

**MISSOURI V. SEIBERT: THE
MULTIFACTOR TEST SHOULD BE
REPLACED WITH A BRIGHT-LINE
WARNING RULE TO STRENGTHEN
MIRANDA'S CLARITY**

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Miranda v. Arizona,¹ one of the most widely known Supreme Court decisions,² has been the source of much controversy since its inception.³ *Miranda* requires the police to tell a suspect in custody that she has the right to remain silent and the right to the assistance of counsel during the interrogation.⁴

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¹ 384 U.S. 436 (1966).

² JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 24.01 (3d ed. 2002); see also Mandy DeFilippo, *You Have the Right to Better Safeguards: Looking Beyond Miranda in the New Millennium*, 34 J. MARSHALL L. REV. 637, 637 (2001) (declaring that "*Miranda v. Arizona* is one of the most widely known [opinions] in American jurisprudence"); Michael Edmund O'Neill, *Miranda Remediated*, 3 GREEN BAG 2D 149, 149 (2000) (stating that *Miranda v. Arizona* is "easily the most recognized case in the American criminal procedure pantheon"); Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 69-72 (1989) (showing the recitation of *Miranda* warnings in a Spiderman comic); Jan Hoffman, *Police Tactics Chipping Away at Suspects' Rights*, N.Y. TIMES, Mar. 29, 1998, at A1 (explaining that the general public is familiar with the *Miranda* warnings because police programs and movies on television have served to popularize them).

³ The *Miranda* opinion has been one of the most heavily criticized criminal procedure decisions. See DRESSLER, *supra* note 2, § 24.01. When the case was initially decided, many police officers and legislators believed that the decision would hinder the ability of law enforcement agencies to obtain confessions. *Id.* Yet, more recently, others have criticized the decision for "not going far enough" to protect the rights of suspects. *Id.*

⁴ The *Miranda* Court devised the following rule:

[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any

Furthermore, *Miranda* states that any response to police questioning is inadmissible unless the police obtain a knowing, intelligent, and voluntary waiver of those rights.⁵ Although the *Miranda* Court “indicated that it was adopting stringent waiver requirements,”⁶ the Court in post-*Miranda* cases did not strictly adhere to this decision.⁷ In post-*Miranda* cases, the Supreme Court established a number of exceptions to *Miranda*'s warning and waiver rules⁸ that effectively weakened *Miranda*'s impact on

significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Miranda, 384 U.S. at 444–45.

⁵ See *id.*

⁶ Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 409 (1999). “[A]s prerequisites to the admissibility of any statement made by a suspect, the Court mandated that a clear warning of rights must be given and a waiver received.” Melissa A. Register, Comment, *Constitutional Law: The Invisible Line Between Intentional and Unintentional Miranda Violations: Missouri v. Seibert*, 93 S.W.3d 700 (Mo. 2002), 15 U. FLA. J.L. & PUB. POL’Y 339, 341 (2004); see Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 19 (2001) (stating that the purpose of the *Miranda* warning is to dispel “the compulsion implicit in custodial questioning”); Paul Marcus, *A Return to the “Bright Line Rule” of Miranda*, 35 WM. & MARY L. REV. 93, 112 (1993) (noting various Supreme Court Justices’ opinions praising the “rigidity” of *Miranda*'s rules).

⁷ See Leo & White, *supra* note 6, at 409 (stating that “[p]ost-*Miranda* decisions have been less strict, however, in mandating specific requirements designed to ensure that suspects freely waive their *Miranda* rights”).

⁸ See DeFilippo, *supra* note 2, at 639 (stating that “[s]ince *Miranda* was decided, the Supreme Court has established a number of exceptions to its seemingly bright-line standard”); Marcus, *supra* note 6, at 112 (explaining that *Miranda* has become “riddled by exceptions, limitations and very particularized factual inquiries”); *id.* at 143 (explaining that these exceptions to *Miranda* were developed by the Supreme Court to aid law enforcement); O’Neill, *supra* note 2, at 149 (declaring that while the *Miranda* doctrine is still standing, it has been effectively weakened by the

law enforcement.⁹ Consequently, interrogators found ways to circumvent the protections provided by the *Miranda* warnings.¹⁰ Recently, in *Missouri v. Seibert*,¹¹ the Supreme Court analyzed the “question-first” interrogation technique used by police to circumvent *Miranda*,¹² and held that the petitioner’s confession obtained by the use of this strategy was inadmissible at trial.¹³

Petitioner Patrice Seibert alleged that her statements to the police should be suppressed because her *Miranda* rights had been violated due to improper police interrogation techniques.¹⁴ Seibert was arrested for helping to plan an arson fire that led to the death of a seventeen-year-old family friend.¹⁵ Employing a two-step interrogation technique, called the “question-first” tactic, the police did not give Seibert her *Miranda* warnings until they obtained from her an initial confession.¹⁶ After eliciting a confession, a police officer gave Seibert her *Miranda* warnings and obtained from her a signed waiver of rights.¹⁷ The officer re-questioned the petitioner and had her repeat her initial statements in order to obtain a “*mirandized*” confession that could be admitted as evidence at trial.¹⁸ Seibert argued that the

exceptions developed by the Supreme Court); Rosenberg & Rosenberg, *supra* note 2, at 74 (asserting that these exceptions and politics have stripped *Miranda* of its value).

⁹ Leo & White, *supra* note 6, at 409 (explaining that because the post-*Miranda* cases have provided police officials with the opportunity to “circumvent” the *Miranda* warnings in particular situations, these decisions have significantly weakened *Miranda*’s impact on law enforcement).

¹⁰ See DeFilippo, *supra* note 2, at 639 (explaining that police officers are taught, through training manuals and courses, how to convince suspects to waive their *Miranda* rights and confess).

¹¹ 542 U.S. 600 (2004).

¹² See generally *id.*

¹³ *Id.* at 604 (plurality opinion) (explaining that “[b]ecause this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda*’s constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible”).

¹⁴ See *id.* at 605 (stating that “Seibert sought to exclude both her prewarning and postwarning statements”).

¹⁵ *Missouri v. Seibert*, 93 S.W.3d 700, 701 (Mo. 2002).

¹⁶ *Seibert*, 542 U.S. at 605 (plurality opinion).

¹⁷ *Id.*

¹⁸ *Id.* (explaining that after Seibert made her unwarned confession, officer Hanrahan resumed questioning and confronted her with her prewarning statements). Another police officer working in the same department as officer Hanrahan explained that this type of two-step interrogation was not confined solely to their precinct in Missouri. See *id.* at 609. This officer further stated that this interrogation technique had been emphasized by other police departments he had

“question-first” interrogation strategy used by the police violated her *Miranda* rights, and therefore, her “*mirandized*” confession should be deemed inadmissible at trial.¹⁹ The Supreme Court of the United States agreed with Seibert, concluding that Seibert’s post-warning statements were inadmissible at trial because the warnings given to her did not serve their purpose.²⁰

Writing for the plurality, Justice Souter explained that Seibert’s post-warning confession was inadmissible because the *Miranda* warnings did not “adequately and effectively”²¹ advise Seibert of her rights.²² Using a multifactor test,²³ the Court reached its decision by examining the circumstances of Seibert’s interrogation.²⁴ The Court concluded, in consideration of these circumstances, that the *Miranda* warnings in Seibert’s case were not effective because a reasonable person in Seibert’s shoes would not have understood her rights.²⁵ Therefore, the Court held that Seibert’s post-warning statements were inadmissible at trial.²⁶

In his concurrence, Justice Kennedy agreed with the

worked for and by a national police training organization. *See id.* In Illinois, the Police Law Institute instructs officers how to elicit an admissible confession from a suspect utilizing this very technique. *See id.* at 610.

¹⁹ *See id.* at 606.

²⁰ *See id.* at 609–17 (indicating that the *Miranda* warnings did not effectively advise Seibert of her rights).

²¹ *Miranda*, 384 U.S. 436, 467 (1966) (stating that “the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored”); *see also Seibert*, 542 U.S. at 611 (plurality opinion) (explaining that the *Miranda* Court was concerned with interrogation tactics that would “disable [an individual] from making a free and rational choice” when deciding whether to speak to the police during an interrogation) (quoting *Miranda*, 384 U.S. at 464–65).

²² *See Seibert*, 542 U.S. at 609–17 (plurality opinion) (indicating that the *Miranda* warnings did not effectively advise Seibert of her rights).

²³ Under the multifactor test, the Court examined:

the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second [rounds], the continuity of police personnel, and the degree to which the interrogator’s questions treated the second round as continuous with the first.

Id. at 615.

²⁴ *See id.* at 615–16.

²⁵ *See id.* at 617 (stating that the circumstances in Seibert’s case “must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect’s shoes would not have understood them to convey a message that she retained a choice about continuing to talk”).

²⁶ *Id.* at 617.

plurality that Seibert's post-warning statements were inadmissible at trial.²⁷ Nonetheless, he rejected the multifactor test that the Court used to reach this decision.²⁸ Justice Kennedy argued that because the multifactor test requires lower courts to assess the circumstances surrounding every two-step interrogation,²⁹ this test would serve to undermine *Miranda's* clarity.³⁰ Consequently, Justice Kennedy proposed an alternative solution limited to intentional two-step interrogations only.³¹ Justice Kennedy explained that if police deliberately employ a two-step interrogation strategy, any post-warning statements relating to the substance of the pre-warning statements "must be excluded unless curative measures are taken before the postwarning statement is made."³² Justice Kennedy suggested that an additional warning may suffice as one type of curative measure.³³

It is submitted that although the ultimate conclusion in *Seibert* is correct, the multifactor test that the Court devised should be replaced with a "bright-line" warning rule. Similar to Justice Kennedy's argument, this Comment argues that the multifactor test should be discarded because it does not adequately protect suspects.³⁴ Instead, the Court should devise a bright-line rule requiring police to recite an additional warning to the suspect that emphasizes the likely inadmissibility of her pre-warning statements.³⁵ Different from Justice Kennedy's

²⁷ See *id.* at 618 (Kennedy, J., concurring) (stating that "[t]he plurality opinion is correct to conclude that statements obtained through the use of this technique are inadmissible").

²⁸ See *id.* at 621–22 (rejecting the plurality's use of the multifactor test).

²⁹ See *id.* at 621 (explaining that the multifactor test "envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations").

³⁰ See *id.* at 622 (stating that "*Miranda's* clarity is one of its strengths, and a multifactor test that applies to every two-stage interrogation may serve to undermine that clarity").

³¹ See *id.* (declaring that Justice Kennedy "would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning").

³² *Id.* at 622.

³³ See *id.* (explaining that "an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient" to render a confession admissible at trial).

³⁴ See *id.* (stating that the multifactor test undermines *Miranda's* clarity).

³⁵ See *id.* (declaring that "an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient").

concurrence, this Comment proposes that this supplemental warning should be mandatory for officers to recite to suspects in both intentional and unintentional two-step interrogations. Unlike the multifactor test, this bright-line warning rule would adequately protect suspects because it would promote the clarity that *Miranda* originally attempted to establish.

Part I of this Comment reviews the history of interrogation law that led to *Miranda* and the post-*Miranda* cases. Part II discusses current interrogation techniques used by police to circumvent *Miranda*, and in particular, examines the “question-first” interrogation technique. Part III rejects *Seibert*'s multifactor test used to analyze “question-first” interrogations. Part IV proposes that the multifactor test should be replaced with a bright-line warning rule.

I. THE EVOLUTION OF INTERROGATION LAW

A confession is widely viewed as the most reliable evidence of guilt.³⁶ Because a confession “largely ensures a conviction,”³⁷ police commonly interrogate suspects in the hope of obtaining one.³⁸ Over the past century, police interrogation procedures have evolved from the use of violence to the psychological manipulation of suspects.³⁹ Consequently, over the years, the Supreme Court has responded to these changes by attempting to establish limits on law enforcement practices.⁴⁰

³⁶ Edwin D. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV L. REV. 42, 42–43 (1968). Staundford, in *Pleas of the Crown*, asserts:

If one is indicted or appealed of felony, and on his arraignment he confesses it, this is the best and surest answer that can be in our law for quieting the conscience of the judge and for making it a good and firm condemnation, provided, however, that the said confession did not proceed from fear, menace, or duress; which if it was the case, and the judge had become aware of it, he ought not to receive or record this confession, but cause him to plead not guilty and take an inquest to try the matter.

Id. (quoting GUILLIAULME STAUNDFORD, LES PLEES DEL CORONE 142a-b (1607) (translated from law French)).

³⁷ *Id.* at 42.

³⁸ See Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a “Trial Right”* in Chavez v. Martinez, 70 TENN. L. REV. 987, 1030–31 (2003) (explaining that in the mid-nineteenth century police agencies began interrogating criminal suspects before trial).

³⁹ See DRESSLER, *supra* note 2, § 24.02 (discussing the shift in police interrogation strategies from the use of physical force to the use of psychological manipulation).

⁴⁰ See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 441–42 (1966) (explaining that

A. *The Court Implemented a Voluntariness Standard to Protect Suspects*

Throughout the first third of the twentieth century, in order to illicit confessions, police “routinely threatened, beat, and tortured suspects.”⁴¹ Consequently, when confronted with the initial confession cases, the Supreme Court sought to protect suspects from “cruel and abusive police tactics” by establishing that a suspect’s confession must be made voluntarily in order to be admissible at trial.⁴² Although the voluntariness standard adopted by the Supreme Court was originally regarded as a common law rule of evidence,⁴³ subsequent cases established constitutional bases for the suppression of an involuntary confession.⁴⁴

The Supreme Court, in *Bram* and *Brown* identified two different constitutional bases for suppressing an involuntary confession.⁴⁵ In 1897, in *Bram v. United States*,⁴⁶ the Supreme

the Court was attempting to clarify confession law by establishing “concrete constitutional guidelines for law enforcement agencies and courts to follow”).

⁴¹ DRESSLER, *supra* note 2, § 22.02 (quoting Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L. POL. & SOC’Y 189, 189 (1997); see also Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309, 336 (1998) (discussing the abusive practices that were used by the police including “beating[s] with fists, blackjacks, rubber hoses, and telephone books; the use of hot lights; confinement[s] in airless and fetid rooms; and hanging[s] from windows”).

⁴² See Timothy Brennan, *Silencing Miranda: Exploring Potential Reform to the Law of Confessions in the Wake of Dickerson v. United States*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 253, 257 (2001) (explaining that “the Supreme Court endeavored to protect individual rights from cruel and abusive police tactics and prevent false confessions”). After adopting the voluntariness standard as the test for admissibility, the Supreme Court in subsequent cases expanded this test. See Driver, *supra* note 36, at 43. The voluntariness test evolved into the “totality of the circumstances” test. See *id.*; see also Haynes v. Washington, 373 U.S. 503, 514 (1963) (declaring that “whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances”).

⁴³ See generally *Hopt v. Utah*, 110 U.S. 574 (1884). In *Hopt*, the Supreme Court established that a confession made to the police is inadmissible at trial unless it is made voluntarily. *Id.* at 587; see also Driver, *supra* note 36, at 42–43 (explaining that according to common law, a confession was deemed to be voluntarily if it was “given in the absence of overt inducements, promises, threats, or actual bodily harm”).

⁴⁴ See *infra* notes 45–52 and accompanying text.

⁴⁵ See Brennan, *supra* note 42, at 255.

⁴⁶ 168 U.S. 532 (1897). In *Bram*, the defendant, a sailor aboard a ship, was suspected by the crew of murdering the ship’s captain. See *id.* at 561. The crew

Court concluded that the Fifth Amendment self-incrimination clause⁴⁷ provided a constitutional basis for the suppression of an involuntary confession.⁴⁸ As a result, compelled confessions were inadmissible in federal criminal trials under the Fifth Amendment.⁴⁹ *Bram* did not apply to state criminal trials “[b]ecause the constitutional privilege against compelled self-incrimination was not then considered a fundamental right.”⁵⁰ In 1936, however, the Court in *Brown v. Mississippi*⁵¹ concluded that the Due Process Clause of the Fourteenth Amendment provided a constitutional basis for excluding physically coerced confessions in a state criminal trial.⁵²

decided to arrest and restrain Bram while he was onboard the ship. *See id.* When the ship reached land, the crew turned over the defendant to the police. *See id.* A police detective then brought Bram to his private office, stripped him of his clothes, interrogated him alone in his office, and elicited a confession. *See id.* at 561–62. To encourage the confession, the detective told Bram that a witness named Brown, who was actually a co-suspect, was standing at the wheel of the ship and saw Bram commit the murder. *See id.* at 562–64. The Court concluded that Bram’s incriminating statements, which were offered into evidence as a confession, were not voluntarily made because they were made under compulsion. *See id.* at 562–64.

⁴⁷ *See* Adam M. Stewart, *The Silent Domino: Allowing Pre-Arrest Silence as Evidence of Guilt and the Possible Effect on Miranda*, 37 SUFFOLK U. L. REV. 189, 191–92 (2004) (explaining that the framers of the Constitution created the privilege against self-incrimination to prevent the type of physically abusive tactics that were employed by the English courts).

⁴⁸ *See Bram*, 168 U.S. at 542 (quoting U.S. CONST. amend. V) (explaining that the self-incrimination clause of the Fifth Amendment governs issues concerning the voluntariness of a confession).

⁴⁹ *See* DRESSLER, *supra* note 2, § 23.01[B][1] (explaining that “*Bram* brought the common law rule under the umbrella of the Fifth Amendment: thereafter, compelled statements were inadmissible in *federal* criminal trials as a matter of constitutional law”); *see also Bram*, 168 U.S. at 543 (declaring that the language of the Fifth Amendment self-incrimination clause “was but a crystallization of the [common law] doctrine as to confessions”).

⁵⁰ DRESSLER, *supra* note 2, § 23.01[B][1]; *see also* Davies, *supra* note 38, at 1039 (pointing out that in *Twining v. New Jersey*, the Court held that because the Fifth Amendment right against self-incrimination was not a “fundamental right,” it would not apply to state criminal trials through the Fourteenth Amendment Due Process Clause (citing 211 U.S. 78, 113 (1908))).

⁵¹ 297 U.S. 278 (1936). In *Brown*, the defendants were indicted for murder. *Id.* at 279. A group of white men, accompanied by the sheriff, beat, whipped, and hung the African-American defendants. *Id.* at 281–82. The sheriff made the defendants understand that the torture would continue until they confessed to committing the crime. *Id.* The Court held that the manner in which the confessions were obtained violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 286. The Court explained that it was clear that the confessions were not made voluntarily and therefore should have been excluded from evidence. *Id.* at 283.

⁵² The Supreme Court stated that “[i]t would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the

These two constitutional bases initially resulted in different standards of admissibility in state and federal courts.⁵³ Under the self-incrimination standard, federal courts followed the strict bright-line rule announced in *Bram* to determine whether an interrogation amounted to compulsion.⁵⁴ The bright-line rule asserted that a confession was not made voluntarily if it was extracted by the use of threats, violence, or promises.⁵⁵ In contrast, state courts followed the due process standard, which required judges to examine not only the actions of the police but also their likely effect on the suspect.⁵⁶ The due process standard became known as the “totality of the circumstances” test because it required a “case-by-case” assessment of all of the circumstances surrounding an interrogation.⁵⁷

confessions . . . and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.” *Brown*, 297 U.S. at 286; see *Missouri v. Seibert*, 542 U.S. 600, 607 (plurality opinion) (stating that “[a] parallel rule governing the admissibility of confessions in state courts emerged from the Due Process Clause of the Fourteenth Amendment”); see also DRESSLER, *supra* note 2, § 23.01[B][2]; Brennan, *supra* note 42, at 256 (explaining that the *Brown* Court held that “a state conviction, based on a physically coerced confession, violated the Due Process Clause of the Fourteenth Amendment”).

⁵³ While *Bram* applied the Fifth Amendment right against self-incrimination to federal criminal cases, *Brown* applied the Due Process Clause of the Fourteenth Amendment to state criminal cases. See DRESSLER, *supra* note 2, § 23.01[B][1]–[2].

⁵⁴ The *Bram* Court asserted a bright-line rule:

[A] confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence A confession can never be received in evidence where the prisoner has been influenced by any threat or promise

Bram, 168 U.S. at 542–43 (internal citations omitted).

⁵⁵ See *id.*

⁵⁶ See DRESSLER, *supra* note 2, § 23.01[B][3] (contrasting the bright-line *Bram* rule with the due process standard and explaining that “the early due process cases seemingly required proof either that the suspect’s will was broken by the police . . . or that the police methods used were the sort likely to result in a false confession”); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 113–14 (1998) (explaining that under the due process standard, judges were required to “examine both the conduct of the police and its impact on the accused”).

⁵⁷ See *Dickerson v. United States*, 530 U.S. 428, 433–34 (2000) (explaining that the cases following *Brown* “refined the [due process voluntariness] test into an inquiry that examines ‘whether a defendant’s will was overborne’ by the circumstances surrounding the giving of a confession”) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)); see also DRESSLER, *supra* note 2, § 23.01[B][3] (declaring that “the due process cases are generally decided on a case-by-case totality-of-the-circumstances basis”); Brennan, *supra* note 42, at 256 (pointing out that the “modern voluntariness standard” arose out of *Brown*); *supra* note 42 and accompanying text (explaining that the voluntariness standard adopted by the

In subsequent cases, the Due Process Clause became the primary constitutional basis used to exclude improper confessions.⁵⁸ Courts began to apply the due process standard in both state and federal cases.⁵⁹ Consequently, the bright-line rule followed by the federal courts was replaced by the “totality of the circumstances” test.⁶⁰

B. The Due Process Voluntariness Standard Evolved into a “Totality of the Circumstances” Test

While the Court’s holding in *Brown* made clear that confessions obtained through physical coercion violated due process,⁶¹ it did not specifically prohibit confessions obtained through psychological coercion.⁶² Therefore, when the Supreme Court began to suppress confessions obtained by violence and torture, police began to employ psychologically coercive interrogation techniques in order to obtain confessions from suspects.⁶³ Consequently, in *Ashcraft v. Tennessee*,⁶⁴ the Supreme Court held that confessions obtained as a result of psychological coercion violate due process and are inadmissible at

Court was later expanded and required an assessment of the “totality of the circumstances”).

⁵⁸ See Brennan, *supra* note 42, at 255. Initially, the federal self-incrimination cases and the state due process cases applied different standards to determine whether a confession was admissible at trial. See DRESSLER, *supra* note 2, § 23.01. The federal cases following *Bram* applied a strict “bright-line rule” to determine whether a confession was given voluntarily or made under compulsion. *Id.* The state cases following *Brown* viewed the “totality of the circumstances” surrounding the interrogation in order to determine whether a confession was made voluntarily. *Id.* As time passed, however, the federal courts also began to apply the due process standard. See John Douard, Note, *The Intrinsically Coercive Nature of Police Interrogation*, 3 RUTGERS RACE & L. REV. 297, 301 (2001).

⁵⁹ See *Dickerson*, 530 U.S. at 433–34 (explaining that federal courts also apply the due process standard when assessing the voluntariness of a confession). Although the Court in *Malloy v. Hogan* concluded that the Fifth Amendment privilege against self-incrimination applied to the states, this incorporation process tended to work backwards. See DRESSLER, *supra* note 2, § 23.01[B][3] (citing *Malloy v. Hogan*, 378 U.S. 1 (1964)). Thus, the federal courts began to adopt the due process standard followed by the states. *Id.*

⁶⁰ See DRESSLER, *supra* note 2, § 23.03[A] (declaring that the bright-line rule established by *Bram* has not prevailed).

⁶¹ Brennan, *supra* note 42, at 256.

⁶² Although “[t]he Due Process Clause of the Fourteenth Amendment effectively excluded confessions extracted with physical force . . . it was less effective at excluding confessions obtained by psychologically coercive methods.” *Id.*

⁶³ See DRESSLER, *supra* note 2, § 23.03.

⁶⁴ 322 U.S. 143 (1944).

trial.⁶⁵

In order to determine whether a confession is psychologically coerced and therefore inadmissible at trial, the Court developed the “totality of the circumstances” test.⁶⁶ Originally, a confession was considered psychologically coerced if obtained by “improper police methods.”⁶⁷ Lower courts, however, struggled to determine what constituted “improper police methods.”⁶⁸ The Supreme Court, in response, refined the inquiry to focus on “whether a defendant’s will was overborne.”⁶⁹ In order to assess whether an interrogator “overbore the will” of the suspect, courts examined the circumstances surrounding the confession.⁷⁰ This “totality of the circumstances” test “required trial judges to examine both the conduct of the police and its impact on the accused.”⁷¹

⁶⁵ See *id.* at 154–55, 154 n.9 (recognizing that Supreme Court case law holds that “a coerced or compelled confession cannot be used to convict a defendant in any state or federal court”); see also Michael J. Zydney Mannheimer, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57, 64 (2002) (explaining that the Court “extended” the *Brown* rule to confessions “extracted through psychological rather than physical coercion”). The “focus” of the Supreme Court “shifted in later cases to determining whether psychological coercion occurred.” *Id.* at 65. “[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.” *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

⁶⁶ *Driver*, *supra* note 36, at 43 (explaining that the “totality of the circumstances” test required courts to assess both physical and psychological coercion).

⁶⁷ *Brennan*, *supra* note 42, at 257 (citation omitted); cf. *Ashcraft*, 322 U.S. at 154 (describing the coercive police conduct at issue and calling it “irreconcilable with the possession of mental freedom”).

⁶⁸ *Brennan*, *supra* note 42, at 257 (citation omitted).

⁶⁹ *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)).

⁷⁰ *Id.* (citation omitted).

⁷¹ *Weisselberg*, *supra* note 56, at 114. Under the totality of the circumstances test, courts were to consider

whether the suspect was afforded adequate sleep and food, whether the suspect was kept isolated from friends, family, and legal counsel, whether the suspect was advised of the right to remain silent and to have an attorney, whether a request for counsel was denied, whether the suspect was kept in foreign surroundings, whether the suspect was taken before a magistrate, whether the circumstances were imbued with the potential for mob violence or other extrajudicial punishments, any threats made of legal action involving members of the suspect’s family, any humiliating treatment of the suspect at the hands of the police, and whether more sophisticated psychological methods were employed. The Court also took into account the idiosyncratic characteristics of the suspect himself, such as his educational, intelligence, and socio-economic levels, his age, his general physical and psychological state, including whether he was under the

The “totality of the circumstances” standard proved to be extremely subjective,⁷² “unpredictable,”⁷³ and “burdensome.”⁷⁴ As a result, this test provided the police and the courts with “little guidance as to what conduct [was] constitutionally permissible in questioning suspects.”⁷⁵ Because of the general lack of guidance offered by this “totality of the circumstances” approach,⁷⁶ police continued to employ psychologically coercive interrogation techniques.⁷⁷

C. *The Miranda Court Replaced the “Totality of the Circumstances” Test with a Bright-Line Rule*

Because the “totality of the circumstances” test did not

influence of drugs or alcohol, his prior experience with the criminal justice system, and his race.

Mannheimer, *supra* note 65, at 65–67 (footnotes omitted).

⁷² See Brennan, *supra* note 42, at 258 (“[T]he test is fact specific and relies heavily on the discretion of judges.”); Weisselberg, *supra* note 56, at 114 (stating that the “value-laden” nature of the test results in “imprecision”); Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2010 (1998) (positing that “the question of whether an interrogation practice violates civilized standards of decency depends on normative judgments relating to the legitimacy of particular police practices”).

⁷³ See Brennan, *supra* note 42, at 257–58 (describing two cases with similar facts that were decided within one year of each other yet which resulted in opposite results); Mannheimer, *supra* note 65, at 70 (“[T]he determination depended entirely on a confluence of factors that might or might not later convince a court that the confession was coerced.”); Penney, *supra* note 41, at 361 (explaining that “[t]he case-by-case balancing approach offered little guidance to lower courts and law enforcement officials”); Weisselberg, *supra* note 56, at 114 (stating that “[u]nhelpful declarations . . . riddled the Court’s opinions”).

⁷⁴ See Brennan, *supra* note 42, at 258 (“Due to the court’s discretion and the fact-specific nature of the ‘totality’ test, it required extensive litigation at both the trial and the appellate levels.”). The Court only heard a very limited number of confession cases each year due to its workload. See Penney, *supra* note 41, at 361.

⁷⁵ DeFilippo, *supra* note 2, at 689; see also Marcus, *supra* note 6, at 100 (explaining that the totality of the circumstances standard does not provide clear rules for courts to determine whether a confession is psychologically coerced); White, *supra* note 72, at 2010 (declaring that the totality of the circumstances test “does not provide a clear guideline . . . [for] assessing whether a police practice unduly impairs a suspect’s freedom of choice”).

⁷⁶ See DRESSLER, *supra* note 2, § 23.03 (“[T]he totality-of-the-circumstances test makes ‘everything relevant but nothing determinative.’”) (quoting Joseph D. Grano, *Miranda v. Arizona and the Legal Mind: Formalism’s Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 243 (1986)).

⁷⁷ See DeFilippo, *supra* note 2, at 689 (asserting that lack of guidance under the due process standard increases the likelihood that police will employ psychologically coercive interrogation techniques).

adequately protect suspects,⁷⁸ the Supreme Court replaced this test with a clear “bright-line” rule.⁷⁹ In *Miranda v. Arizona*,⁸⁰ the Court explained that the “totality of the circumstances” test was an unnecessary inquiry into the voluntariness and resulting admissibility of a confession because “compulsion *inheres* in custodial interrogation to such an extent that *any* confession, in *any* case of custodial interrogation, is compelled.”⁸¹ Therefore, the Court concluded that unless procedural safeguards were established, any confession obtained during a custodial interrogation would necessarily result in unconstitutional compulsion.⁸² Consequently, the Court implemented a bright-line “warning and waiver system” designed to protect suspects.⁸³

Miranda requires the police to warn an in-custody suspect that she has the right to remain silent and the right to the assistance of counsel during the interrogation.⁸⁴ Furthermore,

⁷⁸ See Penney, *supra* note 41, at 362 (explaining that the totality of the circumstances test often forced courts to confront “conflicts in testimony between police and defendants,” the outcome of which was almost invariably “resolved in the police’s favor”); *supra* notes 72–77 and accompanying text.

⁷⁹ See Brennan, *supra* note 42, at 259 (observing that the *Miranda* Court sought to “simplify confession law”); DRESSLER, *supra* note 2, § 24.02 (“[B]y the early 1960s the Court had become thoroughly dissatisfied with the imprecise ‘voluntariness’ test Based upon thirty years of struggle with the doctrine . . . the Court concluded that the test resulted in ‘intolerable uncertainty,’ and that a bright-line rule was needed.”).

⁸⁰ 384 U.S. 436 (1966).

⁸¹ Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 735 (1987); see also *Miranda*, 384 U.S. at 455 (declaring that “the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals”); Mannheimer, *supra* note 65, at 70 (explaining that the *Miranda* Court concluded that an assessment of the circumstances surrounding an interrogation is unnecessary because all custodial interrogations are inherently coercive); *infra* note 82 (pointing out that the *Miranda* Court concluded that compulsion is inherently a part of all custodial interrogations).

⁸² *Miranda*, 384 U.S. at 467 (“[W]ithout proper safeguards[,] the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”).

⁸³ Penney, *supra* note 41, at 366.

⁸⁴ The *Miranda* Court required the following procedures:

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking

any response to police questioning is inadmissible unless the police obtain a knowing, intelligent, and voluntary waiver of those rights.⁸⁵ This bright-line warning and waiver requirement provided the police with clear rules that effectively limited their ability to coerce a suspect into a confession.⁸⁶ Additionally, the *Miranda* doctrine was easier for courts to apply because it effectively eliminated the case-by-case inquiry that was required by the “totality of the circumstances” test.⁸⁷ Consequently, courts were able to reach consistent results that served to regulate police interrogation practices.⁸⁸ Overall, the bright-line *Miranda* rule protected suspects because it informed them of their rights during an interrogation, provided police with a clear standard of conduct to follow, and facilitated judicial review.⁸⁹

D. The Post-Miranda Exception Cases Have Undercut Miranda's Bright-Line Rule

Although *Miranda* provided a “concrete” bright-line rule for

there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

384 U.S. at 444–45.

⁸⁵ *Id.* at 444.

⁸⁶ See DeFilippo, *supra* note 2, at 689 (indicating that this bright-line rule “offers police a clear standard of conduct, which, if followed, will predictably result in the admission of a suspect’s confession into evidence as part of the prosecution’s case in chief”); Penney, *supra* note 41, at 366 (stating that the *Miranda* Court set out a bright-line rule for police to follow). If the police fail to comply with these procedures, regardless of whether a suspect is already aware of her rights, a strong exclusionary rule will apply: “[N]o evidence obtained as a result of [the] interrogation can be used . . .” *Miranda*, 384 U.S. at 479.

⁸⁷ See DeFilippo, *supra* note 2, at 689–90; Penney, *supra* note 41, at 366 (explaining that “[b]y setting out a bright line procedure for the police to follow, the *Miranda* Court also hoped to facilitate judicial review and deter abusive practices”).

⁸⁸ See DeFilippo, *supra* note 2, at 689–90 (explaining that courts can reach consistent decisions because the bright-line rule dictates that “if the *Miranda* warnings were given to a suspect, and the suspect confessed, then the confession is admissible”); Benjamin D. Cunningham, Comment, *A Deep Breath Before the Plunge: Undoing Miranda’s Failure Before It’s Too Late*, 55 MERCER L. REV. 1375, 1379 (2004) (explaining that unless the bright-line *Miranda* rule is followed, courts must bar the government from introducing, “in its case-in-chief, statements of a defendant obtained from a custodial interrogation”).

⁸⁹ See *supra* notes 84–88 and accompanying text.

police officers and courts to follow,⁹⁰ the post-*Miranda* cases have substantially undercut *Miranda*'s warning/waiver requirements by carving out exceptions.⁹¹ In post-*Miranda* decisions, the Supreme Court decided that the *Miranda* warnings were not constitutionally required,⁹² and therefore, the Court concluded that *Miranda*'s "merely prophylactic procedural rules"⁹³ could be overridden in certain situations.⁹⁴ Consequently, in an effort to aid law enforcement, the Supreme Court established a number of exceptions to *Miranda*'s seemingly bright-line standard.⁹⁵

The "impeachment exception" to *Miranda* was established in *Harris v. New York*.⁹⁶ As a result of *Harris*, prosecutors can introduce statements obtained in violation of *Miranda* to impeach the credibility of a defendant if she should take the stand.⁹⁷ The Court expanded this holding in *Oregon v. Hass*.⁹⁸ In *Hass*, after the defendant was given his *Miranda* rights, he indicated that he wished to speak to an attorney; however, the officer continued interrogating the suspect despite this request.⁹⁹ The *Hass* Court held that the officer could still testify regarding

⁹⁰ See Marcus, *supra* note 6, at 141 (quoting *Miranda*, 384 U.S. at 441–42).

⁹¹ See Cunningham, *supra* note 88, at 1387 (stating that "the *Miranda* decision was substantially undercut by gaping exceptions"); DeFilippo, *supra* note 2, at 639; Leo & White, *supra* note 6, at 409.

⁹² See Cunningham, *supra* note 88, at 1387; Donald Dripps, *Is the Miranda Caselaw Really Inconsistent? A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT. 19, 20 (2000).

⁹³ DeFilippo, *supra* note 2, at 639; see also Cunningham, *supra* note 88, at 1387; Dripps, *supra* note 92, at 20.

⁹⁴ See Cunningham, *supra* note 88, at 1387 (explaining that by interpreting the *Miranda* warnings as a "prophylactic" rule rather than a constitutional requirement, the Court was able to override the warnings in certain situations); Rosenberg & Rosenberg, *supra* note 2, at 82 (stating that "the Justices have diluted *Miranda* by denying its constitutional base"); Weisselberg, *supra* note 56, at 126 (declaring that the "original vision of *Miranda* has been lost" because "the Court has separated the warnings and waiver requirement from its constitutional underpinning").

⁹⁵ See Marcus, *supra* note 6, at 143 (stating that recent decisions have attempted to make the *Miranda* bright-line rule "less rigid" in an effort to aid law enforcement).

⁹⁶ 401 U.S. 222, 226 (1971) (holding that the defendant's credibility "was appropriately impeached by the use of his [admissible] earlier conflicting statements").

⁹⁷ Cunningham, *supra* note 88, at 1388 (citing *Harris*, 401 U.S. at 226).

⁹⁸ 420 U.S. 714, 723–24 (1975) (reversing the lower court ruling that an officer's testimony for impeachment purposes was inadmissible on constitutional grounds because the officer did not acknowledge the suspect's request for an attorney); see also Cunningham, *supra* note 88, at 1388; Weisselberg, *supra* note 56, at 127.

⁹⁹ See *Hass*, 420 U.S. at 714–18; see also Cunningham, *supra* note 88, at 1388–89.

the statements that the defendant had made after he requested an attorney for the purpose of the defendant's impeachment.¹⁰⁰

Although the Supreme Court in *Harris* and *Hass* approved the admissibility of statements obtained in violation of *Miranda*, it never explicitly stated that *Miranda* warnings were not constitutionally required.¹⁰¹ The Court, however, in *Michigan v. Tucker*, stated expressly what it had only implied in *Harris* and *Hass*.¹⁰² As a result of *Tucker*, evidence and information acquired as the "fruit" of a *Miranda* violation can still be used against a defendant at trial.¹⁰³ The *Tucker* Court reasoned that evidence or information obtained through a *Miranda* violation does not need to be suppressed because the *Miranda* warnings are merely "prophylactic" procedural rules that are not constitutionally required.¹⁰⁴

Future decisions relied upon the *Tucker* Court's conclusion that *Miranda* rights are "prophylactic."¹⁰⁵ In *New York v. Quarles*,¹⁰⁶ the characterization of *Miranda* rights as a non-constitutional "prophylactic" rule permitted the Court to fashion a "public safety" exception to *Miranda*'s warning requirement.¹⁰⁷ The *Quarles* Court held that police officers are not required to recite the *Miranda* warnings when questioning a suspect in connection with a reasonable public safety concern.¹⁰⁸ Additionally, in *Oregon v. Elstad*, the Court relied on *Tucker*'s characterization of the *Miranda* warnings as "prophylactic."¹⁰⁹ In *Elstad*, the Court held that if an initial confession is obtained

¹⁰⁰ See *Hass*, 420 U.S. at 723–24; see also Cunningham, *supra* note 88, at 1389 (citing *Hass*, 420 U.S. at 722).

¹⁰¹ See Cunningham, *supra* note 88, at 1389; Weisselberg, *supra* note 56, at 127.

¹⁰² 417 U.S. 433, 444 (1974) (declaring that "these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected"); see also Cunningham, *supra* note 88, at 1389; Weisselberg, *supra* note 56, at 128.

¹⁰³ See Weisselberg, *supra* note 56, at 128; see also *Tucker*, 417 U.S. at 450–51.

¹⁰⁴ See *Tucker*, 417 U.S. at 444–46 (stating that "the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege"); see also Cunningham, *supra* note 88, at 1389–90; Dripps, *supra* note 92, at 38–39; Weisselberg, *supra* note 56, at 128–29.

¹⁰⁵ Cunningham, *supra* note 88, at 1391.

¹⁰⁶ 467 U.S. 649 (1984).

¹⁰⁷ See Weisselberg, *supra* note 56, at 129.

¹⁰⁸ *Id.* (citing *Quarles*, 467 U.S. at 656).

¹⁰⁹ 470 U.S. 298, 305 (1985) (quoting *Tucker*, 417 U.S. at 444); Cunningham, *supra* note 88, at 1393–94.

in violation of *Miranda*, the police officer may then recite the *Miranda* warnings and obtain a second confession that will be admissible at trial so long as the suspect waives her *Miranda* rights.¹¹⁰

Overall, the post-*Miranda* cases have served to undermine *Miranda*'s bright-line rule.¹¹¹ These cases declare that under certain circumstances, even if police violate *Miranda*'s warning and waiver rules, a subsequent confession may still be admissible at trial.¹¹² Consequently, it has become increasingly difficult for lower courts to determine whether or not a particular confession is admissible.¹¹³ Therefore, courts must conduct an "agoniz[ing] case-by-case review process."¹¹⁴ Consequently, because the courts no longer strictly enforce the warning and waiver rules, police often violate *Miranda*.¹¹⁵ As a result, *Miranda* currently does not offer suspects the same level of protection that it originally sought to establish.¹¹⁶

II. POST-MIRANDA INTERROGATION TECHNIQUES

Police departments have developed interrogation techniques that are designed to circumvent *Miranda* while operating within the boundaries of what is legally permissible according to the

¹¹⁰ See *Elstad*, 470 U.S. 298, 317–18.

¹¹¹ See Marcus, *supra* note 6, at 94–95 (stating that as a result of the Supreme Court's post-*Miranda* decisions, "*Miranda* no longer provides a 'bright line rule'"); see also Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH L. REV. 1121, 1162 (2001) (explaining that "*Dickerson v. United States* left *Miranda* standing, but with all of the exceptions and modifications that have been crafted during the last thirty-five years").

¹¹² See *supra* notes 96–110 and accompanying text. Although *Miranda* held that a statement obtained in violation of *Miranda* will not be admissible in the prosecution's case-in-chief, post-*Miranda* cases have held that such a statement may be admitted to impeach the credibility of a defendant should he take the stand. See Leo & White, *supra* note 6, at 409–10. Additionally, the post-*Miranda* cases indicate that evidence acquired as a result of a statement obtained in violation of *Miranda* may also be admissible in the prosecution's case-in-chief. *Id.*

¹¹³ See Rosenberg & Rosenberg, *supra* note 2, at 93.

¹¹⁴ See Marcus, *supra* note 6, at 94, 112 (indicating that it is "unfortunate that so many aspects of *Miranda* have become riddled by exceptions").

¹¹⁵ See Leo & White, *supra* note 6, at 414 (explaining that the "[p]ost-*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"); Rosenberg & Rosenberg, *supra* note 2, at 93 (stating that, as a result of the post-*Miranda* decisions, police are now encouraged to violate *Miranda* in certain instances).

¹¹⁶ See *supra* notes 111–15 and accompanying text.

post-*Miranda* exception cases.¹¹⁷ The post-*Miranda* exception cases have concluded that, in certain situations, a confession obtained in violation of *Miranda*'s warning and waiver rules will still be admissible at trial.¹¹⁸ Nowadays, as a result of the post-*Miranda* decisions, police have found ways to obtain admissible confessions while employing a substantial range of interrogation techniques designed to circumvent the protections provided by *Miranda*.¹¹⁹ Police officers are taught, through training manuals and courses, how to convince suspects to waive their *Miranda* rights and confess.¹²⁰

A. Overview of Interrogation Techniques Designed To Circumvent *Miranda*

The many different interrogation techniques that police commonly employ can be classified within three major categories.¹²¹ First, police try to avoid *Miranda*.¹²² Since police are only required to recite *Miranda* warnings when a suspect is in legal custody, police often avoid *Miranda* by "redefin[ing] the circumstances of questioning so that the suspect technically is not in custody."¹²³ Second, police try to negotiate *Miranda*.¹²⁴ That is, even in situations where police do issue the *Miranda*

¹¹⁷ See Leo & White, *supra* note 6, at 431–32.

¹¹⁸ See *supra* notes 96–112 and accompanying text.

¹¹⁹ See Leo & White, *supra* note 6, at 407–09, 408 n. 44 (stating that as a result of the exception cases, police began to employ new interrogation techniques designed to avoid *Miranda*); Weisselberg, *supra* 56, at 129–30 (explaining that the post-*Miranda* cases "created an incentive for police to disregard *Miranda*"); see also *supra* notes 96–116.

¹²⁰ DeFilippo, *supra* note 2, at 639; see Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH L. REV. 1000, 1016 (2001) (explaining that although police are required to read the *Miranda* warnings, they have developed techniques to circumvent *Miranda* while adhering to the letter of the law); see also Jan Hoffman, *Police Refine Methods So Potent, Even the Innocent Have Confessed*, N.Y. TIMES, Mar. 30, 1998, at A1 (explaining that the post-*Miranda* exception cases and the interrogation techniques designed to circumvent *Miranda* have made the warnings "an easily slipped latch").

¹²¹ See Leo, *supra* note 120, at 1016; George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: "Embedded" in Our National Culture?*, in 29 CRIME & JUSTICE: A REVIEW OF RESEARCH 203, 249–52 (Michael Tonry ed., 2002).

¹²² Leo, *supra* note 120, at 1017. Perhaps the most fundamental police strategy is to do an end run around *Miranda*'s requirements by taking advantage of the "definitions, exceptions, and ambiguities in the [*Miranda*] doctrine itself, to use *Miranda* to avoid *Miranda*." Thomas & Leo, *supra* note 121, at 249.

¹²³ See Leo, *supra* note 120, at 1017; Thomas & Leo, *supra* note 121, at 249–50.

¹²⁴ Leo, *supra* note 120, at 1018–19; Thomas & Leo, *supra* note 121, at 250–51.

warnings, they are “enormously successful” at controlling the interrogation process and “moving past the *Miranda* moment to elicit signed waivers.”¹²⁵ Third, police try to “question suspects ‘outside *Miranda*.’”¹²⁶ That is, if a suspect does not waive her *Miranda* rights, the interrogator may choose to resume questioning in violation of *Miranda* to elicit information or a statement that can be used for impeachment purposes.¹²⁷

Currently, it appears that *Miranda* “does little, if anything, to protect suspects against abusive interrogation tactics” because the exception cases have effectively destroyed *Miranda*’s bright-line warning and waiver rules.¹²⁸ Although the goal of *Miranda* was to prevent coercive interrogation techniques,¹²⁹ post-*Miranda* decisions have caused an increase in such techniques.¹³⁰ The development of recent police strategies, arising out of the post-*Miranda* cases, illustrates that police are continuing to use “the same psychological methods of persuasion, manipulation,

¹²⁵ Leo, *supra* note 120, at 1018; Thomas & Leo, *supra* note 121, at 250. In order to obtain a waiver from a suspect, interrogators try to “minimiz[e], downplay[, or deemphasiz[e]” the meaning of the *Miranda* warnings. Thomas & Leo, *supra* note 121, at 250. Police often accomplish this by delivering the *Miranda* warnings in a manner that appears to be neutral. See Leo & White, *supra* note 6, at 432. Additionally, they may try to deliver the warnings in a way that conceals their adversarial role. See *id.* Furthermore, some police officers deliver the warnings in a manner that leads the suspect to believe that waiving his rights will be beneficial. See *id.*

¹²⁶ See Leo, *supra* note 120, at 1020; Thomas & Leo, *supra* note 121, at 251–52; Weisselberg, *supra* note 56, at 132 (explaining that proponents of this technique encourage police officers to violate *Miranda* because although a statement obtained in violation of *Miranda* cannot be used in the prosecution’s case-in-chief, it can still be used to serve other functions).

¹²⁷ Leo, *supra* note 120, at 1020; Thomas & Leo, *supra* note 121, at 251–52. As a result of *Harris v. New York*, which established the impeachment exception to *Miranda*, prosecutors can use statements obtained in violation of *Miranda* to impeach a defendant if she should take the stand. See Leo, *supra* note 120, at 1020. Additionally, evidence and information acquired as a result of a *Miranda* violation can still be used against a defendant at trial. *Id.* The post-*Miranda* cases provide police officers with the incentive to question “outside *Miranda*.” See *id.* This practice has become more widely used over the past ten years, especially in California. *Id.*; see also Weisselberg, *supra* note 56, at 133–36 (illustrating that a California District Attorneys Association bulletin and a California Department of Justice issued training manual and videotape all promote the use of the questioning “outside *Miranda*” interrogation technique).

¹²⁸ See Leo, *supra* note 120, at 1016–17; see also *supra* notes 111–115 and accompanying text.

¹²⁹ Leo, *supra* note 120, at 1021.

¹³⁰ *Id.* at 1021–22. Police have learned to “work *Miranda*’ to their advantage” through the use of strategic psychological interrogation techniques. *Id.* at 1016.

and deception” that were criticized in *Miranda*.¹³¹

B. The Question-First Interrogation Technique

The “question-first” tactic is a new interrogation strategy that can be classified as a type of “interrogating outside *Miranda*.”¹³² This technique has “enabled law enforcement officers formally to satisfy *Miranda*, while escaping its procedural inconvenience.”¹³³ The “question-first” tactic involves a two-step interrogation consisting of a “pre-warning” stage and a “post-warning” stage.¹³⁴ During the “pre-warning” stage, the police officer will question the suspect without reading her the *Miranda* warnings;¹³⁵ however, any confession obtained at this stage of the interrogation will not be admissible at trial because the suspect was not informed of her *Miranda* rights.¹³⁶ If the suspect confesses during the “pre-warning” stage, the police officer will continue with the “post-warning” stage of the interrogation.¹³⁷ During the “post-warning” stage, the police officer will read the *Miranda* warnings to the suspect and ask her for a waiver.¹³⁸ Then, if the suspect waives her *Miranda* rights, the police officer will re-question the suspect regarding her “pre-warning” confession.¹³⁹ The Police Law Institute

¹³¹ *Id.* at 1021; see Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 785 (1997) (explaining that despite the *Miranda* Court’s criticism of “deceptive interrogation techniques,” police manuals continue to instruct officers to employ them in order to illicit confessions); see also *supra* notes 121–27 and accompanying text.

¹³² See Jerry Markon, *Police Tactic To Sidestep Miranda Rights Rejected*, WASH. POST, June 29, 2004, at A1, available at <http://www.washingtonpost.com/wp-dyn/articles/A11895-2004Jun28.html> (stating that the two-step process is referred to as “interrogating outside *Miranda*”).

¹³³ *United States v. Kiam*, 343 F. Supp. 2d 398, 403 (E.D. Pa. 2004).

¹³⁴ *Missouri v. Seibert*, 542 U.S. 600, 605–06 (2004) (plurality opinion) (explaining that “Seibert sought to exclude both her prewarning and postwarning statements”).

¹³⁵ *Id.* at 609 (explaining that during the first stage of the strategy, police “withhold” the *Miranda* warnings).

¹³⁶ See *supra* note 84 and accompanying text (explaining that if the *Miranda* warnings are not recited, then a subsequent confession is not admissible).

¹³⁷ See *Seibert*, 542 U.S. at 609–10 (plurality opinion) (indicating that after an officer draws out a confession, he will begin the second stage of the interrogation).

¹³⁸ See *id.* at 610 (explaining that after the suspect confesses, “officers may then read the *Miranda* warnings and ask for a waiver”).

¹³⁹ See *id.* at 606 (stating that Officer Hanrahan testified he was taught to “question first, then give the warnings, and then repeat the question ‘until I get the answer that she’s already provided once”).

explained that because *Miranda*'s warning and waiver requirements are satisfied during this "post-warning" stage of the interrogation, any subsequent statements regarding the suspect's earlier confession will be deemed admissible at trial.¹⁴⁰

III. ASSESSING THE *SEIBERT* COURT'S MULTIFACTOR TEST

The admissibility of "post-warning" statements obtained by the use of this two-step, "question-first" interrogation technique "raises a new challenge to *Miranda*."¹⁴¹ In *Missouri v. Seibert*,¹⁴² the Supreme Court analyzed the "question-first" interrogation technique. The *Seibert* Court held that the petitioner's post-warning confession, obtained by the use of this technique, was inadmissible at trial.¹⁴³

A. *The Seibert Court Devised a Multifactor Test*

The Court explained that "when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'"¹⁴⁴ Therefore, the plurality concluded that whenever a two-step interrogation occurs, the admissibility of the post-warning statements made by the suspect should depend on "whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object" given the specific facts of the case.¹⁴⁵

To determine whether *Miranda* warnings delivered midstream are effective, the Supreme Court devised a multifactor test.¹⁴⁶ Under this multifactor test, the Court

¹⁴⁰ See *id.* at 610 (explaining that "[i]f the arrestees waive their *Miranda* rights, officers will be able to repeat any *subsequent* incriminating statements later in court") (quoting POLICE LAW INST., ILLINOIS POLICE LAW MANUAL 83 (Jan. 2001–Dec. 2003)).

¹⁴¹ *Id.* at 609.

¹⁴² *Id.* at 604. The plurality explained that the "threshold issue" presented by *Seibert* is "whether it would be reasonable to find that" the *Miranda* warnings "could function 'effectively'" when a police officer questions a suspect first and then recites the warnings later, after eliciting a confession from the suspect. *Id.* at 611–12.

¹⁴³ See *id.* at 604.

¹⁴⁴ *Id.* at 613–14 (quoting *Moran v. Burbine*, 475 U.S. 412, 424 (1986)).

¹⁴⁵ See *id.* at 615.

¹⁴⁶ See *id.* (listing a series of relevant factors); see also *United States v. Aguilar*, 384 F.3d 520, 524 (8th Cir. 2004).

examined

the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second [rounds], the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.¹⁴⁷

After applying the multifactor test, the Court determined that the *Miranda* warnings were ineffective in preparing Seibert for the second stage of the interrogation.¹⁴⁸ Therefore, the Court concluded that Seibert's post-warning statements were inadmissible at trial.¹⁴⁹

B. *The Multifactor Test Should Be Discarded*

Seibert's multifactor test is substantially similar to the "totality of the circumstances" test.¹⁵⁰ That is, both tests require trial judges to examine the circumstances surrounding an interrogation in order to determine whether a suspect's confession is admissible at trial.¹⁵¹ The *Miranda* Court concluded that the "totality of the circumstances" test was an unnecessary inquiry into the voluntariness of a confession.¹⁵² Consequently, because the multifactor test is so similar to the "totality of the circumstances" test, it is also unnecessary.

Like the "totality of the circumstances" test, the multifactor test is "extremely subjective, unpredictable, and burdensome."¹⁵³ The multifactor test is subjective because judges may place

¹⁴⁷ *Seibert*, 542 U.S. at 615 (plurality opinion).

¹⁴⁸ *See id.* at 613–14.

¹⁴⁹ *See id.* at 604.

¹⁵⁰ *See supra* notes 71, 147 and accompanying text (listing the factors of both tests).

¹⁵¹ *See supra* note 71 and accompanying text (illustrating that the totality of the circumstances test requires trial judges to examine the conduct of the police and its impact on the suspect); *see also Seibert*, 542 U.S. at 616 (plurality opinion) (showing that the Justices used the multifactor test to examine the conduct of the police and its impact on Seibert in similar ways); *Crawford v. State*, 100 P.3d 440, 449 (Alaska Ct. App. 2004) (stating that "the *Seibert* plurality held that the defendant's post-*Miranda* statements were inadmissible [] objectively viewing the circumstances from the defendant's position").

¹⁵² *See supra* notes 80–81 and accompanying text.

¹⁵³ *Supra* notes 72–74 and accompany text. Because the multifactor test resembles the "totality of the circumstances" test, it will similarly possess the same inadequacies.

different values on any given factor of the test.¹⁵⁴ Consequently, the test is unpredictable because judges can come out differently on the exact same facts.¹⁵⁵ Additionally, the multifactor test is burdensome on judicial resources because it requires an extensive case-by-case review process.¹⁵⁶

Because the multifactor test is soft and “value-laden,” it does not adequately protect suspects who are subjected to two-step interrogations.¹⁵⁷ The multifactor test also does not create a rule requiring that suspects be advised of their rights during a two-step interrogation.¹⁵⁸ Furthermore, the *Seibert* test does not provide police with a clear standard of conduct to follow because it does not establish precise limits.¹⁵⁹ As a result, the police have little incentive to discontinue the use of intentional two-step interrogations.¹⁶⁰ In addition, the multifactor test does not facilitate judicial review because it provides courts with little guidance as to what will make a post-warning statement

¹⁵⁴ In *Medley v. Commonwealth*, 602 S.E.2d 411, 419 (Va. Ct. App. 2004), the majority concluded that the conduct of the suspect indicated that he understood his *Miranda* rights and the fact that he waived them. The dissent, however, argued that the conduct of the police illustrated that they “persisted in repeated efforts to wear down [the suspect’s] resistance and make him change his mind.” *See id.* at 426 (Benton, J., dissenting) (quoting *Mosley v. Michigan*, 423 U.S. 96, 105–06 (1975)).

¹⁵⁵ *See id.* at 420 (majority opinion) (illustrating that the majority denied the motion to suppress Medley’s statements based on its evaluation of the circumstances surrounding the interrogation). *But see id.* at 426 (Benton, J., dissenting) (showing that the dissenting judges would suppress Medley’s statements based on their view of the circumstances surrounding the interrogation).

¹⁵⁶ Because the multifactor test does not provide judges with much guidance as to when a suspect’s confession is inadmissible at trial, it leaves much of the decision making up to the judges themselves. *See supra* notes 153–155 and accompanying text. Consequently, applying the multifactor test to a given situation may be time consuming because it requires an in-depth analysis. *See, e.g., Medley*, 602 S.E.2d at 420, 426 (Benton, J., dissenting) (illustrating that applying the multifactor test requires careful consideration because reasonable judges may weigh factors differently and reach opposite opinions on how a case should be resolved).

¹⁵⁷ *See supra* notes 72, 78 and accompanying text (discussing problems caused by the similar “totality of the circumstances” test).

¹⁵⁸ *See Missouri v. Seibert*, 542 U.S. 600, 613–14 (2004) (plurality opinion) (showing that the multifactor test listed factors for a court to consider but did not create any bright-line rule that serves to inform suspects of their rights).

¹⁵⁹ *See supra* notes 75–76 and accompanying text (discussing similar problems caused by the “totality of the circumstances” test); *see supra* notes 153–54 and accompanying text (illustrating that because the test is subjective and unpredictable by nature, it does not offer any clear rules that must be followed).

¹⁶⁰ *See supra* notes 76–77 and accompanying text (pointing out that police still employed coercive techniques under the “totality of the circumstances” test).

admissible at trial.¹⁶¹ As a result, courts may improperly admit involuntary post-warning confessions.¹⁶² In sum, the multifactor test should be discarded because it does not provide suspects, police officers, or courts with clear rules.¹⁶³

IV. THE MULTIFACTOR TEST SHOULD BE REPLACED WITH A BRIGHT-LINE WARNING RULE

A bright-line warning rule is needed to govern the admissibility of post-warning statements made by suspects. The *Miranda* Court replaced the “totality of the circumstances” test with a bright-line warning rule.¹⁶⁴ Justice Blackman has written: “*Miranda*’s holding has the virtue of informing police . . . with specificity as to what they may do in conducting custodial interrogation[s], and of informing courts under what circumstances statements obtained during such interrogation[s] are not admissible. This gain in specificity . . . benefits the accused”¹⁶⁵ *Miranda* provided both police officers and the courts with clear rules to follow.¹⁶⁶ Similar to *Miranda*, the Court should also replace the multifactor test with a bright-line warning rule that can adequately protect suspects during two-step interrogations.¹⁶⁷

The Court should devise a bright-line rule requiring police

¹⁶¹ See *supra* notes 74–76 and accompanying text (contending that another problem caused by the similar “totality of the circumstances” test was that it did not provide guidance to the courts).

¹⁶² See *supra* note 154 (indicating that judges may differ in opinion when applying the multifactor test).

¹⁶³ See Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the “New” Fifth Amendment and the Old “Voluntariness” Test*, 65 MICH. L. REV. 59, 95 (1966) (explaining that the “totality of the circumstances” test did not provide any bright-line rules concerning acceptable conduct in an interrogation setting); Marcus, *supra* note 6, at 100 (stating that the “totality of the circumstances” test “[wa]s of limited value to the establishment of workable rules for the criminal justice system”); White, *supra* note 72, at 2010 (explaining that the “totality of the circumstances” test “[d]id not provide a clear guideline”).

¹⁶⁴ See *supra* notes 78–79 and accompanying text.

¹⁶⁵ See Marcus, *supra* note 6, at 112 (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)). Furthermore, Justice Brennan has stated: “We recognize here the importance of a workable rule ‘to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.’” Marcus, *supra* note 6, at 112 (quoting *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979)).

¹⁶⁶ See Marcus, *supra* note 6, at 112.

¹⁶⁷ See *supra* notes 78–89 and accompanying text (describing the similar virtues of *Miranda*’s bright-line warning and waiver rules).

during a two-step interrogation to recite an additional warning after reading the *Miranda* rights to the suspect. This supplemental warning should be required in both intentionally and unintentionally employed two-step interrogations because a suspect may not understand her *Miranda* rights regardless of the interrogator's intentions. If police do not follow these procedures, then a post-warning statement should not be admissible at trial.

This additional warning should read as follows:

The statements that you just made will probably not be admissible at trial because you were never informed of your *Miranda* rights prior to questioning. Now that your *Miranda* rights have been read to you, you have been advised that you retain the right to remain silent and the right to counsel when questioning is resumed. Any statements that you now make may be used as evidence against you in court.

Unlike the multifactor test, this bright-line warning requirement will protect suspects subjected to two-step interrogations because it provides suspects, police officers, and courts with clear rules.¹⁶⁸ The additional warning explains to the suspect that she retains the right to remain silent and the right to counsel during the post-warning stage of the interrogation. Furthermore, the warning requirement provides police with precise rules that will limit their ability to coerce a suspect into confessing.¹⁶⁹ This bright-line rule is easy for courts to apply because it dictates that if an officer follows the required procedures, then the post-warning confession is admissible as part of the prosecution's case in chief.¹⁷⁰ Therefore, courts will be able to reach consistent decisions that will serve to regulate the use of two-step interrogation practices by police.¹⁷¹ In sum, the bright-line warning rule will adequately protect suspects subjected to two-step interrogations because it promotes the clarity that the *Miranda* Court originally attempted to establish by informing suspects of their rights, providing police with a clear standard of conduct to follow, and facilitating judicial review.¹⁷²

¹⁶⁸ See *supra* notes 83–89 (finding that the clarity of *Miranda*'s bright-line rule serves to protect suspects).

¹⁶⁹ See *supra* note 86 and accompanying text.

¹⁷⁰ See *supra* notes 84–87 and accompanying text.

¹⁷¹ See *supra* note 88 and accompanying text.

¹⁷² See *supra* note 89 and accompanying text.

CONCLUSION

Nowadays, *Miranda* does not offer suspects the same level of protection that it originally sought to establish because the exception cases have effectively destroyed *Miranda*'s bright-line warning and waiver rules. This Comment has suggested that replacing the Court's multifactor test in *Seibert* with a bright-line supplemental warning rule will serve to reinforce and strengthen the *Miranda* doctrine. The multifactor test created by the Court does not provide a bright-line rule because it is plagued by the same deficiencies as the "totality of the circumstances" test. Because the multifactor test resembles the "totality of the circumstances" test, it similarly does not provide clear rules and therefore is not capable of strengthening *Miranda*.

The bright-line warning rule will adequately protect suspects from two-step interrogation techniques because it strengthens *Miranda*'s own bright-line rule. That is, the additional warning requirement serves to reinforce the *Miranda* warnings by informing suspects of their rights, providing police with a clear standard of conduct to follow, and facilitating judicial review. Consequently, the bright-line warning rule will effectively eliminate coerced confessions because it provides clear guidelines that will help ensure that only truly voluntary confessions will be admitted at trial.

Currently, the *Miranda* doctrine is in critical condition and the *Seibert* Court should have taken a tougher position against two-step interrogations in order to preserve *Miranda*'s protections. Although the bright-line supplemental warning rule only applies in certain situations, it is a step in the right direction toward strengthening *Miranda*. In sum, the Court needs to take a stronger stance against coercive post-*Miranda* interrogation techniques in order to protect suspects' rights.