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Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda

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Adapting to *Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by *Miranda*

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I. INTRODUCTION

Interrogator: McConnell, what we're going to ask you basically is going to change your life, okay? Your life has changed right now. Okay?

Suspect: Okay.

Interrogator: Uhm, it ain't going to be like it was before you were arrested. Your actions from this point on dictate how your life is going to be. Okay? Uhm, there were some—there are some very, very important questions Sgt. Sutton and I would like to ask you.... What we're going to get at is the truth. And I already have all of it, as to how things occurred, where they occurred, everything else. What I really need to get from you is the whys and an explanation so that the world knows that McConnell isn't a cold-hearted, stone killer. You're not an assassin, you're not a serial killer, something happened that went wrong that day, 'cause I know murder wasn't your intention.... The reason why can only come from you. Okay? And that's what we're going delve into. All right? Listen carefully.... You have the right to remain silent.[1]

Over the past one-third of a century, no criminal procedure decision has precipitated more controversy than *Miranda v. Arizona*,[2] the Warren Court's landmark police interrogation decision. Decided in 1966, *Miranda* held that statements obtained from a suspect as a result of custodial interrogation are inadmissible unless the police conducting the interrogation first warn the suspect of four specified rights, and the suspect voluntarily and intelligently waives those rights.[3] From the time it was decided until the present, *Miranda* has precipitated criticism from both those who believe the decision has imposed

1. Interrogation Transcript of McConnell Adams, Oakland County Sheriff's Dep't, Mich. 3-14 (Dec. 31, 1996) (on file with authors).

2. 384 U.S. 436 (1966).

3. *See id.* at 467-73.

unreasonable restraints on law enforcement, as well as those who believe it has provided insufficient protection to suspects being questioned by the police.[4] In recent times, when first the Burger Court and then the Rehnquist Court replaced the more liberal Warren Court, conservative critics of *Miranda* have preponderated.[5]

From a constitutional standpoint, conservative critics have maintained that, in light of *Miranda*'s acknowledgment that its warning and waiver requirements are not mandated by the Constitution[6] and post-*Miranda* decisions' admission that the *Miranda* safeguards are prophylactic rules designed to provide suspects with additional Fifth Amendment protection,[7] *Miranda* lacks constitutional legitimacy and may properly be replaced by legislative rules providing suspects with lesser Fifth Amendment protection.[8] In *United States v. Dickerson*[9] in early 1999, a divided panel of the Fourth Circuit essentially accepted this argument, holding that since the *Miranda* safeguards are not constitutionally based, a 1968 congressional statute, which replaced *Miranda* with the due process voluntariness test, preempts *Miranda*, rendering its requirements inapplicable to federal cases.

From an empirical standpoint, commentators have recently engaged in an animated debate relating to *Miranda*'s effect on law enforcement.[10] In support of their claim that *Miranda* has imposed significant costs on law enforcement, conservative commentators rely on seemingly sophisticated methodologies,

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4. *See, e.g.*, Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 883-84 (1981) ("*Miranda* does not, any more than the due process test, come directly to grips with the dilemma arising from our simultaneous commitments to the privilege against self-incrimination and to a law enforcement system in which police interrogation is perceived as a necessity.").

5. See, for example, Joseph D. Grano, *Criminal Procedure: Moving from the Accused as Victim to the Accused as Responsible Party*, 19 HARV. J.L. & PUB. POL'Y 711 (1996) and Edwin Meese III, *Promoting Truth in the Courtroom*, 40 VAND. L. REV. 271, 273 (1987), both of which characterize *Miranda* as "truth-defeating." *See also, e.g.*, Stephen Markman, *The Missing Link of Federal Criminal Justice Reform*, 4 CORNELL J.L. & PUB. POL'Y 542, 545 (1995) (arguing that the *Miranda* decision is indicative of "a pervasive willingness to subordinate the truth-seeking function to other interests").

6. *See* 384 U.S. at 467-68.

7. *See infra* note 27 and accompanying text.

8. *See, e.g.*, Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 106-11 (1985).

9. 166 F.3d 667 (4th Cir. 1999).

10. *See infra* text accompanying notes 23-25.

including a multiple regression time series of analysis of crime clearance rates before and after *Miranda*.[11]

Surprisingly, however, in assessing either *Miranda*'s impact on law enforcement or its viability as a constitutional decision, relatively little attention has been given to the ways in which modern interrogators have adapted to *Miranda*.

When *Miranda* was decided, it generated considerable outrage, particularly among those associated with law enforcement.[12] Nevertheless, the decision was not completely unexpected. To scholars familiar with the Court's confession decisions, *Miranda* represented the culmination of the Court's effort, which had begun at least as early as the late 1950s,[13] to

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11. *See* Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty Year Perspective on* Miranda's *Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1082-83 (1998). For a critique of Cassell's flawed methodologies, see generally Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998). As Weisselberg notes, "Cassell's methodology is problematic .... One, therefore, must make a series of foolhardy assumptions to conclude that any purported decrease in confession rates is due to *Miranda*, rather than other factors." *Id.* at 174. For a critique of Cassell's and Fowles' failed attempt to prove that *Miranda* has somehow "handcuffed law enforcement" based on their multiple regression analysis of FBI clearance data, see John J. Donahue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998). Weisselberg summarizes the heart of this critique:

> John Donahue has analyzed the Cassell and Fowles study closely. As an initial matter, Donahue notes that FBI clearance data have proven unreliable because, in addition to the manipulation of clearance rates by local authorities, a perceived decline in clearance rates may reflect nothing more than the improved reporting of crime.... Donahue also doubts Cassell's and Fowles's conclusion that *Miranda* alone lies at the root of any perceived drop in clearance rates in the late 1960s. Cassell's regression analysis establishes only the significance of a "post-1966" variable. The regression analysis itself does not identify *Miranda* as the event that led to a perceived decline in clearance rates within that time period. Further *Miranda* should not have a substantial impact upon clearance rates because solving a crime clears it whether or not an arrest or prosecution occurs, and *Miranda* only operates after a suspect is in custody.... In the end, however, Cassell provides the wrong answers to the wrong questions.

Weisselberg, *supra*, at 174-75.

12. When *Miranda* was decided, Philadelphia Police Commissioner Edward J. Bell decried the decision stating, "I do not believe the Constitution was designed as a shield for criminals." LIVA BAKER, *MIRANDA*: CRIME, LAW AND POLITICS 176 (1983). Similarly, Boston Police Commissioner Edmund L. McNamara complained, "Criminal trials no longer will be a search for truth, but a search for technical error." *Id.*

13. Thus, in *Crooker v. California*, 357 U.S. 433 (1958), the Court by a bare majority rejected the dissent's contention that the defendant should have the right to counsel during pre-trial interrogation so as to avoid the litigation problems precipitated by pre-trial interrogation. Justice Douglas's dissent ex-

provide "some automatic device by which the potential evils of incommunicado interrogation [could] be controlled."[14]

The immediate reaction to *Miranda* was mixed. Critics concerned with *Miranda*'s effect on law enforcement maintained that the Court's novel interpretation of the Fifth Amendment would significantly diminish the conviction rate for serious crimes.[15] Civil libertarians, on the other hand, expressed the view that *Miranda* did not provide adequate Fifth Amendment protection to suspects because it "did not take the final step of stating that the privilege against self-incrimination cannot be fully assured unless a suspect's lawyer is present during police station interrogation."[16] In time, however, legal commentators came to view *Miranda* as a "compromise" that would reasonably accommodate law enforcement in-

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plained the basis for recognizing the suspect's right to counsel at this stage of the proceedings: "The citizen who has been the victim of these secret inquisitions has little chance to prove coercion. The mischief and abuse of the third degree will continue as long as an accused can be denied the right to counsel at this the most critical period of his ordeal." *Id.* at 444 (Douglas, J., dissenting).

In *Spano v. New York*, 360 U.S. 315, 325 (1959), decided one year later, four concurring Justices argued that a suspect who was formally charged with a criminal offense should have a right to an attorney at pretrial questioning. Moreover, other due process decisions decided during this era could be viewed as imposing per se prohibitions on interrogation tactics designed to interfere with the suspect's right to remain silent, *see, e.g.*, *Haynes v. Washington*, 373 U.S. 503 (1963) (finding defendant's confession involuntary primarily because police told him he would be permitted to call his wife only after he confessed), and thus as coming "closer and closer to *Miranda*'s outcome." Catherine Hancock, *Due Process Before* Miranda, 70 TUL. L. REV. 2195, 2223 (1996).

14. Geoffrey R. Stone, *The* Miranda *Doctrine in the Supreme Court*, 1977 SUP. CT. REV. 99, 103 (quoting WALTER SCHAFFER, THE SUSPECT AND SOCIETY 10 (1967)).

15. In his *Miranda* dissent, Justice White stated that there was:

> every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.

Miranda v. Arizona, 384 U.S. 436, 542 (White, J., dissenting).

16. Eric Pace, *Ruling on Police Hailed by A.C.L.U.*, N.Y. TIMES, June 14, 1966, at 25 (quoting statement of John de J. Pemberton, Jr., then the director of the ACLU). Similarly, Aryeh Neier, the director of the ACLU's New York chapter stated that *Miranda* "doesn't go far enough in protecting those who most need protection. We do believe that a person must have the advice of counsel in order to intelligently waive the assistance of counsel." YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 47-49 & n.11 (1980).

terests, while providing criminal suspects with additional Fifth Amendment protection.[17]

During the first few years after *Miranda*, empirical studies suggested that *Miranda*'s impact on law enforcement was minimal.[18] Over the next two decades, few empirical studies were conducted, and attacks on *Miranda* became muted. Although there was some criticism from both the left[19] and the right,[20] the general consensus seemed to be that *Miranda* had improved police practices—at least in the sense that interrogators now afforded suspects a greater degree of dignity[21]—and had had slight, if any, adverse effect on law enforcement.[22]

In the past decade, however, Professor Paul G. Cassell has spearheaded a new assault on *Miranda*. Based on his reinterpretation of post-*Miranda* studies—most of which were con-

17. *See, e.g.*, Yale Kamisar, *The Case, the Man and the Players*, 82 MICH. L. REV. 1074, 1077 (1984); Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 460-61 (1987).

18. *See, e.g.*, Richard Seeburger & R. Stanton Wettick, Jr., Miranda *in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 11-16 (1967) (finding that in one detective division within Allegheny County, after *Miranda*, suspects' confession significantly declined, but the conviction rate remained about the same); Michael Wald et al., *Interrogation in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1523 (1967) (concluding that *Miranda* handicapped police in New Haven, Connecticut, from obtaining a confession necessary for conviction in only 6 of 127 cases); James W. Witt, *Non-Coercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. CRIM. L. & CRIMINOLOGY 320, 325 (1973) (concluding that the post-*Miranda* "success" rate for police interrogations in a California city declined only 2%). For a detailed discussion of these and other studies, see Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 394-437 (1996); Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 632-52 (1996); Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 516-47 (1996).

19. *See supra* note 4.

20. *See, e.g.*, Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1419 (1985) (arguing *Miranda* has "accentuated . . . those features of our system that manifest the least regard for truth-seeking"); Meese, *supra* note 5, at 273 (characterizing *Miranda* as "truth-defeating").

21. *See, e.g.*, CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 37 (1993) (observing that since *Miranda* "[t]he 'third degree' seems to have largely disappeared from the American scene").

22. *See generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 285-86 (1985); *see also* Jerold Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1383 (1977) ("The police officers with whom I have spoken generally acknowledge that announcement of the *Miranda* warnings causes little difficulty if the warnings requirement is limited to interrogation of arrested persons at the police station or in similar settings" (e.g., a patrol car)).

ducted more than thirty years ago—Cassell asserts that the existing empirical data support "the tentative estimate" that *Miranda* has led to "lost cases" against 3.8% of all criminal suspects, a figure that when "multiplied across the run of criminal cases constitutes a large number of criminals."[23] In addition, based on a multiple regression time series analysis of crime clearance rates before and after *Miranda*, Cassell and his co-author Richard Fowles interpret the data as "suggest[ing] that [violent] crime clearance rates would be 6.7% higher" if the Court had not promulgated its *Miranda* decision in 1966.[24] Based on these assessments, which have been disputed by other commentators—most notably Professor Stephen J. Schulhofer[25]—Cassell concludes that *Miranda* should be replaced by an alternative that imposes lesser costs on law enforcement while at the same time providing adequate Fifth Amendment protection to criminal suspects.[26]

Assessing *Miranda*'s costs to law enforcement is legitimate. Post-*Miranda* decisions assert that the safeguards provided by *Miranda* are not mandated by the Fifth Amendment privilege but rather are designed to reduce the likelihood that police will violate the Fifth Amendment rights of suspects subjected to custodial interrogation.[27] Moreover, even Yale Kamisar, one of

23. Cassell, *supra* note 18, at 438.

24. Cassell & Fowles, *supra* note 11, at 1082.

25. *See* Richard A. Leo & Richard J. Ofshe, *Using the Innocent to Scapegoat* Miranda*: Another Reply to Paul Cassell*, 88 J. CRIM. L. & CRIMINOLOGY 557 (1998); Stephen J. Schulhofer, *Bashing* Miranda *Is Unjustified—and Harmful*, 20 HARV. J.L. & PUB. POL'Y 347 (1997) [hereinafter *Bashing* Miranda]; Stephen J. Schulhofer, Miranda *and Clearance Rates*, 91 NW. U. L. REV. 278 (1996) [hereinafter Miranda *and Clearance Rates*]; Schulhofer, *supra* note 17.

26. Cassell advocates that *Miranda* be replaced by safeguards under which before engaging in custodial interrogation, the police would be required to give a suspect five warnings and to tape the ensuing interrogation. *See* Cassell, *supra* note 18, at 496-97. Significantly, the police would not be required to warn the suspect of his right to have an attorney present at questioning (apparently, the suspect would have no such right) and the police would not be required to obtain a waiver of the suspect's rights before commencing their interrogation. *See id.* at 497.

27. In post-*Miranda* cases, the Court has consistently referred to *Miranda*'s requirements as prophylactic safeguards designed to provide individuals with additional Fifth Amendment protection rather than as mandated by the Fifth Amendment privilege. Thus, in *New York v. Quarles*, the Court stated that "[t]he prophylactic *Miranda* warnings . . . are 'not themselves protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" 467 U.S. 649, 654 (1984) (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)); *see also* Oregon

Miranda's staunchest defenders, has conceded that the decision was a "compromise,"[28] designed to strike a proper balance between law enforcement and individual interests. In determining whether *Miranda* provides an appropriate compromise between these conflicting interests,[29] empirical evidence relating *Miranda*'s costs to law enforcement or efficacy in protecting suspects' rights should be taken into account.

In seeking to assess *Miranda*'s costs to law enforcement, however, Cassell consistently asks the wrong questions. Two mistakes are particularly critical. First, instead of focusing on *Miranda*'s qualitative effects, including an assessment of its impact on interrogators' interactions with suspects in a wide range of situations, he seeks to assess *Miranda*'s quantitative effects, by trying to gauge *Miranda*'s precise effect on the confession rate, despite the absence of data necessary to engage in this number-crunching exercise.[30] Second, instead of focusing

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v. Elstad, 470 U.S. 298, 309 (1985) (referring to *Miranda*'s requirements as "prophylactic standards").

28. Yale Kamisar, *The Warren Court and Criminal Justice*, *in* THE WARREN COURT: A RETROSPECTIVE 116, 120 (Bernard Schwartz ed., 1996).

29. *See* DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 199 (1991) (observing that "if the . . . intent of the *Miranda* decision was, in fact, an attempt to 'dispel the compelling atmosphere' of an interrogation, then it failed miserably"); Peter Arenella, Miranda *Stories*, 20 HARV. J.L. & PUB. POL'Y 375, 385-86 (1997) (suggesting that *Miranda* may not provide individuals with significant protection against police pressure to incriminate themselves); *see also* Schulhofer, *supra* note 4, at 884 (concluding that *Miranda* is "infinitely less candid than the due process balancing analysis" in that it fails to fulfill its promise to provide individuals subjected to custodial interrogation with significant protection against police pressure). *But see* Schulhofer, *supra* note 18, at 562 (concluding that "confessions are now mostly the result of persuasion and the suspect's overconfidence, not of pressure and fear").

30. Cassell attempts to quantify *Miranda*'s precise cost to law enforcement in three steps: first, by attempting to measure the number of lost confessions stemming from *Miranda's* warnings and waiver requirement; second, by attempting to measure the percentage of cases in which a confession is necessary for conviction; and, third, by multiplying these two figures to estimate the number of lost convictions as a result of *Miranda*'s warnings and waiver requirement. *See* Cassell, *supra* note 18, at 437. Cassell's attempt at informed quantification amounts to no more than elaborate speculation for at least three reasons. First, the data is simply not adequate to the task: the *Miranda* studies on which Cassell relies are well over three decades old and are replete with methodological flaws. *See* Leo, *supra* note 18, at 646-48; Schulhofer, *supra* note 18, at 506-07; George C. Thomas III, *Is* Miranda *A Real-World Failure?: A Plea for More (and Better) Empirical Evidence*, 43 UCLA L. REV. 821, 823-31 (1996). Second, Cassell selectively counts those outdated and methodologically flawed studies supporting his argument to abolish *Miranda*, while disregarding those studies that do not support his agenda. In his critique of Cassell, Professor Schulhofer observes that:

on *Miranda*'s effect on current interrogation practices and presenting suspects' incriminating statements, Cassell directs his attention primarily to the much less relevant question of *Miranda*'s effect on law enforcement in the past.[31]

Assessing *Miranda*'s precise quantitative effect is impossible because of the *Miranda* studies' limitations. If Cassell's assault on *Miranda* has served no other purpose, the debate precipitated by his assertions[32] has clearly exposed severe methodological deficiencies in the studies testing *Miranda*'s effect on confessions and convictions.[33] Even if all of the empiri-

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at critical points in his analysis, data are cited selectively, sources are quoted out of context, weak studies showing negative impacts are uncritically accepted, and small methodological problems are invoked to discredit a no-harm conclusion when the same difficulties are present—to an even greater extent—in the negative-impact studies that Cassell chooses to feature.

Schulhofer, *supra* note 18, at 502; *see also* George C. Thomas III, *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA. L. REV. 933, 935-96 (1996) (concluding that Cassell's historical evidence does not support the high pre-*Miranda* confession rate that he claims). Third, even if confession rates have declined since *Miranda*, Cassell simplistically and incorrectly assumes he can isolate the precise causal impact of *Miranda* from all the other competing factors—such as the complex social, political and legal changes that have occurred in the United States since the mid-sixties—that might be responsible for such a change. Not surprisingly, Professor Schulhofer, in a lengthy refutation of Cassell's attempt to measure *Miranda*'s costs, argues that Cassell's extrapolations are "simply rhetoric" and "not a serious foundation for assessing social policy." Schulhofer, *supra* note 18, at 546. Elsewhere, Schulhofer has cautioned that, "[r]eaders should understand that these are simply advocacy numbers, derived from indefensibly selective accounts of the available data." Stephen J. Schulhofer, *Pointing in the Wrong Direction*, LEGAL TIMES, Aug. 12, 1996, at 21. Masquerading as sound estimates of a real world phenomenon, Cassell's advocacy numbers are little more than elaborate speculation.

31. Schulhofer makes a similar point, observing that "even if we can assume that the studies give a reliable picture of *Miranda*'s costs thirty years ago, there is strong reason to believe that such costs were transitory and that confession rates have since rebounded from any temporary decline." Schulhofer, *supra* note 18, at 506.

32. *See* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084 (1996); Cassell & Fowles, *supra* note 11; Paul G. Cassell, Miranda*'s "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POL'Y 327 (1997); Cassell, *supra* note 18; Schulhofer, *Bashing* Miranda, *supra* note 25; Schulhofer, *supra* note 18; Thomas, *supra* note 30.

33. *See, e.g.*, Cassell, *supra* note 18, at 405 (criticizing "The 'Seaside City' Study," which found only a 2% drop in the confession rate after *Miranda*, on the ground that the study did not include "cases in which suspects were detained for questioning but never incarcerated" and "did not give any information on how the Seaside Police implemented *Miranda*"); Schulhofer, *supra* note

cal studies were methodologically sound, they would not provide a firm basis for a long-term quantitative assessment of *Miranda*'s impact on law enforcement. Each study focuses on *Miranda*'s impact on a particular group of interrogators at a particular time and place.[34] At best, therefore, the studies provide information relating to the potential effect of *Miranda* on law enforcement in discrete areas of the country during particular periods of time.[35]

Intuitively, it seems obvious that *Miranda*'s effect on law enforcement depends on various factors, including not only the way in which interrogators implement *Miranda*—which is a major focus of this Article—but also factors relating to the crimes being investigated[36] and the sophistication and background of suspects being interrogated.[37] Thus, a finding that a

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18, at 516-17 (observing that with respect to the Pittsburgh study, which found a substantial drop in the confession rate before and after *Miranda*, the pre-*Miranda* confession rate was "based on the study author's count of usable statements" whereas the post-*Miranda* confession rate for 1967 was "based on new forms that police officers began completing immediately after interrogations[;]" a difference that was likely to be important because there was no reason "to assume that officers' on-the-spot judgments about what counted as a usable statement" would be based on the same criteria as that employed by the study author). For more general criticism of the early post-*Miranda* studies, see Leo, *supra* note 18, at 647 ("[W]ith one or two exceptions, these studies—virtually all of which were conducted by lawyers or law professors not trained in the research methods of social science—are replete with methodological weaknesses[.]"); Schulhofer, *supra* note 18, at 506 ("Few, if any, included all necessary segments of the caseload, used proper sampling procedures, insured strict equivalence of the groups compared, and controlled for relevant causal variables other than *Miranda*.").

34. *See, e.g.*, Seeburger & Wettick, *supra* note 18, at 6 (examining Pittsburgh's detective branch files from 1964 through the summer of 1967 for cases of homicide, rape, robbery, burglary, and auto larceny); Witt, *supra* note 18, at 322-23 (reviewing files from 1964 to 1968 dealing with murder, forcible rape, robbery, and burglary, in "Seaside City," a Los Angeles area enclave with a population of approximately 83,000).

35. Not surprisingly, post-*Miranda* studies conducted in different parts of the country reached strikingly different conclusions as to *Miranda*'s effect on confessions. *Compare* Richard J. Medalie et al., *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347, 1414 app. E tbl.E1 (1968) (finding a 3% drop in the statement rate after *Miranda*) *with* Seeburger & Wettick, *supra* note 18, at 12 tbl.2 (showing a 16.9% drop in the confession rate after *Miranda*).

36. *See* Seeburger & Wettick, *supra* note 18, at 12 tbl.2 (showing that in the Pittsburgh detective division the change in the confession rate before and after *Miranda* varied from a slight increase in forcible sex crimes (20.4% to 21.4%) to a very significant decrease in robbery cases (61.2% to 28.9%)).

37. *See* SIMON, *supra* note 29, at 199 ("Repetition and familiarity with the process soon place the professionals beyond the reach of a police interroga-

particular Allegheny County detective division obtained 16.2% fewer confessions during the six months after *Miranda* than it did in the six months prior to *Miranda*[38] may tell us something about *Miranda*'s impact on law enforcement in Allegheny County during the latter half of 1966.[39] It tells us very little about *Miranda*'s immediate impact on interrogators operating in other police departments in other parts of that state. Moreover, it tells us almost nothing about *Miranda*'s effect on law enforcement in the United States as a whole at the end of the twentieth century.

Indeed, Cassell's most glaring defect may be his failure to take into account the ways in which interrogators have adapted to the obstacles posed by *Miranda* over the past thirty-three years. During that period, *Miranda* itself has changed. As a result of the Burger and Rehnquist Court's post-*Miranda* decisions, *Miranda* is no longer one case, but rather a body of safeguards that impose less strict safeguards than the original decision. Moreover, as the obstacles posed to interrogators have become less formidable, interrogators' strategies for surmounting the remaining obstacles have grown more sophisticated.

From the interrogator's perspective, *Miranda*'s requirements are viewed as a stumbling block to conducting a successful interrogation.[40] The *Miranda* opinion's description of interrogation techniques contained in police manuals[41] indicated that long before *Miranda*, police interrogators had developed sophisticated strategies for overcoming the obstacle of a suspect's resistance to providing information to them.[42] Since

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tion."); *see also* Leo, *supra* note 18, at 654-55 (finding on the basis of a sample of more than 170 interrogations that "a suspect with a felony record . . . was almost four times as likely to invoke his *Miranda* rights as a suspect with no prior record and almost three times as likely to invoke as a suspect with a misdemeanor record").

38. *See* Seeburger & Wettick, *supra* note 18, at 12 tbl.2 (finding that the overall confession rate fell from 48.5% to 32.3%).

39. During the same period, Seeburger and Wettick concluded that "before compliance with the *Miranda* requirements the Detective Branch obtained confessions in 54.4% of the cases and after compliance in only 37.5% of the cases." *Id.* at 11. The authors also concluded that during this same period "the conviction rate . . . remained steady." *Id.* at 19.

40. In an interview conducted by Leo, one detective said: "*Miranda* is a stumbling block, it is a hurdle, and it is an important one. It is probably one of the most crucial points in the interrogation." Leo, *supra* note 18, at 663.

41. *See* Miranda v. Arizona, 384 U.S. 436, 448-55 (1966).

42. *See, e.g., id.* at 453-54 (outlining strategies employed when a suspect

1966, the proliferation of new police manuals[43] discussing new strategies for interrogators suggests that during the three decades following *Miranda*, interrogators have become even more sophisticated in overcoming the obstacles to a successful interrogation.[44] Although the manuals do not directly address how an interrogator might induce a suspect to waive his *Miranda* rights,[45] it would be counter-intuitive to believe that the police have not developed strategies for circumventing this obstacle.[46]

Post-*Miranda* decisions help explain whether and to what extent the police are able to implement such strategies. Most importantly, post-*Miranda* decisions addressing the prerequisites of a valid waiver provide at least the broad outlines of the legal framework within which interrogators must operate when trying to induce a suspect to waive his *Miranda* rights. In addition, post-*Miranda* decisions holding that statements obtained in violation of *Miranda* may properly be used for purposes of impeachment are significant both because they bear on the options available to the police when a suspect invokes his *Miranda* rights[47] and because they provide a snapshot of the

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asserts her right to remain silent). Overcoming a suspect's resistance and eliciting a confession were also the primary obstacles that police interrogators confronted prior to *Miranda*.

43. *See, e.g.*, ARTHUR S. AUBRY, JR. & RUDOLPH R. CAPUTO, CRIMINAL INTERROGATION (3d ed. 1980); FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986); CHARLES E. O'HARA & GREGORY L. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (5th ed. 1981); ROBERT F. ROYAL & STEVEN R. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION: A PROFESSIONAL MANUAL AND GUIDE (1976); DAVID E. ZULAWSKI & DOUGLAS E. WICKLANDER, PRACTICAL ASPECTS OF INTERVIEW AND INTERROGATION (1993).

44. *See, e.g.*, AUBREY & CAPUTO, *supra* note 43, at 276-77 (asserting that the interrogator should size-up the suspect before the interrogation to determine which of several interrogation techniques should be employed); ROYAL & SCHUTT, *supra* note 43, at 61-62 (iterating various techniques that may be used to develop rapport with the suspect prior to the interrogation; among them, "[e]stablish confidence and friendliness by talking for a period about everyday subjects"); ZULAWSKI & WICKLANDER, *supra* note 43, at 23 (explaining the importance of taking on the role of the "mediator-negotiator" and convincing the suspect that he can find "common ground" between the prosecution and the suspect).

45. *But see* INBAU ET AL., *supra* note 43, at 234-36 (recommending that interrogators establish consensual "non-custodial" interrogations to avoid the necessity of *Miranda* warnings where possible); *id.* at 224-28 (advising interrogators not to give premature or "extra" *Miranda* warnings, thereby minimizing the possibility that suspects will assert their rights).

46. *See supra* text accompanying note 42.

47. *See generally* Weisselberg, *supra* note 11, at 135-36 (quoting from training videotape advising interrogators as to when they may question "out-

legal framework within which interrogators must operate when the due process test, rather than *Miranda*, regulates their conduct.[48]

In *Miranda*, the Court indicated that it was adopting stringent waiver requirements, which imposed a heavy burden of proof on the government[49] and prohibited interrogators from inducing a waiver through "tricke[ry]" or "cajole[ry]."[50] Post-*Miranda* decisions have been less strict, however, in mandating specific requirements designed to ensure that suspects freely waive their *Miranda* rights.[51] To the extent these decisions permit interrogators to employ new strategies designed to circumvent the protections provided by the *Miranda* warnings, they have significantly affected *Miranda*'s impact on interrogators' interactions with suspects and, ultimately, *Miranda*'s impact on law enforcement.[52]

Miranda also seemed to indicate that statements obtained in violation of *Miranda* would not be admissible for any purpose.[53] Post-*Miranda* cases have held, however, that state-

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side *Miranda*" for the purpose of obtaining impeachment evidence).

48. There are other areas in which the due process test rather than *Miranda* is applicable. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 308 (1985) (stating that fruits derived from a "noncoercive" *Miranda* violation will not be excluded); New York v. Quarles, 467 U.S. 649, 658 n.7 (1984) (stating in dicta that when *Miranda*'s public safety exception applies, the due process voluntariness standard provides the test for determining the admissibility of a suspect's statement). The impeachment cases are particularly significant, however, because they provide the police with a limited opportunity to circumvent *Miranda* even in situations where a suspect invokes his *Miranda* rights. *See generally* James L. Kainen, *The Impeachment Exception to the Exclusionary Rules: Policies, Principles, and Politics*, 44 STAN. L. REV. 1301, 1308 (1992) (discussing impeachment cases dealing with the admissibility of evidence when police continue to interrogate following a suspect's request for an attorney).

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

50. *Id.*

51. *See infra* text accompanying notes 71-177.

52. Other decisions have also broadened interrogators' opportunities to circumvent *Miranda*. For example, *Miranda* only applies to custodial interrogation. *See Miranda*, 384 U.S. at 444. In *Berkemer v. McCarty*, the Court narrowed the definition of custody, holding that a suspect is in custody when his "freedom of action is curtailed to a 'degree associated with formal arrest.'" 468 U.S. 420, 440 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)). *Berkemer*'s holding, of course, opens up the possibility that, so long as they do not effect an arrest, the police may conduct lengthy "interviews" with suspects without giving suspects *Miranda* warnings. *See generally* Kate Greenwood & Jeffrey A. Brown, *Investigation and Police Practices: Custodial Interrogations*, 86 GEO. L.J. 1318 (1998).

53. *Miranda* states:

ments obtained in violation of *Miranda* may be admissible for the purposes of impeaching a defendant's credibility in the event that he testifies on his own behalf.[54] In addition, other post-*Miranda* cases have held that evidence derived from statements obtained in violation of *Miranda*—including not only testimony from other witnesses,[55] but also physical evidence[56] and statements obtained from the suspect himself[57]—may be admissible in the government's case-in-chief. Based on these cases, interrogators dealing with suspects who have asserted their *Miranda* rights still have at least a limited opportunity to circumvent *Miranda*. When seeking statements that will be admissible for the purposes of impeachment, or that they hope will lead to other incriminating evidence, interrogators may employ any interrogation tactics not prohibited by the due process voluntariness test.[58]

The extent to which police circumvent *Miranda* in order to obtain impeachment or derivative evidence is not clear. Cassell's empirical study of interrogations in Salt Lake City, Utah during the summer of 1994 suggested that this tactic was rarely employed.[59] On the other hand, Professor Charles Weis-

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> statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.

Miranda, 384 U.S. at 477

54. *See* Oregon v. Hass, 420 U.S. 714, 721-22 (1975); Harris v. New York, 401 U.S. 222, 225 (1971). In addition, other post-*Miranda* decisions held that evidence derived from statements obtained in violation of *Miranda* would be admissible so long as the evidence was not the product of a due process violation. *See* Oregon v. Elstad, 470 U.S. 298, 304 (1985); Michigan v. Tucker, 417 U.S. 433, 441 (1974).

55. *See Tucker*, 417 U.S. at 450-51.

56. *See Elstad*, 470 U.S. at 302, 307.

57. *See id.* at 308.

58. The due process voluntariness test prohibits the introduction of confessions determined to be involuntary based on an evaluation of the circumstances of the interrogation and the individual characteristics of the suspect subjected to interrogation. For post-*Miranda* cases applying the due process voluntariness test, see, for example, *Arizona v. Fulminante*, 499 U.S. 279, 285-88 (1991); *Colorado v. Connelly*, 479 U.S. 157, 163-70 (1986). *See generally* Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2014-20 (1998) (discussing post-*Miranda* due process voluntariness cases).

59. Of the 129 cases in which Cassell and Hayman gathered data, they report that in none of the interviews did the police continue questioning after a subject invoked *Miranda* rights. *See* Paul G. Cassell & Bret S. Hayman, *Po-*

selberg's more recent examination of interrogation practices indicated that at least in California,[60] training for interrogators includes specific advice as to how they may question a suspect who invokes his right to an attorney in order to obtain statements that will be admissible for the purposes of impeachment,[61] a tactic that is referred to as questioning "outside *Miranda*."[62] Data relating to questioning "outside *Miranda*" provides some basis for determining the types of situations in which the abolition of *Miranda* would likely make a difference.[63] Cases in which police are able to persuade suspects to give statements that are inadmissible under *Miranda* but admissible for the purpose of impeaching the suspect provide a good indication of the types of cases in which abolishing *Miranda* would enable interrogators to obtain additional statements for use in the government's case-in-chief.[64]

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lice Interrogation in the 1990s: An Empirical Study of the Effects of Miranda, 43 UCLA L. REV. 839, 860-61 (1996). Since Cassell and Hayman did not observe the police interviews, however, they had to rely on information related to them by the police. *See id.* at 861 n.123. In Leo's observation of 175 cases, interrogators continued questioning 7 of the 38 suspects who invoked their *Miranda* rights. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996).

60. In assessing how often interrogators intentionally circumvent *Miranda* in order to obtain statements that are admissible for impeachment purposes, Weisselberg observes that in California "training materials" instructing interrogators how to accomplish this goal were "distributed statewide." Weisselberg, *supra* note 11, at 136. He thus concludes that "[t]here can be no doubt that the practice . . . has spread throughout California." *Id.*

61. *See* Weisselberg, *supra* note 11, app. at 189-92 (citing an excerpt of transcript of training video advising interrogators as to when and how they should question suspects "outside *Miranda*").

62. *See id.* at 133.

63. If, as expected, the Supreme Court accepts certiorari in *U.S. v. Dickerson*, 166 F.3d 667 (4th Cir. 1999) a real possibility exists that the Court would hold that the congressional statute replacing *Miranda* makes *Miranda* inapplicable in federal cases. Although predicting results in Supreme Court cases is always hazardous, the Court now contains a solid core of conservatives that might be inclined to defer to legislation replacing *Miranda*'s "prophylactic" rules. Moreover, if the Court were to rule in favor of the government in *Dickerson*, this might at least be the beginning of the end for *Miranda*, since state legislatures would then also be free to pass statutes replacing *Miranda* with the voluntariness test.

64. Specifically, the extent to which questioning "outside *Miranda*" produces statements admissible for impeachment from suspects who responded to the *Miranda* warnings by invoking their right to remain silent or to have an attorney present at questioning provides a good indication of the extent to which abolishing *Miranda* would allow the government to obtain additional statements for use in its case-in-chief. When interrogators obtain statements admissible for impeachment from suspects who were not adequately warned of

In this Article, we will consider some of the ways in which the interplay between the post-*Miranda* Court's interpretation of *Miranda* and modern police officers' interrogation strategies have affected *Miranda*'s impact on law enforcement. Unlike Cassell, we will not attempt to provide a quantitative assessment of *Miranda*'s past or present impact. Rather, drawing from numerous interrogation transcripts collected over the past twelve years,[65] we will explain modern interrogators' most important strategies for dealing with *Miranda* and consider *Miranda*'s current effect on law enforcement in light of these strategies.

In our view, the picture that emerges is far more ambiguous and complex than Cassell—or his chief antagonist, Schulhofer—would have it. *Miranda* does have some impact on law enforcement. Determining the magnitude of its impact or the categories of cases in which it is most likely to make a difference, however, depends on imponderables, including untested assumptions relating to suspects' behaviors and speculation concerning the constitutional principles that would replace *Miranda*. At the very least, these conclusions suggest that our response to *Miranda* should be nuanced rather than sweeping.

In presenting the doctrine and data relevant to the ways in which modern interrogators' adaptation to *Miranda* has affected *Miranda*'s impact on law enforcement, we begin in Part II by examining the post-*Miranda* waiver doctrine and assessing the extent to which the Supreme Court or lower courts have provided a legal framework that allows the police to employ strategies designed to induce waivers of *Miranda* rights. Specifically, this Part considers legal restrictions imposed on interrogators' efforts to elicit *Miranda* waivers by either deemphasizing the significance of the *Miranda* rights or offering express or implied inducements that increase the likelihood of a waiver. Although Supreme Court doctrine relating to these issues is unclear, lower courts have generally interpreted that

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their *Miranda* rights in the first place, assessing the extent to which abolishing *Miranda* would enhance the availability of statements admissible in the government's case-in-chief is more speculative because it is difficult to determine the extent to which these suspects would have made incriminating statements if they had been given the *Miranda* warnings.

65. The excerpts from interrogation transcripts discussed in this Article are taken from interrogation transcripts collected by Richard Leo and Richard Ofshe from cases in various jurisdictions dating from 1987 to the present. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 981 n.1 (1997).

doctrine so as to provide interrogators with considerable leeway. Since interrogators, like other police officers, are likely to interpret unclear legal restrictions in a way that is most favorable to law enforcement,[66] the waiver doctrine's practical effect is to impose relatively few restrictions on interrogators' employment of strategies designed to induce a suspect's waiver of his *Miranda* rights.

Part III considers the strategies currently employed by interrogators to induce *Miranda* waivers. Based on an examination of numerous interrogations conducted in a wide variety of settings, this Part concludes that interrogators employ a range of sophisticated strategies to induce waivers. In particular, interrogators are able to de-emphasize the warnings to such an extent that suspects often perceive that waiver of their rights is the natural and expected course of action.[67] Indeed, interrogators are sometimes able to present the *Miranda* warnings so that suspects are led to believe that waiving their *Miranda* rights will be to their advantage.[68]

Part IV examines post-*Miranda* cases that allow the government to impeach a defendant's testimony through the use of evidence obtained through questioning a suspect "outside *Miranda*." Under these cases, the due process voluntariness test provides the standard for determining the admissibility of statements obtained in violation of *Miranda*.[69] As interpreted by the lower courts, the due process test allows the police to employ a wide range of tactics in questioning suspects "outside *Miranda*."

Part V considers strategies employed by interrogators questioning suspects "outside *Miranda*." In comparison to the empirical evidence relating to strategies employed to induce *Miranda* waivers, data relating to questioning "outside *Miranda*" is sparse. The existing data indicates, however, that interrogators questioning "outside *Miranda*" employ strategies

66. Justice Jackson's statement as to how the police will interpret and apply exceptions to the warrant requirement of the Fourth Amendment has general application: "[T]he extent of any privilege . . . which we sustain, the officers interpret and apply themselves and . . . push to the limit." Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

67. *See infra* notes 185-96 and accompanying text.

68. *See infra* notes 197-214 and accompanying text.

69. *See infra* notes 231-47 and accompanying text.

that are extremely likely to produce incriminating statements.[70]

Drawing from the data presented in the previous parts, Part VI briefly assesses the effect that abolishing *Miranda* might have on law enforcement and suspects' rights. After explaining the most likely changes in both interrogation practices and the law regulating such practices, Part VI seeks to identify the categories of cases in which the abolition of *Miranda* would most likely enable interrogators to obtain additional admissible incriminating statements.

Finally, Part VII discusses the Article's principal conclusions. In assessing *Miranda*'s effect, either on law enforcement or custodial suspects, it is vitally important to consider the various ways in which interrogators have adapted to *Miranda*. As we will show in this Article, police interrogators have refined their interrogation techniques so that, despite the obstacles posed by *Miranda*, they are able to obtain admissible statements. This data should be taken into account in determining *Miranda*'s future.

II. POST-*MIRANDA* WAIVER DOCTRINE

Post-*Miranda* cases have diluted the *Miranda* court's waiver requirements, thereby diminishing the legal barriers that might restrict interrogators from using tactics designed to induce *Miranda* waivers. In assessing the difference between *Miranda*'s waiver requirements and those in effect now, it is useful to consider post-*Miranda* decisions' effects on waiver requirements in three discrete areas: (1) the extent to which the suspect has to understand the meaning of the *Miranda* warnings; (2) restrictions imposed on police efforts to induce a waiver before or at the time the warnings are given; and (3) restrictions imposed on police efforts to induce a waiver after the suspect has been given the warnings and invokes either his right to remain silent or his right to counsel.

A. THE SUSPECT'S UNDERSTANDING OF THE *MIRANDA* WARNINGS

In *Miranda* itself, the Court equated the *Miranda* waiver standard with the waiver of the right to trial counsel articulated in *Johnson v. Zerbst*:[71] in order to meet that standard,

70. *See infra* notes 296-307 and accompanying text.

71. 304 U.S. 458, 462-69 (1938).

the government would have to surmount the "heavy burden" of demonstrating that the suspect "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[72] By equating the standards of waiver applied in *Miranda* with those applied when the right to trial counsel is at issue, the Court seemed to indicate that a *Miranda* waiver could only be found when the suspect was shown to be fully aware of the consequences of foregoing his rights.[73] Under this standard, interrogation strategies designed to de-emphasize the significance of the *Miranda* warnings would be suspect. An intelligent waiver would presumably require a full understanding of the consequences of relinquishing one's rights to remain silent and to have counsel present at questioning.[74]

Post-*Miranda* cases have significantly modified the definition of an intelligent *Miranda* waiver, however. In order to establish such a waiver, the government needs only to demonstrate that the suspect understood the meaning of the *Miranda* warnings, not that he understood the consequences of waiving his rights.[75] Specifically, based on the Court's holding in *Colorado v. Spring*, a suspect may validly waive his *Miranda* rights even though he is not aware of the magnitude of the charges against him at the time of his waiver.[76] And, based on the

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

73. *See, e.g.*, Faretta v. California, 422 U.S. 806, 835 (1975) (stating that in order to waive representation by counsel at trial, a defendant must be "made aware of the dangers and disadvantages of self-representation"); Carnley v. Cochran, 369 U.S. 506, 516 (1962) (holding that in order to establish a valid waiver of trial counsel, there must be proof that "an accused was offered counsel but intelligently and understandingly rejected the offer").

74. *See, e.g.*, Commonwealth v. Sites, 235 A.2d 387, 390 (Pa. 1967) (stating in dicta that a knowing and intelligent waiver of *Miranda* rights "does not occur unless there is full knowledge of the rights one is forfeiting").

75. *See* Colorado v. Spring, 479 U.S. 564, 574 (1987); Moran v. Burbine, 475 U.S. 412, 421-22 (1986).

76. 479 U.S. at 576-77. In *Spring*, the defendant was arrested on a firearms charge. *See id.* at 566. After being given *Miranda* warnings, he waived his rights. *See id.* at 567. The arresting officers questioned the defendant not only about the firearms charge, but also about a murder. *See id.* During this questioning, the defendant made an incriminating statement about the murder. *See id.* Later, he tried to suppress this statement and a confession stemming from it on the theory that his *Miranda* waiver was invalid because at the time of the waiver he was not aware of its consequences in that he did not understand the extent of the questioning he would be subjected to. *See id.* at 569. The Court rejected this argument, finding that once *Miranda* warnings are properly administered and understood, a suspect has all the information he needs to make a valid waiver. *See id.* at 576-77. Any "additional in-

Court's holding in *Moran v. Burbine*, a suspect may waive his *Miranda* rights (including the right to have an attorney present at questioning) even though he is unaware that a lawyer has been retained to represent him.[77]

Based on these cases, the assumption seems to be that reading *Miranda* warnings to a suspect will generally insure that he has sufficient understanding of the warnings to make a valid waiver.[78] *North Carolina v. Butler*,[79] another post-*Miranda* case, establishes, moreover, that a suspect's waiver of his *Miranda* warnings need not be express, but can be implied from the circumstances.[80] Under *Butler*, interrogators may obtain a valid *Miranda* waiver even though the suspect never makes an express written or oral statement that he wishes to waive his rights. After the interrogator informs the suspect of his *Miranda* rights, the suspect may validly waive his rights by

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formation could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature." *Id.* at 577.

77. 475 U.S. at 422-23. In *Burbine*, the defendant was arrested and taken to police headquarters where an officer advised him of his *Miranda* rights. *See id.* at 416. Unknown to the defendant, the defendant's sister had secured an attorney, who attempted to reach the defendant, but was rebuffed by the police. *See id.* at 416-17. That evening, the defendant signed a form waiving his *Miranda* rights and confessed to the murder. *See id.* at 415, 417-18. The defendant sought to exclude his confession on the grounds that the police refusal to allow his attorney to contact him compromised his waiver. *See id.* at 418. In holding the defendant's waiver valid, the Court observed that as long as the defendant could fully comprehend his *Miranda* rights, outside events of which he had no knowledge (in this case, the attorney's attempt to contact him) could have no bearing on his decision to waive. *See id.* at 422.

78. An exception may apply when the suspect is so mentally handicapped that he lacks the capacity to understand the meaning of the *Miranda* warnings. In practice, however, courts have generally held that a suspect's mental capacity is only one of many factors to be considered when determining the validity of a waiver. *See, e.g.*, United States v. Gaddy, 894 F.2d 1307, 1312 (11th Cir. 1990) ("[M]ental illness is only a factor to be weighed in determining the validity of a waiver."); Dunkins v. Thigpen, 854 F.2d 394, 398-99 (11th Cir. 1988) (finding suspect's waiver valid despite evidence of mental retardation).

79. 441 U.S. 369 (1979), *vacating* 439 U.S. 1046 (1978).

80. In *Butler*, the defendant was questioned by FBI agents in connection with an armed robbery and shooting. *See id.* at 370. The agents read the defendant his *Miranda* rights and gave him a waiver form to sign. *See id.* at 371. The defendant acknowledged that he understood his rights and said he would speak to the agents; at the same time, however, he refused to sign the waiver form. *See id.* The defendant then made incriminating statements. *See id.* The Court rejected the defendant's contention that his *Miranda* waiver was per se invalid because he did not sign the waiver form. *See id.* at 373. The Court concluded that, despite the lack of an express written statement of waiver, "[i]n at least some cases waiver can clearly be inferred from the actions and words of the person interrogated." *Id.*

simply indicating that he is willing to speak with the interrogator.[81]

The post-*Miranda* cases thus provide a doctrinal framework within which interrogators seeking a *Miranda* waiver have ample opportunity to de-emphasize the significance of both the *Miranda* warnings and the suspect's decision to waive such warnings. Although the *Miranda* opinion seemed to imply otherwise,[82] interrogators operating within this framework have no obligation to ensure that the suspect understands the significance of his choice to relinquish his rights.

B. RESTRICTIONS IMPOSED ON POLICE EFFORTS TO INDUCE A WAIVER PRIOR TO OR CONCOMITANT WITH THE WARNINGS

In *Miranda* itself, the Court appeared to impose severe restrictions on interrogators' efforts to induce a waiver prior to informing a suspect of his *Miranda* rights. In the context of delineating strict waiver requirements, the Court stated that "any evidence that the accused was threatened, tricked, or cajoled into a waiver" would vitiate the waiver.[83] Under the most common definition of cajolery,[84] this language would seem to prohibit the police from exerting any kind of pressure, including persuasion, that would lead the suspect to waive his rights. Thus, the police would be required to give the warnings in a neutral manner and not use any inducements that might have the effect of precipitating a waiver.

While post-*Miranda* cases have not repudiated this language,[85] in both *Spring* and *Burbine*, the Court emphasized

81. *See* United States v. Gell-Iren, 146 F.3d 827, 829-30 (10th Cir. 1998) (finding a valid waiver where a suspect responded to a police request to waive his rights by asking to speak confidentially to a detective); Stawicki v. Israel, 778 F.2d 380, 381-84 (7th Cir. 1985) (finding a valid waiver where a suspect refused to agree to waiver, but requested to speak to a detective).

82. *See supra* text accompanying note 49.

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

84. "Cajole" is defined as "to persuade with deliberate flattery, esp. in the face of reasonable objection or reluctance." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 313 (Philip Babcock Gove ed., Merriam-Webster 1981).

85. In *Colorado v. Spring*, 479 U.S. 564, 575-76 (1987), the Court quoted *Miranda*'s "trickery" language, but refused to interpret it to apply to an interrogator's failure to inform a suspect that he would be questioned about a crime unrelated to the crime for which he had been arrested. Similarly, in *Moran v. Burbine*, 475 U.S. 412, 423-24 (1986), the Court referred to the "trickery" language, but found that the police behavior—warning the suspect of his right to have an attorney present at questioning without informing him that his attor-

that in determining the validity of a *Miranda* waiver, the critical issue is whether the waiver is voluntary and intelligent.[86] Although *Spring* and *Burbine* did not address whether the police could affirmatively misrepresent information that might have a bearing on the suspect's waiver decision,[87] the Court's articulation of the voluntary waiver standard seemed to suggest that interrogators' use of inducements to precipitate waivers does not necessarily render the resulting waivers invalid. Rather, as other cases have stated, a waiver's validity will be determined by a "totality of circumstances" test that depends on an evaluation of all factors relating to the waiver's voluntariness.[88]

In practice, this totality of circumstances test provides fewer restrictions on the police than *Miranda*'s dicta appeared to contemplate.[89] In applying this test, lower courts typically state that the factors to be considered include "the accused's characteristics, the conditions of interrogation, and the conduct of law enforcement officials."[90] As lower courts have noted,[91] the "totality of circumstances" test closely resembles the due process test under which the voluntariness of a suspect's confession is determined by evaluating the same factors, among others.[92] Providing guidance for police officers under either of

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ney was attempting to contact him—while ethically questionable, did not violate *Miranda*.

86. *See Spring*, 479 U.S. at 573 (citing *Burbine*, 475 U.S. at 421).

87. In *Spring*, the Court left open the question of whether a waiver precipitated by an interrogator's affirmative misrepresentation would be valid. *See id.* at 576 n.8.

88. *See* Colorado v. Connelly, 479 U.S. 157, 169-70 (1986); Fare v. Michael C., 442 U.S. 707, 724-25 (1979); *cf.* Michigan v. Mosley, 423 U.S. 96, 108 (1975) (White, J., concurring), *aff'd*, 254 N.W.2d 29 (Mich. 1977) (arguing that, even after a suspect initially asserts his right to remain silent, voluntariness is the appropriate standard for determining the validity of a *Miranda* waiver).

89. *See, e.g.*, United States v. Jaswal, 47 F.3d 539, 542 (2d Cir. 1995) (per curiam); Commonwealth v. Williams, 640 A.2d 1251, 1259 (Pa. 1994).

90. United States v. Lynch, 92 F.3d 62, 65 (2d Cir. 1996) (quoting United States v. Anderson, 929 F.2d 96, 99 (2d Cir. 1991)); *see also* State v. Knight, 459 S.E.2d 481, 493 (N.C. 1995) ("Some of the factors to be considered include (i) whether the defendant was in custody, (ii) defendant's mental capacity, (iii) the physical environment of the interrogation, and (iv) the manner of the interrogation.").

91. *See, e.g.*, State v. Murray, 510 N.W.2d 107, 110 (N.D. 1994) (applying due process voluntariness test to determine the validity of a *Miranda* waiver). *But see, e.g.*, Commonwealth v. Magee, 668 N.E.2d 339, 344 (Mass. 1996) ("Due process requires a separate inquiry into the voluntariness of the statement, apart from the validity of the *Miranda* waiver.").

92. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 504 (1963) (considering

these "totality" tests is obviously problematic because neither test is designed to impose specific restrictions on the police.[93] Since inducements that render a waiver (or a confession) involuntary in one context may be permissible in another,[94] a court determining the validity of a waiver cannot focus simply on the nature of the police inducement but must assess all of the relevant factors.[95]

In general, more recent cases indicate that the police are afforded considerable freedom to obtain *Miranda* waivers through the use of inducements. During the past decade, no court has held that the police are absolutely prohibited from using any persuasion to induce a *Miranda* waiver.[96] Moreover, while there is no consensus as to the types of inducements that are permissible, lower courts have generally imposed rather permissive limits, providing interrogators with considerable freedom to employ tactics designed to induce a waiver.

A few courts, including the Pennsylvania Supreme Court,[97] have found *Miranda* waivers invalid when police induced suspects to believe that they would receive leniency if they agreed

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as factors a sixteen-hour long questioning, a five to seven day incommunicado detention, and a police refusal to allow the defendant to phone his wife); Spano v. New York, 360 U.S. 315, 322-23 (1959) (considering as factors the defendant's low level of education, an eight-hour overnight uninterrupted interrogation session, and trickery employed by the police).

93. For a discussion of the limitations of both tests, see Mark Berger, *Compromise and Continuity:* Miranda *Waivers, Confession Admissibility, and the Retention of Interrogation Protections*, 49 U. PITT. L. REV. 1007, 1012-21 (1988). For criticism of the due process voluntariness test on the grounds that it failed to provide adequate standards for the police or courts, see, for example, Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 745-55 (1987); Stone, *supra* note 14, at 101-06. For a discussion of the shortcomings of any test that focuses on determining voluntariness, see George C. Thomas III, *Miranda: The Crime, the Man, and the Law of Confessions*, *in* THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING 7, 18 (Richard A. Leo & George C. Thomas III eds., 1998) (concluding that this is "sometimes a philosophical or psychological problem of the first magnitude").

94. *See infra* text accompanying notes 101-33.

95. *See, e.g.*, *Anderson*, 929 F.2d at 99.

96. No cases after 1990 yielded such holding based on federal law. Search of WESTLAW, Allfeds Library (Oct. 25, 1999).

97. *See* Commonwealth v. Gibbs, 553 A.2d 409, 411 (Pa. 1989), *aff'd*, 626 A.2d 133 (Pa. 1993) (holding *Miranda* waiver induced by police promise to inform prosecutor of suspect's cooperation invalid because "[p]romises of benefits or special considerations . . . comprise the sort of persuasion and trickery which easily can mislead suspects into giving confessions"); Commonwealth v. Morgan, 606 A.2d 467 (Pa. Super. Ct. 1992), *aff'd*, 652 A.2d 295 (Pa. 1994) (holding similarly).

to talk with their interrogators.[98] Most courts have held, however, that even inducements that include express or implicit promises of leniency will not necessarily be sufficient to vitiate the waiver.[99] On the other hand, courts are more likely to hold *Miranda* waivers invalid if they were induced through affirmative misrepresentations or misleading statements.[100] Even in these cases, however, courts have been reluctant to hold that an interrogator's misrepresentation automatically renders a suspect's *Miranda* waiver involuntary. As under the due process voluntariness test, the ultimate question of a waiver's validity depends on an assessment of all of the relevant circumstances.

Two cases from the Second Circuit illustrate the parameters within which most lower courts operate in making the waiver determination. In *United States v. Anderson*,[101] a DEA agent arrested the defendant and advised him of his *Miranda* rights.[102] The defendant responded that he understood his rights.[103] The agent then asked the defendant if he wanted a lawyer present before answering questions.[104] The defendant

98. *See* Collazo v. Estelle, 940 F.2d 411, 416 (9th Cir. 1991) (finding waiver invalid because of police admonition that it "might be worse" if suspect didn't cooperate); United States v. Pinto, 671 F. Supp. 41, 60 (D. Me. 1987) (holding that a police promise to keep the suspect out of jail if he cooperated vitiated the suspect's *Miranda* waiver).

99. *See, e.g.*, United States v. Rutledge, 900 F.2d 1127 (7th Cir. 1990). In *Rutledge*, a suspect accused of drug possession waived his *Miranda* rights after he was told that "all cooperation is helpful." *Id.* at 1128. He subsequently confessed to dealing a substantially larger amount of drugs than the police had originally suspected, which resulted in a sentence several times longer than the one he would have received if he had not confessed. *See id.* The court held that the "cooperation" statement made by the police did not invalidate the suspect's *Miranda* waiver: "Far from making the police a fiduciary of the suspect, the law permits the police to pressure and cajole, conceal material facts and actively mislead" within certain limits. *Id.* at 1131; *see also* United States v. Bye, 919 F.2d 6, 9-10 (2d Cir. 1990) (advising a suspect that cooperation may be rewarded with leniency does not per se invalidate a suspect's waiver of his *Miranda* rights); United States v. Ingalls, 982 F. Supp. 315, 317 (D. Vt. 1997) ("Promises of leniency, without more, do not invalidate a *Miranda* waiver.").

100. *See Anderson*, 929 F.2d at 100; United States v. Morgan, 911 F. Supp. 1340, 1350-51 (D. Kan. 1995) (finding waiver invalid when postal inspector told suspect that he would not be permitted to invoke his Fifth Amendment privilege at trial).

101. 929 F.2d 96 (2d Cir. 1991).

102. *See id.* at 97.

103. *See id.*

104. *See id.*

responded that he did not need one.[105] Inexplicably, the agent then told the defendant that if he asked for an attorney, no federal agents would be able to speak to him further.[106] The agent added,

> [T]his [is] the time to talk to us, because once you tell us you want an attorney we're not able to talk to you and as far as I [am] concerned, we probably would not go to the U.S. Attorney or anyone else to tell them how much [you] cooperated with us.[107]

The agent repeated this point three more times. After that, the defendant made several incriminating statements.[108]

The district court held that the defendant's waiver was involuntary because the agent's statements "were intended to trick and cajole the defendant into confessing."[109] The Second Circuit rejected this conclusion, stating that police "[t]rickery does not make it impossible *per se* to find that a defendant voluntarily waived his rights."[110] The court added that the question to be determined is whether, based on the factors considered under the "totality of circumstances" test, "the defendant's will was overborne by the agent's conduct."[111] Thus, the court indicated that, if the defendant was "knowledgeable about *Miranda* waivers,"[112] police trickery, would not be likely to render his waiver involuntary.

On the facts presented in *Anderson*, however, the Second Circuit affirmed the district court, finding that the defendant's waiver and confession were involuntary.[113] The court found that the agent's assertions relating to the loss of any opportunity to cooperate with the government were false and misleading because "[i]t is commonplace for defendants who have acquired counsel to meet with federal law enforcement officials and agree to cooperate with the government."[114] It thus distin-

105. *See id.*
106. *See id.*
107. *Id.*
108. *See id.*
109. *Id.* at 99.
110. *Id.*
111. *Id.*
112. *Id.*
113. Although the district court found that the defendant's *Miranda* waiver was involuntary, the circuit court primarily addressed the question of whether the defendant's confession was voluntary. *See id.* at 98. Due to the way in which it framed the issue, however, the Second Circuit seemed to view these questions as essentially the same. *See id.* at 98-102.
114. *Id.* at 100.

guished *Burbine* on the ground that in the present case, the police induced the defendant's waiver through the use of affirmative misrepresentation.[115] Applying the totality of circumstances test, the Second Circuit concluded that both the defendant's *Miranda* waiver and his confession were involuntary.[116]

In *United States v. Lynch*,[117] ATF agents arrested the defendant for a drug offense, read him the *Miranda* warnings, and transported him to ATF headquarters where he met with an agent who was responsible for "processing"[118] him. During this procedure, the defendant was constantly asking questions and making statements about the case.[119] In response, the agent informed the suspect of his *Miranda* rights,[120] and then told him that if he wished to make any more statements or have his questions answered, he would have to sign a form indicating that he chose to waive his *Miranda* rights.[121] The defendant read the form, signed it, and thereafter made incriminating statements.[122]

The district court held that the defendant knowingly and voluntarily waived his *Miranda* rights.[123] Applying the totality of circumstances test, the Second Circuit affirmed.[124] The court concluded that the agent's suggestion that the defendant would have to waive his *Miranda* rights if he wanted to continue his conversation with the agent was not coercive.[125] The court distinguished *Anderson* on the ground that the ATF agent's statement to the defendant did not constitute an affirmative misrepresentation.[126] The agent "did not present the same type of ultimatum that was presented to the defendant in *Ander-*

115. *See id.* at 100-01.

116. *See id.* at 102.

117. 92 F.3d 62 (2d Cir. 1996).

118. *Id.* at 64 (describing the steps of processing as "taking his fingerprints, advising him of his constitutional rights, and completing a pedigree form").

119. *See id.*

120. The agent asked the defendant to read his *Miranda* rights from an ATF form. *See id.* After doing so, the defendant, at the agent's request, signed a statement on the form indicating that he had read his rights. *See id.*

121. *See id.*

122. *See id.*

123. *See id.* at 65.

124. *See id.*

125. In applying the totality of circumstances test, the court also relied on the defendant's circumstances and actions, including the fact that the defendant chose to answer some questions and not others. *See id.*

126. *See id.* at 65-66.

son."[127] The ATF agent's statement merely indicated that if the defendant wanted the agent to answer his questions "*at that moment*," he would have to sign the waiver form.[128] In contrast to *Anderson*, the ATF agent did not indicate that the defendant's failure to sign the form would "'forfeit forever' any future opportunity to have his questions answered by government officials."[129] Thus, under the circumstances presented, the agent's inducement was not coercive and did not render the defendant's *Miranda* waiver involuntary.[130] The court added, however, that under other circumstances, an agent's refusal to answer questions posed by a criminal suspect may "be misleading as well as coercive."[131] The court emphasized that in this case, the agent was merely responding to the defendant's questions by telling him that he could not answer his questions relating to his criminal case in the absence of a waiver.[132]

As these cases indicate, application of the totality of circumstances test to determine the validity of a *Miranda* waiver provides only minimal restrictions on the types of inducements interrogators may use to obtain a waiver. Even when the inducements are viewed as coercive (i.e., likely to precipitate an involuntary waiver), their use in a particular case may be permissible because, based on the totality of circumstances, the coercive tactic did not overbear the suspect's will. Moreover, in determining whether a particular inducement is coercive, nuances in the facts may be critical. For instance, whether the police have affirmatively misrepresented information to the suspect may turn on such fine distinctions as whether an agent's inducement seems to pertain only to the present (i.e., an opportunity to talk to this officer at this time) or to stretch into the future so that it becomes an ultimatum (i.e., one's only opportunity to talk to the government about this offense).

From the police perspective, this state of the law suggests several conclusions. First, interrogators may properly use a wide array of inducements to obtain a *Miranda* waiver. Sec-

127. *Id.* at 66.

128. *Id.*

129. *Id.* (quoting United States v. Anderson, 929 F.2d 96, 100 (2d Cir. 1991)).

130. *See id.*

131. *Id.*

132. *See id.* The court also observed that the agent was not trying to pressure the defendant into a waiver but was responding to the situation precipitated by the defendant's questions. *See id.*

ond, even when the interrogation tactics employed to induce a waiver are close to the line of impropriety, it will be difficult to predict whether a particular inducement will have the effect of invalidating a *Miranda* waiver. Finally, in close cases, where the tactics employed are close to the line, subtle nuances in the facts, which may arise due to slight variations in an officer's testimony,[133] are likely to determine the outcome.

C. RESTRICTIONS IMPOSED ON POLICE EFFORTS TO INDUCE A WAIVER AFTER A SUSPECT INVOKES HIS RIGHTS

In *Miranda*, the Court seemed to indicate that a suspect's assertion of his right to remain silent or to have an attorney present at questioning must end an interrogator's attempt to question a suspect outside the presence of counsel. According to *Miranda*, once the suspect invokes his right to remain silent, "the interrogation must cease."[134] And when the suspect invokes his right to have an attorney present, "the interrogation must cease until an attorney is present."[135]

Post-*Miranda* cases have held, however, that a suspect's invocation of his right to remain silent or his right to an attorney does not necessarily preclude the police from obtaining a waiver of the suspect's *Miranda* rights.[136] These cases have distinguished situations in which the suspect invokes his right to remain silent from those in which he invokes his right to ob-

133. As Justice Harlan observed in his dissent, *Miranda* does little to alleviate one of the principal problems with incommunicado interrogation—resolving conflicts between the interrogating officers' and suspects' versions of the facts relating to critical issues. Just as the determination of whether a suspect's confession was voluntary within the meaning of the due process test often used to depend on the resolution of a swearing contest relating to what happened during the interrogation, *see* Miranda v. Arizona, 384 U.S. 436, 516 (1966) (Harlan, J., dissenting), the validity of a suspect's waiver now often depends on the resolution of a swearing contest relating to the events surrounding the reading of the *Miranda* rights. *See* Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 808-09 (1970). When suspects and police officers differ as to critical facts, moreover, judges are likely to resolve the credibility dispute in favor of the officers. *See id.* For example, Professor Kamisar found in *Brewer v. Williams*, 430 U.S. 387 (1977), that when the interrogating detective contradicted the suspect's version of the facts, the detective invariably won the swearing contest, but when the detective disputed the defense counsel's testimony, the attorney rather than the detective was found to be credible. *See* KAMISAR, *supra* note 16, at 130.

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

135. *Id.*

136. *See infra* text accompanying notes 138-77.

tain an attorney, making it somewhat more difficult to obtain a waiver in the latter situation.[137] In both situations, however, post-*Miranda* cases provide interrogators with some elbow room within which they can seek to obtain waivers through the use of inducements.

Michigan v. Mosley[138] dealt with a situation in which a suspect responded to the *Miranda* warnings by invoking his right to remain silent, but two hours later, he was given new *Miranda* warnings, after which he waived his rights and then was interrogated. These second *Miranda* warnings were given at a different location by a different officer who was ostensibly investigating a different crime.[139] The *Mosley* majority established the rule that when a suspect responds to the *Miranda* warnings by invoking his right to remain silent, the police are required to scrupulously honor the suspect's invocation of his rights.[140] Concurring in *Mosley*, Justice White maintained that the test in this situation should be simply whether the suspect's waiver of his rights was knowing, intelligent and voluntary, the same test that applies when the suspect does not initially invoke his right to remain silent.[141] By rejecting Justice White's test, the *Mosley* majority "made it clear that the requirement that the police 'scrupulously honor' the suspect's assertion of his right to remain silent is independent of the requirement that any waiver be knowing, intelligent, and voluntary."[142]

Nevertheless, in practice, the difference between *Mosley*'s "scrupulously honor" test and the "knowing, intelligent, and voluntary" test advocated by Justice White appears to be minimal. In *Mosley* itself, the Court held that the "scrupulously honor" test was met.[143] In justifying this result, the Court at one point stated that *Mosley* was not a case in which "the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to

137. *See infra* text accompanying notes 149-51.

138. 423 U.S. 96 (1975).

139. For an excellent examination of the *Mosley* case, see Stone, *supra* note 14, at 129-37.

140. *See Mosley*, 423 U.S. at 104.

141. *See id.* at 107-08 (White, J., concurring).

142. Stone, *supra* note 14, at 133.

143. *See id.* at 135.

make him change his mind."[144] Relying on this language, some lower courts have held that the "scrupulously honor" test only bars the police from persistent attempts to induce a waiver,[145] an approach that is only marginally different from the voluntary waiver test advocated by Justice White.[146] Other lower courts have interpreted *Mosley* as providing a balancing test, under which various factors must be considered in determining whether the individual's rights have been "scrupulously honored."[147] Even under this test, however, interrogators will have considerable opportunity to obtain waivers from suspects who invoke their rights to remain silent, so long as they remain patient and adopt a flexible approach.[148]

When a suspect responds to the *Miranda* warnings by invoking his right to have an attorney present at interrogation, the test for waiver is stricter. In *Edwards v. Arizona*,[149] the Court held that a suspect who invokes this right "is not subject to further interrogation by the authorities" unless he "initiates further communication, exchanges, or conversations with the

144. *Mosley*, 423 U.S. at 105-06.

145. *See* United States v. McClinton, 982 F.2d 278, 282 (8th Cir. 1992) (finding that when a different set of officers interrogated the suspect after he had invoked his right to remain silent, the "scrupulously honor" test was met because the police did not persist in efforts to induce a waiver); Nelson v. Fulcomer, 911 F.2d 928, 939 (3d Cir. 1990) ("This is not a case . . . where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue an interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." (quoting *Mosley*, 423 U.S. at 105-06)).

146. *See* Stone, *supra* note 14, at 135.

147. *See* United States v. Hsu, 852 F.2d 407, 410-12 (9th Cir. 1988); Jackson v. Dugger, 837 F.2d 1469, 1471-72 (11th Cir. 1988); United States *ex rel.* Balderas v. Godinez, 890 F. Supp. 732, 742 (N.D. Ill. 1995); Wilson v. United States, 444 A.2d 25, 29 (D.C. 1982).

148. In *Hsu*, the court held that the police "scrupulously honor[ed]" the suspect's right to cut off questioning even though the same officer questioned him shortly after he asserted his right to remain silent. *Hsu*, 852 F.2d at 410-12. The court based its holding on the officer's deferential treatment of the suspect and the fact that the officer re-advised the suspect of his *Miranda* rights prior to the second interrogation and the physical setting had changed. *See id.* at 411-12. In explaining *Mosley*'s test, the court said that "[f]ar from laying down inflexible constraints on police questioning and individual choice, *Mosley* envisioned an inquiry into all of the relevant facts to determine whether the suspect's rights have been respected." *Id.* at 410. In *Jackson*, the court held that the police "scrupulously honored" the suspect's assertion of his right to remain silent even though, following his assertion of that right, the police approached him and attempted to obtain a waiver of his *Miranda* rights five times in six hours. *Jackson*, 837 F.2d at 1471.

149. 451 U.S. 477 (1981).

police."[150] Based on this test, *Edwards* does provide protection for the suspect who invokes his right to an attorney[151] and then refrains from participating in any further interactions with the police. If the suspect initiates further exchanges with the police, however, the *Edwards* protection no longer applies.

In practice, the *Edwards* exception for the situation in which the suspect "initiates" further exchanges with the police has proven to be significant. First, the Court interpreted the term "initiates" broadly. In *Oregon v. Bradshaw*,[152] a pivotal plurality of the Court[153] concluded that "initiation" occurs whenever a suspect's question or statement to the police can reasonably be interpreted by the police as "evinc[ing] a willingness and a desire for a generalized discussion about the investigation."[154] Under this interpretation, *Edwards*' protection may be lost whenever a suspect says anything that could be construed by the police as pertaining to the charges against him.[155]

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150. *Id.* at 484-85.

151. In order to trigger this protection, however, the suspect's invocation of his right to counsel must be unambiguous. *See* Davis v. United States, 512 U.S. 452, 461 (1994) (Kennedy, J., dissenting). See *infra* notes 215-30 and accompanying text for further discussion of *Davis*'s impact on the strategy employed by interrogators when a suspect invokes his right to have an attorney present.

152. 462 U.S. 1039 (1983).

153. In *Bradshaw*, the suspect was arrested for furnishing liquor to a minor. *See id.* at 1041. He was also suspected of driving the truck that caused the minor's death. *See id.* An officer gave the suspect *Miranda* warnings and then suggested that he had been behind the wheel of the truck when the accident occurred. *See id.* The suspect asserted his right to an attorney and the officer immediately terminated the conversation. *See id.* at 1041-42. A few minutes later, the suspect said to the officer, "Well, what is going to happen to me now?" *Id.* at 1042. The Court split 4-4 as to whether the suspect's question, "Well, what is going to happen to me now?" constituted "initiation" of exchanges or communications within the meaning of *Edwards*. *See id.* at 1045, 1055. Speaking for four Justices, Justice Rehnquist concluded that it was "initiation" because "[a]lthough ambiguous, the [suspect's] question . . . evinced a willingness and a desire for a generalized discussion about the investigation." *Id.* at 1045-46 (plurality opinion). Although not agreeing that a suspect's waiver of his *Miranda* rights should depend on whether he "initiated" further exchanges with the police, Justice Powell joined the Rehnquist plurality in concluding that the suspect in this case validly waived his *Miranda* rights. *See id.* at 1051 (Powell, J., concurring in judgment). See Kamisar, *supra* note 28, at 124 for criticism of the way the Court applied *Edwards* "initiation" test in *Bradshaw*.

154. *Bradshaw*, 462 U.S. at 1045-46.

155. *See supra* note 153.

Moreover, *Edwards*' prohibition on interrogation does not prevent the police from subtly persuading the suspect that it may be in his interest to revoke his assertion of his right to an attorney and waive his rights. If such persuasion is successful, the suspect will then "initiate" further conversations with the police as a prelude to a valid waiver. So long as the police persuasion does not amount to interrogation, the police's interactions with the suspect will not constitute a violation of *Edwards*.[156]

Commonwealth v. D'Entremont, decided by the Massachusetts Supreme Court, provides an apt illustration of a case in which an interrogator's subtle persuasion was found to be permissible under *Edwards*.[157] In *D'Entremont*, the police arrested the seventeen year-old defendant for assault and rape.[158] When they read him his *Miranda* warnings, he invoked both his right to remain silent and his right to have an attorney present.[159] The police then placed him in a cell at the police station.[160] Later that day, his father visited him at the police station and told him not to discuss the facts of the case until he spoke with an attorney.[161]

At 6:00 p.m., about four hours after the defendant's arrest, Detective Terrio went to the defendant's cell.[162] She introduced herself to the defendant and informed him that she had interviewed the victim and obtained her story of what had happened.[163] She then told the defendant that she knew he had advised the police that he did not wish to discuss the facts of

156. However, *Edwards* may be read as holding that once the suspect invokes his right to have an attorney present, the police are prohibited not only from interrogating the suspect but from attempting to induce a waiver. In *Edwards*, Justice White stated that the government could not establish a suspect's waiver by showing that "he responded to further police-initiated custodial interrogation." Edwards v. Arizona, 451 U.S. 477, 484 (1981). This language could be read to mean that once the suspect invokes his right to an attorney the police are prohibited from obtaining "a police-initiated waiver." Minnick v. Mississippi, 498 U.S. 146, 167 (1990) (Scalia, J., dissenting). In other words, unless the suspect "initiates" further exchanges with the police, the police are prohibited from "initiating" communications that might lead the suspect to reconsider her decision to assert her rights.

157. 632 N.E.2d 1239, 1244 (Mass. 1994).

158. *See id.* at 1240.

159. *See id.*

160. *See id.*

161. *See id.*

162. *See id.*

163. *See id.*

the case with them, but, if he changed his mind, she would be willing to speak with him.[164] The defendant told Terrio that he wanted to tell her his side of the story.[165] After receiving another set of *Miranda* warnings, the defendant waived his rights and made an incriminating statement.[166]

The court held that Detective Terrio did not violate *Edwards* because her comments did not constitute interrogation.[167] Under the Court's decision in *Rhode Island v. Innis*,[168] interrogation occurs only when the police engage in the "functional equivalent" of express questioning–that is, words or actions that the police "should have known . . . were reasonably likely to elicit an incriminating response."[169] The court held that Terrio's remarks did not meet this test because they did not imply a question or demand a response.[170] Rather, they merely constituted "an expression of her availability if [the defendant] wanted to talk."[171] Thus, even though her comments obviously "struck a responsive chord,"[172] they did not constitute interrogation.[173]

D'Entremont's analysis shows that certain effective forms of persuasion may be permissible despite the suspect's invocation of his rights. Detective Terrio did "scrupulously honor" the defendant's assertion of his rights, because she informed him that she knew he had invoked his rights and indicated that she would not seek a statement unless he changed his mind. Moreover, although the question whether Terrio's statements to the defendant constituted "interrogation" is undoubtedly a closer one,[174] the court's analysis is supportable. The detective

164. *See id.*

165. *See id.*

166. *See id.* at 1240-41. At Terrio's urging, the defendant talked to his father by telephone from her office before waiving his rights. *See id.* at 1240. Although his father reiterated that the defendant should not talk to the police about the case without having a lawyer present, the defendant persisted in his decision to waive his rights. *See id.* at 1241.

167. The court also held that Terrio did not violate *Mosley*'s "scrupulously honor" test because the defendant was not interrogated before he gave a statement. *See id.* at 1241 n.3.

168. 446 U.S. 291 (1980).

169. *D'Entremont*, 632 N.E.2d at 1242 (citing *Innis*, 446 U.S. at 301).

170. *See id.*

171. *Id.* at 1242-43.

172. *Id.* at 1242 (citing *Innis*, 446 U.S. at 301).

173. *See id.* at 1243.

174. The test for whether an officer's statement constitutes interrogation is whether it is one that the officer "should know [is] reasonably likely to elicit an

merely told the defendant that she had taken the victim's statement and would be available to take his statement in the event that he changed his mind and decided to talk to the police. Ostensibly, her words were neutral, and the court could properly find that it was not the functional equivalent of interrogation because it neither demanded nor invited a response.[175]

In fact, however, Terrio's remarks constituted a powerful inducement that led the defendant to revoke his right to have an attorney present. The inducement occurred as soon as Terrio stated that she had interviewed the victim. That statement could lead the suspect to believe that Terrio might be in a position to make important decisions relating to his case. To strengthen the inducement, moreover, Detective Terrio employed a variation of the reverse psychology described by Mark Twain in *The Adventures of Tom Sawyer*.[176] By suggesting that she was not interested in obtaining a statement but was simply offering the defendant an opportunity to give her one, the detective was able to make the option of giving a statement seem attractive. Under the circumstances, it was not surprising that

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incriminating response from the suspect." *Innis*, 446 U.S. at 301. Moreover, the Court added "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." *Id.* at 301-02 n.7. Arguably, Detective Terrio's statement to the suspect was designed for no other purpose than to lead the suspect to waive his right to have an attorney present and to tell his story to the detective. On the other hand, if *Edwards* holds that the police are prohibited from "initiating" communications relating to the waiver decision with a suspect who has asserted her right to counsel, then Detective Terrio's statement to the suspect would appear to constitute improper "initiation." *See supra* note 150 and accompanying text.

175. For discussions of what constitutes interrogation within the meaning of *Miranda*, see Yale Kamisar, Brewer v. Williams, Massiah *and* Miranda: *What is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1, 101 (1978), *reprinted in* KAMISAR, *supra* note 16; Welsh S. White, *Interrogation Without Questions:* Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209, 1251 (1980).

176. As punishment for playing hooky, Tom Sawyer's Aunt Polly ordered him to whitewash her fence. Tom, however, conned his playmates into doing the job for him by convincing them that whitewashing the fence was a desirable activity rather than a chore. He accomplished this by pretending that he enjoyed the activity so much that he would not allow his friends to do any of the whitewashing for him. *See* MARK TWAIN, THE ADVENTURES OF TOM SAWYER 30-33 (1875). As the author explained, "Tom . . . had discovered a great law of human action, without knowing it—namely, that in order to make a man or a boy covet a thing, it is only necessary to make the thing difficult to attain." *Id.* at 33.

the suspect decided to revoke his earlier decision and waive his rights so that he could make a statement to the detective.

The *D'Entremont* case is not necessarily typical. Indeed, there are few reported cases in which interrogators employ stratagems to induce a waiver after the suspect has invoked either his right to remain silent or his right to have an attorney present at questioning.[177] Nevertheless, the court's holding indicates that, even when a suspect invokes either or both of these rights, interrogators operating within the boundaries of what is legally permissible may employ a substantial range of stratagems to induce *Miranda* waivers.

III. STRATEGIES EMPLOYED BY INTERROGATORS TO INDUCE *MIRANDA* WAIVERS

Although reported cases dealing with interrogators' techniques for obtaining *Miranda* waivers provide the legal framework within which interrogators must operate, these cases do not necessarily provide a good picture of the strategies actually employed by interrogators. First, the police interpret and apply cases in light of their particular concerns. In some instances, this may lead the police to interpret *Miranda* strictly, in order to ensure that incriminating statements obtained by interrogators will be admissible.[178] In other instances, the police may interpret the post-*Miranda* cases so as to maximize the abilities of interrogators to obtain admissible incriminating statements. In determining whether incriminating statements are likely to be admissible, moreover, the police may take into account two factors favoring admissibility: first, lower courts (especially trial courts) are likely to interpret post-*Miranda* doctrine in a way that is favorable to the police;[179] second, at least in cases where the interrogation is not recorded or otherwise transcribed, interrogating officers' testimony relating to the

177. *See, e.g.*, Shedelbower v. Estelle, 885 F.2d 570, 575 (9th Cir. 1989). After the defendant in *Shedelbower* asked for an attorney, the interrogating detectives prepared to leave the room. *See id.* at 572. As they were leaving, one of the detectives falsely told the defendant that the victim had positively identified him as her assailant. *See id.* In response, the defendant waived his right to counsel and confessed. *See id.* The court held that the defendant's waiver was proper because the detective's false statement to the defendant did not constitute interrogation within the meaning of *Miranda*. *See id.* at 573.

178. *See* Leo, *supra* note 18, at 645.

179. *See* Amsterdam, *supra* note 133, at 806-08.

Miranda waiver is likely to minimize facts that would tend to support the suspect's claim of an invalid waiver.[180]

In order to obtain a more accurate picture of interrogators' practices, we will draw on our own examination of recent interrogations,[181] focusing especially on the ways in which interrogators deliver the *Miranda* warnings and the tactics they employ to obtain *Miranda* waivers.

Empirical data indicates that the police deliver the *Miranda* warnings in at least three ways. First, the police may deliver the warnings in a neutral manner; second, they may de-emphasize the warnings' significance by delivering them in a manner that is designed to obscure the adversarial relationship between the interrogator and the suspect; and, third, they may deliver the warnings in a way that communicates to the suspect that waiving his rights will result in some immediate or future benefit for him. While most of the interrogation strategies seem to fall within at least one of these three categories, determining whether an interrogator is merely de-emphasizing the warnings' significance or also offering a benefit in exchange for waiving them is not always easy. Moreover, when dealing with a suspect who invokes either his right to remain silent or his right to an attorney, interrogators will sometimes employ additional strategies in order to induce the suspect to change his mind.

A. DELIVERING *MIRANDA* WARNINGS IN A NEUTRAL MANNER

Interrogators are sometimes advised that a safe way to elicit a *Miranda* waiver and to avoid a legal challenge to that waiver is to deliver the *Miranda* warnings in as simple a manner as possible.[182] The most direct way to execute this advice is to read the warnings from the standard preprinted *Miranda* form cards, even before engaging in any conversation with the

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180. Thus, in advocating that the police be required to record interrogations when feasible, Kamisar observes:

> [i]t is not because a police officer is more dishonest than the rest of us that we should demand an objective recordation of the critical events. Rather, it is because we are entitled to assume that he is no less human—no less inclined to reconstruct and interpret past events in a light most favorable to himself—that we should not permit him to be "a judge of his own cause."

KAMISAR, *supra* note 16, at 137 (quoting Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238, 242 (1950)).

181. *See supra* note 65.

182. *See* Leo, *supra* note 18, at 659.

suspect. To the extent that interrogators follow this practice, they are acting merely as conveyors of legal information, delivering the warnings in a way that appears non-partisan. The interrogator does not seek to persuade the suspect to waive *Miranda*, or to suggest that some benefit might follow from such a waiver. Instead, the interrogator merely delivers the *Miranda* warnings without any apparent strategy, as if he is indifferent to the suspect's response.[183] After reading the warnings, such an interrogator typically asks two questions: whether the suspect understands his rights and whether he wishes to waive them. If the suspect answers yes to both questions, he has waived his *Miranda* rights.[184]

B. DE-EMPHASIZING THE SIGNIFICANCE OF THE *MIRANDA* WARNINGS

Perhaps the most common strategy employed by interrogators seeking *Miranda* waivers is to de-emphasize the significance of the required warnings. Interrogators employing this strategy typically engage in rapport-building small talk with their suspects before mentioning the *Miranda* warnings. In order to de-emphasize the significance of the *Miranda* warnings, the interrogator then portrays the reading of the warnings as an unimportant bureaucratic ritual and communicates, implicitly or explicitly, that he anticipates that the suspect will waive his rights and make a statement.

Interrogators may attempt to de-emphasize the *Miranda* warnings in several ways. One strategy is to camouflage the warnings by blending them into the conversation. Detectives who employ this approach often become less animated when they read the warnings. Thus, some detectives deliver the *Miranda* warnings in a perfunctory tone of voice and bureaucratic manner, implicitly suggesting that the warnings do not merit the suspect's concern or that his passive acceptance of them is a foregone conclusion. Other detectives read the warnings without pausing or looking up at the suspect, sometimes even a little quickly, before requesting the suspect's sig-

183. "One might associate this style with the television character Joe Friday in the popular 1960s television show 'Dragnet.'" *Id.* at 660.

184. After receiving affirmative answers to the two questions, interrogators will typically ask for and receive the suspect's signed statement that he is waiving his *Miranda* rights. *But see* North Carolina v. Butler, 441 U.S. 369 (1979) (holding that a suspect's *Miranda* waiver may be valid even though he declines to give a written statement).

nature on the waiver form, all the while implying that the warnings are merely a matter of routine that necessarily precedes any questioning.

Another way to de-emphasize the *Miranda* warnings is to explicitly call attention to the formality of the warnings, suggesting that they are unimportant. An interrogator employing this strategy typically tells the suspect that the *Miranda* warnings are a mere formality that they need to dispense with prior to questioning. The following interrogation provides an apt illustration:

Interrogator:	Okay, let... let me go ahead and do this here real quick, like I said so don't let this ruffle your feathers or anything like that it's just a formality that we have to go through, okay. As I said this is a *Miranda* warning and what it says is that you have the right to remain silent, anything you say can be used against you in a court of law, you have the right to the presence of an attorney to assist you prior to questioning and to be with you during questioning if you so desire, and if you cannot afford an attorney you have the right to have an attorney appointed for you prior to questioning. Do you understand these?
Suspect:	Yeah.
Interrogator:	Okay. Any questions about those at all?
Suspect:	(shakes head side to side)
Interrogator:	Okay. Now as I've said, uh... our main objective is to try and get some answers for... for things that... that we're looking into. Uh... what we try to do as I've said before is... is go to people that can... can help us and that and lead us in a direction, okay, otherwise we'll roll around aimlessly and uh... end up talking to people that... that don't make any difference, okay. We know that you probably, most definitely have some information that can help us out in this regard. That's why I want to talk to you, okay? Do you know what I'm talking about?
Suspect:	Yeah.
Interrogator:	Okay; so do you know what I want to talk to you about?
Suspect:	(shakes head up and down)[185]

Interrogators may also de-emphasize the significance of the *Miranda* warnings by referring to their dissemination in popular American television shows and cinema, perhaps joking that the suspect is already well aware of his rights and proba-

185. Interrogation Transcript of Dante Parker, Maricopa County Sheriff's Office, Ariz. 1-2 (Sept. 12, 1991) (on file with authors).

bly can recite them from memory. Before giving the *Miranda* warnings in one interrogation, for example, the interrogating detective said to the suspect, "you've probably seen it on TV a thousand times. I know I've said it about ten thousand times."[186] In another interrogation, the interrogating detective developed this same theme as follows:

> Interrogator: ... before we talk to anybody about anything, there's a thing called *Miranda* and I don't know if you've heard about it, if you've seen it on TV, um ... the ... just to cover ourselves and to cover you, to protect you, we need to, to advise you of your *Miranda* rights and we need to know that you understand 'em and that you can hear them, so if you'll speak up for us, okay? Jeff.
>
> Suspect: Yeah.[187]

By referring to the dissemination of *Miranda* warnings in American popular culture, interrogators seek to trivialize the warnings' legal significance. Their hope is that the suspect will not come to see the *Miranda* warning and waiver requirements as a crucial transition point in the questioning or as an opportunity to terminate the interrogation, but as equivalent to other standard bureaucratic forms that one signs without reading or giving much thought.[188]

One of the most powerful de-emphasizing strategies involves focusing the suspect's attention on the importance of telling his story to the interrogator.[189] The interrogators communicate to the suspect that they want to hear his side of the story,[190] but that they will not be able to do so until the suspect

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186. Interrogation Transcript of McConnell Adams, *supra* note 1, at 15.

187. Interrogation Transcript of Lewis Peoples, Stockton Police Dep't, Cal. 4-5 (Nov. 12, 1997) (on file with authors).

188. Indeed, sometimes the interrogator explicitly indicates that the warnings are a formality that the suspect should get out of the way by signing the waiver card. In one case, for example, the interrogator stated:

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

Richard A. Leo, Miranda's *Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259, 272 (1996).

189. "The fraud that claims it is somehow in a suspect's interest to talk with police will forever be the catalyst in any criminal interrogation." SIMON, *supra* note 29, at 201.

190. A standard such refrain goes as follows:

> Listen, Joe, I talked to the witnesses and they all say you're involved in this thing. But before I file any charges, I'd like to get your side of

waives his *Miranda* rights. An interrogator employing this strategy will typically begin with some discussion of the case against the suspect:

> Interrogator: ... Okay, um, I don't know as to what degree involvement that you're in on this thing, okay? But I would like to hear your side of the story. Everybody's got a story to tell. Because you're in custody, I know um, Detective Lucas, he read you your rights once already, right? Um, before I can hear anything, you, I have to read you your rights just like he did. Did you understand them when he read them to you?
>
> Suspect: Yeah.
>
> Interrogator: Okay, it's just like T.V. But I can't talk to you unless I read them to you.[191]

When effectively employed, this strategy will often have the effect of totally undermining the *Miranda* warnings' effect. As in the following example, the suspect becomes so eager to tell his side of the story that he views the warnings as a needless impediment to his goal:

> Interrogator: I don't think this woman was telling us the whole truth. Okay. I think that it's not, probably not as significant as she's letting on at this point. Okay. So this is why you're here. Now I'd like to talk to you about what this woman is saying, we've more or less ah, you know, if we just talk to her and she alleges this felony crime occurred, then we're more or less obligated to make an arrest.
>
> Suspect: Uh-huh.
>
> Interrogator: And I know there's more to it and I know, I know you were there. That's not a problem because, because we have, that, that ain't no big deal. But I also need to know the real truth because I'm not sure she's telling us the whole story.
>
> Suspect: What, what is she trying to say?
>
> Interrogator: Well, she's alleging that you pointed the gun at her.
>
> Suspect: Uh-huh (negative). Nah-uh.
>
> Interrogator: (Unintelligible). Alright before we, before we do that, I, like I said I know there's more to this story than she's telling us. But—

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the story. I want to hear you tell me what you did—and what you didn't do. But first, I gotta read you your rights. You watch TV, you know the drill ....

Peter Carlson, *The Seduction: Cops, Suspects and the New Art of Interrogation*, WASH. POST MAG., Sept. 13, 1998, at 11.

191. Interrogation Transcript of Michael Johnson, Solano County Sheriff's Dep't, Cal. 2-3 (Apr. 26-27, 1992) (on file with authors).

Suspect: I don't even know her, you know what I'm saying (unintelligible)—

Interrogator: Whoa, whoa, whoa. I can't take your statement until we get through that *Miranda* issue.

Suspect: Oh.

Interrogator: You can't tell me anything until we get through that.[192]

In some cases, the strategy employed in the last two examples not only de-emphasizes the significance of the *Miranda* warnings but also communicates to the suspect that he will receive a benefit in exchange for waiving his rights. If the interrogator leads the suspect to believe that telling his side of the story may be to his advantage, then the line between simply de-emphasizing the warnings' significance and offering a benefit in exchange for their waiver is crossed. As in the last example, it is often difficult to determine whether the interrogator has crossed that line.[193] As the next section will show, however, interrogators sometimes employ this strategy so as to make it clear to the suspect that waiving his *Miranda* rights will be to his advantage.

Another way interrogators de-emphasize the significance of the *Miranda* warnings is to treat the suspect's waiver of the warnings as a *fait accompli*, a decision that not only is expected but also requires no participation from the suspect. Interrogators employ this strategy through reading the suspect the *Miranda* warnings and then moving directly into the interrogation without asking the suspect for an explicit waiver of the *Miranda* rights:

Interrogator: Okay. You can call me Mark, all right, if you want? What I want to do is ask you some questions, all right? And I want to get your side of the story. And you're right, maybe you never could do something like this. But since you've been handcuffed and all that stuff, I've got to read you your rights. Have you ever had them read to you before?

Suspect: Uh-huh.

Interrogator: Yeah? You have the right to remain silent. You do not have to talk to me or answer any questions. You have

192. Interrogation Transcript of Kentrick McCoy, Sacramento Police Dep't, Cal. 14-15 (Sept. 1, 1996), *quoted in* Ofshe & Leo, *supra* note 65, at 1002-03.

193. The officer's statement that "if we just talk to her and she alleges this felony crime occurred, then we're more or less obligated to make an arrest" might suggest to the suspect that if he provides the police with a scenario involving less culpability on his part (i.e., showing—as the police believe—that the incident was less "significant") the police will not be obligated to make a felony arrest. *Id.* at 14.

> the right to have an attorney and have an attorney present during questioning if you wish. If you cannot afford to hire one, one will be appointed to represent you free of charge. Do you understand those rights?
>
> Suspect: (Nodding head. Inaudible).[194]

Following this exchange, the detective immediately launched into the interrogation without first asking the suspect whether he wished to waive his rights or even whether he was willing to speak to the police.[195]

Still another approach to de-emphasizing the *Miranda* warnings is to create the appearance of a non-adversarial relationship between the interrogator and the suspect. An interrogator employing this strategy portrays himself as the suspect's friend, confidant or guardian, whose goal is not to obtain incriminating statements but rather to help the suspect improve his situation. If the interrogator personalizes the interaction and convinces the suspect that he is trustworthy, the suspect will almost inevitably view the *Miranda* warnings as insignificant. The following example illustrates the tactics that may be employed to establish the interrogator's non-adversarial role:

> Interrog 1: I consider myself to be a friend of yours.
>
> Suspect: Yeah, you're a friend of mine, Bill, all right.
>
> Interrog 1: We've had hot fudge sundaes together, and we've exchanged Christmas letters and—we've done various things like that.
>
> Suspect: Yeah.
>
> . . . .
>
> Interrog 1: So I guess we, we just need to kind of cut to the, the whole thing and let me lay it out for you a little bit, about some of the reports that we've had. You lived in—did you live in the dorms of Triangle X, or where was it you lived there?
>
> Suspect: Oh, I lived in the dorms, the—
>
> . . . .
>
> Interrog 1: Okay. And at that time your job was managing the wrangling for the ranch?
>
> Suspect: Yeah.

194. Interrogation Transcript of Jason Young, San Pablo/Richmond Police Dep't, Cal. 4-5 (June 21, 1997) (on file with authors).

195. Sometimes detectives modify the traditional phrasing of "Having these rights in mind, do you wish to speak to me?" to "Having these rights in mind, do you want to hear what I have to say?" or "Having these rights in mind, do you want to tell me your side of the story?" *See* Leo, *supra* note 18, at 664.

Interrog 1: We've had any number of reports from girls, who now are 21 years, 22, 23, 24 years old, about you taking some liberties with them at the ranch when you were working there. And these are not, you know, these are not just really young girls. These are, these are kids now who are 21, 22, and these things took place 10 to 15 years ago.

Suspect: Huh.

Interrog 1: So we really need—we need to get to the bottom of it. We've got a problem that we've got to work out. Because there's just too many, too many reports that have come in.

Suspect: Okay.

Interrog 1: Now, what I want to do, before we get too deep into this, is to advise you of your rights. I think you have, you have the right to be advised. So I'll advise you of your rights. Do you have a card with you?

Interrog 2: Yes, I do.

Interrog 1: I left mine at home. You have the right to remain silent. Anything you say can or will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you can't afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish. And you can decide at any time to exercise these rights and not answer any questions when you're making your statement. Do you understand what the rights are[?]

Suspect: Yeah.[196]

Assuming a non-adversarial role not only de-emphasizes the *Miranda* warnings but also may suggest to the suspect that waiving his *Miranda* warnings will be to his advantage. Once the interrogator suggests to the suspect that she is his friend or that she is there to help him, further statements relating to solving a problem or working things out may communicate to the suspect that statements he makes to the interrogator, who is his friend rather than his adversary, will be used to alleviate his difficulty. Thus, in most cases, interrogators who employ this strategy are offering suspects benefits in exchange for *Miranda* waivers, as well as de-emphasizing the *Miranda* warnings' significance.

196. Interrogation of Russell Stone, Salt Lake City Police Dep't, Utah 2-4 (Dec. 5, 1995) (on file with authors).

C. OFFERING SUSPECTS BENEFITS IN EXCHANGE FOR *MIRANDA* WAIVERS

Interrogators may seek to persuade a suspect that waiving his *Miranda* rights will be in his best interest and will result in tangible or intangible benefits. Interrogators pursuing this goal will employ various strategies. Sometimes the interrogator will explicitly tell the suspect that waiver of his rights is the only way he can obtain a tangible benefit. The interrogator may state, for example, that she can only inform the suspect of the charges against him and the likely disposition of his case if the suspect waives his *Miranda* rights; she may state that she can only portray the suspect's account in its most favorable light to the prosecutor if the suspect waives his rights; she may explain that the charges against the suspect will be reduced if the suspect gives some explanation for what he has done; or she may simply assert either that the suspect will be in greater jeopardy if he does not waive *Miranda*, or that he will receive more lenient treatment if he does.

In many cases, however, the benefit offered in exchange for a *Miranda* waiver will be implicit rather than explicit. Consider, for example, the case of Alan Adams. In the pre-waiver portion of Adams's interrogation, detectives confronted Adams with what they wanted him to believe was overwhelming evidence of his guilt:

> Interrogator: ... Your arrest has come about after, uh, well, actually, well over a thousand man hours of investigation ....
>
> ... We have the physical evidence, uh, from the scene. And, uh, what we'd like to do right now is give you the opportunity just to explain why it happened ....
>
> ... [W]e've talked to, uh, numerous people. People who you apparently thought you could confide in, um, and the opposite is true ....[197]

After Adams denied committing the offense, the interrogators used a common post-waiver interrogation technique, telling the suspect that the purpose of questioning was not to discuss whether, but why, he committed the offense:[198]

> Suspect: Well, I can't give you any answers because I didn't do it.

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197. Interrogation Transcript of Alan Adams, Sonoma County Sheriff's Office, Cal. 1 (July 4, 1991) (on file with authors).

198. For a fuller explanation of this interrogation strategy, see Ofshe & Leo, *supra* note 65, at 1006.

Interrogator: Well, it's not a matter of you not or, doing it or not. We know you did it, okay. And we're . . .[199]

After reasserting that the evidence against Adams was conclusive, the interrogator then suggested that Adams' situation might be improved if he spoke to the police and offered an explanation for his actions. The interrogator implied that if Adams told his side of the story, he would not be viewed by the system as a maniacal killer—an outcome that would carry the stiffest of all possible sentences. Instead, he would be viewed more favorably and in the end receive more lenient punishment from the system if he spoke with the police:

Interrogator: . . . [T]here's been a, a one-sided story that's been told right now, of a, of a, a maniacal killer that had no reason that, that wasn't pushed into doing something. And I don't know if that's the case or not. Maybe it is the case, but maybe it's not. Maybe there's something more. Maybe there's an explanation, eh, we all do things for reasons and you're not any different from anybody else. You have reasons. I have reasons for what I do. I've done things in my past that I'm not proud of. But you know what? I've had more control to control myself from doing things like this. You're no dif, any different from anybody else when you think about things like this. The difference is in you is that you acted out on your thoughts and that's the difference and that's why you're under arrest today and that's why you and I are, and, and Detective Doherty are here today. It's because you went a step further than everybody else. And I suppose that you would want to change it but you're not gonna change it, Alan. That's not gonna happen. It's something that has to be dealt with. We're willing to hear your side of the story on that. Because I think that you do have a side. Do you see what I'm saying?[200] . . .

. . . .

Interrogator: [T]he scene is making it look like this is a, a, a maniacal, evil person. Is that what you are?

Suspect: No.

Interrogator: Well, that's what I'm saying. That those are the sym, assumptions that a person has to draw. You, you saw what she saw. And so you think about it. What goes through our mind when we're, we were in it for over fifty hours processing the scene and collecting minute, physical microscopic evidence. Do you see what I'm saying? We were there. What would the scene tell you

199. Interrogation Transcript of Alan Adams, *supra* note 197, at 2.
200. *Id.* at 5.

had you not been there? Huh? You have to understand what we're thinking here, okay? And we're willing to hear your side of the story. We are willing to hear your side of the story. You have a side of the story. Okay? Your friends that you talked to . . . you can only take friendship so far but when you start trusting people with secrets like this, they have an obligation they how, they have an obligation to do the right thing. Because you didn't do the right thing. And yes, they informed us. Okay? And based upon their information, we collected physical evidence and we established proof.

Suspect: My friends informed you?

Interrogator: Yes.[201]

By suggesting that Adams may have made a mistake (rather than being a "maniacal killer"), the interrogators held out to Adams the possibility that he might receive a lesser punishment if he could provide some explanation for his acts rather than letting them look like the conduct of a maniacal or purposeful killer:

Interrogator: When we make mistakes, it's time to do, it's time to make things right (inaudible). Maybe you made a big mistake. Maybe you don't even consider it a mistake. I don't know. Maybe this isn't to you a mistake. I don't know.

Suspect: How could murder not be a mistake?[202]

. . . .

Interrogator: . . . And, and maybe what you did with Anthony caused this to occur. So like I say, I want to talk to you about this physical evidence that, uh, we're getting and we can talk more, you know? If you want to talk more about the other things and . . . and, uh . . . we, we, we are fair people and we're gonna be very fair with you. And I, I would appreciate the same respect that we're giving you. Um, we, we would like to remain very professional about this. Do you understand?

Suspect: Um-hmm. I understand.

Interrogator: Okay. So I want to talk to you about this physical evidence here and get your insight into it. And what I really hope that you'll want to talk to me about is the whys, okay? And maybe, uh, Alan Hill's a good, a good place to start. I don't know. Anthony. It may be a very good place to start with the whys. But before we do all this I want, I, you've probably seen this on T.V. and I'm going to do this for you too. And I don't know if

201. *Id.* at 6.
202. *Id.* at 8.

> your rights have ever been read to you, but I'm going to explain them to you. Okay? I know that you, you probably already know you have the right to remain silent. Anything you say can and will be used against you in a Court of Law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed free of charge to represent you before and during any questioning if you so desire. Do you understand all of those rights?
>
> Suspect: Yeah.[203]

The interrogators then questioned Adams without explicitly asking whether he wanted to continue the discussion and eventually obtained a confession.

As the *Adams* case demonstrates, emphasizing to the suspect that the interrogators need to hear his side of the story is one strategy through which interrogators can suggest to the suspect that waiving the *Miranda* rights will gain him some benefit. Then, the interrogator makes it clear that the suspect will only be able to tell his side of the story if he first waives his *Miranda* rights. When this strategy is effectively employed, some suspects will be so eager to tell their side of the story that they can hardly wait to waive their rights.[204]

The interrogation of McConnell Adams, an excerpt of which appears at the introduction of this Article,[205] depicts a particularly masterful employment of this strategy. Before questioning Adams, the interrogators tell him that the answers he gives them over the next few minutes are going to have important consequences for his future. They are "going to change [his] life" and "dictate how [his] life is going to be."[206] At this point, Adams would likely believe that it is inevitable that he is going to answer the interrogators' questions and that he can help himself by giving the "right" answers.

The interrogators then make it clear to Adams that they know what he did, but they need to determine "the whys and an explanation so that the world knows that McConnell isn't a cold-hearted, stone killer."[207] At this point, the benefit Adams will receive by telling his story becomes clear. By explaining why he killed the victim, Adams can show that he is not in fact

203. *Id.* at 9-10.
204. *See, e.g., supra* text accompanying note 192.
205. *See supra* text accompanying note 1.
206. Interrogation Transcript of McConnell Adams, *supra* note 1, at 3.
207. *Id.* at 14.

a "cold-hearted" killer; rather, as the interrogators have surmised, he is someone who did not intend to kill, and thus will be treated as someone who simply made a mistake. The interrogators have already explained, moreover, that the answers Adams provides concerning this subject will be so important that they will dictate the course of his life. In order to take advantage of this opportunity, however, Adams must first waive his *Miranda* rights. Not surprisingly, Adams elected to waive his *Miranda* rights and make a statement admitting the killings.[208]

In both of these interrogations, the suspects were led to believe that waiving their rights would lead to more lenient treatment by the criminal justice system. If they responded to the interrogators' questions, they might be viewed as something less than a heinous murderer. In both cases, however, the interrogators avoided discussing the specific charges against the suspects. Thus, it could not be said that the officers explicitly indicated that the suspects' waiver of their *Miranda* rights would lead to a reduction of charges.

In other cases, interrogators explicitly or implicitly suggest to the suspect that if he waives his *Miranda* rights and provides a satisfactory explanation to the interrogators, the charges against him will be diminished. In the interrogation of Vince Yarborough (a juvenile), for example, an interrogator told the suspect that he was arrested for two murders and assault, read him his rights, and asked him if he understood. The interrogation then proceeded as follows:

Suspect:	Uh huh. Wait a minute, but what you're sayin, I'm bein arrested for, for what'd you say, two—
Interrog 1:	Actually for two homicides, or one, one homicide and one beat, and one felony assault.
Suspect:	Oh no.
Interrog 2:	Yeah, unless we can find a reason or explanation for, for what happened, that's, we have no choice based on what we have.
Interrog 1:	So do you understand your rights?
Suspect:	Yeah, I understand what you're sayin.
Interrog 1:	Okay, do you want to talk to us about it?

208. *See id.* McConnell Adams's subsequent statement to police was later introduced at trial, and he was convicted of first degree murder and sentenced to life in prison without possibility of parole. *See* James A. McClear, *Iverson Killer Pleads Guilty in Jail Fight: Conviction in Struggle with Staff Will Send Adams Jr. to Maximum Security Prison*, DETROIT NEWS, Feb. 13, 1998, at C4.

Suspect: Yeah, I'll talk [inaudible].[209]

Based on the interrogator's statement to the effect that they had no choice as to the charges unless they could find "a reason or explanation for . . . what happened," Yarborough would be led to believe that his explanation might result in a reduction of charges.

In the interrogation of Alex Garcia,[210] another juvenile, the interrogators suggested that the suspect's explanation might not only lead to less serious charges but even, possibly, to no charges at all. In Garcia's interrogation, the detectives read the *Miranda* rights to the suspect. While the rights were being read, the suspect asked with what he was being charged. One of the detectives responded that there was a "possibility" that the suspect's case would be handled by an adult court, a determination that would be made by the juvenile court judge on the basis of, among other things, the seriousness of the offense.[211] The detective then completed his reading of the *Miranda* warnings, and the suspect signed a card stating that he understood the rights that had been read to him. The interrogation then proceeded as follows:

Interrogator: .... Okay Alex. What we're, we're investigating, like I told you and your father out there, a very serious situation okay?

Suspect: Uh hm.

Interrogator: I don't know what your exact involvement in it at this time, okay? Um.

Suspect: Uh hm.

Interrogator: Obviously, uh, you know that we've been talking to other people about this situation, okay?

Suspect: Uh hm.

Interrogator: Uh, we're gonna give you the opportunity to clear this whole matter up and uh, thats gonna entail you answering some questions to us. Okay? You feel comfortable with that?

Suspect: Pretty much, yeah.[212]

Based on the interrogator's statement to the effect that the suspect would have "the opportunity to clear this whole matter

209. Interrogation Transcript of Vince Yarborough, Vallejo Police Dep't, Cal. 2-3 (1994) (on file with authors).

210. *See* Interrogation Transcript of Alex Garcia, Maricopa County Sheriff's Office, Ariz. (Oct. 26, 1991) (on file with authors).

211. *See id.* at 5.

212. *Id.* at 6.

up," the suspect could reasonably believe that his answers to the interrogator's questions might lead to no charges being brought against him or, at the very least, that he might be charged as a juvenile rather than as an adult. Based on the warnings that had just been read to him, moreover, the suspect would understand that in order to "clear this whole matter up," he would first have to waive his *Miranda* rights.

Interrogators may also imply that the suspect's decision to waive his *Miranda* rights and speak to the police may lead to other types of benefits, such as obtaining help or treatment. The interrogation of Prudencio Sanchez, who was accused of sexually molesting his daughter, included this type of inducement. Before giving Sanchez the *Miranda* warnings, the interrogator gave Sanchez a voice stress analyzer test and told him that he had failed the test. The interrogator then told Sanchez that his conduct did not mean that he was a terrible person. Rather, it showed that he needed help. The interrogator elaborated this theme as follows:

> Interrogator: . . . [W]e think you have a problem and you need help before that problem gets bigger, you have to get help from a professional who can give you some advice so that you can continue with your life and go forward, because if you don't do anything about this, what you have done with your daughter, it will go to something worse, it's going to get worse and that will cause you more damage, to you and your family or the other person who you do this to. Because it's not normal but neither are you a very dangerous person, you are not a criminal who's going to frighten people. But that there are people who need help for your problem, we believe that you are a person who needs professional help to give you advice, so that this does not happen again and you can go on with your life. Right now you have several problems with your family with this and you have to take care of one by one because if you don't take care of any, you are not going to be well, mentally, you are not going to be well. And that's one of the reasons why we are here. Not just to tell you "you're lying" and it's now over, no, what we want is to (know) how did this problem come about, how did it start and why, and to find someone who can give you advice and who can give you some good guidance so that you can go on instead of being stuck here, and that just because, because this happened my life is over. No, you have to think about your future. You're what, 33 years old? 33

> years, you're relatively young, you have to think about your children.[213]

Shortly after this statement, the detective read Sanchez his *Miranda* rights. Sanchez waived his rights and made an incriminating statement.

Significantly, the interrogator did not suggest to Sanchez that he could reduce his criminal punishment by explaining his conduct. Rather, the interrogator emphasized to the suspect that he should explain how his "problem c[a]me about" so that the authorities could provide him with "professional help" and guidance. A suspect hearing this statement might believe that if he explained his conduct, the authorities would be concerned with treating his problem rather than imposing punishment. Even if the suspect believed that his explanation for his conduct would not diminish his punishment, he might still be inclined to waive his rights and explain his conduct, believing that this course of action would be necessary to obtain the treatment he needed.

As these examples illustrate, interrogators induce *Miranda* waivers by offering suspects a wide range of benefits. Moreover, while interrogators sometimes offer explicit benefits, implicit inducements, where the precise benefit to be obtained is unstated, may be even more powerful. When this strategy is effectively employed, the suspect subjected to it is highly likely to waive his *Miranda* rights and make a statement to the police.[214]

D. STRATEGIES EMPLOYED WHEN THE SUSPECT INVOKES HIS *MIRANDA* RIGHTS

When a suspect invokes his right to remain silent or his right to an attorney, the interrogator's strategy may be dictated by time constraints. If the suspect is going to remain in the interrogator's custody for a period of time, the interrogator is likely to cease questioning and give the suspect "a chance to sit and stew . . . for a little while and see if he changes his mind."[215] In this situation, the police hope that allowing the suspect time for reflection may convince him that he can come

213. Interrogation Transcript of Prudencio Sanchez, Monterey County Sheriff's Office, Cal. 37-38 (Oct. 1997) (on file with authors).

214. In all of the cases from which excerpts were drawn in this section, the suspect waived his *Miranda* rights and eventually made either incriminating statements or a full confession.

215. Weisselberg, *supra* note 11, at 189.

up with a story that he can sell to the authorities.[216] If the suspect does not adopt this strategy on his own, then, as the *D'Entremont* case indicates,[217] the interrogator may use subtle tactics to suggest that it may be in his best interest to present his side of the story to the police.

The interrogator's strategy may be different, however, if she has only "one shot" at the suspect.[218] Modern interrogation training videos inform interrogators that, if they believe "it's now or never," because the suspect will soon have a lawyer present or be removed from the interrogator's custody,[219] they might want to question suspects despite their invocation of their rights.[220]

Interrogators who follow this advice may take one of two approaches. As Charles Weisselberg has shown, they may question the suspect "outside *Miranda*."[221] Interrogators adopting this strategy specifically inform the suspect that they are questioning him despite his invocation of his rights, suggesting, however, that the suspect need not be concerned about his statements being used against him, because he is being questioned "off the record" or "outside *Miranda*."[222] The implications of questioning "outside *Miranda*" are considered in Parts IV and V.

In addition, the interrogator may respond to a suspect's invocation of his rights by simply trying to get him to change his mind. In some cases, interrogators adopting this approach will not be particularly subtle. In one case, for example, an interrogator responded to the suspect's repeated requests for a lawyer by simply asking her why she wanted a lawyer.[223] In an effort to elicit statements, the interrogator might then recount the evidence against the suspect. For example:

> Interrogator: You did this—this wound. This was bitten by you. You left this wound, you know? This is one hundred percent positive, do you know? We could take the evidence to court and indicate to them that this wound was bitten by you. In court they will believe us, you know?

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216. *See id.*
217. *See supra* text accompanying notes 157-77.
218. Weisselberg, *supra* note 11, at 189.
219. *Id.*
220. *See id.* at 190-94.
221. *See id.*
222. *Id.* at 132-40.
223. *See* Interrogation Transcript of Lisa Peng, Orange County Sheriff's Dep't., Cal. 120 (Jan. 8, 1994) (on file with authors).

Suspect: Okay, then I—then I want to get a lawyer.

Interrogator: Why do you want a lawyer?

Suspect: Yes, because you have been saying that positively I was the one who bit her. That's correct, even though I do hate my husband. He did this—

Interrogator: Let's not talk about—talk about your husband?[224]

And again:

Suspect: Oh—I want to get a lawyer—to come

Interrogator: Let me ask you this? If you found a lawyer that what can he do for you?

Suspect: He will continue to investigate.

Interrogator: He will not continue to investigate. He will lie for you, do you know that? He should be sitting next to you and speak on behalf of you. He wouldn't investigate.

Suspect: Why wouldn't he investigate for me?

Interrogator: He could—could investigate in person. The result of the investigation is that they would be receiving the evidence from the evidence that we had investigated, you know? But it would be different type of evidence. The evidence would not change, you know? Even if you found a lawyer here we would still have asked the same question? We know that you did this act? If you did this then you should take responsibility and not involve anybody else? Especially your two sons?[225]

The interrogator continued to question the suspect, eventually eliciting a confession.

In other cases, interrogators respond to a suspect's apparent invocation of his rights by purporting to misunderstand the suspect.[226] By redirecting the flow of the conversation, the in-

224. *Id.* at 99-100.

225. *Id.* at 120.

226. Consider the following interrogation of Martinez Davis:

Interrog 1: Okay, as I said earlier, I'm going to read those rights to you again, okay? Uh, you understand that you have the right to remain silent? You understand that?

Suspect: Yeah.

Interrog 1: Okay. You also understand that everything you say can and will be used against you in a court of law. You understand that right?

Suspect: Yes.

Interrog 1: Can you speak up?

Suspect: Yes.

Interrog 1: Okay. You also understand that you have a right to have a lawyer and to have him present with you while you're being questioned. Do you understand that?

Suspect: Yes.

Interrog 1: Uh, if—if you cannot afford, uh, you know, one will be

terrogator can then sometimes get the suspect to change his mind and ostensibly waive his *Miranda* rights.[227] During the interrogation of Prudencio Sanchez, for example, the suspect initially stated that he did not want to speak to the interrogator.[228] The interrogator then asked the suspect to clarify his position. The suspect stated that telling his story was not "now necessary."[229] In the course of reiterating the suspect's rights, the interrogator then suggested to him that if he exercised his right to remain silent, the interrogator would "never know exactly what [his] point of view [was]."[230] After the interrogator repeated the suspect's rights, the suspect waived them and eventually made incriminating statements.

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	appointed for you before any questioning, do you understand that?
Suspect:	Yes.
Interrog 1:	Okay. If at anytime while you're being interviewed, if you decide, uh, you want to stop this statement, uh, we'll no longer question you and the interview will cease. Do you understand that?
Suspect:	Yes.
Interrog 1:	Okay. Now at this time do you wish to give up that right and make this statement?
Suspect:	If it's supposed to be better, I'll do it.
Interrog 2:	Okay. I mean, yes or no. Do you want to make?
Interrog 1:	Yes or no? Do you want to make this statement?
Interrog 2:	Do you want to talk about the same thing we talked about all over?
Suspect:	Not—not on this.
Interrog 2:	What?
Suspect:	Not on this.
Interrog 2:	I don't understand what you mean.

Interrogation Transcript of Martinez Davis, St. Louis Police Dep't, Mo. 2-3 (Mar. 22, 1997) (on file with authors).

227. From a legal standpoint, purporting to misunderstand whether the suspect invoked one of her *Miranda* rights can be an extremely effective strategy. If the interrogator can establish that a reasonable person in the officer's position would not understand that the suspect was invoking her right to an attorney, then based on the Court's decision in *Davis v. United States*, 512 U.S. 452 (1994), the interrogator can properly disregard the suspect's invocation of her right. In *Davis*, the Court "decline[d] to adopt a rule requiring officers to ask clarifying questions" when "a suspect makes a statement that *might* be a request for an attorney." *Id.* at 461. Rather, it held that "after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Id.*

228. *See* Interrogation Transcript of Prudencio Sanchez, *supra* note 213, at 40.

229. *Id.*

230. *Id.*

IV. THE DUE PROCESS VOLUNTARINESS TEST

In assessing *Miranda*'s impact on law enforcement, the due process voluntariness test is significant for two reasons: first, if *Miranda* were overruled, that test would provide the principal protection for suspects subjected to police interrogation; and, second, when current police interrogators seek to obtain impeachment statements or physical evidence by questioning suspects "outside *Miranda*," the due process test provides the standard for determining whether statements obtained by such questioning will be admissible for purposes of impeachment.

If *Miranda*'s core holding—the requirement that the police warn suspects of their rights and obtain a valid waiver of those rights before engaging in custodial interrogation[231]—were overruled, what constitutional safeguards would be afforded to suspects subjected to police interrogation? Although various commentators have advocated replacements for *Miranda*,[232] *Dickerson*'s result suggests that the practical effect of a ruling allowing *Miranda* to be replaced by legislatively enacted safeguards would be the total elimination of *Miranda*-like safeguards. Accordingly, only the other presently existing constitutional restrictions on police interrogation would remain in effect.

Before the privilege against self-incrimination was held to apply to custodial interrogation, the Due Process Clause of the Fourteenth Amendment imposed restraints on police interrogation.[233] In a line of cases beginning with *Brown v. Missis-*

231. As Professor Schulhofer has pointed out, "*Miranda* contains not one holding but a complex series of holdings." Schulhofer, *supra* note 17, at 436. Thus, the Court held both "that informal pressure to speak—that is, pressure not backed by legal process or any formal sanction—can constitute 'compulsion' within the meaning of the fifth amendment" and that "this element of informal compulsion is present in *any* questioning of a suspect in custody." *Id.* In terms of regulating police interrogation practices, however, the Court's core holding barred the admission of a suspect's statement obtained during custodial interrogation unless prior to such interrogation, the interrogating officer gave the suspect the *Miranda* warnings and the suspect validly waived the rights iterated in those warnings. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966).

232. *See, e.g.*, Cassell, *supra* note 18, at 496-97 (advocating that *Miranda*'s warning and waiver requirements be replaced by a different set of warnings and the requirement that interrogations be videotaped); Phillip E. Johnson, *A Statutory Replacement for the* Miranda *Doctrine*, 24 AM. CRIM. L. REV. 303 (1987) (setting out a statutory replacement for *Miranda*'s warnings and waiver requirement).

233. *See generally* Hancock, *supra* note 13, at 2203-32 (tracing the evolution of the pre-*Miranda* due process voluntariness test).

sippi,[234] the Court held that the Due Process Clause barred the admission of confessions determined to be involuntary.[235] Until the mid-1960s, the due process test provided the only constitutional basis for regulating the admissibility of defendants' statements.[236] In 1966, however, *Miranda* held that the Fifth Amendment privilege applies to custodial interrogation.[237] Based on the post-*Miranda* Court's Fifth Amendment jurisprudence, the due process voluntariness test provides the standard for determining whether a confession was obtained in violation of the Fifth Amendment privilege.[238] In several contexts, moreover, the Court has held that the due process voluntariness test, rather than *Miranda*, provides the controlling standard for determining the admissibility of defendants' statements.[239] Most significantly, the Court has held that when the government seeks to introduce a defendant's statement against him for the purpose of impeaching his credibility, rather than strengthening the government's case-in-chief, the due process voluntariness test provides the standard for determining the statement's admissibility.[240] As a result of the government's frequent attempts to introduce statements obtained in violation

234. 297 U.S. 278 (1936).

235. *See generally* Yale Kamisar, *What Is an "Involuntary" Confession?* 17 RUTGERS L. REV. 728 (1963), *reprinted in* KAMISAR, *supra* note 16, at 1-25.

236. In 1964, the Court decided *Massiah v. United States*, 377 U.S. 201 (1964), and *Escobedo v. Illinois*, 378 U.S. 478 (1964), both holding that defendants' confessions were inadmissible because the police violated their Sixth Amendment right to assistance of counsel.

237. *See supra* note 3 and accompanying text.

238. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 655 n.5 (1984) (implying that a confession's admissibility under the Fifth Amendment privilege will be determined on the basis of "traditional due process" standards); Michigan v. Tucker, 417 U.S. 433, 450 (1974) (holding that the defendant's Fifth Amendment privilege was not violated because his statement was voluntary).

239. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 318 (1985) (holding that when statements derived from improperly obtained statements are at issue, subsequent statements may not be excluded as fruit of first statement unless first statement shown to be involuntary under due process test rather than merely obtained in violation of *Miranda*); *Quarles*, 467 U.S. at 655-56 & n.5 (stating that the due process test governs admissibility of statements falling within *Miranda*'s public safety exception). For a humorous comment on the practical impact of the Court's exceptions to *Miranda*, see Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1443 (1987) (describing a fictitious police advisor explaining the Supreme Court's interrogation decisions to the police: "The Supreme Court has said that pre-*Miranda* voluntariness standards are part of the 'real' Constitution. *Miranda* is part of the Court's 'just pretend' Constitution").

240. *See* Mincey v. Arizona, 437 U.S. 385, 397-98 (1978).

of *Miranda* for the purposes of impeachment,[241] courts have developed considerable experience in applying the post-*Miranda* due process test.[242]

Post-*Miranda* cases dealing with the admissibility for impeachment purposes of statements obtained in violation of *Miranda* are pertinent because, at least in situations where the *Miranda* violation occurred as a result of the interrogators' failure to stop interrogating a suspect who invoked his *Miranda* rights,[243] the impeachment cases show some of the situations in which overruling *Miranda* would make a difference for defendants. Statements that had been inadmissible under *Miranda* might be admissible under the post-*Miranda* due process test, thereby providing the police with greater access to statements.[244]

Furthermore, even if *Miranda* is never overruled, the post-*Miranda* impeachment cases have diminished *Miranda*'s current costs to law enforcement. While a statement admissible for purposes of impeaching a suspect's credibility is not as valuable as a statement admissible in the government's case-in-chief,[245] the former statements have considerable value to law enforcement. Statements admissible for the purpose of impeaching the defendant's testimony may deter the defendant from testifying on his own behalf. In addition, based on the Court's dicta in *Oregon v. Elstad*, it appears that evidence, including both witnesses and tangible evidence, derived from a

241. *See* Weisselberg, *supra* note 11, at 127.

242. *See id.* at 113 (citing numerous cases).

243. *See* Oregon v. Hass, 420 U.S. 714, 715-16 (1975).

244. In some cases in which a suspect asserts his right to have counsel present at interrogation, the suspect might later "initiate" further communications with the police, thus allowing the police another opportunity to induce a waiver of the suspect's *Miranda* rights. *See* Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983). When this happens, the suspect may waive his *Miranda* rights, thus enabling the interrogator to obtain an incriminating statement.

245. A statement admissible for the purpose of impeaching a defendant's credibility will not be admissible unless the defendant testifies in his defense at trial. Although the government has sometimes argued that statements obtained from a defendant in violation of *Miranda* may be used for the purpose of impeaching other witnesses that argument has been uniformly rejected. *See, e.g.*, United States v. Hinckley, 672 F.2d 115, 134 (D.C. Cir. 1982) (refusing to allow the government to admit defendant's statements obtained in violation of *Miranda* for the purpose of rebutting defense expert psychiatric testimony); *cf., e.g.*, James v. Illinois, 493 U.S. 307, 320 (1990) (holding that defendant's statements obtained in violation of the Fourth Amendment—which would be admissible for the purposes of impeaching the defendant's testimony—could not be used to impeach the testimony of other defense witnesses).

statement obtained in violation of *Miranda* may be introduced by the government as part of its case-in-chief.[246] Thus, when interrogators are able to obtain impeaching evidence by questioning suspects "outside *Miranda*," *Miranda* provides fewer limitations on law enforcement.[247] Of course, the extent to which interrogators will be able to obtain such statements also depends on the law governing the statements' admissibility.

A. IMPEACHMENT CASES DECIDED UNDER THE POST-*MIRANDA* DUE PROCESS TEST

In *Harris v. New York*,[248] the Court established the impeachment exception to *Miranda*,[249] holding that statements obtained from a defendant in violation of *Miranda* are admissible for the purpose of impeaching the defendant's credibility in the event that he testifies in his own defense at trial.[250] In *Oregon v. Hass*,[251] the Court extended *Harris*, holding that the impeachment exception applies even when the police violate *Miranda* by interrogating a suspect after he responds to the *Miranda* warnings by invoking his right to have an attorney present at questioning.[252] In both *Harris* and *Hass*, the Court

246. 470 U.S. 298, 308 (1985).

247. Although statements admissible only for the purpose of impeaching a defendant's credibility are obviously of less value than statements admissible in the government's case-in-chief, the former statements will often be of considerable value. Assuming the government has other sufficient evidence to present its case to the jury, the government's possession of a statement admissible for impeaching the defendant's testimony may deter the defendant from testifying, thus weakening the defendant's case and creating questions in the jury's mind as to the meaning of his silence. On the other hand, if the defendant does testify in his own defense, the admission of the government's impeaching evidence may be extremely persuasive to the jury because, even though the jury will be instructed to consider this evidence only for the purpose of impeaching the defendant's credibility, the jury will often find it difficult to follow these instructions. Moreover, in contrast to statements admitted in the government's case-in-chief, these statements will be heard by the jury late in the trial, when their potential for influencing the jury may be highest.

248. 401 U.S. 222 (1971).

249. For articles considering the impeachment exception to *Miranda*, see generally Jeffrey Caminsky, *Rebuttal Use of Suppressed Statements: The Limits of* Miranda, 13 AM. J. CRIM. L. 199 (1986); Alan M. Dershowitz & John Hart Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); Kainen, *supra* note 48, at 1301; Stone, *supra* note 14, at 106-15.

250. *See Harris*, 401 U.S. at 225-26.

251. 420 U.S. 714 (1975).

252. In *Hass*, the defendant was given the *Miranda* warnings after he was arrested for burglary. *See id.* at 715. While en route to the police station, the

indicated that the impeachment exception would not apply if the evidence the government sought to introduce was obtained in violation of the due process voluntariness test.[253]

Since establishing the impeachment exception to *Miranda*, the Court only once has addressed whether a statement used by the government for impeachment purposes was admissible under the due process voluntariness test.[254] In *Mincey v. Arizona*,[255] the defendant was seriously wounded in a narcotics raid in which an officer was killed.[256] Just a few hours later, a detective questioned the defendant in the intensive care unit of a hospital.[257] Lying on his back in a bed, encumbered by tubes, needles, and breathing apparatus, the defendant was unable to talk and could respond to the detective only by writing answers on pieces of paper provided by the hospital.[258] At about 8 p.m., the detective gave the defendant the required *Miranda* warnings.[259] When the detective started to question the defendant about the events surrounding the shooting, the defendant wrote, "This is all I can say without a lawyer."[260] The detective nevertheless continued to question the defendant, and a nurse who was present suggested to the defendant that it would be best for him to answer the questions.[261] After giving several

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defendant told the arresting officer that he wanted to call his lawyer. *See id.* The officer told the defendant that he could do that after they arrived at the police station. *See id.* at 715-16. While still en route to the station, the defendant asked the officer if he had to locate some of the stolen property. *See* Weisselberg, *supra* note 11, at 183 (citing *Hass*, 420 U.S. app. at 21-24). The officer replied that defendant was not obligated to do so, but he wanted to get the matter cleared up that night. Defendant then revealed the location of the stolen property to the officer.

253. *See Hass*, 420 U.S. at 723 ("If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness."); *Harris*, 401 U.S. at 224 (observing that the defendant did not claim that his confession was involuntary under the traditional due process test).

254. During the post-*Miranda* era, the Court has addressed the question whether a confession was voluntary under the post-*Miranda* due process test in three cases: Arizona v. Fulminante, 499 U.S. 279 (1991), Colorado v. Connelly, 479 U.S. 157 (1986), Mincey v. Arizona, 437 U.S. 385 (1978). *See generally* White, *supra* note 58, at 2014-20.

255. 437 U.S. 385 (1978).

256. *See id.* at 387.

257. *See id.* at 396.

258. *See id.*

259. *See id.*

260. *Id.* at 399.

261. *See id.*

unresponsive or uninformative answers to the detective's questions, the defendant again asked for a lawyer.[262] The detective ignored this "request and another made immediately thereafter."[263] Although the defendant repeatedly requested that the detective stop questioning him, the detective continued the interrogation until nearly midnight, questioning the defendant continuously except "during intervals when [the latter] lost consciousness or received medical treatment."[264]

In a terse opinion by Justice Stewart, the Court, with only Justice Rehnquist dissenting, held that the defendant's statement to the detective was involuntary under the Due Process Clause.[265] In justifying this conclusion, the Court first stated that the defendant "wanted *not* to answer" the detective.[266] It went on to observe that the defendant was overwhelmed by the detective's relentless questioning.[267] While the pressure exerted by the police was less in this case than in many previous due process cases, the Court emphasized that the defendant was not in a condition that permitted him to resist the degree of pressure exerted: "weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious, . . . his will was simply overborne."[268]

Mincey's analysis, unfortunately, does not provide clear guidelines for determining when evidence obtained in violation of *Miranda* will be inadmissible under the due process test. Based on the Court's conclusion that the defendant "wanted *not* to answer" the detective,[269] *Mincey* could be interpreted as holding that a due process violation will occur when the police continue to interrogate a suspect whose response to the *Miranda* warnings and/or police efforts to question him make it unmistakably clear that he does not wish to be interrogated.[270] On the other hand, the Court's holding did not rely solely on the defendant's repeated invocation of his right not to answer

262. *See id.*
263. *Id.*
264. *Id.* at 401.
265. *See id.* at 402.
266. *Id.* at 401.
267. *See id.* at 401-02.
268. *Id.*
269. *Id.* at 401.
270. In order to distinguish *Hass*, *Mincey*'s broadly interpreted holding could be limited to situations in which a suspect repeatedly invokes his rights, thus making it unmistakably clear to the police that the suspect did not want to answer questions without the presence of an attorney.

questions without the presence of counsel. To the contrary, Justice Stewart's opinion emphasized the defendant's inability to resist the unrelenting pressure exerted by the detective.[271] Thus, *Mincey* could also be interpreted as holding that the defendant's confession was involuntary, because the defendant was unable to resist the extreme coercive pressure exerted by the police. Under this narrower reading of *Mincey*, which is consistent with cases decided under both the pre-[272] and post-*Miranda*[273] due process voluntariness test, courts would have to determine on a case-by-case basis whether the interrogation techniques employed by the police were either so coercive or "so offensive to a civilized system of justice" as to render a defendant's resulting statement involuntary.[274]

B. THE LOWER COURT IMPEACHMENT CASES

Predictably, lower courts have interpreted *Mincey* narrowly. Despite the Court's stated concern that interrogating officers not obtain impeachment evidence through tactics that would constitute an "abuse" of *Miranda*,[275] lower courts have generally held that a mere showing that an officer ignored or disregarded a suspect's repeated invocation of his *Miranda* rights does not render a suspect's statement inadmissible for impeachment purposes.[276] Rather, lower courts have determined the admissibility of impeachment evidence solely on the basis of the due process voluntariness test, which involves an evaluation of the "totality of circumstances," including an ex-

271. *See Mincey*, 437 U.S. at 401-02.

272. *See generally* Hancock, *supra* note 13, at 2220-32 (discussing pre-*Miranda* due process cases in which the defendant's confession was held involuntary); Herman, *supra* note 93, at 747-49 (seeking to determine the meaning of a pre-*Miranda* involuntary confession through analyzing holdings in cases in which the Court held the defendant's confession involuntary).

273. *See generally* White, *supra* note 58, at 2014-20 (discussing post-*Miranda* cases decided under the Due Process Clause).

274. Colorado v. Connelly, 479 U.S. 157, 163 (1986) (quoting Miller v. Fenton, 474 U.S. 104, 109 (1985)).

275. *See* Oregon v. Hass, 420 U.S. 714, 723 (1975); *see also supra* note 252 and accompanying text.

276. *See, e.g.*, State v. Burris, 679 A.2d 121, 135-36 (N.J. 1996) (holding defendant's statement admissible for impeachment because it was freely and voluntarily given even though police denied defendant's request for counsel before obtaining the statement); People v. Winsett, 606 N.E.2d 1186, 1199 (Ill. 1992) (holding defendant's statement voluntary even though police three times denied defendant's request for an attorney).

amination of the defendant's background[277] and physical circumstances,[278] as well as the interrogation techniques employed by the police.[279]

In practice, the lower courts applying this test have imposed few restraints on police interrogation methods. As under the pre-*Miranda* due process cases,[280] interrogation tactics involving force or threat of force are prohibited.[281] However, neither lengthy questioning,[282] trickery,[283] nor the repeated denial of the suspect's request to confer with counsel[284] will be sufficient by itself to render a suspect's statement inadmissible for the purposes of impeachment.[285]

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277. *See* Arizona v. Fulminante, 499 U.S. 279, 286 n.2 (1991) (applying "totality of circumstances" test, the Court took into account defendant's low intelligence, slight build, short stature, poor adaptation to prison stress, and history of psychiatric problems); Spano v. New York, 360 U.S. 315, 321-22 n.3 (1959) (considering factors such as defendant's lack of a high school education, status as "foreign-born" and failure of an army intelligence test).

278. Thus, in *Mincey v. Arizona*, 437 U.S. 385 (1978), the Court took into account the defendant's weakened physical condition. *Id.* at 398-99. In dealing with the admissibility of impeachment evidence, several lower courts have distinguished *Mincey* on the ground that injured defendants questioned by the police after they invoked their *Miranda* rights were in less debilitating physical condition than the defendant in *Mincey*. *See* United States v. Martin, 781 F.2d 671, 674 (9th Cir. 1985) (holding defendant's statement voluntary despite the fact that defendant was "groggy" from the effects of Demerol); State v. Vickers, 768 P.2d 1177, 1184 (Ariz. 1989) (en banc) (finding defendant's statement voluntary because, although he suffered from smoke inhalation, his condition "was not as serious as Mincey's").

279. *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 109 (1985) ("[C]ertain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment.").

280. *See* Ashcraft v. Tennessee, 322 U.S. 143, 160 (1944) ("Interrogation *per se* is not, while violence *per se* is, an outlaw.") (Jackson, J., dissenting).

281. *See, e.g.*, Powell v. State, 483 So. 2d 363, 368 (Miss. 1986) (stating in dicta that a confession "which came about as a result of threats [or] physical mistreatment . . . cannot be used at all, either in the state's case-in-chief or for impeachment purposes").

282. *See, e.g.*, Bastides v. Henderson, 664 F. Supp. 51, 53-54 (E.D.N.Y. 1987) (holding that suspect's statement was voluntary when made after 10 hours in custody).

283. *See* Frazier v. Cupp, 394 U.S. 731, 739 (1969) (holding that police trickery in inducing a confession is not sufficient in itself to render the confession involuntary under the due process test).

284. *See* Crooker v. California, 357 U.S. 433 (1958).

285. Under the "totality of circumstances" test, a combination of these factors may, of course, be sufficient to render a confession involuntary. *See, e.g.*, Cooper v. Dupnik, 963 F.2d 1220, 1248 (9th Cir. 1992) (finding suspect's Fifth

Interrogation tactics that mislead suspects as to the admissibility of statements given during questioning "outside *Miranda*"[286] have not been consistently dealt with by lower courts. When a suspect responds to the *Miranda* warnings by stating that he does not want to answer questions without an attorney, an interrogator who elects to question the suspect "outside *Miranda*" may respond by telling the suspect that he 'still would like to know what happened . . . .'[287] In seeking to persuade the suspect to answer questions, the interrogator may then mislead the suspect as to the admissibility of statements made during the questioning. The interrogator may blatantly misrepresent the law by telling the suspect that his answers to the officer's questions will not be admissible against him,[288] or, without directly lying to the suspect, engage in tactics that are calculated to misinform the suspect as to the extent to which his statements to the interrogator will be admissible. The interrogator may tell the suspect that what he says to the officer will be "off the record,"[289] or he may reassure the suspect by promising him that his statement is "not gonna be used against you—in the case-in-chief—against you, okay?"[290] In either case, the average suspect is not likely to understand that statements he makes to the interrogator may be used for the purpose of impeaching his credibility if he testifies in his own defense.[291]

Amendment rights were violated after police attempted to trick him into waiving *Miranda* rights, held him incommunicado for nearly 24 hours and repeatedly badgered him to confess even after he asserted his right to have counsel present at questioning).

286. The term questioning "outside *Miranda*" has been used in police training courses to describe situations in which interrogators question suspects even though statements obtained from the questioning will be impermissible under *Miranda*. *See* Weisselberg, *supra* note 11, at 133-36.

287. *Id.* at 161 (quoting Transcript of Interview of James McNally, People v. McNally 2-5 (Mar. 2, 1993)).

288. *See, e.g.*, Linares v. State, 471 S.E.2d 208, 211-12 (Ga. 1996) (holding defendant's confession involuntary on the ground that police told defendant that any information he provided would not be used against him).

289. *E.g.*, People v. Bradford, 929 P.2d 544, 566 (Cal. 1997).

290. *E.g.*, Weisselberg, *supra* note 11, at 161 (quoting from Transcript of Interview of James McNally, People v. McNally 2-5 (Mar. 2, 1993)). In order to minimize the possibility that the suspect would believe that the statement could be used against him in any way, the detective added, "Just, this is for our edification of what happened." *Id.*

291. In addition, the suspect is unlikely to know that, under the Court's decisions in *Oregon v. Elstad*, 470 U.S. 298, 318 (1985), and *Michigan v. Tucker*, 417 U.S. 433, 452 (1974), evidence derived from statements obtained in violation of *Miranda* will likely be admissible against him.

When addressing the admissibility for impeachment purposes of statements obtained through these tactics, lower courts have split. At least two state courts have held that even statements obtained after an interrogator's deliberate misrepresentation as to the admissibility of the suspect's statement may be introduced for the purpose of impeachment.[292] Courts in at least one other state—Georgia[293]—have held, however, that this form of misrepresentation is sufficient to render the suspect's statement a violation of due process.

The due process impeachment cases show that interrogators questioning suspects "outside *Miranda*" may, ironically, be able to use suspects' knowledge of their *Miranda* rights as a powerful interrogation tactic.[294] Through their use of the *Miranda* warnings, interrogators can induce suspects to talk by leading them to believe falsely that statements they make cannot be used against them in any way. Thus, the interrogators are essentially able to turn *Miranda* inside out. Instead of indicating to suspects that they are confronted with an adversary situation, which was one of the purposes of *Miranda*,[295] interrogators are able to use the *Miranda* warnings to lead suspects to believe that it is not against their interests to talk when it really is.

V. STRATEGIES EMPLOYED BY INTERROGATORS QUESTIONING "OUTSIDE *MIRANDA*"

The basic strategy employed by interrogators who question "outside *Miranda*" is fairly simple. As Weisselberg's account of such interrogations shows, the interrogator's objective is to convince the suspect that he can talk to the interrogator with-

292. *See* People v. Peevy, 953 P.2d 1212, 1223-24 (Cal. 1998); *Bradford*, 929 P.2d at 568; State v. Favero, 331 N.W.2d 259, 262-63 (Neb. 1983). In *Favero*, the defendant requested an attorney, but none was provided. *See* 331 N.W.2d at 261. The detective proceeded to question the defendant, telling him that anything he said was "off the record" and could not be used as an admission in court. *See id.* Although it characterized the police conduct as illegal, *see id.* at 262, the Nebraska Supreme Court nevertheless held that defendant's statement was admissible for impeachment purposes because it was voluntary. *See id.* at 263.

293. *See Linares*, 471 S.E.2d at 211-12.

294. *See generally* Weisselberg, *supra* note 11, at 132-40 (describing how some police officers are being trained to continue questioning a suspect who has asserted his or her Fifth Amendment rights).

295. *See* Miranda v. Arizona, 384 U.S. 436, 469 (1966).

out any fear that his words will be used against him.[296] To achieve this goal, the interrogator either may tell the suspect explicitly that nothing he says can be used against him,[297] implicitly communicate the same message through statements to the effect that the suspect's answers will be "off the record,"[298] or tell the suspect that his statement will be used only to help the interrogator understand what happened.[299]

Since questioning "outside *Miranda*" is a relatively new interrogation strategy,[300] which appears to be employed only in discrete situations,[301] interrogators would not be expected to have refined this strategy to the same extent as they have refined other strategies, such as de-emphasizing the *Miranda* warnings.[302] Nevertheless, transcripts of recent interrogations suggest that interrogators employing this strategy have developed at least two refinements: first, emphasizing through down-to-earth language that the suspect's statements can have no legal significance and second, making it clear to the suspect that making an "off-the-record" statement will be to his advantage.

When a suspect invokes his right to an attorney, he is obviously concerned about placing himself in legal jeopardy. Therefore, it is especially important for the interrogator to convince the suspect that his words cannot be used against him in any way. As the following example indicates, through repetition and the use of down-to-earth language, an interrogator can deliver this message in a way that will be persuasive to the suspect:

> Interrogator: I mean everything you tell us right now I'm not gonna be able to use any way James because you've already said you're gonna, you want an attorney. Okay? So what, whatever you tell me right now, it's not gonna be admissible anyway. You know what I'm saying. You're smart enough to realize that and I'm being up

296. *See* Weisselberg, *supra* note 11, at 132-40, 189-92.

297. *See supra* notes 286-93 and accompanying text.

298. *See* United States v. Walton, 10 F.3d 1024, 1027 (3d Cir. 1993) (finding that the detective told the suspect he could tell the police what happened "off the cuff").

299. *See* Weisselberg, *supra* note 11, at 161.

300. Weisselberg does not say when interrogators first began to employ this strategy. The training video cited in his article, which advises interrogators as to how to employ the strategy was apparently made in 1990. *See id.* at 189.

301. *See supra* notes 215-22 and accompanying text.

302. *See supra* notes 185-96 and accompanying text.

front with you anyway right now as we're speaking. Okay? You've already said you wanted an attorney and you've been, you've been in court before where, where you know where you said, where they said, "Well this evidence, this testimony is not admissible because my client already went ahead and said he wanted an attorney."[303]

. . . .

Suspect: So what I don't understand if, whatever I say right now is, you know, you can't use because I said I wanted to talk to a lawyer?

Interrogator: No, no you, unless you say, unless you say "Detective I want to go on the record," okay? I mean everything you say right now is not gonna be used against you. I'll tell you that right now. I already know, I already know that you are the person responsible. Okay, that's my, that's my feeling okay? That is my, that's just my feeling. I'm being very up front with you, okay. Ah if I was to say, "No I don't think it's you. I think it's somebody else," well I'd be bullshiting you. I'm just telling you straight.

Suspect: Yeah, I know.

Interrogator: Okay, all I'm interested is finding out the facts. You can tell me off the record, that's fine. I can't use that. I would like it to be on record but that would only be with, with, with, with you saying, "Fine, I will go ahead and tell you and I want it on the record and I realize, I realize that I don't have, that I can have an attorney." But I want to tell you, I mean you know without that, I mean you know whatever you tell me right now doesn't mean a hill of beans. You can tell me that you've murdered 50 people here and that they're buried here, here and there. So what? You know, so what?[304]

The suspect eventually made incriminating statements to the interrogator.

In some situations, of course, an interrogator questioning a suspect "outside *Miranda*" also needs to convince the suspect that there will be some advantage to making a statement to the authorities. For this purpose, interrogators employ essentially the same stratagems that are used to induce a suspect to waive his *Miranda* rights. Thus, after the suspect in one case invoked his right to an attorney, the interrogation proceeded as follows:

303. Interrogation Transcript of James Nimblett, San Diego Police Dep't, Cal. 36 (July 30, 1990) (on file with authors).

304. *Id.* at 45.

Interrogator: Okay. Let me explain something to you Mark. Now let me just, off the record, between the three of us. You're looking at a few years of experience here, okay? And we know pretty much what happened because that's our job. We also know that having handled a number of cases that what occurs at a later date and like I say, this is just off the record, just between the three of us, because we're just detectives, we're curious about things that we see physically, we're just kind of curious how it happened. Sometimes, I know that when you get yourself in a situation like this, it really looks bleak. You say to yourself, "Man, this is bad." But I find and my partners here have found that sometimes there is mitigation. There's a reason why things happen. You see what I'm saying and for whatever reason, it just happens. It's what you call like a "heat of passion." And a lot of times with males and females, that's what happens. You get into a little situation. You know you try to get next to one another and things don't work out, that's all. And one person gets pissed off and you know through no fault of anybody's once in awhile, they have a couple of drinks, you know, and their minds just not working like it normally does. We understand that. But those are things we have to know, those are things in all honesty are in your defense. You see what I'm saying? Otherwise, you're just stuck. It's like looking at one side of the coin and saying, "But there's two sides of the coin." And that's, I know you've never found yourself in any kind of trouble before like this, and you're saying to yourself, "Okay, this is, this is."

Suspect: Yeah.

Interrogator: This is, yeah, this is something that I didn't know about, but what I'm trying to tell you is that sometimes you just have to, you know, it's easier to talk about it. You understand what I'm saying? I can say it's off the record, I just want to, just from an investigative standpoint, we're just curious how you even got involved with her.[305]

The suspect chose to speak to the detectives and confessed at trial, where his confession was introduced for the purposes of impeaching his testimony.[306] He was convicted and eventually sentenced to death.[307]

305. Interrogation Transcript of Mark Alan Bradford, L.A. Police Dep't, Cal. 36 (Apr. 19, 1988) (on file with authors).

306. *See* People v. Bradford, 929 P.2d 544, 555 (Cal. 1997).

307. *See id.* at 550-51.

VI. A WORLD WITHOUT *MIRANDA*

In order to determine whether *Miranda*'s warnings and waiver requirement provide an adequate constitutional safeguard, society needs to decide the extent to which law enforcement officers interrogating criminal suspects should be restrained, and the extent to which individuals subjected to such interrogation should be protected. Data relating to the various ways in which interrogators have adapted to *Miranda* cannot, of course, answer these fundamental questions.[308] That data does, however, shed light on some of the issues that have been viewed as significant by both *Miranda*'s proponents and detractors.

Specifically, the post-*Miranda* Supreme Court decisions provide some insight as to how courts might be expected to deal with police interrogation cases in a world without *Miranda*. Also, the empirical data relating to how modern interrogators are able to avoid the obstacles posed by *Miranda* provide some basis for predicting the effect that overruling *Miranda*'s core holding would have on police interrogation practices, the availability of incriminating statements to law enforcement, and the experience of individuals subjected to police interrogation.

A. LEGAL RESTRICTIONS ON POLICE INTERROGATION PRACTICES

The due process impeachment cases provide a lens through which we can glimpse how interrogation cases might be dealt with in a world without *Miranda*'s warning and waiver requirements. As the *Mincey* case illustrates, the due process test provides few guidelines for the police.[309] If the post-*Miranda* due process test were to replace *Miranda*, the police would not be prohibited from employing interrogation tactics that are likely to exert considerable pressure on the average suspect.[310] In contrast to our present system, moreover, sus-

308. Striking the appropriate balance between the interests of law enforcement and suspects involves ethical issues as well as empirical and policy questions. *See* George C. Thomas III, *The Twenty-First Century: A World Without* Miranda?, *in* THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING, *supra* note 93, at 314.

309. *See* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 116 (1997) (observing that "[t]he post-*Miranda* due process test provides essentially the same relatively scant guidelines on interrogation methods as the pre-*Miranda* test").

310. *See supra* notes 280-85 and accompanying text.

pects subjected to these tactics would not have the option of preventing or terminating interrogation by invoking either their right to remain silent or their right to have an attorney present at questioning. Even if the police repeatedly denied the suspect's request for counsel,[311] subsequent statements obtained by the police might be held to be admissible.

Thus, if *Miranda* were replaced by the post-*Miranda* due process voluntariness test, the most obvious difference would be the loss of bright-line rules that impose restraints on the police. As a bright-line rule to control "the potential evils of incommunicado interrogation,"[312] *Miranda* undoubtedly has some deficiencies.[313] Nevertheless, the restraints *Miranda* does impose on the police are important ones. As Professor Schulhofer has pointed out, *Miranda* ensures that suspects subjected to custodial interrogation know that the police must honor their assertion of their rights.[314] The loss of a bright-line rule that provides this protection not only makes it more difficult to determine when police tactics cross the line that separates permissible interrogation techniques from those that are "offensive to a civilized system of justice," but also increases the likelihood that the latter type of tactics will be employed.[315]

Thus, if *Miranda* were replaced by the due process voluntariness test, courts would have to determine whether continued interrogation of suspects who invoke the right to remain silent or the right to have an attorney present during interrogation violates due process. Based on the pre-*Miranda* cases, especially those decided prior to the cases foreshadowing *Miranda*,[316] courts would be likely to address these issues on a case-by-case basis. In cases where the suspect can show no more than that he was denied the right to have counsel present

311. *See supra* note 284 and accompanying text.

312. *See* Stone, *supra* note 14, at 103.

313. *See supra* note 4.

314. *See* Schulhofer, *supra* note 4, at 880.

315. Even if abolishing *Miranda*'s warnings and waiver requirement would not alter the police interrogation practices, the suspect's inability to stop an interrogation would make it more likely that interrogations would continue to the point where they would become "offensive" to our system of justice.

316. *See* Hancock, *supra* note 13, at 2232-37 (observing that, although the Court almost never overruled a due process precedent, the standards applied to determine whether a confession was involuntary "kept changing," and that, in view of the increasingly strict restraints on the police imposed by cases decided immediately prior to *Miranda*, these cases "foreshadowed" *Miranda*'s outcome).

during a lengthy police interrogation, pre-*Miranda* cases such as *Crooker v. California*[317] and *Cicenia v. LaGay*[318] indicate that courts would be unlikely to find a due process violation.

Accordingly, the loss of interrogating officers' obligation to honor the suspect's assertion of his rights would considerably enhance the officers' power to engage in interrogation practices likely to exert pressure on suspects. Because of the limitations of the case-by-case approach mandated by the due process test, moreover, lower courts' ability to monitor and restrain these practices would be insignificant.[319] Without *Miranda*, interrogating officers would be relatively free to subject suspects to skilled interrogation techniques even after the suspects indicated that they wanted to avoid all such interactions with the police.

B. POLICE INTERROGATION PRACTICES

The abolition of *Miranda*'s warning and waiver requirements would send the symbolic message to police that their interrogation practices would be less scrutinized by the courts and, therefore, their latitude to exert pressure on reluctant suspects to confess would be greater. Police investigators would likely interpret the abolition of *Miranda*'s warning and waiver requirements as an invitation to conduct longer, more accusatorial and more manipulative forms of interrogation. At the same time, it is likely that police managers would in their public rhetoric respond to the abolition of the warning and waiver requirements by insisting that their department's interrogation practices had been fair and professional in the *Miranda* era and would remain so in the post-*Miranda* era.

In practice, however, it seems likely that many, if not all, interrogators would simply disregard the previously required *Miranda* warnings altogether and commence interrogation as if they never existed. During questioning, it is likely that interrogators would not refer to the *Miranda* rights at all, except in

317. 357 U.S. 433, 438 (1958) (holding that the defendant's confession was voluntary even though police questioned him for several hours after denying his request to have a specific attorney present).

318. 357 U.S. 504, 508 (1958) (holding that the defendant's confession was voluntary and admissible despite the fact that the police denied him the opportunity to consult with his attorney who was present at the station house where the defendant was being interrogated).

319. *See generally* KAMISAR, *supra* note 16, at 14-22 (elaborating as to why the voluntariness terminology employed by the pre-*Miranda* due process cases is not only "loose and unrevealing" but also "downright misleading").

a minority of cases, when using the tactic of persuading the suspect that the interrogator is his friend and trying to create the appearance of extending the right to silence and the right to counsel, even while talking the suspect out of actually invoking these rights.[320] Of course, the extent to which police even referred to a suspect's right to silence and/or counsel and honored suspect invocations would likely vary by the type and seriousness of the alleged crime, the strength of the evidence the police already possessed, and the age, sex, race, education and criminal record of the suspect. To the extent that interrogators adverted to the right to silence and the right to counsel in the post-*Miranda* era at all, they would be least likely to do so in more serious cases, such as high-profile felony cases in which the police perceived a great deal of external pressure to solve the crime.

Moreover, when conducting an interrogation, the police would not have to be concerned that the suspect might terminate police questioning by invoking his rights. Under *Miranda*, a suspect subjected to custodial interrogation has a means of protecting himself if he finds the police questions more difficult than he anticipated; he may simply invoke his right to remain silent or his right to have an attorney present, and the police will be bound to stop questioning him.[321] In some cases, the interrogator's knowledge that the suspect may invoke these rights may, by leading her to perceive that persuasion, not intimidation, is necessary to elicit a confession, make her less inclined to employ overbearing tactics.[322] Conversely, abolishing *Miranda* removes this restraint on interrogation tactics. In-

320. Even before *Miranda* was decided, the *Inbau Interrogation Manual* advised interrogators that when dealing with a suspect who refuses to answer questions or asks for an attorney or relative, they should concede to the suspect that he has the right to remain silent. *See* FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 111 (1962), *cited in* Miranda v. Arizona, 384 U.S. 436, 453 (1966). According to this edition of the manual, "This usually has a very undermining effect. First of all, [the suspect] is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses [him] with the apparent fairness of his interrogator." *Id.*

321. *See Miranda*, 384 U.S. at 473-74; *see also supra* notes 134-77 and accompanying text.

322. Thus, Professor Schulhofer concludes that under our current system of interrogation "confessions are now mostly the result of persuasion and the suspect's overconfidence, not of pressure and fear." Schulhofer, *supra* note 17, at 561. If the suspect's ability to invoke his *Miranda* rights were eliminated, it seems likely that a greater proportion of confessions would be precipitated by "pressure and fear" rather than "persuasion and the suspect's overconfidence."

stead of being concerned about the suspect's possible reaction to her tactics, the interrogator will only need to be concerned about a court's after-the-fact evaluation of whether the tactics were so offensive as to violate due process.

C. GAINS FOR LAW ENFORCEMENT RESULTING FROM *MIRANDA*'S ABOLITION

In what categories of cases would *Miranda*'s abolition be most likely to assist interrogators in obtaining incriminating statements? Since there is currently no data that clearly identifies cases in which *Miranda* invocations are most likely to occur, the answer to this question must necessarily be speculative. We do know that suspects who presently invoke their *Miranda* rights are not randomly distributed but, instead, are more likely to have prior criminal records, especially prior felony records.[323] What to make of this observation, however, rests on a series of assumptions and inferences. If we assume (1) that suspects with prior felony records would not assert a right to remain silent or a right to counsel in the absence of mandated *Miranda* warnings; (2) that, in the absence of such warnings, interrogators could elicit confessions from those suspects with prior felony records who would otherwise have invoked their rights; and (3) that suspects with prior felony records tend to engage in more serious offenses than suspects without prior records, then it is reasonable to hypothesize that abolition of *Miranda*'s warnings and waiver requirement would have its greatest impact on suspects with prior felony records and would, therefore, often have more impact in serious than non-serious cases. In these categories of cases, *Miranda*'s abolition would be most likely to increase the likelihood that law enforcement would obtain incriminating statements.

The extent of law enforcement's gain, however, would almost certainly be slight for at least three reasons. First, the abolition of *Miranda*'s warning and waiver requirements would not affect the overwhelming majority of suspects—including suspects with prior felony records—because about 80% of custodial suspects already waive their *Miranda* rights.[324] The abolition of *Miranda*'s warnings and waiver requirement would thus appear to be relevant in about 20% of all cases. Second,

323. *See* Leo, *supra* note 18, at 654.

324. *See* Richard A. Leo, "Miranda *and the Problem of False Confessions*," *in* THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING, *supra* note 93, at 275.

when dealing with this narrow category of cases, it is not certain that police, even operating without the restraints imposed by *Miranda*, would frequently be able to elicit incriminating statements. Taken as a group, suspects who assert their *Miranda* rights may be unlikely to make incriminating statements to the police under any circumstances, because they have been hardened by exposure to the criminal justice system. As David Simon has observed, the most hard-core criminals know how to deal with the police: "The professionals say nothing."[325] Even if *Miranda* were abolished, the police would be unlikely to obtain incriminating statements from this category of suspects.

Law enforcement's gains, however slight, would also likely vary over time. In the short term, it seems reasonable to assume that the abolition of *Miranda* would have little effect on suspects with prior felony records, many (if not most) of whom would be aware, even in the absence of any *Miranda* warnings, of their Fifth Amendment rights to terminate interrogation.[326] In the long term, however, abolishing *Miranda* might decrease experienced suspects' knowledge of their rights and thus increase the number of incriminating admissions they are likely to make in interrogations.

Of course, in the absence of better case data, it remains impossible to know with any reasonable degree of precision either the category of cases most likely to be affected by the abolition of the *Miranda* warning and waiver requirements, or how such cases are likely to be affected. For, even if the abolition of the *Miranda* warning and waiver requirements permitted the police to obtain more incriminating admissions in more serious cases, the effect would almost certainly vary, based on the fol-

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325. *See* SIMON, *supra* note 29, at 198. Simon elaborates as follows:

> [T]he professionals say nothing. No alibis. No explanations. No expressions of polite dismay or blanket denials. In the late 1970s, when men by the names of Dennis Wise and Vernon Collins were matching each other body for body as Baltimore's premiere contract killers and no witness could be found to testify against either, things got to the point where both the detectives and their suspects knew the drill:
>
> Enter Room.
> Miranda.
> Anything to say this time, Dennis?
> No, sir. Just want to call my lawyer.
> Fine, Dennis.
> Exit room.

Id.

326. *See supra* note 325.

lowing factors: the length of the interrogation, the experience of the officers conducting the interrogation, the strength of evidence possessed by the police, the crime rate in the jurisdiction, and the age, sex, race, and education of the suspect. To adequately assess the impact of the abolition of *Miranda* on confession outcomes in serious cases, scholars need to better understand the impact that the *Miranda* warning and waiver requirements currently exert on different types of cases and their outcomes. To this end, we need more and better empirical scholarship on the real-world impact of *Miranda*.[327]

VII. CONCLUSION

If *Miranda* is viewed not as mandated by the Constitution, but rather as providing safeguards designed to protect suspects' Fifth Amendment rights,[328] it is appropriate to consider *Miranda*'s costs to law enforcement, as well as the value of the protections it provides to suspects subjected to custodial interrogation. In assessing such costs, however, it is important to take into account the ways in which modern interrogators have adapted to *Miranda*, refining their interrogation techniques so that, despite the obstacles posed by *Miranda*, they are able to obtain statements from suspects that will be admissible if the suspect is charged with a criminal offense.

In this Article, we have shown that individual interrogators have adapted to *Miranda* in different ways. While some interrogators continue to adhere to the letter of *Miranda*, reading suspects the *Miranda* warnings in a neutral manner, others have implemented a variety of strategies designed to convince suspects that waiving their *Miranda* rights is either an inevitable byproduct of the process or in their own best interests. In addition, whereas some interrogators cease questioning as soon as a suspect invokes his *Miranda* rights, others respond to this impediment to interrogation by questioning a suspect "outside *Miranda*" in the hope that they will thereby obtain statements admissible for the purpose of impeaching the suspect's testimony if he testifies in his own defense at trial.

Empirical data relating to stratagems employed by interrogators to surmount the obstacles posed by *Miranda* shed light on *Miranda*'s costs to law enforcement. Though these stratagems are not employed by all interrogators, their use by

327. *See* Thomas, *supra* note 30, at 837.

328. *See supra* note 27 and accompanying text.

some interrogators in some situations provides ample evidence that when obtaining incriminating statements is most important to the police, they are able to minimize the extent to which *Miranda* imposes costs on law enforcement. In view of this data, assessments that seek to quantify the costs of *Miranda* in terms of lost confessions or lost cases should be dismissed as insignificant. If interrogators are able to minimize *Miranda*'s impact in the cases that are most important to them, assessing *Miranda*'s impact on the basis of lost incriminating statements in all cases—including those in which interrogators may have failed to use sophisticated interrogation techniques because obtaining incriminating statements appeared unnecessary—seems beside the point. *Miranda*'s costs to law enforcement can be better assessed by focusing on the extent to which *Miranda* leads to lost incriminating statements in cases where the loss of such statements is especially important to law enforcement.

Although seeking to quantify *Miranda*'s burden on law enforcement is a dubious enterprise, *Miranda* undoubtedly imposes some costs on law enforcement. *Miranda*'s safeguards lead to the loss of statements that would otherwise be admissible in the government's case-in-chief.[329] Abolishing *Miranda* would, therefore, result in at least some gains for law enforcement, because the government would have a greater opportunity to introduce incriminating statements that would strengthen its case-in-chief.

Are these gains sufficient to justify abolition of *Miranda*'s warnings and waiver requirement? To even begin to answer this question, we would want to know what constitutional safeguards would replace *Miranda*. If *Miranda* were simply removed from the constitutional landscape, the due process voluntariness test would govern the admissibility of statements resulting from custodial interrogation. The costs resulting from the loss of *Miranda*'s bright-line protection for suspects might be considerable. Suspects subjected to custodial interrogation would no longer be aware that the police have an obligation to honor their assertion of rights. As a result, interrogators might be more inclined to employ overbearing interrogation tactics,

329. From the government's perspective, obtaining statements admissible for the purpose of impeachment is generally not as advantageous as obtaining statements admissible in its case-in-chief. Statements admissible for impeachment will be admissible only if the suspect testifies in his defense and, even then, only for the limited purpose of impeaching his credibility. *See, e.g.*, Harris v. New York, 401 U.S. 222, 224-25 (1971).

and suspects, deprived of a possible means of terminating the interrogation, might be more susceptible to their effects. Moreover, courts seeking to regulate police interrogation practices would be required to determine the legitimacy of particular practices on a case-by-case basis, an approach that prior experience has shown to be ineffective.

In this Article, we are not taking a position on whether *Miranda*'s warning and waiver requirements should be overruled or modified. Our point is simply that in assessing *Miranda*'s effects, on either law enforcement or those subjected to police interrogation, it is vitally important to consider the various ways in which interrogators have adapted to *Miranda*. As we have shown in this Article, modern interrogators often engage in practices that successfully overcome the obstacles to obtaining incriminating statements posed by *Miranda*. This data should be taken into account in determining *Miranda*'s future.