELAND SECURITY 6 (2004), *available at* http://www.ice.gov/doclib/news/library/speeches/garcia030205.pdf.

412. *See* ANDORRA BRUNO ET AL., IMMIGRATION LEGISLATION AND ISSUES IN THE 112TH CONGRESS (2011).

413. BUREAU OF JUSTICE ASSISTANCE, *supra* note 391, at 2–3.

414. BRUNO ET AL, *supra* note 412.

415. *See* SCAAP AWARDS, supra note 27.

416. U.S. GOV'T ACCOUNTABILITY OFFICE, CRIMINAL ALIEN STATISTICS: INFORMATION ON INCARCERATIONS, ARRESTS, AND COST 19 (2011), *available at* http://www.gao.gov/new.items/d11187.pdf. The study population was based on a random sample of 249,000 individuals, approximately 81% of whom were SCAAP-eligible inmates referred by local law enforcement agencies to ICE from 2004 to 2008. *Id.* The remaining 19% were the population of aliens incarcerated in federal prisons as of December 27, 2008. Even if the entire sample of federal BOP prisoners fell into this category, 112,850, or 56% of the SCAAP-referred individuals fell into this category. *Id.* at 50–52.

417. 8 U.S.C. §§ 1325–26 (2006). While it is impossible to discern how many of the 660,599 eligible immigrants referred through SCAAP fell into either of the two categories for compensation that subject SCAAP-eligible inmates to civil and criminal charges, the GAO report suggests a high probability that many of them did. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 416, at 19.

Finally, data obtained from ICE confirm that state and local police have been playing a growing role in criminal immigration enforcement and comprising a bigger share of referrals. A recent analysis by Professor Sklansky revealed that the share of criminal immigration cases resulting from state and local referrals increased from 5.4% of all ICE criminal cases to 10% by 2009. In total, more than 46,000 federal criminal immigration cases resulted from state and local referrals last year.[418] With local actors increasingly contributing to the growth in criminal immigration prosecutions and increasingly referring to ICE individuals subject to criminal and civil immigration violations under SCAAP at record numbers, the government's "force multiplier" theory is being realized in the criminal immigration context as well.

The court's emerging exceptionalism for immigrants is particularly serious given the widespread criminal and civil custodial interrogations regarding immigration status, which is compounded by the substantial financial incentives local agencies receive for identifying and referring to ICE individuals subject to criminal and civil immigration penalties. Local law enforcement officials receive a considerable amount of money for each day they detain a qualifying "criminal alien," creating strong incentives to interrogate as many individuals as possible about their immigration status to maximize the number of qualifying aliens referred to ICE.[419] Government reports have criticized SCAAP for an absence of accountability for how local agencies obtain immigration status information and how jurisdictions use the money,[420] and audits have confirmed that local agencies have engaged in fraudulent reporting of inmates and have referred a high number of U.S. citizens and legal residents to obtain additional funds.[421] Although there have been reports that SCAAP is insufficient to cover costs for incarcerating criminal aliens in certain jurisdictions,[422] there have been numerous reports of local agencies spending SCAAP reimbursements to pay for costs wholly unrelated to detaining "criminal aliens"; such costs include expanding general prison services and programs,[423] covering local budget shortfalls, and even diverting

418. David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism* [draft of August, 18, 2011] (on file with author). Professor Sklansky shared the underlying documents he obtained from ICE through a FOIA in response to an email request. 11-FOIA-2143, email from David Sklansky to author, Aug. 20, 2012 (email and documents on file with author).

419. U.S. OFFICE OF MGMT. & BUDGET, *supra* note 397, §§ 1–4.

420. *Id.*

421. *Id.*; CALIFORNIA STATE AUDITOR, STATE OF CALIFORNIA INTERNAL CONTROL AND STATE AND FEDERAL COMPLIANCE AUDIT REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2011 65 (March 2012), *available at* http://www.bsa.ca.gov/pdfs/reports/2011-002.pdf (reporting audit of California Department of Corrections submitted nearly 2,000 ineligible inmate records for inmates with multiple registration numbers, and review of 29 submitted records revealed inmates were U.S. citizens or lawful permanent residents).

422. Seth Hoy, *Illinois County "Just Says No" to Costly Immigration Detainers, Immigration Impact* (Sept. 14, 2011), http://immigrationrationimpact.com/2011/09/14.

423. *See, e.g.*, Steven Butler, *Board Recognizes Sheriff, Senator*, CULPEPER STAR-EXPONENT, Dec. 7, 2011 (SCAAP grant used to pay for contract nursing services); Gabriel Khouli, *NCSO, Juvenile Court to Help Troubled*, COVNEWS, Feb. 25, 2012 (life skills

money for fraudulent personal use.[424] The high level of fraudulent and erroneous referrals and the misuse of SCAAP funds raises concerns that local jurisdictions may disregard suspects' rights to maximize their financial gain from the program.

This year, ICE leveraged SCAAP to increase incentives for local agencies to get involved in other immigration enforcement initiatives and penalize agencies that do not fall in line. ICE Director John Morton threatened to withhold SCAAP funds from jurisdictions that refused to collaborate in controversial enforcement efforts such as Secure Communities and immigration detainers, even though SCAAP does not cover these costs.[425] Similarly, the DOJ modified SCAAP to provide funding only for DHS-verified unauthorized aliens and exclude payment for "unverified inmates," which in past years have comprised up to 45% of all referrals.[426] To maximize SCAAP funding levels, the DOJ has encouraged jurisdictions to participate more directly in immigration enforcement measures such as Secure Communities and 287(g).[427]

The widespread involvement of untrained local and state police in immigration enforcement and considerable financial advantages of such activity also heighten the risks that state and local law enforcement will engage in unconstitutional policing.[428] Scholars and leading police organizations have leveled serious criticism about the expanding role of local

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courses); Jeremy Redmon, *Georgia Could Bear More of the Costs of Jailing Illegal Immigrants*, ATLANTA J. CONST., Mar. 8, 2012 (reporting that DeKalb County Sheriff used SCAAP money "to pay for employee salaries and prevent furloughs amid a county funding gap last year, replace doors in the county jail and pay for rehabilitation programs for inmates to prevent recidivism); *Newton Detention Center Inmates Graduate From Self-Improvement Classes*, NEWTON CITIZEN, June 11, 2012 (anger management classes); Kyle Siegel, *Security Cameras Coming to Pettis County Courthouse*, SEDALIA NEWS J., June 13, 2012 (courthouse security cameras); Memorandum from Carlo Pacot, Budget and Policy Analyst for Dallas County to Commissioners Court (Apr. 4, 2008), http://www.dallascounty.org/department/comcrt/agenda/files/2008Apr15b.pdf (hiring additional law enforcement staff).

424. *See, e.g.*, Brittany Wallman, *Disgraced Sheriff's $1.6 Million Office Detailed*, SUN SENTINEL, June 5, 2011 (describing how Broward County Sheriff spent $1.6 million of SCAAP funds for private office).

425. *See, e.g.*, Rob Margetta, *ICE Director Says '287(g)' Decision in Arizona was Apolitical, Crackdown on 'Sanctuary' County Coming*, CQ HOMELAND SECURITY, July 12, 2012 (ICE Director threatening to withhold SCAAP funds to Cook County for sanctuary measures and refusal to participate in Secure Communities); NATIONAL IMMIGRATION PROJECT, THE ALL-IN-ONE GUIDE TO DEFEATING ICE HOTEL REQUESTS, app. 4 at 1–2 (2012), *available at* http://nationalimmigrationproject.org/community/All%20in%20One%20Guide%20Appendix%204.pdf.

426. BRUNO ET AL., *supra* note 412; *see, e.g.*, DOJ, BUREAU OF JUSTICE ASSISTANCE, FY 2008 SCAAP AWARDS (2008).

427. BRUNO ET AL., *supra* note 412, at 13.

428. *See, e.g.*, Chacón, *supra* note 29, at 1618 ("[R]acial profiling . . . has a long history of surfacing when local law enforcement becomes engaged in immigration enforcement."). Several states have called local officials to identify more "criminal aliens" to obtain additional SCAAP funding with local budget cuts. *See, e.g.*, JOSEPH BILLY ET. AL., FINAL REPORT OF THE CORRECTIONS AND HOMELAND SECURITY COMMITTEE 8 (2010), *available at* http://www.state.nj.us/governor/news/reports/Corrections%20&%20Homeland%20Security.pdf (recommending that local officials "redouble their efforts to identify and record foreign nationals," because payments "are below expected levels").

police in prosecuting federal immigration crimes because immigration enforcement is both highly complex and distinct from their primary duties.[429] Local officials lack the knowledge, experience, and training in immigration law on how to detect criminal or civil violations of federal immigration laws, and on immigrants' procedural protections, compared to the intensive training federal immigration agents receive that is necessary to protect civil rights.[430] Studies have found that even unfunded federal programs incorporating untrained local police into immigration enforcement have a track record of increased racial profiling.[431] For example, when ICE introduced the Criminal Alien Program in Irving, Texas, which placed ICE officials in the local jail but provided no financial benefit to the local agency, there was a marked rise in low-level criminal arrests of Hispanics.[432] In this sense, these institutional arrangements and structural shifts effectively serve to normalize the effect of emerging doctrinal exceptionalism and the absence of clarity in *Miranda* jurisprudence for immigrants.

With courts inconsistently protecting immigrants' *Miranda* rights with the creation of vague and unworkable rules, there is no guidance for police operating in complicated terrain, and in many jurisdictions there is no disadvantage for local officials to *not* provide *Miranda* warnings. By conditioning the warnings on an officer's stated intent, courts are giving officers an easy way to circumvent the warnings. The current law creates a tenuous dynamic that allows local actors to not respect immigrants' *Miranda* rights during custodial interrogations about immigration status for criminal and civil purposes. As a result, the hundreds of thousands of suspects that are questioned about their immigration status for civil and criminal purposes under SCAAP each year are at risk of not knowing that they have the right to remain silent and the right to an attorney, and

429. *See, e.g.*, Gene Voegtlin, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE, TRIBAL, AND LOCAL LAW ENFORCEMENT, INT'L ASSOC. OF CHIEFS OF POLICE (2004), *available at* http://www.theiacp.org/Portals/0/pdfs/Publications/ImmigrationEnforcementconf.pdf ("Whether or not a person is in fact remaining in the country in violation of federal civil regulations or criminal provisions is a determination best left to these agencies and the courts designed specifically to apply these laws and make such determinations after appropriate hearings and procedures. The local patrol officer is not in the best position to make these complex legal determinations.").

430. *Id.*

431. *See, e.g.*, Letter from Thomas E. Perez, Assistant Att'y Gen., Civil Rights Div., DOJ, to Bill Montgomery, Maricopa Cnty. Att'y, Arizona 11 (Dec. 15, 2011), *available at* http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf. (finding widespread racial profiling by the Maricopa County Sheriff's Office that targeted people who spoke Spanish or had "dark skin"); Tennessee Immigrant and Refugee Rights Coalition, *Citations/Warrants for No Driver's License by Ethnicity and Race: Comparing the Year Prior to 287(g) and the Year Following 287(g)* (2008), http://www.tnimmigrant.org/storage/misc/No_Drivers_License_1_year_overview%206-2008.pdf (noting a statistically significant increase in arrests of Latinos for driving without a license after implementation of 287(g) program).

432. *See, e.g.*, TREVOR GARDNER II & AARTI KOHLI, CHIEF JUSTICE EARL WARRANT INSTITUTE ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 1, 5, 8 (2009), *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

that they are in an adversarial position, utterly deprived of the choices that *Miranda* sought to secure. The absence of clarity, combined with the pressures for funding, also opens the door for direct coercion by local officials. According to Morris County Jail officials, individuals who remain silent in response to SCAAP referral questioning are placed into isolation until they respond.[433]

These doctrinal and institutional shifts have implications for all individuals in the criminal justice system, regardless of alienage.[434] As the SCAAP data indicates, placing local officials on the front line of immigration enforcement has resulted in a large number of errors in the identification of criminal aliens, with local agencies misidentifying upwards of 300,000 individuals referred to ICE in the last few years.[435] There have also been documented reports of inaccurate referrals to ICE through SCAAP that have resulted in U.S. citizens enduring prolonged immigration detention and removal proceedings.[436]

With these institutional agreements and incentivizing structures, courts, instead of providing guidance to the vast number of law enforcement officials conducting custodial interrogations about immigration status, are causing more confusion along a critical terrain, with serious and widespread consequences.

V. PROPOSALS

Given that the Court's post-*Miranda* decisions have largely signaled a reluctance to further regulate police questioning, with some notable exceptions, it is important for the federal government to step in to align immigration questioning with the constitutional protections long afforded to immigrants. Lower courts have expended significant resources to address this issue but have provided no guideposts to law enforcement officials for applying *Miranda* warnings in dual civil and criminal inquiries. The problem with judicial confusion is that there are no clear lines to guide police conduct in dual immigration inquiries. On a practical level, with the federal government providing local officials financial incentives for referring and detaining individuals subject to civil and criminal penalties, there is intense pressure for local law enforcement officials to err on the side of questioning individuals about their immigration status without appropriate procedural protections.

The federal government has several options to address this problem. First, the Department of Homeland Security should uniformly and expressly classify questioning of incarcerated individuals about their immi-

433. Undersheriff Interview, *supra* note 10.

434. Nationally, about 70 percent of immigrants are legal permanent residents or American citizens. Nancy Morawetz & Alina Das, *Legal Issues in Local Police Enforcement of Federal Immigration Law*, in THE ROLE OF LOCAL POLICE: STRIKING A BALANCE BETWEEN IMMIGRATION ENFORCEMENT AND CIVIL LIBERTIES 72 (Police Foundation Conference, Washington, DC, Aug. 21, 2008).

435. SCAAP AWARDS, *supra* note 27.

436. Stevens, *supra* note 402, at 663–74.

gration status as a custodial interrogation with criminal consequences in its federal-local partnerships, such as the SCAAP and 287(g) programs. Local law enforcement agents, therefore, would be on notice that they are required to inform suspects that any information they provide as part of the investigation may later be used against them in criminal proceedings.

Furthermore, the way in which local law enforcement officials identify nationality and immigration status must be lawful and proceeded by a *Miranda* warning. Before asking questions for purposes of ICE referral, local officials who ask ICE referral questions should also be required to determine whether individuals have invoked their right to counsel or silence. The SCAAP program has proliferated to unprecedented proportions. A critical response to immigration inquiries is to provide *Miranda* warnings, on intake forms at jails if the person in custody may be questioned about immigration status. *Miranda* warnings should be implicated during immigration questioning because a noncitizen should be granted the right to understand the consequences that would ensue in both the immigration and criminal justice systems if he lists a place of birth on an intake form.

Promulgating such rules would promote uniformity within the administration of these programs and create a solution that satisfies the various tests used by lower courts. Such a solution would not be especially resource intensive because local law enforcement agencies must comply with regulations as a condition of SCAAP;[437] if SCAAP can be used to incentivize enforcement, it can also be used to ensure immigrants' constitutional rights are respected. This solution may be over-inclusive, but the government could use this approach in programs that encompass identifying immigrants that could be subject to criminal immigration penalties, such as the SCAAP program.

This approach has been adopted in the tax and securities contexts even in non-custodial interrogations. The SEC and the IRS provide *Miranda*-type warnings to interviewees during non-custodial interrogation and require that individuals sign forms ensuring they are aware of their rights and have validly waived them before questioning. The SEC provides a form to all interviewees and witnesses who testify that informs them that they may assert their Fifth Amendment privilege against self-incrimination and that any information provided may be used against them.[438] Under IRS guidelines, agents must provide similar warnings prior to cus-

437. BUREAU OF JUSTICE ASSISTANCE, *supra* note 391, at 2–3.

438. The SEC's warnings are contained on SEC Form 1662. SECURITIES & EXCHANGE COMMISSION SEC FORM 1662 (2011), *available at* http://www.sec.gov/about/forms/sec1662.pdf (providing: "Information you give may be used against you in any federal, state, local or foreign administrative, civil or criminal proceeding brought by the Commission or any other agency. You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment to the Constitution of the United States, to give any information that may tend to incriminate you."); *see also* United States v. Stringer, 408 F. Supp. 2d 1083, 1086 (D. Or. 2006), *vacated in part and rev'd in part*, 521 F.3d 1189 (9th Cir. 2008).

todial and noncustodial interrogation, which are entitled a non-custody or an in-custody "statement of rights."[439] The in-custody statement tracks *Miranda*, while the noncustodial warnings generally inform interviewees of their privilege against self-incrimination and inform them that their statements may be used against them.[440]

In addition to providing warnings, the government should ensure that there is a suppression remedy available to deter the use of these statements. Notably, because the IRS and SEC warnings are not constitutionally required, several courts have found that the agencies' failure to inform individuals of their rights has no bearing on the admissibility of any self-incriminating statements.[441] The Court has also weakened the *Miranda* remedy within its own jurisprudence. Given these constraints, DHS and the Department of Justice should develop a policy that they will not prosecute individuals who did not receive adequate warnings prior to dual civil and criminal immigration inquiries.

Another alternative is that the federal government could require that this questioning be administered outside the booking process. This solution would address the inconsistent case law on booking inquiries, and make clear that such questioning complies with the dual civil and criminal procedural strictures of *Miranda*.

In all of these solutions, affirmatively informing local officials is critical for courts grappling with the applicability of *Miranda* warnings. Local law enforcement agents would be on clear notice of the purpose of the question and that criminal consequences could attach to the inquiry. These solutions would ensure that suspects' constitutional rights are always protected because *Miranda* warnings would have to be provided by law enforcement agents for statements to be admissible. Furthermore, requiring law enforcement officials to provide *Miranda* warnings ensures that suspects are aware of and understand their constitutional rights.

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439. I.R.S. HANDBOOK FOR SPECIAL AGENTS § 342.133 (1982) [hereinafter I.R.S. HANDBOOK] (procedures for custodial interrogation); *id.* § 342.132 (noncustodial interrogation); *see* IRS, In-Custody Statement of Rights, http://www.irs.gov/irm/part9/36208003.html; IRS, Non-Custody Statement of Rights, http://www.irs.gov/irm/part9/36208004.html.

440. The IRS noncustodial statement of rights provides as follows:

> In connection with my investigation of your tax liability (or other matter), I would like to ask you some questions. However, first I advise you that under the Fifth Amendment to the Constitution of the United States I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I also advise you that anything you say and any documents which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding.

I.R.S. HANDBOOK, *supra* note 439, § 342.132.

441. In *United States v. Caceres*, 440 U.S. 741, 744 (1979), for example, the Supreme Court found that the IRS's failure to follow its internal procedures regarding authorization for electronic surveillance did not call for suppression of defendant's recorded statements.

VI. CONCLUSION

The convergence of criminal and civil immigration enforcement has brought significant new challenges to long-established *Miranda* protections for immigrants, made more weighty by federal incentives involving local law enforcement agents in both aspects of the federal enforcement. As *Miranda* rules play a critical role in the conduct of all the actors within the criminal justice system, the absence of uniformity creates specific problems for immigration enforcement and risks for serious systematic transgressions on a local and federal level.

This Article has sought to explore a new and under-theorized dynamic of how *Miranda* jurisprudence is developing in an unprecedented manner for immigrants in lower courts as well as the practical implications of the new jurisprudence. To ensure that policies like those in Morris County do not proliferate and that distinctions about long-established criminal procedural protections are not made along alienage lines in the courts or on the ground, the federal government must provide clarity about the rights guaranteed to immigrants by all actors within the system, including local law enforcement agents empowered to enforce immigration laws. At a minimum, *Miranda* requires that incarcerated suspects receive an unequivocal warning before being questioned about incriminating information to protect their Fifth Amendment privilege of self-incrimination. Furthermore, *Miranda* and its progeny require that individuals have the right to invoke their *Miranda* rights and require that these rights be respected.

This Article proposes that replacing the courts' inconsistent rules with bright-line federal regulations will resolve confusion and strengthen the *Miranda* doctrine, while bringing much needed clarity to local law enforcement officials. Such regulations will also adequately protect suspects by preventing attempts by law enforcement officials to circumvent the warning because those regulations will strengthen *Miranda*'s own bright-line rules. That is, regulation provides police with a clear standard to follow and eases judicial review. Therefore, the bright-line rule will work to eliminate coerced confessions, impermissible local policies, and pretextual excuses by law enforcement officers that they were not aware of the criminal consequences of the questioning.

Finally, without regulatory limits on the procedures used to question incarcerated suspects about their immigration status, courts will continue to waver and expend unnecessary resources to grapple with *Miranda* in a manner that threatens to further narrow the Court's *Miranda* jurisprudence and create inconsistent rules to regulate officers' conduct.

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