

THE WRITING ON THE WALL: *MIRANDA*'S "PRIOR
CRIMINAL EXPERIENCE" EXCEPTION

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INTRODUCTION

IN June 2001, police arrested Samuel Patane for violating a restraining order.¹ While Colorado Springs police detectives read him his *Miranda*² rights, Patane, a convicted felon, interrupted them, stating, "I know my rights."³ The police then stopped reading the *Miranda* warnings.⁴ During the ensuing custodial interrogation, while standing handcuffed outside of his house, Patane told the detectives the location of an illegal handgun and gave them permission to enter his house to retrieve it.⁵ After determining that the police did not have probable cause to arrest Patane, the trial court suppressed the statement and weapon; the government subsequently appealed.⁶ The United States Court of Appeals for the Tenth Circuit concluded that probable cause was not lacking and reinstated the case. However, Judge Ebel, writing for the panel, excluded Patane's statement and weapon because the detectives violated his constitutional rights by failing to read the *Miranda* warnings—even though, as Patane professed, he already knew his rights.⁷ The Supreme Court, focusing only on the "fruits" analysis,

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¹ *United States v. Patane*, 542 U.S. 630, 635 (2004).

² *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

³ Joint Appendix at 40, *Patane*, 542 U.S. 630 (No. 02-1183).

⁴ *Patane*, 542 U.S. at 635.

⁵ *Id.*

⁶ See *United States v. Patane*, 304 F.3d 1013, 1014 (10th Cir. 2002).

⁷ *Id.* at 1018–19.

allowed the gun into evidence, but the Court did not decide the underlying issue of whether Patane's statements could be used against him in the prosecution's case-in-chief.⁸

This Note will propose that Samuel Patane's actual knowledge of his rights could have dispositively foreclosed any *Miranda*-based suppression motions. Essentially, this Note's premise will be that the government too quickly conceded that a *Miranda* violation had taken place.⁹ Instead, the government should have argued that Patane knew his rights well enough to survive any *Miranda* challenge. The government would have based this argument on his history as a convicted felon who had been read the *Miranda* warnings in his prior criminal experience. In other words, his prior experience with the criminal justice system could have been a sufficient proxy for knowledge.

This proposed "prior criminal experience" exception to *Miranda* is straightforward and tracks the logic and rationale of the original case. The *Miranda* decision requires that police read a suspect a set of warnings to ensure that the suspect knows his rights and only waives those rights "voluntarily" and "knowingly."¹⁰ The exception, though, would ensure that trial courts did not allow these constitutionally required warnings to give an advantage to criminal suspects where none is needed. Under the new exception, just as today, law enforcement agents would be required to administer *Miranda* warnings to every suspect before custodial interrogation.¹¹ However, should a law enforcement officer negligently fail to give the warnings, use of an incriminating statement against a suspect in court would not be barred under all circumstances. Rather, the

⁸ *Patane*, 542 U.S. at 636-37.

⁹ In the initial evidentiary hearing in the District Court, Suneeta Hazra, the Assistant U.S. Attorney, argued that no *Miranda* violation took place. Joint Appendix at 73-74, *Patane*, 542 U.S. 630 (No. 02-1183). However, in subsequent filings before the District Court's ruling, and then again throughout the appellate process, the government conceded that the police violated the constraints of *Miranda* by not completely reading Patane his rights. See *Patane*, 542 U.S. at 635 n.1; *Patane*, 304 F.3d at 1018; Joint Appendix at 86, *Patane*, 542 U.S. 630 (No. 02-1183); Transcript of Oral Argument at 48, *Patane*, 542 U.S. 630 (No. 02-1183). The Court did not rule on the issue. *Patane*, 542 U.S. at 635 n.1.

¹⁰ *Miranda*, 384 U.S. at 444 (1966).

¹¹ Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444.

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statement might be admissible depending on the suspect's knowledge of his rights gained through prior criminal experience. For those with no prior criminal record, the statements would be excluded because of the *Miranda* violation. For those with a prior criminal record, the new exception would impose upon the trial court the obligation to determine if the suspect knew his rights—that is, to determine if the “knowledge” prong of *Miranda*'s two-part test was met.

Essentially, the trial court would determine if a suspect was Mirandized in his earlier experience and, if so, would employ a totality of the circumstances test to determine whether the suspect knew and understood his rights at the time of his most recent statement to police. Compulsion still would be presumed in the absence of *Miranda* warnings, so the burden would fall on the prosecution to show that the defendant had the constitutionally required knowledge—not upon the suspect to prove the negative.¹² If the court found the suspect had knowledge of his rights, a police officer's negligence in failing to Mirandize him would be immaterial, and the court would allow the statement into evidence.¹³ If the court found that the suspect did not have knowledge of his rights, the prong would not be met, and the court would exclude any such evidence because of the constitutional violation.¹⁴ The proposed “prior criminal experience” exception would only apply to the “knowledge” prong; the voluntariness inquiry would remain unchanged.

In a mechanical sense, the dictates of *Miranda* would still largely be observed. The new standards would be used only in a limited subset of cases. The “prior criminal experience” exception would only apply in cases in which: (a) an officer *negligently* fails to apprise a suspect of his *Miranda* rights; (b) the suspect makes an incriminating statement; and (c) the suspect has such prior experience with the criminal justice system that knowledge can be safely

¹² The “prior criminal experience” exception does not contain a burden-shifting test like that delineated in *Batson v. Kentucky*, 476 U.S. 79, 97 (1986). Rather, a totality of the circumstances test is used to better incorporate all attendant circumstances, and to better align the exception with other *Miranda*-based evidentiary hearings.

¹³ An analogy can be made to the situation when an appellate court finds “harmless error” in a trial court ruling or instruction.

¹⁴ That is, unless another recognized exception applies. See *infra* Part III.

assumed. This exception is constitutionally permissible because it does not affront the fundamental notion that law enforcement officers are required to read the *Miranda* warnings to every suspect prior to custodial interrogation. If the police *negligently* fail to read a suspect his rights, however, the exception would provide that any ensuing incriminating statement would not be excluded *automatically*; rather, exclusion would depend on the suspect's prior experience within the criminal justice system. Overall, this variation from traditional *Miranda* caselaw is intended only to operate on the margins, in cases such as *Patane*, to limit the number of guilty defendants who go free. The Constitution requires safeguards for the accused, but it should not handicap society for a police officer's honest mistake.

Samuel Patane's case, though, is merely the first (and most obvious) layer of the argument—he said he knew his *Miranda* rights and, more likely than not, he actually did know those rights. Other less clear situations, however, also would fall under the prior criminal experience exception. The question naturally arises: What threshold level of prior criminal history is enough to impute knowledge? While the new exception theoretically could apply broadly to all who have been arrested in the past, the most likely result of an evidentiary hearing is that the new exception would apply mainly to those suspects who have more experience with the system than just having been arrested.¹⁵ As some courts have noted, a mere brush with the justice system does not necessarily convey to a suspect sufficient knowledge of his *Miranda* rights.¹⁶ The trial courts would look for those suspects who at one time undeniably had knowledge of their right to remain silent and right to counsel, ideally having invoked these rights in their prior criminal experi-

¹⁵ This Note expresses no opinion on whether suspects who are lawyers, jurists, and policemen would be subject to the rules of the new regime.

¹⁶ See *United States v. Anderson*, 929 F.2d 96, 99 (2d Cir. 1991) (“We look first at defendant's background. He had been arrested 12 times previously and on 11 occasions pled guilty to the crime charged. The government believes this experienced criminal background proves his statements were freely given. We disagree. Nothing in the record reveals that on the prior occasions Anderson was given *Miranda* warnings or that he waived his rights, or in fact made any statements to the police. His background suggests familiarity with the criminal justice system generally; it does not intimate any knowledge of the rules regarding the benefits of cooperating with the government in federal court.”).

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ence. Of course, once the regime was recognized, the trial courts and courts of appeals would develop the exact characteristics that suit the best constitutional balance. It would not be an easy task, and line-drawing problems inevitably would result, but the exception is nonetheless constitutionally valid.

Since the Supreme Court failed to take up this pivotal issue in *Patane*¹⁷—the issue of whether Samuel Patane knew his rights well enough to waive them without being read the *Miranda* warnings following his arrest—it undoubtedly will arise again as practitioners and courts struggle to find the boundaries of the now-unquestionably constitutional strictures of *Miranda*.¹⁸ Based on recognized Supreme Court limitations of and exceptions to *Miranda*, the newly-defined exception proposed in this Note would bring about a constitutionally valid, though unexplored, approach that procedurally and substantively affirms *Miranda*'s core dictate: Each suspect must know his rights before he can waive them. This Note's "prior criminal experience" exception is premised on the central fact that *Miranda*'s bright-line rule is no more; rather, case-by-case determinations are the rule, rather than the exception. As this Note will reveal, prior criminal experience can be a valid proxy for the knowledge and intelligence necessary to waive one's Fifth Amendment rights to silence and counsel.

¹⁷ Though the government in *Patane* could have argued differently—and the Court could have decided on the alternative basis—legal commentators have failed to address the issue because, largely, *Patane* fell through the cracks. The fallout from other cases obscured *Patane*. *Missouri v. Seibert*, decided the same day as *Patane*, had a more controversial holding, invalidating incriminating statements after police misconduct. *Missouri v. Seibert*, 542 U.S. 600, 604 (2004). Also, *Blakely v. Washington*, decided four days prior, cast doubt on the federal sentencing guidelines. *Blakely v. Washington*, 542 U.S. 296 (2004). The following Term, the Court confirmed that *Blakely* also sounded the end of the federal sentencing guidelines, a fact which has received wide coverage by the press and legal commentators alike. See *United States v. Booker*, 543 U.S. 220, 227 (2005).

¹⁸ Of course, the full meaning of *Miranda* is by no means certain. See, e.g., *Patane*, 542 U.S. at 645 (Kennedy, J., concurring) ("Unlike the plurality, however, I find it unnecessary to decide whether the detective's failure to give Patane the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself . . ."). Here, Justice Kennedy disagrees with the plurality's sense that the Fifth Amendment is violated only when unwarned statements are introduced at trial—and thus not at the exact time the police fail to read a suspect the *Miranda* warnings—preferring to save the issue for another day. See also Brief for Criminal Justice Legal Foundation as Amicus Curiae Supporting Petitioner at 3–4, *Patane*, 542 U.S. 630 (No. 02-1183).

Part I of this Note will briefly trace the path and rationales of the *Miranda* doctrine since its first delineation in 1966. Part II will chart the Court's numerous subsequent limitations to *Miranda*, which draw the outer contours of when and where the doctrine applies. Part III will map the many exceptions to the regime that have come about over the last four decades. This Part also will include a coherent set of principles that underlie all the Court's exceptions to *Miranda*, paving the way for the "prior criminal experience" exception. Part IV will fully explore the proposed exception, and detail the importance that courts already place on prior criminal experience in the context of criminal procedure. This Part will rebut two circuit cases that—though not directly addressing the issue—casually mentioned and erroneously discarded the bases of the proposed exception. Part V will address a few foreseeable problems in administering the new exception. Finally, this Note will conclude that the exception is constitutional and logistically feasible, and that trial judges must diligently monitor its use.

I. THE STATE OF THE LAW: *MIRANDA V. ARIZONA*
AND ITS PROGENY

A. *Miranda: Mechanics and Rationale*

In *Miranda v. Arizona*, the Warren Court tried to balance a suspect's individual rights and society's interest in solving crimes. The decision set forth the familiar refrain that can be heard in every police show on television. In the Court's words, "[p]rior 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."¹⁹ Further, the Court said that not every suspect was entitled to have his rights recited, but only those suspects undergoing custodial interrogation.²⁰

¹⁹ *Miranda*, 384 U.S. at 444.

²⁰ *Id.* The Court consistently has upheld the custodial interrogation requirement. See, e.g., *Illinois v. Perkins*, 496 U.S. 292, 297 (1990). For the definition of custodial interrogation, see *supra* note 11.

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The Court set forth the standard to ensure that any confession came about both “voluntarily” and “knowingly.”²¹ The main fear of the Justices was that suspects were being brow-beaten into confessing; the opinion sought to prevent governmental coercion.²² Knowledge was necessary to fortify the voluntariness of any waiver, as a suspect cannot validly waive something he does not understand.

The procedural safeguards of *Miranda* are enforced first at the trial court level. The lack of *Miranda* warnings leads to an irrebuttable presumption of compulsion, which overrides the voluntariness requirement of a valid confession.²³ The Court struck this particular balance for several reasons. First, the Court was concerned with the inherent pressures of custodial interrogation.²⁴ Second, the Court sought to deter police conduct that exacerbates the already intense inherent pressures of interrogation.²⁵ Third, the Court wanted a bright-line rule that could easily direct police and trial courts alike.²⁶

1. Pressures of Custodial Interrogation

Suspects are automatically at a disadvantage during custodial interrogation. Under the Court's presumption that custodial interrogations mainly take place at the station house, a suspect is cut off from everything and everyone he knows and presented with one or several heavy-handed police officers accusing him of committing a

²¹ *Miranda*, 384 U.S. at 444. *Miranda* uses the phrase “voluntarily, knowingly, and intelligently.” However, two-pronged *Miranda* inquiries only give effect to the first two terms. Courts fold “intelligently” into “knowingly,” presumably because in many cases it would not be “intelligent,” in the term's popular use, to waive one's rights.

²² See *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (“The sole concern of the Fifth Amendment, on which *Miranda* was based, is governmental coercion.”).

²³ *Oregon v. Elstad*, 470 U.S. 298, 307 (1985). Of course, end-runs around the irrebuttable presumption certainly are possible. See *infra* Part III.

²⁴ *Miranda*, 384 U.S. at 445–58. For a more succinct explanation, see also Marcy Strauss, *Reinterrogation*, 22 *Hastings Const. L.Q.* 359, 375–76 (1995) (discussing the similar rationale behind *Edwards v. Arizona*, 451 U.S. 477 (1981)).

²⁵ *Miranda*, 384 U.S. at 445–58.

²⁶ *Id.* at 441–42. For more on *Miranda*'s rationales, see generally Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 *Yale L.J.* 447 (2002); David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 *Ohio St. L.J.* 805 (1992); Bettie E. Goldman, Note, *Oregon v. Elstad: Boldly Stepping Backwards to Pre-Miranda Days?*, 35 *Cath. U. L. Rev.* 245 (1985).

crime.²⁷ The police have every advantage, the suspect has every disadvantage. In such a situation, the *Miranda* Court feared that a guilty suspect might feel compelled to begin talking, either truthfully condemning himself or attempting to exonerate himself in such a way that he would provide evidence of his guilt. Further, the Court sought to eliminate false confessions caused by a suspect's overwhelming desire to immediately end the interrogation.²⁸ The Court instituted the *Miranda* requirement so that the suspect would know that he did not have to talk and that he could have a lawyer present in case he did want to talk but did not want to risk self-incrimination.²⁹ In theory, this requirement would remove some of the pressures of interrogation and ensure that the suspect did not waive his constitutional rights through his own ignorance.³⁰

2. Police Deterrence

Even with the inherent pressures of custodial interrogation, police have an even larger, albeit illegal, tool: the threat of physical intimidation. The Court found that threats of physical violence, and indeed actual physical violence, sometimes occurred in interrogation rooms, even after the 1936 decision *Brown v. Mississippi* excluded, on due process grounds, incriminating statements (and any evidence whatsoever) resulting from physical coercion.³¹ More so, though, the Court in *Miranda* was concerned with the far more prevalent psychological interrogation techniques used by police. The decision asserted that deception and psychological abuse were at least as compelling as physical coercion.³² The Court wanted to

²⁷ The use of the third-person masculine "he" to characterize suspects throughout this paper is mainly for stylistic convenience. However, it also reflects that the overwhelming majority of all arrested persons are male. See U.S. Dep't of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics – 2002, at 354 (2003).

²⁸ See *Miranda*, 384 U.S. at 455 n.24.

²⁹ *Id.* at 465–66.

³⁰ *Id.*

³¹ *Id.* at 445–46; *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

³² *Miranda*, 384 U.S. at 448. The Court was wary of the police making frightening and untrue allegations and statements, even going so far as to admonish certain police tactics, including "Mutt and Jeff" (the classic "Good Cop / Bad Cop" strategy), the "false friend" tactic, reverse line-ups, and telling a suspect that guilt can be inferred from silence—in short, tactics that are effective in prompting suspects to confess. *Id.* at 452–54.

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circumscribe police interrogation techniques to preserve individual will to resist interrogation.

3. *Bright-Line Rule*

Perhaps the most discussed rationale of *Miranda*, in both law review articles and dissents to Court-created exceptions, is its explicit desire for a bright-line rule.³³ With *Miranda's* prescriptions, the Court sought a bright-line rule that could easily be followed, both by police in the interrogation room and by judges at trial. One commentator has discussed the Court's rationale as a rule of efficiency:

Specific guidelines are particularly useful in the area of interrogation where vague, general guidance may give the police significant leeway to wear down the accused and persuade him to incriminate himself. Moreover, precise and defined rules help inform the courts in determining when statements obtained during police interrogations may be properly suppressed. Judicial resources which would otherwise be expended making difficult assessments concerning the admissibility of confessions are thus conserved.³⁴

The Court understood that its tinkering had substantial implications for the efficacy of police work;³⁵ the bright-line was intended to mitigate some of these consequences by ensuring that police knew *ex ante* what sort of behavior would be acceptable after *Miranda*. The *Miranda* standards created a threshold inquiry that, in theory, would take less time than the previous due process voluntariness test and offer clearer standards for decision.

B. Forty Years of Extrapolation and Equivocation

The decades following *Miranda* saw much academic and jurisprudential debate over *Miranda's* underpinnings. In 2000, the Court finally settled the issue of *Miranda's* permanent position in criminal procedure by declaring it a constitutional rule in

³³ *Id.* at 441–42 (“We granted certiorari . . . to give concrete constitutional guidelines for law enforcement agencies and courts to follow.”).

³⁴ Strauss, *supra* note 24, at 377 (citations omitted).

³⁵ *Miranda*, 384 U.S. at 477–78.

Dickerson v. United States.³⁶ Though *Miranda* has been upheld—indeed, even constitutionalized—its numerous refinements and exceptions have strayed from the original idealistic creation of the Warren Court.

The *Miranda* progeny have been both supportive and destructive of the vision of the original case. Though the last four decades are highlighted by internal conflict over what *Miranda* should mean, the decision's ability to protect the accused has been substantially contracted. While the Court in *Dickerson* found (affirmed is too strong a word) that the *Miranda* rule is grounded in the Constitution, it also upheld the many exceptions it had created when the rule was generally described as prophylactic instead of constitutional.³⁷ Further, over the years, the Court has erratically interpreted *Miranda*. The Court has found that when a defendant invokes the right to counsel, the police have to leave him alone, but it has further held that only a stringently definitive invocation will suffice to invoke the right.³⁸ The Court has held that an invocation of *counsel* would act as a permanent injunction against police interrogation until the attorney arrives, but that an invocation of *silence* would only create a temporary, charge-specific cessation.³⁹ While the Court has confirmed that the individual waiver of self-incrimination rights can only be done voluntarily and knowingly, it has also held that an undercover policeman need not administer *Miranda* warnings to a suspect in prison on pending charges.⁴⁰ And finally, the Court has consistently confirmed that *Miranda* warnings are required for suspects during custodial interrogation,⁴¹ but it has refused to extend the warnings to grand jury witnesses, even though appearing in front of the grand jury is compulsory and the

³⁶ 530 U.S. 428, 444 (2000).

³⁷ *Id.* at 432, 441. See Part III *infra* for a detailed discussion of the exceptions.

³⁸ *Davis v. United States*, 512 U.S. 457, 459 (1994); *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981).

³⁹ *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990); *Arizona v. Roberson*, 486 U.S. 675, 682–83 (1988); *Michigan v. Mosley*, 423 U.S. 96, 103–07 (1975).

⁴⁰ *Illinois v. Perkins*, 496 U.S. 292, 294 (1990); *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

⁴¹ See, e.g., *Perkins*, 496 U.S. at 297 (1990).

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questioning often is *at least as coercive* as modern police interrogation.⁴²

Combined, these cases—both strengthening and detracting from *Miranda*—show the Court's continuing struggle to balance individual rights with effective law enforcement. This internal tension has been the hallmark of the *Miranda* doctrine since its inception. Though, after *Dickerson*, *Miranda* certainly is here to stay, the courts continue to flesh out exactly what *Miranda* means in definition and in scope.

II. *MIRANDA'S* LIMITATIONS

The main point of contention against any proposed refinement of *Miranda* is that the bright-line rule must be preserved. However, the substantial limitations that the Court itself has placed on *Miranda* show that amorphous standards supersede clear rules in a large number of cases. Each limitation is based on the fundamental premise that, in some areas of *Miranda* jurisprudence, it is *impossible* to sustain a bright line; the line, in fact, is quite murky.⁴³ A vague totality of the circumstances test pervades every aspect of *Miranda* jurisprudence, including when and to whom *Miranda* applies. As one Justice noted at the oral arguments for *Patane*, the Supreme Court has dealt with "factual disputes about every single aspect of *Miranda*," taking "between 40 and 50 cases" to define the scope of *Miranda* since the doctrine was announced forty years ago.⁴⁴ The same Justice went on to recognize that the end result of

⁴² Many prosecutors and scholars believe that the grand jury setting is extraordinarily coercive. See Ralph S. Spritzer, Criminal Waiver, Procedural Default, and the Burger Court, 126 U. Pa. L. Rev. 473, 484 (1978); Note, Facilitating Administrative Agency Access to Grand Jury Material, 91 Yale L.J. 1614, 1617–19 (1982); Jocelyn Lupert, Note, The Department of Justice Rule Governing Communications with Represented Persons: Has the Department Defied Ethics?, 46 Syracuse L. Rev. 1119, 1131 (1996). Further, while it is the (unsupervised and unenforceable) policy of the DOJ to advise a suspect in a grand jury setting of his Fifth Amendment rights (per U.S. Dep't of Justice, U.S. Attorneys' Manual 9-11.151 (1997)), there is no constitutional or legal requirement to do so. *Minnesota v. Murphy*, 465 U.S. 420, 431 (1984); *United States v. Washington*, 431 U.S. 181, 187–88 (1977).

⁴³ "[T]he concerns underlying the *Miranda* . . . rule must be accommodated to other objectives of the criminal justice system." *Patane*, 542 U.S. at 644–45 (Kennedy, J., concurring) (internal citations omitted).

⁴⁴ Transcript of Oral Argument at 28, *Patane*, 542 U.S. 630 (No. 02-1183).

much *Miranda* jurisprudence, a “totality of the circumstances” test, “seems to me the fuzziest of all lines.”⁴⁵

As a threshold matter, since *Miranda* rights need only be read prior to custodial interrogation, trial courts need to determine if a suspect’s particular encounter with police resulted in custody. Custody for *Miranda* purposes borrows from Fourth Amendment jurisprudence with respect to the meaning and type of police “seizure.” A person is in custody within the meaning of *Miranda* if he is subjected to the level of restraint associated with a full-blown arrest under the Fourth Amendment. Of course, the definition of arrest is fundamentally fuzzy, depending on an assessment of all attendant facts and circumstances. Caselaw shows constant fact-specific posturing over the definition of custody, including looking to such factors as whether a police officer brandishes his weapon; how many police officers are present; whether the police are wearing their uniforms or civilian clothes; the location of the conversation; whether the police block the suspect’s egress from the location; whether the police use functionally equivalent words to “you are seized”; whether the police use physical force on the suspect; whether the suspect is handcuffed; and even whether the officer speaks in a harsh tone.⁴⁶ No one factor is outcome-determinative, and not all determinations appeal to common sense. For instance, just because a suspect is handcuffed and held at gunpoint does not necessarily mean he is in custody;⁴⁷ this event could qualify as a *Terry* stop in which the officer detains a suspect for a brief amount of time, so brief in fact that custody does not attach.⁴⁸ Another example involves the common-place occurrence of routine traffic stops by police: Since such stops are analogous to *Terry* stops rather than formal custody, police need not give *Miranda* warnings to a detained motorist during questioning pursuant to the stop.⁴⁹ In some situations, however, routine traffic stops do lead to custody

⁴⁵ *Id.*

⁴⁶ See *United States v. Drayton*, 536 U.S. 194, 203–06 (2002) (discussing whether a suspect is seized under the Fourth Amendment).

⁴⁷ See, e.g., *Houston v. Clark County Sheriff Deputy John Does 1–5*, 174 F.3d 809, 814–15 (6th Cir. 1999).

⁴⁸ See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

⁴⁹ *Berkemer v. McCarty*, 468 U.S. 420, 439–40 (1984).

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for *Miranda* purposes.⁵⁰ The Court itself has noted its inability to create a bright-line rule for these situations:

We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop. . . . [T]here will be endless variations in the facts and circumstances, so much variation that *it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers* to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.⁵¹

To put it mildly, the lines separating a voluntary interview from a conversation during a *Terry* stop from a custodial interrogation are not always clear. Trial courts must determine this threshold issue every day based on case-specific factors.

Custody is by no means the only area of *Miranda* jurisprudence that requires the trial court to make an individualized finding. As previously discussed, waiver analysis proceeds under two prongs, one to test whether the waiver was made “voluntarily,” the other to test whether it was made “knowingly” and “intelligently.”⁵² However, the voluntariness of the waiver is tested essentially by the *exact same* totality of the circumstances inquiry as was the voluntariness of the actual confession itself under pre-*Miranda* case-law.⁵³ Additionally, the government need only prove the voluntariness of the waiver by a preponderance of the evidence; this is the same standard used to determine the voluntariness of confessions themselves.⁵⁴ Furthermore, the trial court is afforded great leeway in its individual determination on the voluntariness inquiry: appellate courts may overturn a trial court only upon a finding of “clear error.”⁵⁵ Thus, as shown by the continuation of the standards-based, case-specific inquiries prevalent before *Miranda*, the Court

⁵⁰ Id. at 440–41. In *Berkemer*, the detained motorist ultimately was arrested and taken into formal custody. Id. at 423–24.

⁵¹ *Florida v. Royer*, 460 U.S. 491, 506–07 (1983) (emphasis added).

⁵² *Miranda*, 384 U.S. at 444.

⁵³ See *United States v. Redditt*, 87 F. App'x 440, 443, 445 (6th Cir. 2003).

⁵⁴ *Colorado v. Connelly*, 479 U.S. 157, 169 (1986).

⁵⁵ See, e.g., *United States v. Garibay*, 143 F.3d 534, 536 (9th Cir. 1998).

failed to achieve its stated goal of creating a bright-line rule by requiring police to obtain a waiver from the suspect.

Even if voluntariness is not in doubt, a defendant sometimes can raise the issue of competency to attack an assertion that he was mentally capable of waiving any rights. Competency determinations are not made according to hard and fast rules. In fact, "there is no absolute cut off in terms of age, intellectual, or psychological functioning that automatically renders a person incompetent to waive his or her rights."⁵⁶ The determination again is left to the purview of the individual trial courts.

Thus far, the illustrative examples of *Miranda*'s limitations have focused on issues either prior to questioning or when a suspect has at some time waived his rights. However, another individually tailored determination must be made when a suspect in some way refers to his desire to invoke his rights but does not do so with sufficient clarity. The Court has held that, for a suspect to invoke his *Miranda* rights, he must do so *unequivocally*.⁵⁷ Trial courts are left to determine what a "reasonable officer in light of the circumstances would have understood" the suspect's statement to mean.⁵⁸ Thus, "Maybe I should talk to a lawyer" is an equivocal statement.⁵⁹ Ambiguity also pervades the statements "Why should I not get an attorney?" and "I can't afford a lawyer but is there any way I can get one?" and "What time will I see a lawyer?"⁶⁰ It seems that suspects must "invoke their rights with unnatural directness and clarity."⁶¹ Although the trial court must determine whether the invocation was equivocal, the Supreme Court has not provided clear guidelines for how to do so. Thus, by promulgating a vague standard, the Court has created a ripe opportunity for intra-circuit variation, further muddying the supposed bright-line created by

⁵⁶ I. Bruce Frumkin, Competency to Waive Miranda Rights: Clinical and Legal Issues, 24 Mental & Physical Disability L. Rep. 326, 326 (2000).

⁵⁷ *Davis v. United States*, 512 U.S. 452, 459 (1994).

⁵⁸ *Id.*

⁵⁹ *Id.* at 462.

⁶⁰ See *Soffar v. Cockrell*, 300 F.3d 588, 595 (5th Cir. 2002).

⁶¹ Peter M. Tiersma & Lawrence M. Solan, Cops and Robbers: Selective Literalism in American Criminal Law, 38 Law & Soc'y Rev. 229, 255 (2004).

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Miranda.⁶² Furthermore, while the Court has strictly parsed invocation language, it will find waiver of a suspect's rights based not just on expressly spoken words but on inference as well.⁶³ The Court basically allows lower courts to find waiver in every circumstance in which there is no *absolutely clear* invocation. In so doing, the Court minimizes the actual impact of *Miranda* while paying lip service to its continuing importance.

Each of these limitations, separately or together, requires the trial courts to invest their time in the very individualized facts of each case, either by requiring briefs from parties or by holding evidentiary hearings. This very important procedural obligation lurks in the background of each of the crafted limitations on the scope of *Miranda*. In showing *Miranda's* many limitations, this Note not only argues that *Miranda* was more thunder than lightning but also seeks to demonstrate that finding the edge of each of these limitations requires extensive work by trial and appellate courts throughout the country. The "bright line" *Miranda* attempted to create certainly is not as clear in real-world practice as it was in the Warren Court's idealistic theory.

III. *MIRANDA'S* EXCEPTIONS

The reach of *Miranda* is greatly circumscribed by the limitations the Supreme Court has placed on its applicability. However, *Miranda* certainly is still "embedded in routine police practice to the point where the warnings have become part of our national culture."⁶⁴ One public misconception of the current *Miranda* regime is that a failure to read a suspect the *Miranda* warnings makes any incriminating statements inadmissible at trial. In reality, due to a patchwork of exceptions, many unwarned statements are introduced at trial every year. Broadly, the Court has generated four lines of exceptions to *Miranda*: the "public safety" exception, the impeachment exception, the physical "fruits" exception, and the

⁶² For a lengthy discussion on pre-*Davis* caselaw and post-*Davis* problems, see Susan L. Ross, Comment, *Davis v. United States: The Ambiguous Request for Counsel*, 30 New Eng. L. Rev. 941 (1996).

⁶³ I. Bruce Frumkin & Alfredo Garcia, Psychological Evaluations and the Competency to Waive Miranda Rights, *Champion*, Nov. 2003, at 12, 13; see also *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

⁶⁴ *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

testimonial “fruits” exception.⁶⁵ Yet even with these exceptions, current caselaw is over-inclusive such that suspects like Samuel Patane, who already know their rights, nonetheless escape liability for making incriminating statements outside *Miranda*.⁶⁶ An exploration of current caselaw identifies a way to excise this over-inclusiveness.

Even when *Miranda* unquestionably applies, the Court has carved out certain exceptions for situations in which, in its view, society will benefit by sacrificing the patently guilty individual’s constitutional rights. Put another way, in some instances societal interests trump individual rights. Notwithstanding *Dickerson v. United States*, it remains clear that while *Miranda*’s safeguards are a universal requirement, the scope of exclusion is malleable to say the least. Indeed, as Justice Kennedy noted in concurrence in *Patane*, “the concerns underlying the *Miranda* . . . rule must be accommodated to other objectives of the criminal justice system.”⁶⁷ What, then, are the “other objectives” alluded to by Justice Kennedy? A review of the *Miranda* progeny shows that the goal of individualized protection is subsumed when three key factors are found: (1) when public safety is at issue; (2) when the truth-finding process is furthered; and (3) when the police do not intentionally abrogate the purpose of *Miranda*. Exceptions to *Miranda* become possible if the Court believes a sufficient quantum of aggregate support from these three broad considerations warrants overriding

⁶⁵ Each of these exceptions either was expressly defined or grew from roots planted in the pre-*Dickerson* era, when the Court termed *Miranda* a prophylactic rule. However, *Dickerson* impliedly preserved each of these exceptions. *Id.* at 441, 443–44. Furthermore, the Court held:

These decisions [making exceptions to and broadening coverage under *Miranda*] illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.

Id. at 441. Some commentators expressly say that *Dickerson* preserved *Miranda*’s exceptions. See, e.g., Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 *Mich. L. Rev.* 1121, 1162 (2001).

⁶⁶ While the fact that *Miranda* originally was a rule may indicate that the Warren Court wanted it to be over-inclusive, the doctrinal contractions of the Burger and Rehnquist Courts have tried, if anything, to employ more standards in the inquiry and to remove as much over-inclusiveness as possible.

⁶⁷ *Patane*, 542 U.S. at 644–55 (Kennedy, J., concurring).

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Miranda's specific goals. While this Note does not want to confuse correlation with causation, the Court undoubtedly has recognized *Miranda* exceptions only when some or all of the three broad policy considerations are sufficiently addressed.⁶⁸

A. When Public Safety Is At Issue

In *New York v. Quarles*, the Court established an immediate public necessity exception to *Miranda*.⁶⁹ In that case, the police chased and caught a suspect who had been wielding a gun; when he was apprehended, he had only an empty holster.⁷⁰ The police immediately—and purportedly only thinking of the safety of themselves and others—asked the obliging suspect the location of his gun, but only after retrieving the gun did the police formally arrest and *Mirandize* the suspect.⁷¹ The Court held the initial statement and the gun admissible, absent *Miranda* warnings, even though the suspect was being questioned in a custodial setting that otherwise would have required warnings.⁷² The Court found a “public safety exception” to *Miranda* in cases of immediate necessity involving present danger to the police and the public.⁷³ Again, the Court was concerned with balancing societal interests against those of a suspect in custody:

Here, had *Miranda* warnings deterred Quarles from responding to [police questions] about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. [The police officer] needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.⁷⁴

⁶⁸ Each of the three factors appears to be necessary, at least implicitly, but they are not always sufficient if a proposed exception is far enough along the slippery slope. For example, implicit in the truth-finding exceptions is a public safety rationale, that it is better to have a patently guilty defendant behind bars.

⁶⁹ *New York v. Quarles*, 467 U.S. 649, 657–58 (1984).

⁷⁰ *Id.* at 652.

⁷¹ *Id.*

⁷² *Id.* at 659.

⁷³ *Id.* at 657–58.

⁷⁴ *Id.* at 657.

Essentially, the Court created a wholesale modification of *Miranda* not contemplated in the original ruling. The adjustment was based on a perceived need of the police to help remove an immediate threat from the public and from themselves. In such a situation, the Court found that societal needs weigh more heavily than individual rights.

In crafting the public safety exception, the Court implicitly minimized its *Miranda* admonition that warnings are required “unless other fully effective means are devised.”⁷⁵ Admittedly, the exception envisioned by the Court is narrow, and only a moderate number of cases each year are based on it.⁷⁶ However, even within these relatively few cases, the fault in the *Miranda* bedrock has been exploited by numerous state courts and lower federal courts. The Tenth Circuit expanded the exception to include a situation in which a suspect and all the occupants of a house had been restrained (presumably eliminating any safety issues), but a gun for which the police were searching had not been found.⁷⁷ At least three state supreme courts base a “rescue doctrine” in the *Quarles* exception, expanding the exception beyond questions related to possible danger to the police and public from guns (such as “where is the gun?”) to questions dealing with individual-specific safety (such as “where is your wife?”, when police believe a suspect has kidnapped someone and left her in harm’s way).⁷⁸ One state intermediate court even used the *Quarles* exception to justify the re-questioning of a suspect who had already invoked his *Miranda*

⁷⁵ *Miranda*, 384 U.S. at 444.

⁷⁶ An initial Westlaw search conducted by the author shows only forty-one federal and state cases discussing the exception in 2004, of which only twenty-five base their conclusions on *Quarles*. Of these twenty-five, only one case *excludes* evidence over a government argument that the *Quarles* exception applies. See *United States v. Memoli*, 333 F. Supp. 2d 233, 236–37 (S.D.N.Y. 2004) (Rakoff, J.).

⁷⁷ *United States v. Phillips*, 94 F. App’x 796, 801 n.2 (10th Cir. 2004). The *Phillips* court acknowledged that *Quarles* was “factually distinguishable” but nonetheless admitted the suspect’s statement gained outside *Miranda* regarding the location of a gun in the house. *Id.* Even though all residents undeniably had been secured, the court asserted that the gun-drug nexus justified the expanded *Quarles* exception because securing the residents “did not completely eliminate the risk that a weapon hidden somewhere could pose a danger to one of them or to the police.” *Id.* at 801 n.2.

⁷⁸ See *People v. Coffman*, 96 P.3d 30, 76 (Cal. 2004); *State v. Drennan*, 101 P.3d 1218, 1233 (Kan. 2004); *Commonwealth v. Sepulveda*, 855 A.2d 783, 790–91 (Pa. 2004).

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rights because the police were unable to find a gun that he may have hidden⁷⁹—though this technique of re-questioning after invocation explicitly counteracts other *Miranda* progeny.⁸⁰ Another state intermediate court expanded the exception to cover situations in which the possibly dangerous “weapon” was a dog, not a gun.⁸¹ In the absence of a clarifying Supreme Court case, these exceptions crafted by inferior courts have the effect of constitutionally-recognized exceptions to *Miranda*. The *Quarles* exception is anything but finite, and the “bright-line” is no longer visible in this area.

B. When the Truth-Finding Function Is Served

Another line of exceptions—created by the Court just five years after the initial *Miranda* decision—allows statements taken outside *Miranda* to be used as impeachment evidence against a suspect should he decide to testify at trial. Though the government is barred from using the statements against a defendant during its case-in-chief, the government can use the defendant's self-incriminating words to impeach him during cross-examination even though the police violated *Miranda*'s requirements. This impeachment evidence exception first appeared in *Harris v. New York*.⁸² In justifying the exception, the Court determined that the truth-telling purpose of avoiding perjured testimony outweighed the technical prescriptions of *Miranda*:

Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively

⁷⁹ *People v. Brewer*, No. A100489, 2004 WL 363496, at *6–8 (Cal. Ct. App. Feb. 27, 2004).

⁸⁰ *Michigan v. Mosley*, 423 U.S. 96, 104–07 (1975) (holding that, after a Mirandized suspect invokes his right to silence, the police may only re-initiate interrogation after an indeterminate amount of time, and then only upon re-reading the *Miranda* warnings).

⁸¹ *State v. Wilson*, 592 S.E.2d 619 (table), No. COA03-374, 2004 WL 385544, at *3 (N.C. Ct. App. Mar. 2, 2004).

⁸² 401 U.S. 222, 225–26 (1971).

waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.⁸³

The Court believed that the jury could use the prior inconsistent testimony to assess the defendant's credibility without using it as substantive evidence of his guilt on the charged crimes. Essentially, the Court circumscribed a portion of *Miranda*, another retreating action not contemplated by the original holding.

The *Harris* exception was upheld and extended four years later in a factually distinguishable case, *Oregon v. Hass*.⁸⁴ In *Hass*, the suspect was given full *Miranda* warnings, but the officer continued his interrogation without a waiver.⁸⁵ The Court allowed not only impeachment on cross-examination but also the calling of the officer as a rebuttal witness.⁸⁶ "Again, the impeaching material would provide valuable aid to the jury in assessing the defendant's credibility; again, the benefits of this process should not be lost; and, again, . . . there is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief."⁸⁷ Yet another extension of the exception was made shortly thereafter in *United States v. Havens*.⁸⁸ In *Havens*, the Court held that even testimony first elicited from the defendant on cross-examination can be impeached under the *Harris* exception, so long as the testimony falls within the proper scope of the direct examination.⁸⁹ Thus, as long as the inadmissible statement is voluntary and its admission furthers the search for truth, the Court seems willing to discount—or even dismiss—other constitutional concerns.

The Court shows even less concern for the spirit of *Miranda*'s individual protections when *Miranda* violations lead to evidence that does not involve a defendant incriminating himself at trial with his own words. For some time, the only Court case to rule on the subject—*Michigan v. Tucker*—established the general idea that the

⁸³ Id. at 224.

⁸⁴ 420 U.S. 714 (1975).

⁸⁵ Id. at 715–16.

⁸⁶ Id. at 717.

⁸⁷ Id. at 722 (internal citations omitted).

⁸⁸ 446 U.S. 620, 623 (1980).

⁸⁹ Id. at 626–27.

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"fruits" of the excluded statement are admissible.⁹⁰ In that case—decided just eight years after the *Miranda* decision—police questioned a suspect outside *Miranda* and obtained a lead on an individual who later incriminated the suspect.⁹¹ The Court held that even though the police had violated the suspect's constitutional rights, it was improper to exclude the evidence derived from the statement—that is, the testimony of the individual incriminating the suspect.⁹² The Court considered not just the *Miranda* violation but the policy effects of excluding the evidence:

Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.⁹³

The Court noted that the rationale behind *Miranda* of deterring police misconduct was not implicated because the defendant was not compelled to give self-incriminating evidence that could be used at trial.⁹⁴ More importantly, the Court confirmed that as long as the trustworthiness of the evidence is not in question, there is little reason to exclude it.⁹⁵

Thirty years later, in *United States v. Patane*, the Court addressed the issue of physical "fruits." As discussed at the beginning of this Note, the suspect in *Patane* was questioned outside *Miranda* and voluntarily revealed the location of an illegal handgun.⁹⁶ The judgment of the Court (as expressed in a three-Justice plurality opinion whose decision was supported by a two-Justice concurrence) was that the handgun could be used as substantive evidence determinative of the defendant's guilt.⁹⁷ Justice Thomas, writing for the plurality, wanted to keep *Miranda* jurisprudence as close as possible to

⁹⁰ *Michigan v. Tucker*, 417 U.S. 433, 452 (1974).

⁹¹ *Id.* at 436–37.

⁹² *Id.* at 452.

⁹³ *Id.* at 446.

⁹⁴ *Id.* at 447–48.

⁹⁵ *Id.* at 448–49.

⁹⁶ *Patane*, 542 U.S. at 635.

⁹⁷ *Id.* at 634.

the literal language of the Fifth Amendment, which says nothing about physical evidence.⁹⁸ Justices Kennedy and O'Connor, concurring in the judgment, noted that "[i]n light of the important probative value of reliable physical evidence, it is doubtful that exclusion can be justified by a deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation."⁹⁹

Keeping the backstop of the Due Process Clause in mind, the Court appears willing to overlook many technical violations of *Miranda* if the search for truth is somehow aided. As shown throughout *Miranda*'s major exceptions, in certain instances, the value of the truthfulness of the trial process trumps *Miranda*'s protection of the individual suspect.

C. When Police Do Not Intend to Abrogate the Purpose of *Miranda*

The final line of *Miranda* exceptions is more complicated than the other exceptions because it revolves around not just objective violations of *Miranda*, but also discernible police motives in evading *Miranda*'s requirements. In some circumstances, police officers strategically attempt to obtain initial un-Mirandized statements, which are inadmissible, to increase the likelihood of subsequent Mirandized confessions, which are admissible. This issue of testimonial fruits first arose in *Oregon v. Elstad*.¹⁰⁰ In *Elstad*, police arrested a teenage suspect in his own home and, without first reading him his *Miranda* rights, asked him questions to which he gave incriminating answers.¹⁰¹ The suspect was then taken to the police station, and upon being read and waiving his *Miranda* rights, he confessed to a crime.¹⁰² At trial, the defendant moved to suppress both confessions—the first one at the house and the second one at the police station. He argued in favor of suppression for the first confession because it was un-Mirandized. The subsequent confession, he argued, was tainted by the initial violation—that is, the defen-

⁹⁸ Id. at 636–41 (“In short, nothing in *Dickerson* calls into question our continued insistence that the closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it.”).

⁹⁹ Id. at 645 (Kennedy, J., concurring).

¹⁰⁰ 470 U.S. 298 (1985).

¹⁰¹ Id. at 300–01.

¹⁰² Id. at 301–02.

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dant would not have confessed the second time had he known his earlier confession could never have been used in court. The Court held that the first un-Mirandized statement from the house was inadmissible, but that the subsequent Mirandized confession from the police station *was* admissible.¹⁰³ The Court noted: "[A] careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible. The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'"¹⁰⁴ The Court reasoned that the second confession was valid because the warnings were waived voluntarily and knowingly.¹⁰⁵ Importantly, the Court expressly dismissed the defendant's claim that his ignorance of the law's treatment of his first confession was an impediment to knowingly and voluntarily confessing.¹⁰⁶

After *Elstad*, police around the country were trained on how to circumvent the spirit of *Miranda* while adhering to the letter of the constitutional requirements laid out in the *Elstad* decision.¹⁰⁷ National workshops literally taught local police how to minimize *Miranda*'s impact.¹⁰⁸ In 2004, however, the Court changed the landscape of police interrogation tactics and invalidated an *Elstad*-type confession: In *Missouri v. Seibert*, the plurality opinion indicated—but did not explicitly say—that the inquiry no longer is objective but must turn on police intent.¹⁰⁹ Though the dissent criticized the further erosion of clarity with regard to *Miranda* inquiries at the trial-court level,¹¹⁰ the plurality's reasoning mainly focused on police deterrence, a virtually ever-present concern throughout the *Miranda* progeny.¹¹¹ Per *Elstad*, when "none of the earmarks of coercion" are present, the Court puts less emphasis on excluding vol-

¹⁰³ Id. at 302.

¹⁰⁴ Id. at 310–11 (citation omitted).

¹⁰⁵ Id.

¹⁰⁶ Id. at 316–17.

¹⁰⁷ *Missouri v. Seibert*, 542 U.S. 600, 609–611 (2004); see also Weisselberg, *supra* note 65, at 1123–24.

¹⁰⁸ See *Seibert*, 542 U.S. at 609–11.

¹⁰⁹ Id. at 616–17.

¹¹⁰ Id. at 627 (O'Connor, J., dissenting).

¹¹¹ Id. at 611–17.

untary statements.¹¹² However, the facts of *Seibert* demonstrated an apparent desire on the part of the interrogator to vitiate the suspect's free will in a manner inconsistent with the spirit of *Miranda*. Those facts demand some exposition.

Seibert dealt with a mother who had confessed to accidentally killing a mentally retarded resident of her house while covering up the natural death of one of her children afflicted with cerebral palsy.¹¹³ The consequences of the police bypassing *Miranda* were clearly greater in *Seibert* than in *Elstad*, in which a boy had confessed to breaking into a neighbor's house. Using a tactic called "question-first," the initial interrogator intentionally omitted the mandatory *Miranda* warnings, and instead questioned the suspect in a custodial setting outside *Miranda* for thirty to forty minutes, eventually obtaining a confession.¹¹⁴ After giving the suspect a twenty minute cigarette and coffee break, the interrogator returned with a tape recorder, gave the required *Miranda* warnings, and obtained a signed waiver.¹¹⁵ The interrogator then began questioning the suspect again, largely repeating information he had learned in the first interrogation, and eventually obtaining a full confession under *Miranda*.¹¹⁶

The *Seibert* plurality noted that the factors relevant to a determination of admitting a subsequent statement after an initial unwarned statement included:

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, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first.¹¹⁷

The details of each case, on their face, seem objective. However, the plurality's ultimate reasoning focuses on the subjective intent of the police: "Strategists dedicated to draining the substance out

¹¹² 470 U.S. at 316; see also *Seibert*, 542 U.S. at 614 (discussing *Elstad*).

¹¹³ *Seibert*, 542 U.S. at 604.

¹¹⁴ *Id.* at 604–05.

¹¹⁵ *Id.* at 605.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 615.

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of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute."¹¹⁸ Thus, the plurality excluded both the unwarned and warned statements because the mid-stream warnings could not have been effective under the circumstances.¹¹⁹

Though *Seibert* is a relatively recent decision, commentators have already noted how it further obscures the long-since shaded "bright-line rationale" of *Miranda*.¹²⁰ Whereas *Elstad* held that a procedural misstep could be cured through the actual administration of *Miranda* warnings, *Seibert* appears to take the trial courts into the gray area of the police officer's mind. At the end of the day, greater justice considerations convinced the Court to abrogate its supposed bright-line *Elstad* exception to its supposed bright-line *Miranda* rule in favor of a standards-based system. In fact, the Court in *Seibert* focuses on police motives—the decision actually sets up a system of proxies to determine police intent. The proxy system, while theoretically avoiding an inquiry into the individual officer's intent, inarguably is set up to punish bad faith questioning outside *Miranda* and to permit testimony gained outside *Miranda* due to good faith mistakes.¹²¹ The Court in *Michigan v. Tucker* presaged the *Seibert* opinion:

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. *Where the official action was*

¹¹⁸ *Id.* at 617.

¹¹⁹ *Id.*

¹²⁰ See, e.g., Melissa A. Register, Case Comment, Constitutional Law: The Invisible Line Between Intentional and Unintentional *Miranda* Violations, 15 U. Fla. J.L. & Pub. Pol'y 339, 346 (2004).

¹²¹ See Colleen Cox, Note, Crafting a *Miranda* Exclusionary Rule for Two-Part Interrogations: A Lesson from *Missouri v. Seibert* on the Value of Deterrence, 37 Ariz. St. L.J. 663, 664 (2005) ("[I]n most cases, intentional *Miranda* violations will render warned statements inadmissible and unintentional violations will render warned, voluntary statements admissible.").

pursued in complete good faith, however, the deterrence rationale loses much of its force.¹²²

Seibert, taken together with *Elstad* and *Tucker*, seems to make a distinction between negligent and willful police misconduct. When police act in good faith, individual protections can be overcome by greater, broader considerations.

D. Lessons Learned: When the Court Will Defend Miranda

In pronouncing each of its exceptions and limitations over the past four decades, the Court has often compromised *Miranda*'s rigidity in favor of greater justice considerations: enhancing the need for public safety and effective law enforcement, guarding the truth-finding process of the jury trial and the inherent trustworthiness of certain forms of evidence, and preventing the inherent unfairness in penalizing society for the innocent mistakes of the police. Justice Scalia has noted that the patchwork of *Miranda* limitations and exceptions "do[es] not make sense," and warns the Court that its inability to form a coherent *Miranda* jurisprudence leaves it open to the charge that it is "some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy."¹²³ The Court simply has not created a cogent framework for *Miranda*'s daily application; it has left a vacuum in which trial courts must operate without direction.

Still, one can articulate certain considerations the Court weighs before willingly setting *Miranda* aside. As seen through its progeny, instead of creating a barrier behind which defendants can always take shelter, *Miranda*'s strictures are an inherent balance of individual protections and societal rights. While *Miranda* is maximally comprehensive in the protections it affords, it is minimally deep.¹²⁴ Though police are required to use the warnings in the vast majority of cases, the warnings are the barest of advisements to a suspect about to endure police interrogation. The doctrine was not always so shallow. At its inception, the dictates of *Miranda* seemed almost limitless: It was "a case that all but mandated defense attor-

¹²² *Michigan v. Tucker*, 417 U.S. 433, 447 (1974) (emphasis added).

¹²³ *Dickerson v. United States*, 530 U.S. 428, 455 (2000) (Scalia, J., dissenting).

¹²⁴ This language is analogous to that used by Professor Cass Sunstein. See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 262 (1999).

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ney participation in custodial interrogations to dispel inherent compulsion.”¹²⁵ With *Miranda's* erosion over the last four decades, however, some now dare to describe the landmark decision as little more than a “weak rule of evidence,”¹²⁶ which is only concerned with “providing the minimal amount of notice to a defendant about his privilege against self-incrimination such that a court can uphold his confession as voluntary.”¹²⁷ Many commentators believe that if the Court were serious about protecting individual rights under the Fifth Amendment, it would encourage legislatures to replace the *Miranda* warnings with a better alternative, like videotaping all interrogations or mandating the presence of an attorney before and during interrogation.¹²⁸ Yet clearly the Court has never mandated these enhanced protections.

That said, the doctrinal principle of *Miranda* is still present in spirit, though its fabric is a bit worn. Any exception to it truly must be justified. In pronouncing exceptions and limitations, the Court often speaks in terms of the goals of higher truth. As stated at the beginning of this Part, *Miranda's* goal of individual protection can be overcome when the Court finds a quantum of support from three considerations: (1) when public safety is at issue; (2) when the truth-finding process is furthered; and (3) when the police do not intend to abrogate the broader goals of *Miranda*. As the Court itself notes, “Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated.”¹²⁹ One must bear these three factors in mind during the following discussion of the “prior criminal experience” exception to *Miranda*.

¹²⁵ Susan R. Klein, *Miranda's* Exceptions in a Post-Dickerson World, 91 J. Crim. L. & Criminology 567, 570 (2001).

¹²⁶ Weisselberg, *supra* note 65, at 1122. This argument finds some support in the *Patane* plurality opinion, which says that a violation of *Miranda* is not a violation of the Fifth Amendment unless the statement is introduced at trial. 542 U.S. at 633–34.

¹²⁷ Klein, *supra* note 125, at 570.

¹²⁸ See, e.g., Timothy Brennan, Note, 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, 273–76 (2001).

¹²⁹ *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984).

IV. THE INEVITABLE BATTLE AHEAD: *MIRANDA*'S "PRIOR
CRIMINAL EXPERIENCE" EXCEPTION

A. *The Exception*

Miranda is not absolute: the Court stated in *Miranda* that the requisite warnings can be excused if "other fully effective means are adopted" to ensure a suspect's knowledge of his rights,¹³⁰ and this notion was recently affirmed in *Dickerson*.¹³¹ As laid out in the Introduction of this Note, the "prior criminal experience" exception holds law enforcement to the same supposed bright-line standard of today: police are *required* to administer *Miranda* warnings to all suspects in a custodial interrogation. However, should a law enforcement officer *negligently* fail to give the warnings, use of an incriminating statement against a suspect in court would not be barred absolutely. Rather, the statement might be admissible depending on the suspect's prior criminal record. For those with a prior criminal record, the "prior criminal experience" exception would impose a burden on the government to prove that the suspect knew his rights. Because satisfying the "knowledge" prong is a necessary but not sufficient requirement of the *Miranda* inquiry, the exception circumvents *Miranda*'s initially-proclaimed irrebuttable presumption of compulsion upon a failure to warn. Instead, failures to warn would constitute a rebuttable presumption contingent, in addition to the other factors, on an adequate showing of knowledge by the prosecution.

In determining whether prior knowledge necessarily equated to current knowledge under each case's unique circumstances, the trial courts would take into account several factors: whether the suspect actually was *Mirandized* in his prior encounter with police; the length of time between the prior and current arrests; the difference between the suspect's current and prior alleged crimes (for example, misdemeanor shoplifting versus felony murder); the extent of the suspect's prior experience with the system (that is, whether he was arrested, arraigned, or convicted); whether, as in Samuel Patane's case, the suspect says he knows his rights; and

¹³⁰ *Miranda*, 384 U.S. at 444.

¹³¹ *Dickerson v. United States*, 530 U.S. 428, 440 (2000) (repeating *Miranda*'s contention that the legislature can replace the *Miranda* warnings with other requirements that are "at least as effective") (citation omitted).

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most tellingly, whether the suspect invoked his rights on a prior occasion. These factors would supplement the myriad factors the courts already sift through in deciding the knowledge prong in waiver-validity determinations, as discussed below.¹³² This proposed exception, therefore, would merely add an additional facet to *Miranda*'s knowledge inquiry—one that is potentially the most probative of a suspect's actual knowledge.

*B. The Importance of Prior Criminal Experience as
the Predominant Factor in the Inquiry*

To some, prior criminal experience may seem an odd factor on which to base a constitutional exception to *Miranda*. After all, the exception acts to limit one of the two central elements *Miranda* seeks to preserve. However, the Court has already recognized the importance of prior criminal experience in many *Miranda* settings.

One such setting involves the voluntariness of a *Miranda* waiver. As previously discussed, the two parts of a *Miranda* waiver test are the "voluntary" and "knowing and intelligent" prongs. To prove that the suspect's waiver was voluntary, the government must show that police did not use unduly coercive tactics.¹³³ Clearly, trying to determine which police tactics are coercive for each individual suspect is a subjective test. Trial courts consider several factors in their totality of the circumstances test to determine whether a waiver was voluntary, including the location and length of the interrogation; whether the suspect initiated contact with the police; any potential physical intimidation; any overwhelming psychological coercion; and the suspect's personal characteristics, including age, mental competency, and *prior criminal experience*.¹³⁴

This Note proposes that prior criminal experience be treated as a proxy for the "knowledge" prong in some cases. In applying the totality of the circumstances test in a "knowing and intelligent" waiver determination, some courts already occasionally use the

¹³² See *infra* notes 135–136 and accompanying text.

¹³³ See, e.g., *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

¹³⁴ See Mandy DeFilippo, *You Have the Right to Better Safeguards: Looking Beyond Miranda in the New Millennium*, 34 *J. Marshall L. Rev.* 637, 675–79 (2001). De Filippo adds, "[A] suspect's lack of knowledge or understanding about the criminal justice system could make it easier for police to confuse, trick, or simply coerce . . ." *Id.* at 679; see also 34 *Geo. L.J. Ann. Rev. Crim. Proc.* 163–64 (2005).

suspect's prior criminal record as a factor in the inquiry, if not as a full-blown proxy.¹³⁵ By using prior criminal experience in the determination of a waiver's validity with respect to the "knowing and intelligent" prong, those circuits confirm that it is an important factor in the inquiry.¹³⁶ Importantly, no circuit courts have held that prior criminal experience *cannot* be used as a factor. Similarly, the Supreme Court has indicated that prior criminal experience is a factor in voluntariness hearings,¹³⁷ and has never specifically held that prior criminal experience should *not* be used as a factor in de-

¹³⁵ Only a handful of circuit cases have done so *explicitly*, and cases in the same circuit do not always mention prior criminal experience under this prong. See, e.g., *United States v. Isom*, 588 F.2d 858, 862 (2d Cir. 1978) ("Moreover appellant expressed his understanding of his rights as they were read to him, signed the waiver of rights form, and had had rather considerable prior experience with law enforcement officers."); *United States v. Banks*, 78 F.3d 1190, 1198-99 (7th Cir. 1996) ("Mr. Mills had prior experience with law enforcement officials . . . and had twice before exercised his right to remain silent—even without having been Mirandized.") (citation omitted); *United States v. Thompson*, 866 F.2d 268, 271-72 (8th Cir. 1989) ("Thompson's very serious, relaxed, thoughtful demeanor, his prior experience with the criminal justice system and his signing of the consent to search form provides further proof that he was capable of and did make an informed and intelligent decision to talk.") (citations omitted); *Rone v. Wyrick*, 764 F.2d 532, 535 (8th Cir. 1985) ("[C]onsidering Rone's intelligence, enhanced maturity and vast experience with the law, we disagree with his assertion that he unknowingly or unintelligently waived his right against self-incrimination."); *United States v. Garibay*, 143 F.3d 534, 538-39 (9th Cir. 1998) (finding that the defendant did not knowingly and intelligently waive his rights based, in part, on his lack of prior criminal experience).

Many additional circuit cases have used a suspect's prior criminal record *implicitly* as a proxy for knowledge while discussing it under one amalgamated inquiry including the voluntariness prong. See, e.g., *United States v. Burrous*, 147 F.3d 111, 116-17 (2d Cir. 1998); *United States v. Johnson*, 94 F. App'x 964, 965-66 (3d Cir. 2004); *Correll v. Thompson*, 63 F.3d 1279, 1288 (4th Cir. 1995); *United States v. Doe*, 226 F.3d 672, 680 (6th Cir. 2000); *Chillers v. Gramley*, 64 F.3d 665 (table), No. 94-1667, 1995 WL 496744, at *3 (7th Cir. Aug. 17, 1995); *United States v. Lewis*, 833 F.2d 1380, 1388 (9th Cir. 1987); *United States v. Morris*, 247 F.3d 1080, 1090 (10th Cir. 2001).

¹³⁶ See, e.g., *Chillers v. Gramley*, 64 F.3d 665 (table), No. 94-1667, 1995 WL 496744, at *3 (7th Cir. Aug. 17, 1995) ("Chillers was arrested ten times as a juvenile and three times as an adult prior to his arrest on the present murder charge. Chillers' familiarity with police procedure strongly suggests that he was not disadvantaged by youthful ignorance or the naivete born of inexperience.") (citations omitted); *Evans v. Demosthenes*, 98 F.3d 1174, 1176 (9th Cir. 1996) ("When Officer Johnson read Evans his *Miranda* rights, Evans interrupted sarcastically stating that he knew them. . . . No doubt he did, based upon the evidence in the record of his prior experience with the criminal justice system, including felony convictions.")

¹³⁷ See *Miller v. Fenton*, 474 U.S. 104, 117 (1985) (discussing "the defendant's prior experience with the legal process, and familiarity with the *Miranda* warnings" as factual issues bearing on the voluntariness of waiver).

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termining the “knowing and intelligent” prong of the *Miranda* inquiry. Rather, the Court has chosen to remain silent on the issue, and none of the circuit courts have expressly noted the Supreme Court’s lack of decision in the area. Thus, the use of prior criminal experience in determining the validity of “knowing and intelligent” waiver determinations at best finds support, and at least is not discredited, by circuit caselaw. It seems the issue is open to debate and ripe for a prosecutor to argue.

Yet *Miranda* waiver validity is not the only area in which the Court has used, or allowed circuit courts to use, prior criminal experience to determine the suspect’s rights. Prior criminal experience is used as a totality of the circumstances factor in many areas of criminal jurisprudence. It is used as a factor in determining the competency of a minor to waive *Miranda* rights.¹³⁸ It is used as a factor in deciding whether to allow the withdrawal of a guilty plea.¹³⁹ And it is used as a factor in determining valid consent to a Fourth Amendment search.¹⁴⁰ As shown by each of these examples, courts routinely observe that prior criminal experience is probative of a suspect’s knowledge of his rights in numerous areas of criminal procedure.¹⁴¹ In most instances under the proposed exception, prior criminal experience will be but one important factor in determining whether the suspect had knowledge of his *Miranda* rights. In some instances, based on the extent of the experience, it will be the determinative factor, essentially acting as a straight proxy. Since courts often already use prior criminal experience in some form—from pre-trial motions through post-trial sentencing hearings—they should also be allowed to use it in another significant area of criminal procedure: *Miranda*’s “knowledge” prong.

¹³⁸ See *Fare v. Michael C.*, 442 U.S. 707, 725–27 (1979); see also Frumkin, *supra* note 56, at 326–27 (discussing competency to waive *Miranda* rights generally and noting that defendant’s arrest history may be relevant).

¹³⁹ See *United States v. Head*, 927 F.2d 1361, 1375 (6th Cir. 1991).

¹⁴⁰ See *United States v. Chaidez*, 906 F.2d 377, 381 (8th Cir. 1990); see also *United States v. Watson*, 423 U.S. 411, 424–25 (1976).

¹⁴¹ But see *Yarborough v. Alvarado*, 541 U.S. 652, 668–69 (2004) (holding that prior criminal experience cannot be used as a factor in determining whether custody exists for the purposes of *Miranda*).

*C. The Rationales of Recognized Miranda Exceptions
Support the Proposed Exception*

As discussed in the prior section, since prior criminal experience is an important factor used throughout Fourth and Fifth Amendment jurisprudence, some circuit courts have felt comfortable using it in a totality of the circumstances test to show knowledgeable waiver of *Miranda* rights. While those courts have used prior criminal experience as a factor, they have not said it is dispositive, nor a direct proxy. Inherently, though, those courts believe that prior criminal experience is indicative of knowledge of one's rights, regardless of whether one has been read those rights in the instant case. It requires only one additional step—as of yet untaken—to hold that, even without a *Miranda* warning in an instant arrest, a suspect sufficiently knows his rights in order to be able to waive them. In real-world practice, it logically follows that a suspect with considerable prior criminal experience knows his rights, regardless of whether police read him his *Miranda* warnings in the most recent encounter. In current caselaw, though, courts have been reluctant to acknowledge that reality.

Miranda generally demands that warnings be read prior to every custodial interrogation. But as this Note has explained, the Supreme Court has recognized exceptions to that rule, admitting evidence even when police should have read a suspect his rights but failed to do so. As previously explained, the Court is willing to allow exceptions to the general rule after considering and weighing three important goals, which reach more broadly than *Miranda*.¹⁴² Support for the “prior criminal experience” exception to *Miranda* draws from the same considerations underlying the other recognized exceptions to *Miranda*: the exception has a public safety rationale, involves the admission of information that will further the truth-finding process, and applies because the *Miranda* lapse came about through no intentional subversive act of the police officer. Though the prior criminal experience exception finds support in the broad goals that underlie *Miranda*'s recognized exceptions, it is undeniably a qualitatively different excursion from set *Miranda* progeny. The exception imputes knowledge to a suspect, that which *Miranda* expressly was crafted to ensure. For the recognized

¹⁴² See supra note 68 and accompanying text.

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exceptions, knowledge still matters, but the other three considerations are paramount. The prior criminal experience exception is nonetheless viable because of the tortuously conflicted *Miranda* progeny and the Court's unwillingness to hold firm to *Miranda*'s original bright-line rule. It is no longer untoward to directly attack *Miranda*'s "knowledge" prong, especially given that the proposed exception does not represent a march backward to the prior due process regime. This new exception merely recognizes the conflict within current *Miranda* jurisprudence and asserts that the broader goals underlying *Miranda*'s recognized exceptions lend credence to the viability of the prior criminal experience exception.

Though unstated, the Court's public safety rationale logically relates to the idea that recidivist offenders make up a large part of new arrests. One of the greatest threats to public safety is the significant percentage of recidivist offenders across all categories of crime. Admittedly, there certainly is a qualitative difference between a gun (representing an immediate threat) and a recidivist felon, who merely represents a dramatically higher threat than the average citizen. However, the unquestioned *New York v. Quarles* progeny have retreated from the need for an immediate threat before the public safety exception applies.¹⁴³ Moreover, the recidivist threat is persistent and widespread. For example, the Department of Justice reports that "[t]he 272,111 offenders discharged in 1994 had accumulated 4.1 million arrest charges before their most recent imprisonment and another 744,000 charges within 3 years of release."¹⁴⁴ Additionally, the other exceptions—especially the impeachment and "fruits" exceptions—realistically contain an implicit public safety rationale, stemming from their unwavering commitment to the "truth-finding" process. In real-world practice, judges would be hard-pressed to allow criminals to go free when truthful information shows their guilt. *Miranda*'s recognized exceptions acknowledge that reality: as long as the incriminating information is truthful and the purposes of *Miranda* are not subverted,

¹⁴³ See *supra* Section III.A.

¹⁴⁴ Patrick A. Langan & David J. Levin, U.S. Dep't of Justice, No. NCJ 193427, *Recidivism of Prisoners Released in 1994*, at 1 (2002), available at <http://www.ojp.usdoj.gov/bjs/abstract/rpr94.htm>. Though the data is from 1994, this is the most current information available.

it is better to have the criminal off the street than to follow *Miranda* strictly.

The prior criminal experience exception recognizes and attempts to solve the problem of repeat criminals threatening public safety while adhering to the Court's general *Miranda* strictures. This solution inherently involves expanding the understanding of "public safety" in the *Miranda* context from referring only to an immediate threat in a particular incident to encompassing the general safety of the greater public. Yet the departure is not as drastic as it may at first seem. It is unfair and unrealistic to characterize the public safety exception as a "gun exception" as was first intended. While *Quarles* speaks of immediacy in terms of instantaneous mortal danger, state and lower federal court decisions have consistently expanded the timeframe and type of danger in the limited opportunities available to do so.¹⁴⁵ Those courts seemingly believe that "public safety" is a flexible term that may be tailored by trial judges to fit a variety of diverse situations. Appellate courts have been unable or unwilling to force trial courts to adhere strictly to the Supreme Court's original vision of *Quarles*. Of course, the Supreme Court too has been unwilling to rule on any of those lower courts' dilutions of the *Quarles* principle. Although the traditional view of the public safety exception is not in perfect sync with the prior criminal experience exception, certainly parallels exist that should give a trial court pause—especially since the traditional view has been outpaced by subsequent caselaw.

This Note does not seek to enter the debate over whether *Miranda* has significantly burdened law enforcement—whether it has cost society too much while seeking to protect the individual.¹⁴⁶

¹⁴⁵ See *supra* notes 77–81.

¹⁴⁶ This extensive debate continued through the latter part of the 1990s, but recently any substantive discussion of it has been criticized as "flogging [a] very dead horse." Stephen J. Schulhofer, *Miranda, Dickerson, and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 Mich. L. Rev. 941, 943 (2001). On one side, Professor Paul Cassell—now Judge Cassell (D. Utah)—argued that *Miranda* cost too much and, regardless, did not provide significant individual benefits. On the other side, Professor Stephen Schulhofer disputed Professor Cassell's conclusions and the methodology by which he reached those conclusions. Largely staying above the fray, Professor Richard Leo declared it impossible to tell, because of the existence of so many variables. See generally 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 (1998); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassess-*

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Indeed, such debate is solely academic, since *Dickerson* guaranteed that the basic premise of *Miranda* is here to stay. Rather, the exception addresses concrete occasions in which *Miranda* undeniably has acted to the detriment of society. Even in *Dickerson*, the Court noted that "[t]he disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his 'rights,' may nonetheless be excluded and a guilty defendant go free as a result."¹⁴⁷

Although the exception acts on the margins, it does so by targeting *Miranda* at its core rather than just its periphery. For the public safety rationale to be valid in the face of such a fundamental change in doctrine, actual public safety benefits must be realized. One question is how many suspects the exception will affect. This question is hard to answer, because the empirical resources simply do not exist—nobody knows exactly. However, we do have anecdotal instances, in both the circuit courts and trial courts, showing that factually guilty recidivist felons have testimony excluded due to a failure to warn.¹⁴⁸ Even if the exception would result in admitting incriminating evidence and supporting convictions in a limited number of cases, the mere low number does not affect the constitutional permissibility of the exception. For another such example, one need only look to the *Quarles* public safety exception, which affects a relatively small number of defendants every year but still garners constitutional recognition.¹⁴⁹ Even if the exception assists in

ment, 90 Nw. U. L. Rev. 387 (1996) [hereinafter Cassell, *Miranda's Social Costs*]; Richard A. Leo, Inside the Interrogation Room, 86 J. Crim. L. & Criminology 266 (1996) [hereinafter Leo, *Inside the Interrogation Room*]; Richard A. Leo, Questioning the Relevance of *Miranda* in the Twenty-First Century, 99 Mich. L. Rev. 1000 (2001); Stephen J. Schulhofer, *Miranda* and Clearance Rates, 91 Nw. U. L. Rev. 278 (1996); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500 (1996) [hereinafter Schulhofer, *Miranda's Practical Effect*].

¹⁴⁷ *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

¹⁴⁸ See, e.g., *Patane*, 54-2 U.S. at 634-35; *United States v. Faulkingham*, 295 F.3d 85, 86-87 (1st Cir. 2002) (involving a suspect with a prior arrest record making an un-Mirandized incriminating statement during a subsequent arrest; the record is unclear as to if the prior arrest resulted in conviction); *United States v. Sterling*, 283 F.3d 216, 217-18 (4th Cir. 2002) (involving a convicted felon giving an un-Mirandized incriminating statement during a subsequent arrest); *United States v. DeSumma*, 272 F.3d 176, 177-78 (3d Cir. 2001) (involving a convicted felon giving an un-Mirandized incriminating statement during a subsequent arrest).

¹⁴⁹ See supra note 76.

only one additional conviction, the exception's implementation is arguably worthwhile, if for no other reason than preventing one criminal from going free, and one victim from being further aggrieved. As one commentator noted:

In a large country with a high crime rate, even 0.1% of all arrests represents a lot of cases. More to the point, the release of only one guilty murderer or rapist is one too many. A single case of that sort must be counted as a substantial social cost.¹⁵⁰

Indeed, the Court itself has recognized the importance of even small numbers of cases in which an exception applies: “[S]mall percentages . . . mask a large absolute number of felons who are released because the cases against them were based in part on” constitutional violations.¹⁵¹ Trial courts should attempt to fix the current *Miranda* reading that—albeit occasionally—causes such societal costs. Even though the prior criminal experience exception provides benefits in a relatively small number of cases, across the entire system it would have a real-world effect on past and future victims, rather than just being a small statistical abstract. This fact surely bolsters the new exception's “public safety” reasoning.

After public safety considerations, the second factor the Court relies on in its *Miranda* exceptions is whether the information serves the truth-finding process. As noted above, this rationale is seen in *United States v. Patane*, *Oregon v. Elstad*, *Harris v. New York*, and *Michigan v. Tucker*, in each of which the Court notes the strong probative value of the admitted evidence in the jury's search for the truth. Additionally, the *Miranda* decision was in part based on the Court's fear that police officers might coerce incriminating statements from suspects—statements that lack a presumption of veracity because of the coercion. The prior criminal experience exception serves these same objectives. Under the exception, there is no reason to doubt the trustworthiness of the statements made by the suspects because the exception does not apply in circumstances of police coercion. The voluntariness prong of the *Miranda* inquiry is *unchanged*. Rather, the exception applies in situations more analogous to *Patane*, *Elstad*, and *Tucker*, in which the “knowledge”

¹⁵⁰ Schulhofer, *Miranda's Practical Effect*, *supra* note 146, at 502.

¹⁵¹ *United States v. Leon*, 468 U.S. 897, 908 n.6 (1984).

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prong drives the admissibility analysis. If the suspect's will is overborne, then the admission fails to meet the "voluntary" prong of the *Miranda* inquiry, and falls outside the proposed exception—indeed, there can be no exception to such a due process violation.¹⁵²

As alluded to at the beginning of this section, the Court's treatment of *Miranda*'s two prongs differs, and the differences are salient to the prior criminal experience exception. Knowledge is not the main point of the *Miranda* inquiry; it certainly is one of the two prongs the Court identifies as pivotal in any *Miranda* hearing, but over time the knowledge prong has been reduced to the red-headed step-child of *Miranda* jurisprudence. The suspect in *Quarles*, the case that set out the public safety exception, voluntarily made the statement but did not do so knowingly (or at least, not "knowingly" in the procedural sense that *Miranda* requires, after having been read the warnings). The suspect in *Harris*, one of the impeachment cases, certainly made his statement voluntarily, but did not do so knowingly (again, not in the procedural sense that *Miranda* requires for use in a case-in-chief). Nonetheless, the Court allowed the voluntary, though unknowing, statements to be used at trial. Further evidence of the primacy of the voluntariness inquiry can be seen in an examination of *Miranda*'s limitations. The *Terry v. Ohio* discussion in Part II shows that the Court cares less about knowledge than lack of compulsion. So long as voluntariness is not in question, the Court is willing to balance knowledge with changing societal needs. In an increasingly complex world of police/suspect interaction, the prior criminal experience exception undeniably preserves the central tenet of *Miranda*—voluntariness—while acting to limit the increasingly dwindling importance of the knowledge prong.

The third factor of the Court's inquiry in considering exceptions involves police motivation. After *Missouri v. Seibert*, and to some degree after *Quarles* and *Elstad*, it is clear that officer intent matters to the Court. Though Fourth Amendment decisions talk about objectivity and reasonableness,¹⁵³ in the *Miranda* area intent is sometimes important. Twenty years ago, in defining the *Quarles*

¹⁵² See *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936).

¹⁵³ See, e.g., *Whren v. United States*, 517 U.S. 806, 813 (1996) ("We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.").

public safety exception, the Court attempted to distance itself from involving trial courts in deciphering individual officer motivations; there, it noted that “the application of the exception which we recognize today should not be made to depend on *post hoc* findings at a suppression hearing concerning the subjective motivation of the arresting officer.”¹⁵⁴ However, in the same opinion, the Court said that the exception is valid only for police “questions necessary to secure their own safety or the safety of the public and [not] questions *designed* solely to elicit testimonial evidence from a suspect.”¹⁵⁵ It seems the Court wanted the trial courts not to look into an officer’s mind but to somehow determine inferentially whether a question was designed in an admissible way. This inherent tension is resolved in *Elstad* and *Seibert*. In *Elstad*, the police negligently failed to administer *Miranda* to the suspect, and then cured the defect upon later reading the suspect his rights. In *Seibert*, the police *intentionally* failed to administer *Miranda* to the suspect, and the subsequent reading did not cure the prior violation. In *Seibert*, the Court established a proxy system to capture police intent. The prior criminal experience exception extends—beyond the point the Court has been willing to vocalize thus far—the central premise of *Seibert*: intent matters. No matter the wary diffidence of the *Seibert* plurality or the vociferous back-peddling of the dissent, the only way to explain *Seibert* is to admit that individual officer intentions matter.¹⁵⁶

D. How Two Cases Already Have Gotten It Wrong

Though the prior criminal experience exception logically follows from existing caselaw, two circuits, using dubious logic that misapplied then-existing caselaw, have refused to entertain such an exception. Preliminarily, it is important to note that neither case was directly concerned with the proposed exception and both cases actually mentioned it in an offhand manner (one, only in a footnote).

¹⁵⁴ New York v. Quarles, 467 U.S. 649, 656 (1984).

¹⁵⁵ Id. at 659 (emphasis added).

¹⁵⁶ See Cox, *supra* note 121, at 678 (“As a result, courts are making findings on an officer’s intent to violate *Miranda* in deciding whether statements thereby obtained are admissible, even though the *Seibert* plurality said ‘the focus is on facts apart from intent that show the question-first tactic at work.’”).

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Nonetheless, it is necessary to discuss these two cases and point out their inapplicability.

In *United States v. Longbehn*, an officer did not read the *Miranda* rights to a suspect prior to a custodial interrogation.¹⁵⁷ Only here, the suspect was a fellow police officer,¹⁵⁸ someone who undoubtedly had the “knowledge” which *Miranda* warnings seek to impart. The suspect made an incriminating statement outside *Miranda*, and the district court admitted the statement at trial.¹⁵⁹ The Eighth Circuit reversed the district court’s ruling:

We . . . reject the government’s contention that even if Longbehn were in custody, his position as a police officer obviates the requirement of a *Miranda* warning. The requirement of *Miranda* warnings is not contingent either upon a defendant’s actual or presumed knowledge of his rights or on his status but, rather, must be honored in *all* instances of custodial interrogation.¹⁶⁰

In so doing, the *Longbehn* majority explicitly grounded its opinion on dicta in the Supreme Court decision *Berkemer v. McCarty*.¹⁶¹ The holding of that case, though, stands for a different proposition than the one cited by the Eighth Circuit. In *Berkemer*, in the context of traffic stops and Fourth Amendment custody, the Supreme Court demanded that trial courts determine custody on a case-by-case basis:

Admittedly, our adherence to the doctrine just recounted will mean that the police and lower courts will continue occasionally to have difficulty deciding exactly when a suspect has been taken into custody. Either a rule that *Miranda* applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more

¹⁵⁷ 850 F.2d 450, 451–52 (8th Cir. 1988).

¹⁵⁸ *Id.* at 452–53. This case is used only as a vehicle for explaining some courts’ misunderstanding of the current state of *Miranda* caselaw. Again, this Note takes no stance on the applicability of the prior criminal experience exception to police officers.

¹⁵⁹ *Id.* at 450 n.1, 451.

¹⁶⁰ *Id.* at 453.

¹⁶¹ 468 U.S. 420, 440 (1984).

easily administered line. However, each of these two alternatives has drawbacks that make it unacceptable.¹⁶²

This passage represents a substantial disconnect with the purported reason for the Eighth Circuit's decision. The Eighth Circuit dismissed the allegation of knowledge with but a casual citation, in no way paying deference to the many similarly reasoned exceptions the Court placed on *Miranda*.

Longbehn, though, was not the only circuit court decision to mistakenly conclude that case-by-case determinations go against the spirit of *Miranda*.¹⁶³ In *United States v. Bland*, a parole officer read the suspect his *Miranda* rights while he was in the hospital.¹⁶⁴ The suspect interrupted the officer, saying he had heard them "a million times before," but the officer nonetheless completed the warnings.¹⁶⁵ However, the warnings were defective: the officer failed to itemize that the suspect could have an attorney during questioning.¹⁶⁶ The district court held that the *Miranda* warning, though deficient, was adequate to warn the suspect of his rights. After the defendant was found guilty, the Ninth Circuit reversed and remanded the case, instructing the trial court on remand to exclude the defendant's confession gained after the deficient *Miranda* warnings.¹⁶⁷ In a footnote, the Ninth Circuit dismissed the government's second-tier argument that the defendant's prior criminal experience obviated the need to read him the full warnings.¹⁶⁸ In justifying its dismissal of the claim, the court quoted only one line from *Miranda*: "The Fifth Amendment privilege is so fundamental to our system . . . and the expedient of giving an adequate warning . . . so simple, [that] we will not pause to inquire in individual cases

¹⁶² *Id.* at 441.

¹⁶³ Additionally, a handful of federal district courts in other circuits have arrived at the same conclusion as the Eighth Circuit. See *United States v. Hammond*, 841 F. Supp. 421, 423 n.1 (D.D.C. 1993) (suppressing the statement of a suspect with prior criminal experience); *United States v. Prior*, 381 F. Supp. 870, 877 (M.D. Fla. 1974) (suppressing the statement of a suspect who was a lawyer); *Fisher v. Scafati*, 314 F. Supp. 929, 938 (D. Mass. 1970) (dismissing the argument that prior knowledge of rights satisfied the demands of *Miranda*).

¹⁶⁴ 908 F.2d 471 (9th Cir. 1990).

¹⁶⁵ *Id.* at 472.

¹⁶⁶ *Id.* at 474. The officer said only that an attorney could be made available *prior* to questioning. *Id.* at 473.

¹⁶⁷ *Id.* at 472-73.

¹⁶⁸ *Id.* at 474 n.1.

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whether the defendant was aware of his rights without a warning being given."¹⁶⁹ Importantly though, the Ninth Circuit ignored the fact that the meaning of this line, taken out of context in *Miranda*, has been abrogated by the Court's consistent application of limitations and exceptions to *Miranda* since the original holding. Rather, the Ninth Circuit should have recognized that *Miranda*'s knowledge prong is inherently a balancing act. The state of the law at the time of *Bland*, as now, explicitly rejected the expansive dicta of *Miranda* in favor of sticking to its one central, though embattled, premise.

The ultimate contention of *Bland* and *Longbehn* is that *Miranda* requires the incantation of the warnings regardless of the suspect's prior criminal history. Such a reading of *Miranda* is not unreasonable; the original decision refers to that very fact, as noted in *Bland*:

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not *pause to inquire* in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or *prior contact with authorities*, can never be more than speculation; a warning is a *clearcut* fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.¹⁷⁰

However, when *Longbehn* and *Bland* were decided more than fifteen years ago, the Eighth and Ninth Circuits failed to grasp that the original holding of *Miranda* had mutated into something entirely different from what was originally intended. It is possible the opinions would have been more thoughtfully expressed had the government more fully argued the point, rather than making only a token attempt. That *Miranda* now stands for something different

¹⁶⁹ Id. (citation omitted).

¹⁷⁰ *Miranda*, 384 U.S. at 468–69 (citation omitted) (emphasis added).

than the Warren Court's original intention is not seriously in question; though *Miranda* clearly has limits, those limits are abstract, and the circuits were unwilling to go into the gray area this Note now tackles.

As discussed throughout this Note, the Court's *Miranda* progeny have created severe limitations on and exceptions to *Miranda*, even in the face of language in the original opinion *explicitly* to the contrary of those very limitations and exceptions.¹⁷¹ Majority Supreme Court opinions have referenced the above quote *only once* since *Miranda*, and that mention occurred more than thirty years ago.¹⁷² In those intervening thirty years, the Court has limited *Miranda* based on a strict definition of custody¹⁷³ and the defendant's unequivocal invocation of his rights.¹⁷⁴ In those intervening thirty years, the Court has created and expanded recognized exceptions based on public safety,¹⁷⁵ impeachment,¹⁷⁶ physical "fruits" evidence,¹⁷⁷ and testimonial "fruits" evidence.¹⁷⁸ And in those intervening thirty years, though superficially saying that trial courts should not determine whether a *confession* was knowing and voluntary, the Court has ensured that the trial courts carefully consider whether a *waiver* has been knowing and voluntary.

The original *Miranda* holding purportedly expedited trial matters by making sure trial courts do not "pause to inquire" whether

¹⁷¹ Several Supreme Court decisions refining and explaining *Miranda* have qualified *Miranda*'s language explicitly. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 438 (2000) ("[A]lthough we concede that there is language in some of our opinions that supports the view . . ."); *Harris v. New York*, 401 U.S. 222, 224 (1971) ("Some comments in the *Miranda* opinion can indeed be read as indicating . . .").

¹⁷² See *Schneekloth v. Bustamonte*, 412 U.S. 218, 245 (1973) (repeating the phrase to bolster a Fourth Amendment rule). But see *Withrow v. Williams*, 507 U.S. 680, 708–09 (1993) (O'Connor, J., concurring in part and dissenting in part); *Solem v. Stumes*, 465 U.S. 638, 661 n.7 (1984) (Stevens, J., dissenting) (repeating the phrase to bolster a Sixth Amendment rule).

¹⁷³ See *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984); see also *United States v. Drayton*, 536 U.S. 194 (2002) (holding that two suspects were not in custody so as to invalidate a consent search).

¹⁷⁴ See *Davis v. United States*, 512 U.S. 452, 459 (1994).

¹⁷⁵ See *New York v. Quarles*, 467 U.S. 649, 655–57 (1984).

¹⁷⁶ See *United States v. Havens*, 446 U.S. 620, 627–28 (1980); *Oregon v. Hass*, 420 U.S. 714, 722 (1975); *Harris v. New York*, 401 U.S. 222, 224–26 (1971).

¹⁷⁷ See *Patane*, 542 U.S. at 633–34.

¹⁷⁸ See *Oregon v. Elstad*, 470 U.S. 298, 318 (1985). But see *Missouri v. Seibert*, 542 U.S. 600, 604 (2004).

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a suspect knew his rights without a warning. For each of the substantive limitations, exceptions, and refinements to *Miranda*, however, the Court has demanded that trial courts "pause to inquire" in each and every instance in which *Miranda* possibly could be implicated. The Court's *Miranda* holding should not be given broad meaning in an age where trial courts every day "pause to inquire" whether the suspect knew his rights well enough to waive them. The reality of *Miranda* law is that case-by-case determinations are the rule rather than the exception. The Court has ensured this outcome by eliminating the bright-line rule espoused in *Miranda* and replacing it with the whims of a "nine-headed Caesar."¹⁷⁹ The "prior criminal experience" exception is just another in a long line of *Miranda* exceptions un contemplated by the original holding, but constitutionally permissible nonetheless.

V. POTENTIAL PROBLEMS IN ADMINISTERING THE EXCEPTION

It is important to address a few obvious potential problems with the exception's eventual administration by the trial courts. First, trial courts undoubtedly will have difficulty determining when a police officer has negligently—rather than intentionally—omitted the *Miranda* warnings. In the short time since *Seibert*, though, several circuit courts are already doing just that, explicitly looking at officer intent as a threshold inquiry before undergoing a "knowledge" prong analysis.¹⁸⁰ It has not been a difficult shift, because the

¹⁷⁹ See *Dickerson v. United States*, 530 U.S. 428, 455 (2000) (Scalia, J., dissenting).

¹⁸⁰ See, e.g., *United States v. Naranjo*, 426 F.3d 221, 232 (3d Cir. 2005) ("Accordingly, unless the agents deliberately withheld warnings, *Elstad* controls Naranjo's *Miranda* claim."); *United States v. Black Bear*, 422 F.3d 658, 664 (8th Cir. 2005) ("[T]he key to *Seibert* is whether the police officer's technique was a 'designed,' 'deliberate,' 'intentional,' or 'calculated' circumvention of *Miranda*."); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005) ("Justice Kennedy's opinion therefore represents the holding of the *Seibert* Court: The admissibility of postwarning statements is governed by *Elstad* unless the deliberate 'question-first' strategy is employed. If that strategy is deliberately employed, postwarning statements related to the substance of prewarning statements must be excluded . . .") (footnote and citation omitted); *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004) ("What emerges from the split opinions in *Seibert* is this: at least as to *deliberate* two-step interrogations in which *Miranda* warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of *Elstad* has been replaced by a presumptive rule of exclusion . . ."); *United States v. Aguilar*, 384 F.3d 520, 525 (8th Cir. 2004) ("[T]he acts of the police were intentional. . . . That was the situation in *Seibert* and

trial courts have already been undertaking similar analyses, in other settings, for at least the last two decades. For instance, per *Arizona v. Youngblood*, the Court will not presume a due process violation in the context of *Brady* material (evidence favorable to the accused) unless a criminal defendant shows “bad faith on the part of the police” with regard to destruction of evidence.¹⁸¹ Under *Brady*, the burden to prove bad faith lies with the defendant, not the government.¹⁸² Also, in the context of *Batson v. Kentucky*, after the criminal defendant presents prima facie evidence of discrimination and the prosecutor explains the race-neutral motives at the root of the government’s peremptory challenges, the district court then has the duty, essentially, to assess the *credibility* of the prosecutor.¹⁸³ Whenever a district court finds a *Batson* violation, it is a de facto determination by the court that the prosecutor acted in bad faith. These other contexts show that a “bad faith” inquiry is not a foreign concept to the trial courts, and in fact is undertaken relatively regularly. Regardless, difficulty of application does not make the exception unconstitutional. It is mere hackery to protest the constitutionality of the prior criminal experience exception on grounds of impracticability, since trial courts already face the exact same inquiry in other settings. The courts would have to create a system of proxies to determine police intent, just as the Court did in *Seibert*. As an additional safeguard—and a more lenient one than the *Youngblood* standard—the burden would be on the *government* to prove that the police officer did not intentionally circumvent *Miranda*.

Second, in certain situations, it would be difficult to determine if the particular defendant knew his rights well enough from his prior criminal record, or was ever even *Mirandized* in the past, despite

here, as the method and timing of the two interrogations establish intentional, calculated conduct by the police.”) (footnote omitted); *Reinert v. Larkins*, 379 F.3d 76, 91 (3d Cir. 2004) (“[I]t is fair to read *Eltad* as treating the . . . [initial] conversation as a good-faith *Miranda* mistake” Zimmerman’s initial failure to read Reinert his *Miranda* rights, though unfortunate and unexplained, seems much more likely to have been a simple failure to administer the warnings rather than an intentional withholding”) (quoting *Seibert*, 542 U.S. at 615). But see, e.g., *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1139–42 (9th Cir. 2005) (discussing the non-applicability of Justice Kennedy’s concurring opinion in *Seibert*).

¹⁸¹ *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

¹⁸² See *Brady v. Maryland*, 373 U.S. 83, 86 (1963).

¹⁸³ 476 U.S. 79, 96–97 (1986).

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having been arrested. Indeed, since courts have been unwilling to say that lawyer-suspects and police-suspects already inherently satisfy *Miranda*'s knowledge prong, it would be difficult to prove when recidivist defendants "know" their rights in the *Miranda* sense. The best proof, of course, is that the defendant invoked his rights in a prior case. Yet official records—of arrests, dispositions, and investigations themselves—are often notoriously incomplete. Again, while this is a difficult problem that trial courts would face, the burden necessarily would fall on the government—in trying to get the un-Mirandized incriminating statement admitted into evidence—to prove that the defendant had prior knowledge. This stringent burden should act sufficiently to protect the defendant's constitutional rights. The administrative problems with the exception are not insurmountable, and the trial courts should always lean toward excluding the statements. Though the exception may prove difficult to administer, that fact alone does not negate its constitutional permissibility.

It is important here to address the normative criticism that the prior criminal experience exception preys on the weakest in society, affecting those who most need the *Miranda* warnings. The exception merely removes an advantage in some situations in which no such advantage is needed. The suspects who invoke their rights are, by and large, recidivist felons. One study by Professor Richard Leo, one of the few scholars dedicated to researching the impact of *Miranda*, found that repeat felons are four times more likely to invoke their rights than those who have had no contact with the criminal justice system, and three times more likely than recidivist misdemeanants.¹⁸⁴ Further, Professor William Stuntz, another scholar who has spent a considerable part of the last few decades examining *Miranda* law, found the people who invoke *Miranda* are either really smart or are recidivist criminals:

The winners in this regulatory game are likely to be the savvy suspects, the ones who have the most sophisticated understanding of their situation, and who can therefore best manipulate the system to their benefit. These savvy suspects are in turn likely to be defined by either wealth or experience—meaning experience

¹⁸⁴ See Leo, *Inside the Interrogation Room*, supra note 146, at 286.

dealing with the system, something that recidivists naturally possess.¹⁸⁵

Thus, the prior criminal experience exception removes an over-inclusive part of *Miranda* that recidivists use to their advantage.

CONCLUSION

Overall, the cost of the prior criminal experience exception, including any administrative difficulty, is low. Yet “lack of costs” has never been the only reason to support a *Miranda* exception—and it is not the only reason here. There are definite benefits to the prior criminal experience exception in helping the government put some criminals in jail, either through introduction of incriminating statements at trial or with greater leverage in a plea bargain. Additionally, the benefits of the proposed exception are anecdotally undeniable, yet quantitatively uncertain. It is important to note, however, in assessing the costs and benefits of the exception, that this is not some policy question that legislators need to balance in order to decide how to cast a vote—rather, this is a valid constitutional rule. Sometimes, with regard to constitutional decisions, the costs outweigh the benefits—many have said that about *Miranda* itself¹⁸⁶—but such an imbalance never affects the validity of the constitutional argument. The prior criminal experience exception does not force the judge to reach such a decision between policy and constitutionality; the exception, rather, flows from past Supreme Court policy with regard to *Miranda*. It is a substantial departure from the current state of the law, yet it recognizes and accepts the case-by-case analysis implicit under today’s *Miranda* regime.

The “prior criminal experience” exception, though not yet adopted, draws support from current Supreme Court and circuit court caselaw. The exception meets each of the three critical considerations the Court weighs when determining whether to allow an exception to *Miranda*: (1) when public safety is at issue; (2) when the truth-finding process will be served by admitting the evidence; and (3) when the police do not intentionally abrogate the

¹⁸⁵ William J. Stuntz, *Miranda’s Mistake*, 99 Mich. L. Rev. 975, 977 (2001).

¹⁸⁶ See supra note 146.

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broader goals of *Miranda*. Further, the "prior criminal experience" exception is a logical extension of the Court's limitations and exceptions to *Miranda* over the last forty years. Though prior criminal experience may seem qualitatively different from some of the other *Miranda* exceptions—attacking a *Miranda* prong directly rather than circuitously—it directly and indirectly serves the same policy rationales of the recognized exceptions.¹⁸⁷

Like every aspect of *Miranda*, the trial courts must closely monitor the exception. Indeed, when the government argues in favor of the applicability of the exception, the trial court might have to hold another evidentiary hearing. The overall cost in terms of judicial resources will be quite low; all that will be required of trial courts is an occasional extra evidentiary hearing, or a few minutes of an evidentiary hearing that is already going to be held. Fortunately, trial courts often hold these types of hearings surrounding every aspect of Fourth and Fifth Amendment criminal procedure, including *Miranda*.

Of paramount importance in these hearings will be the government's offer of proof that the police were, in fact, *negligent* in not administering the warnings—the trial court must find by a preponderance of the evidence that the police did not intentionally circumvent *Miranda*. If one thing is clear from the holding in *Missouri v. Seibert*, it is that the Court does not like the picture of a cop purposefully trying to make an end-run around *Miranda*. The trial courts' willingness to hold police to high standards is necessary to make the "prior criminal exception" work in practice as well as it does in theory. This is especially important because, after *Patane*, police have a great incentive to violate *Miranda*, in the hopes that talking through a suspect's invocation will lead to the discovery and subsequent admission of physical evidence equally probative of the truth.¹⁸⁸ Statistics bear out the fact that repeat felons, more so than others, know their rights and invoke them more frequently;¹⁸⁹ trial courts need to make sure that police respect a

¹⁸⁷ See supra Section IV.C.

¹⁸⁸ See generally Clymer, supra note 26.

¹⁸⁹ See Leo, Inside the Interrogation Room, supra note 146, at 286:

Though I tested for twelve social, legal and case-specific variables, the only variable that exercised a statistically significant effect on the suspect's likelihood to waive or invoke his *Miranda* rights was whether a suspect had a prior

proper *Miranda* invocation. The trial courts must vigilantly monitor police behavior to ensure compliance with the bounds of the “prior criminal experience” exception. Fortunately, though, trial courts are well versed in case-by-case determinations of *Miranda* issues. The prior criminal experience exception merely adds another factor to the inquiry surrounding *Miranda*’s knowledge prong, a balancing act that trial courts already perform every day.

criminal record . . . [W]hile 89% of the suspects with a misdemeanor record and 92% of the suspects without any record waived their *Miranda* rights, only 70% of the suspects with a felony record waived . . . Put another way, a suspect with a felony record in my sample 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.

Id. Though the sample size in Leo’s study is relatively small ($n=174$) and isolated, the results are supported by the studies of Wald et al., and to some degree by Neubauer and Leiken. Id. at 290–92 (citing Wald et al., *Interrogations in New Haven: The Impact of Miranda*, 76 *Yale L.J.* 1519, 1643–48 (1967); David W. Neubauer, *Confessions in Prairie City: Some Causes and Effects*, 65 *J. Crim. L. & Criminology* 103, 104 (1974); Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 *Denv. L.J.* 1, 19–20 (1970)). Further, these findings are implicitly supported by Professor Cassell’s assertions that *Miranda* creates an overbearing societal cost by reducing the confession rate. See, e.g., Cassell, *Miranda’s Social Costs*, supra note 146, at 445.