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The Immigrant and Miranda

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Article

The Immigrant and *Miranda*

Anjana Malhotra*

Abstract

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

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Introduction

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

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

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

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

³ *Miranda*, 384 U.S. at 457.

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

⁵ *Wong Wing v. United States*, 163 U.S. 228, 229 (1895).

⁶ Neil Gotanda describes constitutional colorblindness as relying on the technique of nonrecognition – “noticing but not considering race.” Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 16 (1991). Described in more detail,

Nonrecognition has three elements. First, there must be something which is cognizable as a racial characteristic or classification. Second, the characteristic must be recognized. Third, the

and is not formally a “race case,” the deployment of markers of difference place *Miranda* within the Warren court’s equality jurisprudence, where race, ethnicity, national origin, and citizenship are irrelevant for determining constitutional criminal procedural safeguards. Ernesto Miranda became Mexican so that it would be clear that the criminal justice system is meant to be one system for citizens and noncitizens alike.⁷

However, this long established unitary criminal justice system has begun to unravel on a doctrinal and practical level, as can be seen in the following example. In Morristown, New Jersey, law enforcement officials from the Morris County Sheriff’s Office ask every inmate in custody at the Morris County Correctional Facility whether they were born in the United States.⁸ If the individual answers “no,” the Jail informs Immigration and Customs Enforcement (“ICE”) under the State Criminal Alien Assistance Program (“SCAAP”), which compensates the County if the inmate is subject to civil or criminal immigration penalties.⁹ The Morris County Sheriff’s Department has taken the position that rights under *Miranda v. Arizona*¹⁰ do not apply to this, or any other, ICE referral questions it asks suspects about immigration status pursuant to a state-wide policy.¹¹ Thus, despite the fact that an inmate’s answer to this question could lead to prosecution for federal immigration crimes which have sentences of up to 20

characteristic must not be considered in a decision. For nonrecognition to make sense, it must be possible to recognize something while not including it in making a decision.

Id. at 16-17.

⁷ While individuals subject to civil deportation/removal proceedings are afforded a different set of protections because removal is civil penalty, the Supreme Court has not only reaffirmed this doctrine of equality of constitutional protection for noncitizens, but in fact strengthened the criminal procedural protections afforded to noncitizens in recent years. *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) (holding that the right to the effective assistance of counsel can be violated by a criminal defense attorneys failure to warn about the immigration consequences of pleading guilty). See also Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1332-40 (2011) (exploring how *Padilla* may represent a critical pivot point that reconceptualizes the Court’s conception of the civil or criminal nature of deportation).

⁸ Interview with Morris County Sheriff Ed Rochford and Undersheriff Frank Corrente, May 14, 2010 (notes on file with author) [hereinafter Interview with Morris County Sheriff and Undersheriff, May 14, 2010]. In an official report, the Sheriff’s Office has stated that they ask this question pursuant to “instructions and directives from ICE.” Sheriff Edward Rochford, Chief Ralph McGrane, Warden Frank Corrente, Staci Santucci, Esq., Morris County Sheriff’s Office, *An Impact Review of the United States Bureau of Immigration and Customs Enforcement 287(g) Programs Upon the County of Morris*, Submitted to the Morris County Board of Chosen Freeholders (Oct. 19, 2007) [hereinafter “Morris County 287(g) Impact Review”], although in previous interviews, Undersheriff Corrente has stated this question is based on state rules. Interview with Undersheriff Frank Corrente, March 5, 2010 (notes on file with author) [hereinafter “Morris County Undersheriff Interview, March 5”].

⁹ *Id.*; *Morris County 287(g) Impact Review*, at 1; 8 U.S.C. § 1231(i).

¹⁰ 384 U.S. 436 (1966).

¹¹ Interview with Morris County Sheriff and Undersheriff, May 14, 2010; Interview with Morris County Undersheriff, March 5, 2010.

years, officials do not provide Miranda warnings to individuals before asking them the ICE referral question, nor do they know or ascertain whether inmates have been Mirandized or invoked their right to be silent or right to speak with an attorney prior to questioning,¹² Morris County law enforcement officials do not permit individuals to contact an attorney before answering this question¹³ and place individuals who remain silent in response to this question into isolation until they respond.¹⁴ According to County Officials, all New Jersey jails follow this ICE referral system.¹⁵

The policies in place in Morris County, which are similar to practices throughout the country, reflect the views of local law enforcement officials throughout the country that question hundreds of thousands of individuals a year about their immigration status, place of birth or other questions that could lead to criminal and civil immigration sanctions do not require the same criminal procedure safeguards as other criminal law enforcement. Further, the failure or refusal to provide Miranda warnings in this context has been approved by a number of lower courts that have begun to tread dangerous new ground by developing a new doctrinal exceptionalism in *Miranda* jurisprudence for noncitizens. Although the Supreme Court in 1967 held in *Mathis v. United States*¹⁶ that the distinction of whether an initial custodial interrogation is intended for a civil or criminal investigation does not control the analysis for *Miranda* purposes if the investigation could lead to criminal charges in the tax context, this rule has not been applied in the immigration context. Instead, many lower courts have applied an unusual subjective analysis to determine whether *Miranda* rights apply to dual civil-criminal immigration questioning that diverges from the Court's focus on objective factors in analyzing *Miranda* rights. This aberration in immigrants' rights is occurring at a time when criminal immigration prosecutions are at a record high, comprising more than half of the federal criminal docket.¹⁷ This Article explores the roots of this new doctrinal exceptionalism and argues that it runs counter to long established *Miranda* jurisprudence and threatens to create dual track criminal procedure safeguards where one's *Miranda* rights depend in part on one's status.¹⁸ This Article argues that this is located in

¹² Interview with Morris County Sheriff and Undersheriff, May 14, 2010; Morris Interview with Morris County Undersheriff, March 5, 2010.

¹³ *Id.*; Morris County Sheriff's Office May 12, 2010 response to March 8, 2010 Open Records Act Request, p 1 (on file with author).

¹⁴ *Id.*; Morris County Undersheriff Interview, March 5, 2010.

¹⁵ Interview with Morris County Sheriff and Undersheriff, May 14, 2010; March 5 Corrente Interview. N.J.S.A. 10A:31-6.1.

¹⁶ 391 U.S. 1 (1967).

¹⁷ See Transactional Records Access Clearinghouse [hereinafter "TRAC"], *FY 2009 Federal Prosecutions Sharply Higher: Surge Driven by Steep Jump in Immigration Filings* (2009), available at trac.syr.edu; Joanna Lydgate, *Comment, Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 511 (2010).

¹⁸ Miranda rights not affected when custodial interrogation relates to crimes such as robbery, etc.; affected when custodial interrogation relates to immigration matters.

doctrinal confusion stemming from dual civil and criminal investigation of immigration violations.¹⁹ Courts, perhaps improperly influenced by the plenary power doctrine's exceptional treatment of the border and its enforcement,²⁰ have circumvented *Miranda's* safeguards for certain immigrants, departing from a unitary criminal justice system.

The doctrinal confusion of courts on this issue compounds the already serious implications of the federal government's significant structural changes in immigration enforcement. Despite the U.S. government's recent successful challenge to Arizona's state law authorizing local law enforcement, it has recently dedicated resources to measures that incentive and enlist untrained state and local law enforcement officials throughout the country as their front line of criminal and civil immigration enforcement.²¹ The federal government has used increased financial incentives in programs such as the SCAAP, which compensates local agencies to identify and refer to ICE immigrants in violation of criminal and civil immigration laws. However, unlike federal immigration officers, these local law enforcement personnel receive no training in immigration law and immigrants' constitutional protections. Such programs incentivize local law enforcement officers to abrogate noncitizens of their rights by providing compensation to local jails for pre- and post-trial incarceration of "criminal aliens." In the last five years, local officials have questioned and referred to ICE some 1.65 million suspects under SCAAP,²² in hopes of identifying eligible individuals subject to civil or criminal immigration violations to obtain a share of the \$4.65 billion the federal government allocated for SCAAP since 2007.²³ In effect, courts are enabling and legitimizing practices and policies that are already jeopardizing rights for non-citizen defendants. With the federal government enforcing criminal violations of immigration laws at unprecedented rates with the help of untrained local law enforcement officials, the risks of long-standing procedural protections for immigrants is substantial.

Surprisingly, while there is rich scholarly literature addressing the serious

¹⁹ See *infra* text accompanying notes ____ - ____.

²⁰ For the plenary power doctrine, see Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990).

²¹ See, e.g., Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1161-63 (2008) (describing increased role of state and local officials in enforcement of immigration laws); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1084-88 (2004) (describing federal effort to enlist local police in immigration enforcement after September 11).

²² See BJS, *FY 2007-2011 SCAAP Awards*, SCAAP Data Masterfile.

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

deficiencies of constitutional protections in civil immigration proceedings²⁴ and collateral consequences of criminal convictions on immigration status,²⁵ the developing doctrinal inequalities in immigrants' well-established constitutional protections and resulting the disproportionate impact on Latinos has received little scholarly attention. Scholars have only recently begun to take note of the shifting landscape of immigration enforcement in the criminal sphere, but such analysis has focused more on policy and institutional shifts rather than how courts are responding to these issues.²⁶ Much of the "crimmigration" scholarship has primarily addressed the convergence between immigration and local law enforcement of federal immigration laws and the collateral consequences of immigration laws for noncitizens.

My goal is to add to the literature in two ways. First, I examine doctrinal dimensions of *Miranda* and how it treats immigrants. That is to say, I use *Miranda* jurisprudence and federal interpretation to provide a sense of how courts are addressing the merged system of immigration enforcement and criminal justice, and secondarily with local actors as primary gatekeepers in civil and criminal immigration enforcement. The question I address is how doctrine has shifted and created new rules for immigrants in a once-uniform criminal justice system. *Miranda* rights provide a good prism for understanding how rights and rules are changing for immigrants. Second, I want to provide a sense of the on-the-ground impact of the new and confusing *Miranda* rules that courts have

²⁴ Jennifer Chacon, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563 (2010) (exploring the procedural inadequacies of the current system in light of the ongoing changes in immigration enforcement); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 295, 311-21 (2008) (arguing that the civil designation of expulsion proceedings has been repudiated by scholars and abandoned by the Court and critiquing the absence of procedural protections in such proceedings); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472, 500-10 (2007) (arguing immigration law has "absorb[ed] the theories, methods, perceptions, and priorities" of criminal law enforcement); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) (arguing that the line between immigration law and criminal law "has grown indistinct").

²⁵ See, e.g., Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000) (discussing the changes to the law and critiquing reform proposals).

²⁶ David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 167 (2012); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1845 (2011); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. L. REV. 1281, 1294 (2010); Jennifer Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 135-36 (2009) (discussing scholarship on convergence of criminal justice and immigration control regimes); Daniel Kanstroom, *Criminalizing the Undocumented: Irony Boundaries of the Post-September 11th "Pale of Law"*, 29 N.C. J. INT'L L. & COM. RSEG. 639, 652 (2004) ("Deportation is now often a virtually automatic consequence of a non-citizen's criminal conviction for even a minor state misdemeanor.").

developed in light of the unprecedented changes in criminal and civil immigration enforcement. I examine how the shift in *Miranda* jurisprudence operates, and on what scale. I am particularly interested in the ways in which courts are compounding institutional structures that are already altering immigrants' rights in an unprecedented era of criminal immigration enforcement. Courts are redefining rights and have departed from long-established criminal and immigrants' rights jurisprudence, which has significant implications for the substantive rights for noncitizens and citizens alike in the criminal justice system, as well as with the institutional actors charged with enforcing immigration law.

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

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

I. Background

A. Civil and Criminal Enforcement of Immigration Laws

Federal immigration laws include both civil and criminal components, codified in the Immigration and Nationality Act ("INA"). Until recently,

immigration has long been regulated in the civil sphere.²⁷ Unlawful presence, alone, is a civil violation.²⁸ Although scholars have critiqued the removal system as essential punitive,²⁹ the federal government uses a civil regulatory process, known as “removal proceedings,” to adjudicate whether an individual is deportable based on their status and may be removed from the United States.³⁰ During the removal process, individuals are entitled to statutory rights, due process, and other constitutional protections that share some overlap with the criminal justice system, but not the full panoply of criminal procedural protections.³¹

The INA also contains criminal provisions for immigration violations. For example, a person who enters the country illegally can be charged and prosecuted for a misdemeanor, and reentry after deportation is punishable for up to twenty years.³² The INA also contains criminal sanctions for entering the country without inspection or by use of false representations,³³ willful failure to register as an alien after thirty days following entry into the country,³⁴ illegal reentry following a deportation order,³⁵ and willful failure to depart or apply for travel documents after deportation order.³⁶

Non-citizens facing criminal charges for immigration violations undergo identical criminal proceedings as citizens, and are entitled to the full panoply of procedural protections as U.S. citizens in all phases of the criminal process. To prosecute an immigration crime, federal prosecutors must follow the same procedures as all federal crimes: bring charges that are adjudicated in Article III Courts, with grand jury indictments and use jury trials to decide guilt. The Supreme Court established a unitary criminal justice system for immigrants and

²⁷ Sklansky, *Ad Hoc Instrumentalism*, *supra* at 167; Chacón, *Managing Migration*, *supra* at 136.

²⁸ 8 U.S.C. § 1182(a)(6)(A)(i) (2012).

²⁹ *See, e.g.,* Legomsky, *Asymmetric Criminal Justice*, *supra* n. at 511-512 (critiquing the Supreme Court’s designation of deportation or removal as a civil sanction); Markowitz, *Deportation Is Different*, *supra* __ 1314-1318 (arguing that the Court’s designation of removal proceedings as civil is doctrinally incoherent).

³⁰ 8 U.S.C. §§ 1226, 1229 (2012).

³¹ *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893); *See also, Chacon, A Diversion of Attention?* *supra* at 1603-1605; Stumpf, *Crimmigration Crisis*, *supra* at 390-395.

³² 8 U.S.C. §§1325, 1326.

³³ 8 U.S.C. §§ 1325(a)(2)-(3) (defining as criminal the entry into the country by eluding examination as well as entry by use of false or misleading representation).

³⁴ 8 U.S.C. §§ 1302, 1306 (stating that any alien who willfully fails to register after thirty days can be guilty of a misdemeanor and fined up to \$1000 or imprisoned up to six months or both).

³⁵ 8 U.S.C. § 1326(a).

³⁶ 8 U.S.C. § 1253.

citizens more than a century ago in *Wong Wing v. United States*,³⁷ when it invalidated a federal law passed during Chinese exclusion that created both a criminal penalty of hard labor and civil deportation for Chinese workers who were adjudicated to not be citizens or legal residents through a summary proceeding.³⁸ The Court held that the law violated the Fifth and Sixth Amendments for imposing a criminal penalty for immigration violations without a judicial trial because “all persons within the territory of the United States are entitled to the protections”³⁹ Since *Wong Wing*, the Court has continued to reaffirm equality for noncitizen criminal defendants all criminal rights and protections, including Miranda warnings and the right against self-incrimination protected by the Fifth Amendment.⁴⁰

Although, as described below, an upsurge in federal criminal prosecutions and institutional shifts have recently blurred the boundaries between civil and criminal of immigration laws,⁴¹ Congress and the Supreme Court have formally maintained these distinctions.

B. Miranda Warnings in the Criminal Context: The Rule and the Rationale

The Fifth Amendment privilege against self-incrimination⁴² prohibits the government from compelling any person to give testimonial statements that may subject him or her to criminal prosecution or penalties, regardless of citizenship⁴³ in civil, criminal proceedings or informal settings.⁴⁴ In *Miranda v. Arizona*,⁴⁵ the Supreme Court held that the Fifth Amendment privilege requires the police to advise a suspect in custody prior to questioning of the now-famous warnings: that

³⁷ 163 U.S. 228, 229 (1895).

³⁸ Act of May 5, 1892, ch. 60, § 4, 27 Stat. 25

³⁹ *Id.* at 235.

⁴⁰ *Wong Wing v. United States*, 163 U.S. 228, 229 (1895). *See also United States v. Balsys*, 524 U.S. 666, 671 (1998); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953).

⁴¹ *See, e.g., Sklansky, Ad Hoc Instrumentalism, supra note 24*, at 167; Eagly, *Prosecuting Immigration, supra note __*, at 1294 (“immigration enforcement and criminal justice have merged into a “single, integrated regulatory bureaucracy ... that blurs and reshapes law enforcement power, prosecutorial incentives, and the aims of the criminal law”).

⁴² U.S. CONST. AMEND. V. (no one “shall be compelled in any criminal case to be a witness against himself.”).

⁴³ *Matthews v. Diaz*, 426 U.S. 67, 77 (1976). (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection [under the Fifth Amendment].”)

⁴⁴ *See, e.g., Lefkowitz v. Turley*, 414 U.S. 70 (1973) (“The Fifth Amendment privilege against self-incrimination allows individuals not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”).

⁴⁵ 384 U.S. 436 (1966).

she has the right to remain silent and to the assistance of counsel during the interrogation, or the functional equivalent,⁴⁶ and a failure to do so will ordinarily result in suppression unless the accused makes a voluntary, knowing, and intelligent waiver of their rights.⁴⁷ By doing so, the Court extended the constitutional safeguard against self-incrimination to informal settings, including jail.⁴⁸

The *Miranda* Court believed these rules were necessary to counteract the “inherently coercive” nature of police interrogation, reflecting both its experience in reviewing abuses that routinely took place at the police stationhouse in interrogating suspects, and its close review of the psychological ploys described in police manuals.⁴⁹ Recognizing that “custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals,”⁵⁰ the Court held that the warnings would “dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgement of [a] suspect's Fifth Amendment rights.”⁵¹ The Court was also concerned about the previous unwieldy fact-intensive due process voluntariness test that previously governed the admissibility of self-incriminating statements made during custodial interrogations, which courts found challenging to administer⁵² and police to follow.⁵³ Thus, the *Miranda* rules provided a more objective and “concrete”⁵⁴ method for courts to presumptively identify coerced statements and guide police in conducting constitutionally permissible custodial interrogations, while protecting suspects.⁵⁵

Guided by these concerns for clarity, *Miranda* and its progeny held that *Miranda* warnings and waivers are triggered before any custodial interrogation⁵⁶

⁴⁶ See *Duckworth v. Eagan*, 492 U.S. 195, 202-03 (1989) (warnings must be “‘a fully effective equivalent’” of the *Miranda* language, and “reasonably ‘conve[y] to [a suspect] his rights as required by *Miranda*’”).

⁴⁷ *Miranda*, 384 U.S. at 474.

⁴⁸ Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 436-38 (1987).

⁴⁹ *Miranda*, 384 U.S. at 448-59.

⁵⁰ *Id.* at 455.

⁵¹ *Moran v. Burbine*, 475 U.S. 412, 425 (1986).

⁵² Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 745 (1987).

⁵³ See *infra* Section II.C.

⁵⁴ The Court explained that it granted cert in *Miranda* to address the “problems... of applying the privilege against self-incrimination to in-custody interrogation, to give concrete constitutional guidelines for law enforcement agencies and courts to follow.” *Miranda*, 384 U.S., at 441-442.

⁵⁵ *Id.*

⁵⁶ The Court has subsequently required that “custody” and “interrogation” be defined by objective factors and not by the subjective intent of the police or the belief of the accused. See, e.g., *Stansbury v. California*, 511 U.S. 318, 323-24 (1994) (“[T]he initial determination of custody

during a criminal investigation⁵⁷ or ***a civil investigation that could result in a criminal prosecution***.⁵⁸ Government officials must clearly administer the four warnings under *Miranda* in a manner that is not misleading⁵⁹ and provide suspects the “[o]ppportunity to exercise these rights ...throughout the interrogation.”⁶⁰ Any waiver of these rights must be knowing and intelligent.⁶¹ Once a suspect has invoked her “right to silence” or “right to counsel,” government officials must cease all questioning of the suspect⁶² until counsel is provided,⁶³ or the suspect reinitiates further communication.⁶⁴ These waiver rules apply to subsequent questioning of the suspect about any offense,⁶⁵ by any government official who seeks to question the suspect.⁶⁶

Since *Miranda* was decided, while the Court has opted for objective rules and clarity,⁶⁷ it has carved out a number of exceptions⁶⁸ to the initial decision, in circumstances where the underlying policy purposes for *Miranda* are absent.⁶⁹

depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.”); *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980).

⁵⁷ Specifically, an individual facing custodial investigation “must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” *Miranda*, 384 U.S. at 479.

⁵⁸ See, e.g., *United States v. Mathis*, 391 U.S. 1, 5 (1968) (requiring *Miranda* warnings where the petitioner was questioned by the government regarding a civil matter that immediately lead to a criminal investigation, before IRS interrogation of a taxpayer suspected of tax fraud); *United States v. Mata-Abundiz*, 717 F.2d 1277, 1279 (9th Cir.1983).

⁵⁹ See *United States v. Beale*, 921 F.2d 1412, 1435 (11th Cir.1991); *California v. Prysock*, 453 U.S. 355 (1981).

⁶⁰ *Miranda*, 384 U.S. at 479.

⁶¹ *Id.*

⁶² *Michigan v. Mosely*, 423 U.S. 96 (1975).

⁶³ *Edwards v. Arizona*, 451 U.S. 477 (1981).

⁶⁴ *Id.* at 484-85; *Minnick v. Mississippi*, 498 U.S. 146, 149-156 (1990).

⁶⁵ *Roberson*, 486 U.S. at 683-84.

⁶⁶ See *Id.* (holding that an officer initiating a custodial interrogation must “determine whether the suspect has previously requested counsel.”); *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991).

⁶⁷ See *supra*, Section IIIC.

⁶⁸ See, e.g., *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010) (creating 14-day break in custody rule); *United States v. Patane*, 542 U.S. 630, 633 (2004) (exception for the fruit of the tree doctrine for physical evidence); *New York v. Quarles*, 467 U.S. 649 (1984) (public safety exception to *Miranda*); *Harris v. New York*, 401 U.S. 222, 226 (1971) (allowing unwarned statements for impeach purposes).

⁶⁹ Scholars have criticized these exceptions as weakening the *Miranda* protections and its impact. See *infra* note ____

One such exception is the “booking exception,” which exempts *Miranda* warnings to questions essential for a police booking process, unless the questions should have known that the question would elicit an incriminating response.⁷⁰ Because some of the dual civil and criminal immigration *Miranda* cases involve the booking process, the next section outlines the parameters of this exception and the Court’s definition of interrogation under *Miranda*.

C. Interrogation, The Booking Exception, and its Exception

Relevant to cases addressing dual civil and criminal immigration questioning, the Court has defined “interrogation” to mean questions or words or actions that are likely to be incriminating, measured objectively from the perspective of the suspect. The Court has also held that *Miranda* warnings generally do not need to be given prior to asking a suspect booking questions about routine identifying information “normally attendant to arrest and custody,”⁷¹ because such questions do not normally elicit incriminating responses. However, the Court has made clear that *Miranda* applies to booking questions designed to elicit incriminating responses.⁷² As courts assessing whether dual criminal civil immigration custodial questioning constitutes “interrogation” and some analyze questions asked at booking, this section reviews the Court’s decisions of interrogation and the booking exception.

The Supreme Court provided guidance on both the definition of interrogation and the booking exception in *Rhode Island v. Innis*⁷³ and *Pennsylvania v. Muniz*.⁷⁴ In *Innis*, a suspect, after invoking his *Miranda* right to counsel, made incriminating statements in response to a statement made by one of the police officers in a conversation with another officer, while they were transporting him to the police station.⁷⁵ In deciding whether the officer’s statement violated the suspect’s *Miranda* rights, the Supreme Court defined

⁷⁰ *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980); *Pennsylvania v. Muniz*, 496 U.S. 582, 601, (1990) (plurality opinion of Brennan, J.).

⁷¹ *Innis*, 446 U.S. at 301. *See also U.S. v. Parra*, 2 F.3d 1058 (10th Cir. 1993) *cert. denied*, 510 U.S. 1026 (1993) (“The underlying rationale for the exception is that routine booking questions do not constitute interrogation because they do not normally elicit incriminating responses.”).

⁷² *Muniz*, 496 U.S. at 602 n. 14 (“Without obtaining a waiver of the suspect’s *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions.”).

⁷³ 446 U.S. 291 (1980).

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

⁷⁵ *Innis* was arrested in connection with a robbery with a sawed-off shot gun. During the ride to the police station, the two officers transporting him conversed among themselves when one officer stated, “there’s a lot of handicapped children running around this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.” *Id.* at 294-295. *Innis* then asked the police to turn around so that he could show them where the gun that he used to kill the taxicab driver was located, which was later used to criminally convict him. *Id.* at 295.

interrogation for purposes of *Miranda* to include both express questioning and its “functional equivalent,” or “any words or actions on the part of police (other than those *normally attendant* to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.”⁷⁶

Reflecting the *Miranda* Court’s concerns with safeguarding suspects from a coercive interrogation environment, the Court held that the interrogation inquiry turns on the perceptions of the suspect, measured by an objective standard.⁷⁷

While the Court made clear that interrogation does not turn on the actual intent of the police,⁷⁸ it observed in a footnote that the actual intent of the police may be relevant if there is “a police practice is designed to elicit an incriminating response from the accused.”⁷⁹ Read together, the Court in *Innis* used an objective test to define whether questions or their functional equivalent are interrogation, allowing consideration of actual intent only as evidence of police tactics designed to incriminate, consistent with *Miranda* both for its focus on the suspect and for its emphasis on a clear, objective inquiry.⁸⁰ In dicta, it noted that interrogation did not include questions “*normally attendant* to arrest and custody.”⁸¹

Ten years later, in *Pennsylvania v. Muniz*⁸² the Court reaffirmed the objective approach both in defining interrogation and in carving out the booking exception. In *Muniz*, the defendant was arrested for driving while intoxicated and taken to the police station. At the station, the booking officer asked Muniz, without providing *Miranda* warnings, for his name, address, height, weight, eye color, date of birth, and his current age as well as the date of his sixth birthday, which Muniz could not remember. The Court held that the defendant’s responses to basic identifying questions asked without *Miranda* warnings were custodial interrogations but exempt from *Miranda*, but held that his response to the question about the date of his sixth birthday was inadmissible under *Miranda*.⁸³ The Court reasoned that *Miranda* applied to the question about his sixth birthday

⁷⁶ *Innis*, 446 U.S. at 301. The Court defined an “incriminating response” to mean “any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial.” *Id.* at 302 n.5.

⁷⁷ 446 U.S. 291, 301 (1980). *See also* Welsh S. White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 MICH. L. REV. 1209 (1980).

⁷⁸ *Id.* (the definition of interrogation focuses on “the perceptions of the suspect, rather than the intent of the police [to] reflect[] the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police”).

⁷⁹ *Id.* at 301 n. 7.

⁸⁰ *Innis*, 446 U.S. at 301 The Court’s decision surprised scholars at the time for its broad definition of interrogation, its focus on the perspective of the suspect and clear objective standards. *See, e.g.,* Jesse Stewart, *The Untold Story of Rhode Island v. Innis: Justice Potter Stewart and the Development of Modern Self-Incrimination Doctrine*, 97 VA. L. REV. 431, 439 (2011).

⁸¹ *Id.* at 300-301.

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

⁸³ *Id.* at 601.

because the question called “for a response requiring him to communicate an express or implied assertion of fact or belief, confronted with the ‘trilemma’ of truth, falsity, or silence, the historical abuse against which the privilege against self-incrimination was aimed.”⁸⁴

A plurality of the Court held that the first six identifying questions were exempt from *Miranda* because they were “limited focused inquiries” that were “for record keeping purposes only” and designed to secure the “biographical data necessary to complete booking or pretrial services.”⁸⁵ The Court reasoned that routine booking questions were “not likely to be perceived as calling for any incriminating purpose [by the suspect].”⁸⁶ The plurality underscored, however, that the police may not ask questions during booking that are “designed to elicit incriminatory admissions.”⁸⁷ In recognizing the booking exception, the *Muniz* plurality cited to three Court of Appeals cases, all of which carefully limited the exception to routine questions necessary to secure biographical data, where there was no objective evidence that the police did not use booking questions as a “guise” to gain incriminating evidence or to “subterfuge” suspects’ rights under *Miranda*.⁸⁸ A fifth Justice, Justice Marshall, concurred that all booking questions constituted custodial interrogation for purposes of *Miranda*.⁸⁹

⁸⁴ *Id.* at 596-97. (“By hypothesis, the custodial interrogation’s inherently coercive environment precluded the option of remaining silent, so he was left with the choice of incriminating himself by admitting the truth that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not know was accurate (which would also have been incriminating”).

⁸⁵ *Id.*, quoting Brief for the United States as Amicus Curiae 12, quoting *U.S. v. Horton*, 873 F.2d 180, 181 n. 2 (8th Cir.1989).

⁸⁶ *Id.* at 605.

⁸⁷ 496 U.S. at 602 n. 14 (internal quotations omitted) (citing *United States v. Avery*, 717 F.2d 1020, 1024–1025 (6th Cir. 1983); *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983); *United States v. Glen-Archila*, 677 F.2d 809, 816, n. 18 (11th Cir. 1982)).

⁸⁸ 496 U.S. at 602 n. 14; *Avery*, 717 F.2d at 1024–1025 (holding *Miranda* did not apply to statement made in response to booking questions because they were “part of a routine procedure to secure biographical data ... did not relate, even tangentially to criminal activity,” and “there is no evidence that the defendant was particularly susceptible to these questions, or that police somehow used the questions to elicit an incriminating response from the defendant”); *Mata-Abundiz*, 717 F.2d at 1280 (holding booking exception did not except INS agent from providing *Miranda* warnings before questioning suspect about biographical information about suspect’s immigration status because questions did not relate to booking and agent should have known that civil investigation could turn criminal); *Glen-Archila*, 677 F.2d at 816, n.18 (holding routine booking question about suspect’s address exempt from *Miranda* because question was “routine, biographical, and not intended to induce an incriminating response.”).

⁸⁹ Justice Marshall reasoned that instead of creating a new *Miranda* booking exception it would be better “to maintain the clarity of the doctrine by requiring police to preface all direct questioning of a suspect with *Miranda* warnings.” *Muniz*, 496 U.S. at 611 n.1 (Marshall, J., concurring in part and dissenting in part) (quoting *Innis*, 446 U.S. at 300-01).

When analyzed from the coercion concerns animating *Miranda*, the exception of routine booking questions does not increase the compulsion perceived by a suspect above the level inherent in custody. On the other hand, the Court made sure to maintain the fundamental protection of *Miranda* to protect against police coercion, by holding that questions asked during booking that are designed to elicit incriminatory admissions do not come under this exception. Notably, in recognizing the limitation of the booking exception, the *Muniz* plurality cited to *United States v. Mata-Abundiz*, which held that “[c]ivil as well as criminal interrogation of in-custody defendants by INS investigators should generally be accompanied by the *Miranda* warnings.”⁹⁰ Observing that the test for the booking exception to *Miranda* “is objective,” and “[t]he subjective intent of the agent is relevant but not conclusive,”⁹¹ the Court in *Mata-Abundiz* concluded that the officer’s statements that the interview was to obtain biographical information for a “routine, civil investigation,” was irrelevant in light of the objective factors suggesting that the questions were likely to elicit an incriminating response.⁹²

As *Mata-Abundiz* and the facts of *Muniz* demonstrate, the Court defined the booking exception narrowly to routine biographical questions, and that both this exception, like the definition of “interrogation” as an objective inquiry, to be analyzed from the perspective of the suspect.⁹³ In elaborating on the interrogation inquiry in *Innis* and *Muniz*, the Court has continued to emphasize the importance of focusing on the suspect, to reflect the purpose of *Miranda* to counteract the coercion inherent in custodial interrogation.⁹⁴

Following *Muniz*, all federal court of appeals outside the immigration context recognized the booking exception, and most lower courts have generally adopted the same objective inquiry and suspect-focused principles that the Court used in *Innis* to define “interrogation” to decide whether the booking exemption applies.⁹⁵ While a minority of federal courts and some state courts addressing the

⁹⁰ *Mata-Abundiz*, 717 F.2d at 1279-1280.

⁹¹ *Id.* at 1280.

⁹² *Id.*

⁹³ 2 LaFave, Israel, King & Kerr, *Criminal Procedure*, § 6.7(a), 599 (3d. ed. 2007) (“[I]t makes more sense to consider the objective purpose manifested by the police—that is, what an objective observer with the same knowledge as the suspect would conclude the police were up to.”); Yale Kamisar, *Police Interrogations and Confessions*, 4 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1922, 1928 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000); White, *Supra* __ *Interrogation Without Questions*, 1209. *Accord* *Mata-Abundiz*, 717 F.2d at 1280.

⁹⁴ *See, e.g., Illinois v. Perkins*, 496 U.S. 292, 296 (1990) (“Coercion is determined from the perspective of the suspect.”); *Arizona v. Mauro*, 481 U.S. 520, 528-29 (1987) (same).

⁹⁵ *See, e.g., United States v. Cowan*, 674 F.3d 947, 958 (8th Cir.2012); *United States v. Pacheco-Lopez*, 531 F.3d 420, 423-424 (6th Cir. 2008); *Rosa v. McCray*, 396 F.3d 210, 222 (2d Cir.2005); *United States v. Reyes*, 225 F.3d 71, 76–77 (1st Cir.2000); *United States v. Bogle*, 114 F.3d 1271, 1275 (D.C. Cir. 1997) *cert. denied*, 522 U.S. 938 (1997); *United States v. Brown*, 101 F.3d 1272, 1274 (8th Cir. 1996); *United States v. Ventura*, 85 F.3d 708, 711 (1st Cir. 1996);

booking exception have considered subjective factors of the suspect⁹⁶ or the officer⁹⁷ in applying the booking exception,⁹⁸ the prevailing view is that the inquiry turns on an objective analysis whether the police asking a question during booking *reasonably should have known* that the question would elicit an incriminating response.⁹⁹

Reflecting the concerns animating *Miranda*, most courts have characterized the booking exemption as a “limited exemption”¹⁰⁰ that applies on to questions essential for booking purposes that ask “simple identification information of the most basic sort.”¹⁰¹ To curb abuse of the booking exception, almost all courts of appeals have made held that the police may not use routine biographical questioning as a guise for obtaining incriminating information.¹⁰²

United States v. Bishop, 66 F.3d 569, 572 (3d Cir. 1995); *United States v. Henley*, 984 F.2d 1040, 1042 (9th Cir. 1993); *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir.1986); *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir.1983); *United States v. Booth*, 669 F.2d 1231, 1238 (9th Cir. 1982); *United States v. Hinckley*, 672 F.2d 115, 122 (D.C.Cir.1982). Some courts held prior to *Muniz* that the booking exception applied to all questions asked, even during booking. *See, e.g., United States v. Edwards*, 885 F.2d 377, 384-85 (7th Cir. 1989).

⁹⁶ The Sixth Circuit has considered subjective factors from the perspective of the suspect, *United States v. Clark*, 982 F.2d 965, 968 (6th Cir. 1993), but has also held that actual intent of the police is not relevant in applying the booking interrogation. *United States v. Soto*, 953 F.2d 263, 265 (6th Cir. 1992) (“Absence of intent to interrogate, while not irrelevant, is not determinative of whether police conduct constitutes interrogation.”).

⁹⁷ The Fourth and Fifth Circuit have both considered subjective factors from the perspective of both the suspect and the police. *See, e.g., United States v. Virgen-Moreno*, 265 F.3d 276, 294 (5th Cir. 2001) (examining officer’s intent to conclude booking exception did not apply). *See also* Meghan S. Skelton & James G. Connell, III, *The Routine Booking Question Exception to Miranda*, 34 U. BALT. L. REV. 55, 87-92 (2004) (collecting cases).

⁹⁸ Some state courts examine only whether the police were exercising an administrative function, without further inquiry; whether this test is the appropriate one was recently raised in a petition for certiorari. *See, e.g., Alford v. State*, 358 S.W.3d 647 (Tex.Crim.App.2012), *petition for cert. filed*, 80 U.S.L.WEEK 3660 (US. July 12, 2012) (No. 11-1318).

⁹⁹ *See, e.g., Rosa*, 396 F.3d at 222; *Bogle*, 114 F.3d at 1275; *Ventura*, 85 F.3d at 711; *Henley*, 984 F.2d at 1042; *United States v. Taylor*, 985 F.2d 3, 7 (1st Cir. 1993); *United States v. Soto*, 953 F.2d 263, 265 (6th Cir. 1992); *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1046 (9th Cir. 1990); *Disla*, 805 F.2d at 1347; *United States v. McLaughlin*, 777 F.2d 388, 391-92 (8th Cir. 1985); *Mata-Abundiz*, 717 F.2d at 1280; *United States v. Minkowitz*, 889 F. Supp. 624, 627 (E.D.N.Y. 1995).

¹⁰⁰ *See, e.g., Rosa*, 396 F.3d at 222; *United States v. Downing*, 665 F.2d 404, 406 (1st Cir.1981); *Muniz*, 496 U.S. at 602 n. 14, quoting Brief for United States as Amicus Curiae 13.

¹⁰¹ *Virgen-Moreno*, 265 F.3d at 294; *United States v. Burns*, 684 F.2d 1066, 1076 (2d Cir. 1982); *LaVallee*, 521 F.2d at 1113.

¹⁰² *See, e.g., Robinson v Percy*, 738 F.2d 214, 220 (7th Cir. 1984); *Avery*, 717 F.2d at 1024-2; *Hinckley*, 672 F.2d at 123-26; *LaVallee*, 521 F.2d at 1113 n. 2.; *Downing*, 665 F.2d at 407; *Booth*, 669 F.2d at 1238 (“[W]e recognize the potential for abuse by law enforcement officers who might, under the guise of seeking “objective” or “neutral” information, deliberately elicit an incriminating statement from a suspect.”).

II. The Erosion of *Miranda* through the Emergence of Doctrinal Exceptionalism in the Immigration Context

This section explores how lower courts have created an aberration in *Miranda* jurisprudence for criminal and civil questions about immigration status by departing from well-settled principles. While the Supreme Court has long adopted an objective analysis to interpret the application of *Miranda*, the tests used by lower courts in the immigration context have largely been subjective, ambiguous, and in conflict with well-established Supreme Court authority regarding dual civil and criminal interrogations. In addition, this emerging doctrine further conflicts towards the clear tests adopted by the Court in *Miranda* and the policies and animating principles underlying *Miranda*. By subtle doctrinal manipulation, courts are backtracking from a century of equal treatment of citizens and non-citizens in the criminal justice system to exempt them from the well-established requirements of *Miranda*. The current subjective approach and misapplication of direct precedent allows immigrants' rights to *Miranda* warnings to be diminished in a central way: the government may be permitted to label its investigation as a civil matter or an officer may plead ignorance to criminal immigration laws in order to avoid the procedural guarantees of *Miranda* even when by design the intent of the investigation is criminal or both criminal and civil.¹⁰³

One theoretical caveat must be made. In the 45 years since *Miranda* was decided, the Supreme Court has increasingly carved out exceptions to its core principles.¹⁰⁴ While the conduct-regulating rules requiring warnings prior to custodial interrogation have largely remained the same and the Court recently affirmed the constitutional underpinnings of *Miranda*,¹⁰⁵ it has also effectively weakened the legal significance of police's failure to follow the rules. There is an ongoing academic debate about the protective value of the doctrine in light of the Court's recent decisions and contemporary interrogation tactics police to evade suspect's *Miranda* rights.¹⁰⁶ However, even as the Court has made inroads into

¹⁰³ Eagly, *Prosecuting Immigration*, *supra* n. 24, at 1294; Adam B. Cox & Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 N.Y.U. L. Rev. 1403, 1414 (2009).

¹⁰⁴ *See infra* n. 68.

¹⁰⁵ *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

¹⁰⁶ *See, e.g.*, Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 21-23 (2010) (arguing that recent precedent has effectively overruled *Miranda*); Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1521, 1525 (2008) ("[T]he Supreme Court has effectively encouraged police practices that have gutted *Miranda*'s safeguards."); Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-first Century*, 99 MICH. L. REV. 1000, 1009-10, 1016-23 (2001) (observing that police have learned to evade *Miranda* by interrogating outside of custodial settings or through psychological manipulation). *But see* Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1061 (2001) (observing that most of the Supreme Court opinions creating exceptions to *Miranda*

Miranda protections over the years, it has done so in a way that has continued to provide a functional approach and test to guide officers. The next part discusses the development of multi-factored tests by lower courts in the immigration context that depart from the first and central interpretive principles in *Miranda* and its progeny.

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

Though there is relative clarity with regard to an objective definition of *Miranda* rights during custodial interrogation, with a carefully drawn approach to the booking exception to protect against inculpatory booking questions, lower courts have been confounded when faced with custodial questioning in dual civil and criminal interrogations to obtain immigration status, both within and outside of the booking context. There is a circuit split on resolving the issue of whether questioning detained suspects dual in civil criminal immigration inquiries constitute interrogation. The Second,¹⁰⁷ Fourth,¹⁰⁸ Eighth,¹⁰⁹ Tenth¹¹⁰ and Eleventh¹¹¹ Circuits, and at least one panel of the Ninth Circuit¹¹² have adopted a highly unusual subjective approach that analyzes the actual intent of the officer conducting the interrogation. Relying on direct evidence of an officer's intent, these Courts look at a broad range of factors, including whether the officer knows the distinctions of civil and criminal law, suspected violations of criminal or civil immigration laws, or had background facts about the suspect. These Courts largely ignore the rule in *Mathis*, and have relied on the plenary power doctrine to characterize dual criminal and civil interrogations as "civil."

The second approach, adopted by the First¹¹³, Third¹¹⁴, and several panels of the Ninth Circuit¹¹⁵ uses an objective multi-factor test focused on the suspect

"involved a good faith or unintentional violation of the prophylactic rule, coupled with particularly high costs for implementing the rule").

¹⁰⁷ See, e.g., *United States v. Rodriguez*, 356 F.3d 254, 259 (2d Cir.2004).

¹⁰⁸ See, e.g., *United States v. D'Anjou*, 16 F.3d 604, 609 (4th Cir. 1994), *cert. denied*, 512 U.S. 1242 (1994).

¹⁰⁹ See, e.g., *United States v. Ochoa-Gonzalez*, 598 F.3d 1033, 1038 (8th Cir.2010).

¹¹⁰ See, e.g., *United States v. Medrano*, 356 Fed. Appx. 102, 107 (10th Cir. 2009); *United States v. Parra*, 2 F.3d 1058 (10th Cir. 1993) *cert. denied* 510 U.S. 1026 (1993).

¹¹¹ See, e.g., *United States v. Lopez-Garcia*, 565 F.3d 1306, 1316 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1012 (2009).

¹¹² See, e.g., *United States v. Salgado*, 292 F.3d 1169, 1172 (9th Cir. 2002) *cert. denied*, 537 U.S. 1011. *But see United States v. Chen*, 439 F.3d 1037, 1040 (9th Cir.2006); *Gonzalez-Sandoval*, 894 F.2d at 1046- 47; *Mata-Abundiz*, 717 F.2d at 1280.

¹¹³ See, e.g. *United States v. Doe*, 878 F.2d 1546, 1551 (1st Cir. 1989) (Breyer, J.) ("The question is an objective one; the officer's actual belief or intent is relevant, but it is not conclusive.").

based on *Innis*, to examine whether, based on the totality of the circumstances, the officer objectively should have known that questioning were likely to elicit incriminating information.¹¹⁶ In the latter approach, the officer's intent is relevant but not determinative, and more consonant with the Court's guidance in *Miranda*, *Innis* and *Muniz*.¹¹⁷

This is not to say that Courts of Appeals within these two categories consistently apply one approach to determine whether *Miranda* rights apply in dual civil and criminal inquiries, as there are variances in approaches between and within circuits, and differences in the factors courts consider relevant to the analysis. For example, some courts hat *Miranda* unequivocally applies to dual civil and criminal booking inquiries about information related to immigration status information because "while there is usually nothing objectionable about asking a detainee his place of birth, the same question assumes a completely different character when an agent asks it of a person he suspects is an illegal alien."¹¹⁸ Other courts, even within the same Circuit, have applied the booking exception to hold *Miranda* does not cover immigration-status related inquiries, regardless of the officer's intent.¹¹⁹ In deciding this issue, courts generally focus on factors not traditionally considered by courts in defining interrogation, booking exceptions and *Miranda* jurisprudence. As described below, the aberration in *Miranda* jurisprudence for immigrants raises some troubling issues for uniformity, guidance to law enforcement officers and the unitary criminal justice system that has long protected immigrants and citizens equally.

1. Subjective Intent of Law Enforcement Officers

The Second, Fourth, Tenth and Eleventh Circuit, as well as one panel of the Ninth Circuit have adopted a subjective test to define interrogation and the booking exception for *Miranda* purposes in dual civil and criminal immigration inquiries. These courts focus on the "actual criminal investigative intent" of the

¹¹⁴ *United States v. Carvajal-Garcia*, 54 Fed. Appx. 732, 2002 WL 31667659 (3rd Cir. 2002). Notably, the Court expressed its agreement with a Ninth Circuit case that held that an officer's need not suspect that an immigration inquiry would lead to a criminal charge.

¹¹⁵ See, e.g., *Chen*, 439 F.3d at 1040; *Gonzalez-Sandoval*, 894 F.2d at 1046- 47; *Mata-Abundiz*, 717 F.2d at 1280.

¹¹⁶ *Innis*, 446 U.S. at 301.

¹¹⁷ See, e.g., *Chen*, 439 F.3d at 1040 ("The investigating officer's subjective intent is relevant but not determinative, because the focus is on the perception of the defendant."); *Doe*, 878 F.2d at 1551 ("The question is an objective one; the officer's actual belief or intent is relevant, but it is not conclusive.").

¹¹⁸ See, e.g., *Henley*, 984 F.2d at 1042. *Gonzalez-Sandoval*, 894 F.2d 1043, 1046-47 (9th Cir.1990), *United States v. Equihua-Juarez*, 851 F.2d 1222, 1225-26 (9th Cir.1988); *Mata-Abundiz*, 717 F.2d at 1280. See also *United States v. Aragon-Ruiz*, 551 F.Supp.2d 904, 933 (D.Minn.2008).

¹¹⁹ Compare *Salgado*, 292 F.3d at 1172 with *Mata-Abundiz*, 717 F.2d at 1280; *Parra*, 2 F.3d at 1061 with *Medrano*, 356 Fed. Appx. at 102.

government official to determine whether he subjectively intended to elicit an incriminating response for a criminal violation. This highly fact-intensive analysis turns on factors including the particular officer's knowledge about the criminal immigration provisions, intent or authority to charge the suspect with an immigration-related crime and the particular suspicions held by the officer that the suspect has committed an immigration crime.¹²⁰

In applying this test, courts often rely exclusively on officers' sworn testimony to determine his intent to elicit criminal charges, despite objective evidence to the contrary as well as the officer's authority to bring criminal charges. The Eleventh Circuit took courts this approach in *United States v. Lopez-Garcia*,¹²¹ where a local police officer deputized to enforce immigration laws pursuant to a federal-local "287(g) agreement"¹²² questioned Jorge Lopez-Garcia about his immigration status one day after his arrest for driving without a valid driver's license and drug possession. Without providing *Miranda* warnings, the officer asked Lopez-Garcia about his immigration status and informed him that if he did not have valid immigration papers, immigration proceedings would be initiated against him, he could see an immigration judge or sign a waiver to have his removal expedited.¹²³ Lopez-Garcia responded by admitting he was born in Mexico and in the U.S. illegally, which the government subsequently used as evidence to criminally convict him of reentering the country after previously being deported.¹²⁴

The Eleventh Circuit held that the immigration questions did not constitute "interrogation" under *Miranda* based on the officer's personal intentions in questioning, as well as his authority to prosecute immigration law. While referencing the *Innis* objective standard, the court relied on the officer's sworn statement that he did not believe that Lopez-Garcia was undocumented and, in any event, that he did not have the authority to bring criminal charges against the suspect. The court further reasoned that *Miranda* did not apply because the officer did not question the suspect for "law enforcement purposes," but rather to determine whether he should be subject to civil removal proceedings.¹²⁵

In using a subjective test to analyze the officer's intent, the court ignored several hard, ascertainable facts that suggested the Officer "should have

¹²⁰ See, e.g., *Rodriguez*, 356 F.3d at 259; *Salgado*, 292 F.3d at 1172; *Lopez-Garcia*, 565 F.3d at 1316.

¹²¹ 565 F.3d 1306, 1316 (11th Cir.2009), *cert. denied*, 130 S. Ct. 1012 (2009).

¹²² *Id.* See also 8 U.S.C. § 1357(g). Agreements pursuant § 1357(g), INA § 287(g) allow the federal government to delegate immigration enforcement authority to state and local police pursuant to a formal agreement between the agencies and the Department of Justice.

¹²³ *Lopez-Garcia*, 565 F.3d at 1311-12.

¹²⁴ 8 U.S. C. 1326(a),(b)(2).

¹²⁵ *Lopez-Garcia*, 565 F.3d at 1317 ("[D]eciding whether to bring criminal charges was, as he put it, 'not his call.'").

known”¹²⁶ his questions would elicit an incriminatory response and that Lopez-Garcia may have felt coerced. The officer’s intent could have been discerned by the fact that he selected Lopez-Diaz for an interview about his immigration status, and began his interview with Lopez-Garcia by describing the consequences of not having lawful status and provided the suspect with three options if he was undocumented before asking him his place of birth, and whether he had any documentation in the United States.¹²⁷ Furthermore, as the court observed, the County’s police procedures on immigration questioning provided that officers may only discuss deportation with suspects if he determines the individual is undocumented,¹²⁸ which the officer did *prior* to asking the suspect about his status. Viewed objectively, the officer’s conduct during the interview and police procedures suggest he suspected Lopez-Mendoza did not have legal status, which the officer knew to be a criminal offense.¹²⁹

Other courts adopting the subjective approach have also focused on the officer’s knowledge of criminal immigration law and stated intent to investigate civil violations to determine whether the officer was personally aware that the questions could elicit incriminatory information.¹³⁰ For example, in *United States v. Rodriguez*,¹³¹ the Second Circuit held that an ICE agent’s questions to a prisoner in state custody about his immigration status did not warrant *Miranda* warnings,¹³² even though the agent was aware that Mr. Rodriguez deliberately overstayed his visa, which is a criminal offense.¹³³ The Second Circuit, however, found that *Miranda* did not apply based on the agent’s sworn statement because he asked the questions for a civil purpose and “did not know that the information that he elicited could be the basis for criminal prosecution.”¹³⁴ As in *Lopez-*

¹²⁶ *Innis*, 446 U.S. at 301.

¹²⁷ *Lopez-Garcia*, Br. for Appellants at 7-8.

¹²⁸ *Lopez-Garcia*, 565 F.3d at 1311.

¹²⁹ *Id.*

¹³⁰ *Salgado*, 292 F.3d at 1172.

¹³¹ 356 F.3d at 259.

¹³² *Id.* at 256-257. The agent interviewed the suspect “pursuant to an INS policy of interviewing inmates whose national origin is listed as unknown or somewhere other than the United States.” *Id.*

¹³³ *Id.* at 259 (“Smith also testified that he was not aware that information that he elicited could be the basis for criminal prosecution. Indeed, the only information that Rodriguez gave Agent Smith that might have been relevant to a prosecution was that Rodriguez, having entered the United State legally, had deliberately overstayed his visa.”).

¹³⁴ *Id.* The Second Circuit also reasoned that the ICE agent could not have possibly known the statements were incriminating for Rodriguez’ subsequent illegal reentry charges because he did not illegally reenter the country until after the interview in question. *Id.* Several district courts applying the subjective “actual criminal intent” test in *Rodriguez* have acknowledged the problems in relying on an officer’s knowledge about the civil and criminal distinctions in immigration law, and thus have held that it is sufficient if officers engage in questioning to uncover a civil immigration violation. *See, e.g., United States v. Toribio-Toribio*, 2009 WL 2426015 (N.D.N.Y.

Garcia, the Second Circuit relied on the officers sworn statements about his subjective intent and knowledge of criminal immigration law to hold that *Miranda* did not apply. This approach is also problematic, as one court that rejected this formulation of the subjective test found, because only prosecutors have a true understanding of the likelihood that a suspect will be charged, “an immigration agent’s testimony that he or she did not think prosecution likely is of minimal significance in determining whether the agent had investigative intent during the interview.”¹³⁵

Courts have also used a subjective test in applying the booking exception to exempt questions about immigration status, without regard to objective factors that suggest an investigatory intent.¹³⁶ For example, in *Salgado*, the Ninth Circuit applied the booking exception to exempt *Miranda* to a police officer’s questions to a suspect about alienage, relying on the officer’s testimony that he asked the question for a “true booking” purpose and the fact that he was not an ICE criminal investigator.¹³⁷ However, by focusing on the officer’s stated purpose and role, the Court disregarded the fact that officer asked the questions “as part of a cooperative arrangement between the ICE and the Jail to identify Jail detainees who were in the United States illegally and facilitate the initiation of civil and criminal INS proceedings against them.”¹³⁸

The appellate courts using the subjective inquiry to determine whether dual civil and criminal questioning constitutes interrogation are departing from the clear mandates of *Innis* and *Muniz*, establishing that the analysis of whether

Aug.6, 2009) (suppressing responses to agents’ questions related to place of birth due to agent’s failure to administer *Miranda* warnings because “although the [officer] was primarily looking into administrative deportation, he had ample reason to believe that Defendant was falsely representing his citizenship and knew that such a false representation could give rise to criminal charges”); *United States v. Fnu Lnu*, 2010 WL 1686199 at * 9 (S.D.N.Y. Apr. 22, 2010) (“Those investigating a situation with possible criminal aspects rarely make the decision whether to charge a suspect [and] ... may have their own opinions about whether the individual should be charged. But only the prosecutors will, generally speaking, have a true understanding of the likelihood that a suspect will be charged.”); *United States v. Adoni-Pena*, 2009 WL 3568488 (D. Vt. 2009) (suppressing responses to officer’s questions place of nationality, citizenship, and immigration status in illegal reentry prosecution where officer testified that he was “primarily concerned with administrative deportation”).

¹³⁵ *Fnu Lnu*, 2010 WL 1686199 at * 9.

¹³⁶ See *Salgado*, 292 F.3d at 1172; *United States v. Valdez-Martinez*, 267 Fed.Appx. 571 (9th Cir. 2008) (holding booking exception applied to ICE agent’s biographical questions because agent testified that he questioned the suspect for civil and not criminal purposes and did not learn about facts supporting criminal charges until the unMirandized interview); *D’Anjou*, 16 F.3d at 609 (same); *Medrano*, 356 Fed. Appx. at 107 (holding that *Miranda* warnings not required where ICE agent’s booking questions about suspects’ name was not an attempt to elicit incriminatory statements because officer already knew suspect’s name and immigration status). But see *Parra*, 2 F.3d at 1067-68.

¹³⁷ *Salgado*, 292 F.3d at 1174.

¹³⁸ *Id.*, at 1179 (Pregerson, J., dissenting).

questions are considered interrogation is an objective one. Subjective views are only relevant to this inquiry if there is “a police practice is designed to elicit an incriminating response from the accused.”¹³⁹ The subjective approach in the criminal immigration context turns the Court’s clear rule on its head by focusing on officer’s statements that they did not intend to elicit an incriminating response, and ignoring affirmative police practices designed to elicit information for “civil and criminal”¹⁴⁰ for immigration purposes. This approach has also ignored the Court’s mandate that the interrogation inquiry focuses on the perspective of the suspect, in order to counteract the effects of coercion on suspects.¹⁴¹ None of the courts using the subjective approach considered the perspective of the suspect.

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

2. Objective Test in Immigration Inquiries

The First, Sixth, Third, and a majority of panels in the Ninth Circuit apply a more objective test to determine whether an officer’s attempt to elicit incriminating remarks to invoke *Miranda*.¹⁴² Generally, this approach has been more protective and straightforward, but has also resulted in a case-by-case multi-factored adjudication. Following *Innis*, these courts assess totality of the circumstances to determine whether *police should have known* that questioning could produce an incriminating response from the perspective of the suspect.¹⁴³ In contrast to the subjective test, the officer's intent is relevant, but it is not determinative.¹⁴⁴

¹³⁹ *Innis*, 446 U.S. at 301 n. 7.

¹⁴⁰ *Salgado*, 292 F.3d at 1179 (Pregerson, J., dissenting).

¹⁴¹ *Innis*, 446 U.S. at 301 (the definition of interrogation “focuses primarily upon the perceptions of the suspect, rather than the intent of the police,” and that “[t]his focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices.”).

¹⁴² See, e.g., *United States v. Pacheco-Lopez*, 531 F.3d 420 (6th Cir.2008); *Chen*, 439 F.3d at 1040; *Carvajal-Garcia*, 54 Fed. Appx. at 734; *Gonzalez-Sandoval*, 894 F.2d at 1046- 47; *Doe*, 878 F.2d at 1551; *Mata-Abundiz*, 717 F.2d at 1280.

¹⁴³ *Innis*, 446 U.S. at 301.

¹⁴⁴ See, e.g., *Chen*, 439 F.3d at 104 (“The investigating officer's subjective intent is relevant but not determinative, because the focus is on the perception of the defendant.”); *United States v.*

The central factors these courts consider are the nature of the information sought, the objective purpose of the questions, the content and circumstances of the questioning, and the relationship between the crime and immigration information. Under this approach, courts have the ability to independently analyze the facts and evidence to determine what the officer should have anticipated from a question, and rely less on the stated intent of the police.¹⁴⁵ In using this approach, courts generally find that dual civil and criminal immigration booking inquiries constitute interrogation for Miranda purposes, questions about “a detainee’s place of birth takes on new meaning if the officer ... suspects that the individual is an illegal alien.”¹⁴⁶

In applying the objective test to determine whether civil and criminal questions about immigration status constitute interrogation or are subject to the booking exception, courts examine the “content and context”¹⁴⁷ of questions about immigration status, regardless of the officer’s stated intent. The Third and Ninth Circuit, for example, have held that an immigration agents’ questions about suspects’ place of birth and immigration status are designed to elicit incriminatory evidence when the officer had objective reasons to believe that a suspect had violated a criminal immigration law.¹⁴⁸ Unlike the subjective test, the officer’s sworn testimony and knowledge of criminal law is irrelevant to the analysis.¹⁴⁹

Similarly, courts also look to the relationship of a suspect’s actual or possible criminal charges and their immigration status if the officer knew or should have known that the question would lead to an incriminating response.¹⁵⁰

Doe, 878 F.2d 1546, 1551 (1st Cir.1989) (Breyer, J.) (“The question is an objective one; the officer’s actual belief or intent is relevant, but it is not conclusive.”).

¹⁴⁵ See, e.g., *United States v. Medina*, 2008 WL 2039013 (D.Kan. May 12, 2008) (“While Agent Spake’s subjective intent may have been an administrative inquiry, the court finds that an objective view of the evidence shows that Agent Spake knew or, at the very least should have known, that his questions were reasonably likely to elicit incriminating responses both based on the NCIC information and the nature of the questions asked.”).

¹⁴⁶ *Gonzalez-Sandoval*, 894 F.2d at 1048.

¹⁴⁷ *Id.* at 1047. See also *Equihua-Juarez*, 851 F.2d at 1226-7 (holding immigration agent’s questions about defendant’s biographical information constituted an “interrogation” when it could be used to determine whether the suspect should be deported or criminally prosecuted because it was linked to an offense with which he was eventually charged).

¹⁴⁸ *Carvajal-Garcia*, 54 Fed. Appx. 732, 2002 WL 31667659 (holding that suspect’s *Miranda* rights violated when immigration agents questioned suspect about his full name, date and place of birth for the purposes of determining if he had been previously deported after the suspect had already invoked his right to counsel under *Miranda*); *Gonzalez-Sandoval*, 894 F.2d at 1046 (same).

¹⁴⁹ *Id.*

¹⁵⁰ See, e.g., *Doe*, 878 F.2d at 1551-52 (“[Q]uestions about citizenship, asked on the high seas, of a person present on a foreign vessel with drugs aboard,” constituted improper interrogation, since U.S. citizenship was an element of the offense.”); *Mata-Abundiz*, 717 F.2d at 1279 (holding that an INS agent had reason to know that an admission regarding alienage, “coupled with the

Under this approach, the closer the connection between the crime in question and the information sought, the stronger the inference that the agent should have known that his inquiry was “reasonably likely to elicit an incriminating response from the suspect.”¹⁵¹

Several courts have held that *Miranda* applies where there is objective evidence that an arresting officer,¹⁵² state or federal prosecutor¹⁵³ suspects that an individual has violated civil immigration laws or is foreign born,¹⁵⁴ without requiring evidence that the civil violation would lead to a criminal charge.¹⁵⁵ And in the booking context, some courts examine whether the relevant booking question was *essential* for administrative purposes, recognizing that questions asked during a routine booking process about place of birth constitutes interrogation because they can lead to illegal reentry charges, or misdemeanor illegal entry offenses.¹⁵⁶ This approach seeks to deter abuse of the civil process to

evidence of firearms possession, could lead to federal prosecution”); *Gonzalez-Sandoval*, 894 F.2d at 1046-47 (statements elicited by border patrol agents about detainee's immigration status and place of birth constituted improper interrogation because he suspected detainee of illegal reentry); *U.S. v. Sepulveda-Sandoval*, 729 F. Supp. 2d 1078, 1101 (D.S.D. 2010) (holding *Miranda* required before questioning suspect about immigration status because his answer provided incriminating evidence for his criminal firearms charges); *United States v. Lopez-Chamu*, 373 F. Supp. 2d 1014 (C.D. Cal. 2005) (holding *Miranda* required for questions regarding nationality and citizenship where officer aware that suspect was previously deported and later charged with three counts of illegal re-entry following deportation).

¹⁵¹ *Mata-Abundiz*, 717 F.2d at 1279.

¹⁵² See, e.g., *United States v. Villa-Gonzalez*, 2009 WL 703682 (D.Neb. Mar 16, 2009) (holding that *Miranda* warnings were required prior to ICE officers' interviews about immigration status because it was based on local police officers' hunch that they were undocumented immigrants).

¹⁵³ See, e.g., *United States v. Vasquez-Martinez*, 2006 WL 376474 (W.D. Ark. Feb. 9, 2006) (suppressing statements made in response to ICE agents' questions about name and place of birth under *Miranda* and holding questioning constituted interrogation based on state prosecutor's suspicion that suspect was an undocumented immigrant).

¹⁵⁴ See, e.g., *Equihua-Juarez*, 851 F.2d at 1225 n. 7 (9th Cir.1988) (“The [a]gent's questions were directed at eliciting information which could be used in a criminal investigation and potential prosecution of [the defendant] on charges of felony illegal entry.”); *Thompson v. United States*, 821 F. Supp. 110 (W.D.N.Y. 1993), *aff'd*, 35 F.3d 100 (2d Cir. 1994) (booking exception inapplicable where immigration agent's question about citizenship designed to elicit information for deportation purposes); *United States v. Hernandez-Ruiz*, 808 F. Supp. 717, 718 (D. Ariz. 1992).

¹⁵⁵ See, e.g., *United States v. Mellado- Enguallista*, Crim. No. 08-307, 2009 WL 161240 at *9(D. Minn., Jan. 22, 2009) (holding ICE investigator should know his questions could produce incriminating responses because his purpose was to gather information for deportation proceeding).

¹⁵⁶ See, e.g., *United States v. Arango-Chairez*, 875 F.Supp. 609, 611, 616 (D.Neb.1994), *aff'd without opinion*, 66 F.3d 330 (8th Cir. 1995) (finding that unwarned statements made to an ICE officer who interviewed the defendant shortly after he was taken into custody at a state correctional center for traffic violations constituted “interrogation” and was not exempt under booking exception because the immigration officer should have known that his questions were reasonably likely to elicit an incriminating response); *Mellado-Evanguelista*, 2009 WL 161240 at

circumvent *Miranda* warnings.¹⁵⁷

Finally, the Ninth Circuit has also found a federal jurisdiction's pattern of federal immigration prosecutions and the timing of criminal charges¹⁵⁸ after conducting a civil investigation relevant whether questions about immigration status are likely to elicit an incriminating response for *Miranda* purposes.¹⁵⁹

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

Despite the variances among the circuits in the tests employed to determine whether *Miranda* applies to dual civil and criminal immigration questioning, almost all courts to consider the issue have departed from the Supreme Court's well established rule in *Mathis v. United States*¹⁶⁰ that *Miranda* rights apply custodial questioning during a civil investigation that could lead to criminal charges. In almost every case to consider this issue in the immigration context, there was no dispute that the officer sought and elicited information as part of a civil investigation that was later used to criminally convict the suspect of immigration-related charges. However, courts largely ignored or misapplied the rule in *Mathis* by framing the *Miranda* inquiry on the officer's stated, or objective, intent to elicit information for a criminal purpose instead of whether the officer asked the questions to elicit information as part of a civil investigation, and whether it was likely the investigation could result in criminal charges.

The Supreme Court held in *Mathis v. United States*¹⁶¹ that the distinction of whether an initial custodial interrogation is intended to elicit information for a civil or criminal investigation does not control the analysis for *Miranda* purposes if the investigation could lead to criminal charges. In *Mathis*, a civil IRS agent conducted two un-*Mirandized* interviews of an inmate while he was incarcerated on unconnected state criminal charges, as part of a civil investigation that the

*6 ("While the nature of the violation of the immigration laws--which could range from the civil/administrative charge of deportation to felony criminal charges for illegal reentry--remained to be seen at the time of the September 4 interview, no penalty was ruled out.").

¹⁵⁷ See, e.g., *Mata-Abundiz*, 717 F.2d at 1279 ("If civil investigations by the INS were excluded from the *Miranda* rule, INS agents could evade that rule by labeling all investigations as civil. Civil as well as criminal interrogation of in-custody defendants by INS investigators should generally be accompanied by the *Miranda* warnings."); *Mellado-Evanguelista*, 2009 WL 161240 at *4 ("[The] Government cannot avoid the requirements of *Miranda* simply by labeling immigration investigations 'civil' or 'administrative' when its agents know or reasonably should know that the questions they ask in the course of such investigations are likely to elicit incriminating responses.").

¹⁵⁸ See, e.g., *Mata-Abundiz*, 717 F.2d at 1280.

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

¹⁶⁰ 391 U.S. 1 (1967).

¹⁶¹ *Id.*

government characterized as a “routine tax investigation where no criminal proceedings might be brought.”¹⁶² At the time of the interviews, the IRS had not initiated a criminal investigation¹⁶³ and the agent followed protocol for a civil tax investigation. More than one year after his initial interview, the IRS brought criminal federal tax fraud charges against him based on statements he made during the un-Mirandized custodial interrogations.¹⁶⁴ The government argued that *Miranda* did not apply to the IRS agents’ questions to the suspect because the inmate was questioned as part of a civil, and not criminal, investigation and because he was being held on a separate state criminal charge at the time of his interview.¹⁶⁵ The *Mathis* Court rejected both contentions, holding that it was irrelevant that he was questioned about conduct unrelated to the state criminal offense for which he was incarcerated. The Court further held that *Miranda* warnings were required since there was a *possibility* during the investigation that the inmates’ responses could result in a criminal prosecution, observing that “tax investigations frequently lead to criminal prosecutions, just as the one here did.”¹⁶⁶ The Court concluded that the un-Mirandized statements made by the defendant should be suppressed and reversed the tax fraud conviction.

The Court in *Mathis* intentionally adopted a clear rule¹⁶⁷ that applied *Miranda* rights to civil investigations that could result in criminal charges, finding the differences between the two types of investigations “are too minor and shadowy to justify a departure from the well-considered conclusions of *Miranda*.”¹⁶⁸ The only factors the court found relevant in adopting this rule in the tax context is that the suspect was questioned while in custody, and the possibility of criminal charges could result from the civil investigation. The Court based its latter finding on a general observation of the frequency that civil tax investigations lead to criminal investigations and the short timeframe between the initiation of criminal charges from the suspect’s last interview, although neither of these facts appear to be dispositive.¹⁶⁹ To understand the full import and clarity

¹⁶² *Id.* at 4-5.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2.

¹⁶⁵ *Id.* at 4.

¹⁶⁶ *Id.* at 4-5

¹⁶⁷ *Mathis* has been viewed as a literal and accurate extension of *Miranda*, that that reflected the decision’s rationale. See, e.g., Daniel Yeager, *Rethinking Custodial Interrogation*, 28 AM. CRIM. L. REV. 1, 65 (1991); Mary Crossley, *Miranda and the State Constitutions: State Courts Take a Stand*, 39 VAND.L.REV. 1693, 1708, n. 8 (1986).

¹⁶⁸ *Mathis*, 391 U.S. at 3-4.

¹⁶⁹ As the dissent in *Mathis* and subsequent commentators have pointed out, the Court’s premise that civil tax investigations frequently lead to criminal charges appears to be overstated, as civil tax investigations are “widespread,” and around the time *Mathis* was decided only about 1 in 2,000 IRS civil investigations lead to criminal charges. See, e.g., *Mathis*, 391 U.S. at 7 (White, J., dissenting) (noting that civil tax liability investigations are “widespread,” and noting “the thousands of inquiries into tax liability made annually ... whose goal is only to settle fairly the

of the Court's holding in *Mathis*, it is important to consider what the Court expressly held was irrelevant to its decision: no criminal investigation had been commenced at the time of either of the interviews; there was no certainty that criminal proceedings would be brought against the suspect;¹⁷⁰ the suspect was questioned about conduct unrelated to the offense for which he was incarcerated; the agent only asked the suspect two questions;¹⁷¹ the agent's stated purpose of the interview was to elicit information for a civil, and not criminal, investigation; and the IRS agent was a civil investigator. In announcing a clear rule with limited exceptions, the *Mathis* Court reflected the concerns in *Miranda* for clarity¹⁷² and protecting suspects against police abuse in *Miranda*, and specifically protected against the ability for government officials to engage in subterfuge by using a civil investigation to obtain evidence for criminal charges.¹⁷³

Consistent with the rule in *Mathis*, the Supreme Court has never required certainty of a criminal prosecution as a predicate for *Miranda* warnings or the ability of a suspect to invoke her Fifth Amendment privilege against self-incrimination.¹⁷⁴ The Fifth Amendment privilege against self-incrimination applies not only at criminal trials, but in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate the defendant in future criminal proceedings.¹⁷⁵ The Court has held that the Fifth Amendment privilege extends to any questions that "not only extend[s] 'to answers that would in themselves support a conviction ... but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant.'"¹⁷⁶

civil accounts between the United States and its citizens."); Gregory L. Diskant, *Exclusion of Confessions Obtained Without Miranda Warnings in Civil Tax Fraud Proceedings*, 73 COLUM. L. REV. 1288, 1291-92, n. 42 (1973). In addition, the Court's observation of the proximity of timing between the last civil and criminal interview does not appear to be controlling, as the Court also found that *Miranda* applied to the IRS agent's first interview, which occurred more than a year prior to the IRS's initiation of criminal charges. *Mathis*, 391 U.S. at 4.

¹⁷⁰ The government characterized the interview as a "routine tax investigation where no criminal proceedings might be brought." *Id.* at 5

¹⁷¹ *Id.* at 3 n.2.

¹⁷² *Id.*

¹⁷³ Milton Handler, *Some Practical Problems In Current Antitrust Litigation*, 45 F.R.D. 293, 315 (1968) (citing to *Mathis*, 391 U.S. at 1 ; Appendix 72-77).

¹⁷⁴ *Maness v. Meyers*, 419 U.S. 449, 461-462 (1975). See generally Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325 (1991). Cf. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (Fifth and Sixth Amendment criminal procedural rights required for federal civil divestiture action to deprive individual of American citizenship as penalty for divestment action).

¹⁷⁵ *United States v. Lee*, 315 F.3d 206 (3rd Cir.), cert. denied, 540 U.S. 858 (2003).

¹⁷⁶ *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)) (emphasis added). The Supreme Court has made clear that any witness may invoke the Fifth Amendment privilege against self-incrimination "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory" when his compelled testimony would create a real danger of domestic criminal prosecution. *Kastigar v. United States*, 406 U.S. 441, 444

Likewise, in *Innis*, the Court noted the Fifth Amendment privilege against self-incrimination does not “distinguish degrees of incrimination.”¹⁷⁷

The Court’s holding in *Mathis* should be binding in the immigration context given recent trends in the immigration civil and criminal enforcement and the similarities in the immigration and tax enforcement system. The Court’s observation in *Mathis* that civil “tax investigations frequently lead to criminal prosecutions” holds equally true in the immigration context, and perhaps even more acutely than the tax context, even when *Mathis* was decided. As described in more detail in IIIA, the recent adoption of “zero tolerance” programs designed to criminally prosecute all apprehended undocumented migrants in certain jurisdictions have lead to dramatic increases in the sheer numbers, and odds that immigrants will be referred for criminal prosecution by civil immigration authorities.¹⁷⁸ Last year, civil immigration enforcement agents referred 89,874 cases for federal criminal prosecution,¹⁷⁹ and the Customs and Border Patrol referred 1 in 5 of all individuals it arrested to the DOJ for criminal prosecution, or about 69,080 people.¹⁸⁰ In contrast, around the time *Mathis* was decided, the IRS recommended 1,067 cases for criminal tax fraud prosecution, and about 1 in 2,000 IRS civil investigations lead to criminal charges.¹⁸¹ Since *Mathis*, criminal tax prosecutions have increased slightly; in 2010, the IRS

(1972); *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984); *Lefkowitz*, 414 U.S. at 77-79. During a removal proceeding, an individual can invoke the Fifth Amendment, so long as his answers would not subject him to prosecution in the United States, *see, e.g., Valeros v. INS*, 387 F.2d 921 (7th Cir. 1967), but silence may be used as the basis for drawing certain adverse inferences at least with respect to non-incriminatory matters. *See, e.g., Chavez-Raya v. Immigration and Naturalization Serv.*, 519 F.2d 397 (7th Cir.1975).

¹⁷⁷ *Id.* at 301 n.5.

¹⁷⁸ Compare *infra*, Section IIIA; Lydgate, *A Review of Operation Streamline*, *supra* at 511 (2010) (analyzing Operation Streamline, a federal enforcement initiative that requires the criminal prosecution of unlawful border crossers on the U.S.-Mexico border); Daniel Kanstroom, *Hello Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L.J. 599, 599-600 (1990) (“Deportation proceedings frequently raise the possibility of collateral criminal proceedings. For example, INA section 275 authorizes criminal prosecution for entry without inspection, which is perhaps the most common basis for deportation of aliens in the United States.”) with Boris I. Bittker and Lawrence Lokken, *Fed. Tax’n Income, Est. & Gifts*, § 114.9, at *1 (2012) (“In the audit process, the IRS unearths far more cases exuding an aroma of tax evasion than can be prosecuted, given the limited funds earmarked for the extensive investigations and prosecutorial efforts required to establish guilt beyond a reasonable doubt”).

¹⁷⁹ Transactional Records Access Clearinghouse, *Decline in Federal Criminal Immigration Prosecutions* [hereinafter “TRAC, 2012 Immigration Prosecutions”] (2012) available at <http://trac.syr.edu/immigration/reports/283/> (last accessed Aug. 2, 2012). During the same period, the IRS referred 1,583 criminal tax cases to the DOJ. Transactional Records Access Clearinghouse, *Prosecutions for 2012 Referring Agency: Internal Revenue Service*, 2012.

¹⁸⁰ *Id.*

¹⁸¹ Diskant, *Miranda Warnings in Civil Tax Fraud Proceedings*, *supra* at 1291-92.

referred 1,507 individuals for prosecution of criminal tax fraud tax.¹⁸² Civil compliance officers referred about one-third, or 539 of these cases¹⁸³ to the IRS Criminal Unit, out of 1,581,394 routine civil examinations.¹⁸⁴

The structure and practice of the federal immigration and tax enforcement also share a number of similar features which make the concerns articulated in *Mathis* equally relevant to the immigration context. Similar to the tax context, where “civil and criminal sanctions apply to the same conduct”¹⁸⁵ there is considerable overlap in criminal and civil provisions of immigration laws.¹⁸⁶ For example, illegal entry or reentry after removal carry both criminal and civil penalties, and last year accounted for 90% (72,000) of all immigration convictions last year --due, in large part, to referrals from agents conducting civil investigations.¹⁸⁷ In addition, civil IRS agents, like civil immigration authorities are the most common catalyst for criminal tax investigations,¹⁸⁸ and similar to tax, the point at which a civil immigration investigation turns criminal is ambiguous.¹⁸⁹ Furthermore, in both tax and immigration criminal cases, the

¹⁸² Internal Revenue Service, *Enforcement Statistics - Criminal Investigation (CI) Enforcement Strategy*, <http://www.irs.gov/uac/Enforcement-Statistics>. The Criminal Investigations Unit (“CI”) initiated 2,889 criminal tax investigations. *Id.*

¹⁸³ Treasury Inspector General For Tax Administration, *Trends in Criminal Investigation’s Enforcement Activities Showed Improvements for Fiscal Year 2010, With Gains in Most Performance Indicators*, 12, 24 (Ref: 2011-30-068), July 25, 2011.

¹⁸⁴ IRS, *Internal Revenue Service Data Book 2010*, 22 (2010). Direct interviews by civil agents accounted for 342,762, or 17% of all civil examinations. *Id.* In 2010, the IRS recorded 3,039,087 abated civil penalties.

¹⁸⁵ Steven Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1 (1966). See also Boris I. Bittker and Lawrence Lokken, FED. TAX’N INCOME, EST.& GIFTS, § 114.9, at *2 (2012) (“[C]riminal [tax] fraud provisions cover much of the same ground as the civil penalty”). See, e.g., IRC §§ 6662, 6663, 7201, 7203, 7206, 7207.

¹⁸⁶ Compare 8 U.S.C. § 1325 (c) (criminal unlawful entry misdemeanor offense) with 8 U.S.C. § 1182(a)(6)(i) (unlawful entry constitutes grounds for inadmissibility); compare 18 U.S.C. § 1546(a) (2006) (possession or use of a false immigration document a removal ground) with 42 U.S.C. § 408(a)(7) (2006) (providing criminal penalties for false representation of a Social Security number). See, e.g., Motomura, *The Discretion That Matters*, *supra* at 1828-30 (estimating that approximately 6.7 million non-citizens are subject to both criminal and civil penalties for entering the United States illegally).

¹⁸⁷ Grassroots Leadership, *Green Paper, Operation Streamline: Drowning Justice and Draining Dollars along the Rio Grande*, at 3 (July 2010), available at www.grassrootsleadership.org; Transactional Records Access Clearinghouse, *Illegal Reentry Becomes Top Criminal Charge* [hereinafter TRAC, 2011 *Illegal Reentry*] (2011) available at <http://trac.syr.edu/immigration/reports/251/> (last accessed July 6, 2012).

¹⁸⁸ Amanda Cochran, *Evidence Handed to the IRS Criminal Division on a ‘Civil’ Platter: Constitutional Infringements on Taxpayers*, 91 J. CRIM. L. & CRIMINOLOGY 699, 711 (Spring 2001).

¹⁸⁹ Compare, *Id.* (citing *United States v. McKee*, 192 F.3d 535 (6th Cir. 1999)) (“many civil tax investigations are covert criminal tax investigations”) with Eagly, *Prosecuting Immigration*, *supra* at 1294.

typical process of criminal investigations is inverted: whereas in non-tax or immigration criminal cases, the government seeks to identify the perpetrator of an alleged crime, in tax and immigration cases, the government knows the identity of the alleged perpetrator and seeks to amass incriminating information.¹⁹⁰ This makes a suspect's custodial statements of paramount importance, and in practice, both agencies rely primarily on a suspect's admissions to establish both civil and criminal violations.¹⁹¹ This inverted process raises concerns that the agency or officials could exert undue pressures on obtaining information from the suspect, or circumvent a suspect's rights in the criminal process by labeling the investigation civil. Given the increasing criminal penalties and rising criminal prosecutions for immigration violations, *Mathis* should directly control the analysis and application of *Miranda* warnings in the immigration context. The structural similarities between civil and criminal immigration laws and enforcement practices highlights the need for Courts apply *Mathis* correctly in the immigration context.

Despite the fact that the *Mathis* rule is binding to civil custodial interrogatories about immigration status that could lead to criminal charges, most Courts of Appeals have failed to apply this clear rule to the immigration context, although courts adopting the objective test have been more faithful to the *Mathis* inquiry.¹⁹² Both approaches have generally overlooked the core holding in *Mathis* by focusing exclusively on the officer's intent to elicit information for a criminal offense, instead of examining whether the questioning was for a civil violation that would result in criminal charges.

Courts adopting the subjective test in the Tenth, Eleventh and some panels of the Ninth Circuit, did not even acknowledge or reference the Court's straightforward decision in *Mathis* that *Miranda* applies to civil investigations where criminal charges could result. In each of these cases, the court recognized that the officer had a civil investigatory purpose in questioning the suspect about his immigration status, but did not consider whether the officer intended to elicit information as part of a civil investigation that could lead to criminal charges. Rather, the courts examined whether the officers questioned the suspects with specific actual intent to bring criminal charges, had the authority to criminally charge the suspect or knew the distinctions between civil and criminal

¹⁹⁰ Cochran, *Civil Platter supra*, note 204 at 707-708.

¹⁹¹ Compare Steven Duke, *Prosecutions for Attempts to Evade Income Tax: A Discordant View of a Procedural Hybrid*, 76 YALE L.J. 1 (1966) ("The Government's use of the taxpayer's statements to build up a net worth case, moreover, is not limited to statements obtained by the agents from the defendant.") with *Cuevas-Ortega v. INS*, 588 F.2d 1274, 1278 (9th Cir.1979) (in immigration context, "it is more likely than not that the alien will freely answer the government agent's question").

¹⁹² See, e.g., *Mata-Abundiz*, 717 F.2d at 1280 (applying *Mathis* to hold as civil as well as criminal interrogation of in-custody defendants by INS investigators should generally be accompanied by the *Miranda* warnings).

immigration law.¹⁹³ These factors were all rejected by the Court in *Mathis*, where the Court held that *Miranda* applies to “routine” civil investigations if it could lead to a criminal investigation even of the IRS agent had a civil investigatory purpose and “no criminal proceedings might even be brought,”¹⁹⁴ a result the Court reached without any reference to the subjective intent of the IRS agent.¹⁹⁵

The Second Circuit in *Rodriguez*¹⁹⁶ did address *Mathis*, but misread the holding to require that the civil agent has certainty that criminal charges would result from the civil investigation underway.¹⁹⁷ Based on this reading, the court distinguished *Mathis* by finding that the officer could not possibly have known at the time of the interview that the suspect would be criminally charged because the crime for which the suspect was actually prosecuted, illegal reentry after being deported, had yet to occur at the time of the interview.¹⁹⁸ However, the investigating agent testified that he questioned Rodriguez to “determine whether Rodriguez was subject to administrative deportation proceedings,”¹⁹⁹ and the suspect admitted to visa fraud, which carries both criminal and civil penalties.²⁰⁰ The court disregarded these similarities to *Mathis* by relying on the immigration agents’ testimony that “he was not aware that information that he elicited could be the basis for criminal prosecution.”²⁰¹

While courts using the objective test generally resulted in an outcome more faithful to *Mathis* by not considering an officer’s subjective intent or

¹⁹³ *Lopez-Garcia*, 565 F.3d at 1317 (Miranda warnings not required for identity questions where officer is “simply tasked with facilitating the removal of individuals illegally present in the country” and officer had no basis to believe that suspect would be prosecuted for the offense or admit to illegal reentry); *Rodriguez*, 356 F.3d at 289 (finding *Miranda* did not apply during immigration officer’s questions about place of birth where it “was conducted solely for the purpose of determining whether Rodriguez would be subject to administrative deportation after his release”); *Salgado*, 292 F.3d at 1172 (*Miranda* warnings not required before an civil immigration agents’ “routine” questions about place of birth and citizenship because the interview “was solely for the administrative purpose of determining whether Salgado was deportable when he got out of jail” where there was no evidence officer intended to bring criminal charges and immigrant was not in jail in for an offense related to immigration laws).

¹⁹⁴ *Mathis*, 391 U.S. at 4.

¹⁹⁵ Daniel Yeager, *Rethinking Custodial Interrogation*, 28 AM. CRIM. L. REV. 1, 11 (1991).

¹⁹⁶ *Rodriguez*, 356 F.3d at 259.

¹⁹⁷ *Id.* (“It is clear from the [*Mathis*] Court’s recitation of the facts of the case that the purpose of the investigation under consideration was, inter alia, to obtain evidence in connection with a possible subsequent civil or criminal prosecution, criminal prosecution of the defendant being a likely outcome.”) *citing Mathis*, 391 U.S. at 2–3.

¹⁹⁸ *Rodriguez*, 356 F.3d at 259.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* (“Indeed, the only information that Rodriguez gave Agent Smith that might have been relevant to a prosecution was that Rodriguez, having entered the United State legally, had deliberately overstayed his visa. This is not a crime for which Rodriguez was ever prosecuted.”)

²⁰¹ *Id.*

knowledge of immigration law, the focus of this test also conflicts with *Mathis*. As in these subjective cases, in all of the cases adopting the objective approach, the officials questioned suspects to uncover civil immigration violations. Instead of assessing the likelihood that criminal charges could result from the investigation, most courts examined whether there were objective facts to suggest that the official had a criminal investigatory purpose, despite *Mathis*' clear holding that criminal intent does not control the analysis.

In theory, an objective inquiry of an officer's intent could be consistent with *Mathis* if it focuses on the categorical and institutional likelihood that civil immigration interrogations could result in criminal charges, and in some cases there was overlap between the two inquiries. However, most courts following the objective approach relied on factors expressly or implicitly held irrelevant under *Mathis*, such as the relationship between the criminal charges that the suspect was facing at the time of the interview and the suspect's immigration status to determine whether *Miranda* applies.²⁰² *Mathis*, however, expressly rejected the government's argument that *Miranda* did not apply because the civil investigation was unrelated to the suspect's underlying state criminal offense.²⁰³ In other cases, courts considered the officer's knowledge about the suspect's background that could give rise to an inference of an immigration crime, or the content of the questions in the civil interview. While the existence of some of these facts could give rise to the likelihood that an individual could face a criminal proceeding, *Mathis* did not consider the IRS agent's intent or knowledge. Rather, *Mathis* examined only to the institutional conduct: that civil IRS investigations frequently lead to criminal charges and that the civil investigation at issue lead the IRS to initiate criminal charges shortly after the suspect's last custodial interview. Notably, some courts considered such factors that were present but not dispositive in *Mathis*, including the timing that criminal charges were initiated after his civil interrogation²⁰⁴ and fact that criminal charges resulted from the civil investigation.²⁰⁵

²⁰² See, e.g., *Gonzalez-Sandoval*, 894 F.2d at 1047 (considering relevant officer's knowledge that suspect may have previously been deported); *Carvajal-Garcia*, 54 Fed. Appx. at 735; *Equihua-Juarez*, 851 F.2d at 1226-28 (same); *United States v. Gomez-De la Cruz*, No. 10CR336, 2011 WL 883692, at *8 (D.Neb. 2011) (noting when requested information is so clearly linked to the suspected offense, a reasonable officer should be able to foresee his questions might elicit an incriminating response from the individual being questioned); *United States v. Bernal*, No. 10CR338, 2011 WL 1103360, at *8 (D.Neb. 2011) (finding Fourth and Fifth Amendment protections applied because the immigration officers were investigating identity theft, as opposed to immigration offenses).

²⁰³ *Mathis*, 391 U.S. at 4-5 (*Miranda* applies even when suspect is in custody for crime unrelated to purpose of investigation).

²⁰⁴ See, e.g., *Mata-Abundiz*, 717 F.2d at 1280 (questioning conducted by an immigration agent constituted an "interrogation" when agent initiated criminal investigation three hours after civil immigration investigation).

²⁰⁵ See, e.g., *Gonzalez-Sandoval*, 894 F.2d at 1047; *Equihua-Juarez*, 851 F.2d at 1226-28; *Solano-Godines*, 120 F.3d at 961-62.

Several district courts have used an objective approach to apply *Mathis* correctly in the immigration context,²⁰⁶ and at the appellate court level, one court has correctly analyzed *Mathis* in the immigration context. In *United States v. Chen*,²⁰⁷ the Ninth Circuit held that *Miranda* applied to a civil interrogation of a detained suspect's immigration status because he faced a "heightened risk" of criminal prosecution in light of the government's record of prosecuting misdemeanor illegal reentry under 8 U.S.C. § 1325 in his jurisdiction. Although the court navigated through Ninth Circuit precedent to reach this conclusion, and relied on other factors to follow court precedent, its focus on the "practice of prosecuting §1325 violations" was in line with the central inquiry in *Mathis*. Notably, in dicta, the Court observed that the "inherent threat" of criminal prosecution under § 1325 could potentially "render INS questioning [about alienage] an interrogation," if the interviewing officer had reason to suspect the defendant was foreign born.

As several of the courts applying *Mathis* to the immigration context have reasoned, the correct application of its holding and rule is necessary to prevent against police abuse and preserve the privilege of self-incrimination of immigrants. As one court has stated "[i]f civil investigations by the INS were excluded from the *Miranda* rule, INS agents could evade that rule by labeling all investigations as civil."²⁰⁸ *Mathis*, then serves as a critical protection for suspects questioned about civil and criminal charges by effectively holding "that the investigator cannot control the constitutional question by placing a 'civil' label on the investigation."²⁰⁹

By dismissing the weight and relevance of *Mathis*, lower courts are allowing government officials them to circumvent immigrants core constitutional protections and threatening the once-unitary criminal justice system. As in the tax context, the absence of full protections in the immigration context directly implicates the coercion concerns animating *Miranda*. The Court in *Miranda* reasoned that the warnings and clear rules were needed because "[q]uestioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will."²¹⁰ This protection holds especially true in dual civil and criminal interrogations about immigration status, as discussed in Part IIIB. Because the distinction between

²⁰⁶ See, e.g., *Mellado- Enguallista*, 2009 WL 161240 (holding *Miranda* required for ICE agent's routine civil investigatory questions to gather information for deportation proceeding because "[i]t follows from the Court's decision in *Mathis* that even if Agent Carey's investigation was aimed at gathering information for a deportation hearing rather than for prosecution of a specific crime, his questioning could still amount to interrogation for *Miranda* purposes.").

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

²⁰⁸ *Mata-Abundiz*, 717 F.2d at 1279–80.

²⁰⁹ *Id.*

²¹⁰ *Perkins*, 496 U.S. at 297.

civil and criminal is hard for police, much less courts, to classify, courts ignored the critical role the *Mathis* rule serves in ensuring “meaningful protection to Fifth Amendment rights,” which was the “whole purpose of the *Miranda* decision.”²¹¹

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

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

The central doctrinal import of *Miranda* was to reshape the previous Fifth Amendment inquiry into the admissibility of statements obtained in jailhouse interrogations, which was previously governed by a fact-specific voluntariness analysis under the due process clause of the Fifth Amendment.²¹² In the face of a constitutional standard that was both unwieldy for courts to administer and law enforcement agents to comprehend effectively, the Court attempted “to give concrete constitutional guidelines for law enforcement agencies and courts to follow.”²¹³ Even as the Court has made inroads into *Miranda* protections in recent years by diminishing the remedies for law enforcement’s failure to adhere to the rules announced in *Miranda*,²¹⁴ the Court has left the warnings and the use of objective criteria intact in its contemporary jurisprudence.²¹⁵

1. Return to Doctrinal Confusion

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

²¹¹ *Mathis*, 291 U.S. at 4.

²¹² The Court first held that the Due Process Clause of the Fourteenth Amendment requires suppression of a coerced confession in *Brown v. Mississippi*, 297 U.S. 278 (1936), which reversed a conviction based on a torture-induced confession.

²¹³ *Miranda*, 384 US at 441-42.

²¹⁴ *See, infra* ____; *Chavez v. Martinez*, 538 U.S. 760, 770 (2003) (rejecting civil rights claim by suspect subjected to abusive interrogation without *Miranda* warnings and holding that “core” *Miranda* violations occur only when coerced statements are entered into evidence, not when the coercion occurs).

²¹⁵ *See, e.g., J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2402 (2011) (“By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect’s position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person’s subjective state of mind.”).

the doctrinal confusion that the Supreme Court sought to avoid when it decided *Miranda*. While the Court in *Miranda* sought to establish safeguards to protect suspects from coerced confessions, it was also premised on a rejection of a subjective and highly fact-specific approach to the admissibility of confessions that preceded *Miranda* which caused confusion for courts and law enforcement officials.²¹⁶

Prior to the Court's decision in *Miranda*, courts used a "totality of the circumstances" test to determine whether a confession was voluntary or obtained through police misconduct or coercion in violation of the due process clause and privilege against self-incrimination.²¹⁷ There was no single test or approach that governed the admissibility of confessions. Essentially, the voluntariness test required courts to assess whether the police deprived a suspect of his free will, resulting in deep inconsistencies in the law.²¹⁸ The weaknesses in the totality of the circumstances test have been acknowledged by supporters²¹⁹ of *Miranda*, as well as its critics.²²⁰ As the Court described, "[t]he voluntariness rubric [that preceded *Miranda*] has been variously condemned as useless, perplexing, and legal double talk."²²¹

In its many decisions on voluntariness prior to *Miranda*, the Court adopted a test that was avowedly flexible and case-specific and took into account an expansive range of factors, with no single factor being determinative.²²² The "totality of the circumstances" included an assessment of the personal characteristics of the suspect in an effort to determine retrospectively whether the particular suspect had the ability to withstand interrogation without "breaking down."²²³ In other cases, the personal characteristics of the suspect were, with the analysis focusing on various aspects of police conduct, including the specific

²¹⁶ *Dickerson*, 530 U.S. at 444.

²¹⁷ Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733 (1987); Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966); Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1838 (1987).

²¹⁸ The test was a two pronged inquiry directed at assessing whether the police used coercion, and whether the coercion overcame the will of the suspect. *See, e.g.*, Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 471 (1999).

²¹⁹ *Id.* at 471-72.

²²⁰ *See* Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979) (noting "the intolerable uncertainty that characterized the thirty-year reign of the due process voluntariness doctrine").

²²¹ *Miller v. Fenton*, 474 U.S. 104, 114 n. 4 (1985) (internal quotations and citations omitted).

²²² Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 745 (1987).

²²³ *See, e.g.*, *Reck v. Pate*, 367 U.S. 433, 441-42 (1961); *Spano v. New York*, 360 U.S. 315, 321-22 and n.3 (1959); *Fikes v. Alabama*, 352 U.S. 191, 193 (1957).

words used in the interrogation, whether the suspect had been allowed to consult with family members or counsel, or advised of his right against self-incrimination.²²⁴ The Court also developed, as a matter of due process, a number of disjointed rules that held confessions inadmissible, regardless of other “circumstances,”²²⁵ such as physical force.

Because there are unlimited ways that police conduct and suspects could interact, courts expended substantial resources in parsing out the dynamics of custodial interrogations.²²⁶ With no clear test, courts found it challenging to determine when an individual’s will was overborne in a constitutionally impermissible manner. Furthermore, because interrogations were conducted out of sight of third parties or judicial officers, determining whether statements were coerced often involved a swearing contest between police and suspects, causing courts to often err on the side of law enforcement.²²⁷

At the same time, the evolving values underlying the voluntariness test changed over time, resulting in a “cornucopia of Due Process tests” among lower courts, which the Supreme Court never effectively resolved.²²⁸ As a result, the analysis varied by jurisdiction without any uniform rules to guide it, making the standard an unwieldy one for the Supreme Court or lower courts to administer effectively.²²⁹ As Justice Hugo Black remarked during oral argument in *Miranda*, “no court in the land can ever know [whether the confession is admissible] until [the case] comes to us.”²³⁰ The result was a conflicting body of law about what practices or circumstances the Court would find consistent with due process,²³¹ preventing effective appellate guidance and control of trial court application of the test.²³² On a practical level, the inherent ambiguities of the standard provided

²²⁴ See, e.g., *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Harris v. South Carolina*, 338 U.S. 68 (1949); *Leyra v. Denno*, 347 U.S. 556 (1954); *Malinski v. New York*, 324 U.S. 401 (1945).

²²⁵ See Cathquarrine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195 (1996).

²²⁶ See, e.g., *Culombe v. Connecticut*, 367 U.S. 568, 571-72 (1961) (warning that general principles are of little help in resolving voluntariness issue, and suggesting that nature of issue effectively compels “a case-by-case approach”); *Quarles*, 467 U.S. at 683 (same).

²²⁷ See Ogletree, *Are Confessions Really Good for the Soul?*, *supra* at 1834 (1987).

²²⁸ Hancock, *Due Process Before Miranda*, at 2237 (“[T]he Court usually never overruled a Due Process precedent, and simply ignored inconsistent cases, or distinguished them when necessary or convenient.”).

²²⁹ See Kamisar, *Confessions*, *supra* 93, at 471 (The test became “the test was too amorphous, too perplexing, too subjective and too time-consuming to administer effectively.”)

²³⁰ 63 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 894 (Phillip B. Kurland & Gerhard Casper eds., (1966)).

²³¹ See Kamisar, *Confessions*, *supra*, at 471-72; Herman, *The Supreme Court*, *supra*, at 752.

²³² See, e.g., *Quarles*, 467 U.S. at 683 (recounting some history of pre-Miranda analysis: “Difficulties of proof and subtleties of interrogation technique made it impossible ... for the judiciary to decide with confidence whether the defendant had voluntarily confessed his guilt or whether his testimony had been unconstitutionally compelled. Courts ... [nationwide] were spending countless hours reviewing the facts of individual custodial interrogations.”).

little guidance for police on how to conduct interviews.²³³ As one commentator noted, “[u]nder the ‘totality of the circumstances; approach, virtually everything is relevant and nothing is determinative. If you place a premium on clarity, this is not a good sign.’”²³⁴

In the face of this vague and inconsistent body of law, the *Miranda* Court sought to resolve these contradictions to provide clear guidance to law enforcement in their conduct in creating a “concrete” and an objective, easily applied rule for courts to assess the admissibility of custodial statements.²³⁵ The Court explicitly rejected the previous case-by-case approach for determining voluntariness, due to the inherent problems in discerning what occurred during an interrogation and determining whether the suspect’s will had been overcome.²³⁶ As the Court observed recently in upholding the constitutional underpinnings in *Miranda*, it may sometimes be the case that “a guilty defendant go[es] free,” but the Court deemed that a lesser disadvantage than trying to operate under a totality-of-the-circumstances test, which “is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner.”²³⁷ Without clear guidance, lower courts often upheld confessions that involved clearly improper and abusive tactics.²³⁸

Of course, *Miranda*, at its core, was also a way to protect suspects by addressing the gaps created in the previous due process analysis, which posed an “unacceptably great” risk that involuntary custodial confessions would escape detection.²³⁹ *Miranda* thus represents a “carefully drawn approach,”²⁴⁰ acknowledging that the “principal advantage” of the rules announced in *Miranda* is their “ease and clarity of application.”²⁴¹ *Miranda*’s requirements have “the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.”²⁴²

²³³ *Id.*

²³⁴ *Id.*

²³⁵ In *Miranda*, the Court explained that it granted certioari to address the “problems... of applying the privilege against self-incrimination to in-custody interrogation, to give *concrete constitutional guidelines* for law enforcement agencies and courts to follow.” 384 U.S., at 441-442, (emphasis added).

²³⁶ *Miranda*, 384 U.S. at 468-69.

²³⁷ *Dickerson*, 530 U.S. at 444.

²³⁸ Steven Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869 (1981)

²³⁹ *Dickerson*, 530 U.S. at 442.

²⁴⁰ *Moran*, 475 U.S. at 427.

²⁴¹ *Id.* at 425 (citations omitted).

²⁴² *Fare v. Michael C.*, 442 U.S. 707, 718 (1979).

The highly subjective approach and multi-factored objective tests used by courts to decide whether *Miranda* applies to dual civil and criminal immigration interrogations returns immigrants to the pre-*Miranda* interrogation room and courts of 45 years ago, before the Court decided *Miranda*. The difficulty of the case-by-case analysis of immigrants' *Miranda* rights is made apparent by the inconsistent results and disjointed rules. As in the pre-*Miranda* era the multiplicity of factors considered by these courts render "the test [] too amorphous, too perplexing, too subjective and too time-consuming to administer effectively."²⁴³ The reliance on government's subjective intent is rife with the same proof difficulties that were pervasive in the pre-*Miranda* jurisprudence caselaw that turned on a "swearing contest,"²⁴⁴ which as in the due process cases, has been routinely won by law enforcement officials.²⁴⁵ The refusal of most courts to apply binding Supreme Court precedent on the issue in *Mathis* reflected the tendency of the pre-*Miranda* era tendency of courts to "simply ignore[] inconsistent cases, or distinguish[] them when necessary or convenient."²⁴⁶ Without clear guidance, lower courts are expending considerable resources to decide these cases, and frequently upholding statements made by immigrants in violation of their *Miranda* rights, thereby creating a substantial risk that officials will circumvent immigrants' *Miranda* rights.

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

In the years since *Miranda* was decided, the Supreme Court has reaffirmed its rejection of unpredictable and inconsistent subjective tests in favor of a more consistent approach and objective test established in *Miranda*,²⁴⁷ as described above, regarding the Court's rules about interrogation. This has held true even as the Court has developed a number of exceptions that effectively weakened *Miranda*'s protective power and impact on law enforcement.²⁴⁸ While the Court has shifted the overall rationales to law enforcement interests rather than a concern for suspects, it has consistently reasoned that objective tests are necessary to effectively guide courts and police in the admissibility of confessions and has rejected subjective multi-factored tests.²⁴⁹ These decisions represent a marked contrast to the approach lower courts have taken in the immigration context.

²⁴³ Kamisar, *Fortieth Anniversary of the Miranda Case*, *supra* at 169.

²⁴⁴ Ogletree, *Are Confessions Really Good for the Soul?*, *supra* at 1834.

²⁴⁵ *Id.*.

²⁴⁶ Hancock, *Due Process Before Miranda*, *supra* at 2237.

²⁴⁷ *Dickerson*, 530 U.S. at 444.

²⁴⁸ *See supra* note ____.

²⁴⁹ *See, e.g., Fare*, 442 U.S. at 718 (defining rigidity to be the core virtue of *Miranda* because it "inform[s] police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.").

a. Custody

As *Miranda* is designed to guard against the inherently compelling pressures of compulsive interrogation, *Miranda* rights attach only when a person is in custody or deprived of her freedom of action in any significant way.²⁵⁰ The Supreme Court has long held is evaluated by two levels of objective criteria: first, an “objective determination” of the circumstances surrounding the interrogation, and, second whether a “reasonable person” would have felt he or she was free to leave.²⁵¹ Since *Miranda* was decided, the Court has continued to explicitly reject the use of subjective factors in this analysis, making clear that the question of custody “depends on the objective circumstances of the interrogation, [and] not on the subjective views harbored by either the interrogating officers or the person being questioned.”²⁵² In recent decisions, the Court has taken great care to focus on objective criteria in analyzing custody to promote ease of administrability for police and judges, fairness to the suspect and police and stability in the law.

In the 1990s, the Court in *Stansbury v. California*²⁵³ explicitly rejected analyzing the subjective intent of law enforcement officers on the ground that it would create the irrational situation of forcing suspects to “probe the officer's innermost thoughts.”²⁵⁴ Because the inquiry focuses on how a reasonable person would perceive her circumstances, the Court emphasized that “an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation or interview, and thus cannot affect the *Miranda* custody inquiry.”²⁵⁵ In *Thompson v. Keohane*,²⁵⁶ the Court held that judges should make the determination of whether a suspect is in custody in order to advance uniformity and consistency, observing that the “law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law.”²⁵⁷

²⁵⁰ *Oregon v. Mathiason*, 429 U.S. 492, 495 (per curiam) (holding *Miranda* warnings attach “only where there has been such a restriction on a person's freedom as to render him ‘in custody’”). See also *Perkins*, 496 U.S. at 296.

²⁵¹ *Id.*

²⁵² *Stansbury*, 511 U.S. at 323-24.

²⁵³ *Id.* at 324-25.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 324-25 citing *Berkemer*, 468 U.S., at 435, n. 22.

²⁵⁶ 516 U.S. 99, 112 (1995).

²⁵⁷ *Id.* citing *Berkemer*, 468 U.S., at 436-439; Monaghan, *Constitutional Fact Review*, 85 COLUM.L.REV. 229, 273-276 (1985) (“[N]orm elaboration occurs best when the Court has power to consider fully a series of closely related situations”; case-by-case elaboration when a constitutional right is implicated may more accurately be described as law declaration than as law application”).

Last term, in *Howes v. Fields*,²⁵⁸ the Court reaffirmed that the custody determination also requires an objective analysis of the *suspects'* and *officers'* perspective. In *Howe*, the Court examined whether a suspect was in custody when he was questioned after being escorted from his prison cell by sheriff's deputies to a conference room, told he was free to leave, remained unrestrained, and the door to the conference room remained open. The Court held that the inquiry involved analyzing whether under "the objective circumstances of the interrogation," whether a "reasonable person" would have felt free to leave.²⁵⁹ Analyzing the "general" perspective of a suspect in his position, the Court concluded that the objective facts of the interview were "consistent with an interrogation environment in which a reasonable person would have felt free to terminate the interview and leave."²⁶⁰

In 2011, the Court again underscored the salience and rationale of an objective approach to determining custody in *J.D.B. v. North Carolina*.²⁶¹ In *J.D.B.*, the Court considered whether a 13-year-old student was in custody when a uniformed police officer took him from his classroom to a closed-door school conference room, and questioned him there about a theft with school administrators for 30 minutes without providing him with *Miranda* warnings.²⁶² The student was criminally charged based on statements he made during the interrogation. Noting that the Court has "repeatedly emphasized, whether a suspect is 'in custody' is an objective inquiry,"²⁶³ it held that a child's age is an objective factor relevant to the custody analysis so long as her age was known to the officer or would have been objectively apparent to a reasonable officer. The *J.D.B.* Court was careful to define age as an objective criteria based on scientific evidence and its recent precedent, in order to provide clear guidance to the police, who make "in-the moment judgments as to when to administer *Miranda* warnings."²⁶⁴ Limiting the analysis to objective criteria and "reasonable person" standard, the Court held, "avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and diving how those particular traits affect each person's subjective state of mind."²⁶⁵

While custody focuses on a separate, albeit interrelated, aspect of *Miranda* jurisprudence the Court's focus on objective criteria to provide clarity for police and for uniform precedent and stability in the law is equally applicable to the

²⁵⁸ 132 S.Ct. 1181 (2012).

²⁵⁹ 121 S.Ct. at 1189.

²⁶⁰ *Id.* at 1193 (quoting *Yarborough*, 541 U.S. at 664-66).

²⁶¹ 131 S.Ct. 2394 (2011).

²⁶² *Id.* at 2396.

²⁶³ *Id.* at 2402.

²⁶⁴ *Id.* at 2402-2404.

²⁶⁵ *Id.* at 2402.

concerns raised by the varying tests lower courts have developed for immigrants in the *Miranda* context. Most courts in the immigration context focus specifically on the actual suspicions—and knowledge—of the agent, without regard to uniformity; the right to *Miranda* warnings on dual criminal and civil immigration interrogations now turn primarily on jurisdiction. The failure of courts to provide consistent, objective factors for this inquiry has resulted in unworkable rules and confusion for law enforcement agents at courts, and leave immigrants vulnerable to abuse.

b. Waiver

Under *Miranda*, a knowing and intelligent waiver is a condition precedent to interrogation; a suspect must be read his *Miranda* rights, and must waive them, before interrogation can begin.²⁶⁶ Once a suspect has invoked her rights unambiguously, all questioning must cease. This “rigid requirement” in *Miranda* has “the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.”²⁶⁷ While the Court has made inroads into the definition of a valid waiver in recent years, it has continued to emphasize the need for clear rules to guide this inquiry.

For example, in February 2010, in *Maryland v. Shatzer*²⁶⁸, the Court held that a fourteen day break in custody ends the *Edwards v. Arizona*²⁶⁹ presumption that statements made by suspects after invoking their right to counsel are involuntary. In *Shatzer*, the Court addressed a case where law enforcement agents questioned a suspect held on separate state charges without counsel two years after he had invoked his right to counsel in a previous interrogation. In the second interview, the suspect waived his right to counsel and made incriminating statements, which were subsequently used to obtain a conviction against him. The Court held his statements to be admissible, and set a new rule that the presumption of involuntariness under *Edwards* lasts for only 14 days, reasoning that two weeks provided “plenty of time for the suspect to get acclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”²⁷⁰ In establishing the 14-day rule, the Court rejected a fact-specific inquiry in order to provide clear rules to law enforcement officers, observing that “[i]t is impractical to leave the answer to that question for clarification in future case-by-case adjudication; law enforcement officers need to

²⁶⁶ *Miranda*, 384 U.S. at 479 (After ... warnings have been given, and such opportunity [to invoke the *Miranda* rights] afforded ... the [suspect] may knowingly and intelligently waive these rights and agree to answer questions or make a statement.”)

²⁶⁷ *Fare*, 442 U.S. at 719.

²⁶⁸ 130 S. Ct. 1213 (2010).

²⁶⁹ 451 U.S. 471 (1981).

²⁷⁰ *Shatzer*, 130 S.Ct. at 1223.

know, with certainty and beforehand, when renewed interrogation is lawful.”²⁷¹

In 2010, in *Berghuis v. Thompkins*²⁷², the Court similarly adopted a new bright line in the waiver context by requiring that a suspect who wishes to invoke her right to be silent make a statement that indicates a clear and unambiguous waiver. The Court rejected the previous fact-specific inquiry in favor of a clear rule requiring an unambiguous invocation of the right to silence. The Court relied on its previous decision in *Davis v. United States*,²⁷³ which similarly held that a suspect must clearly invoke her right to counsel during an interrogation for it to be valid under *Miranda*. In *Berghuis*, the Court reasoned that the old rule that allowed a waiver through an “ambiguous act, omission, or statement,” would require police to “to make difficult decisions about an accused's unclear intent.”²⁷⁴ By contrast, the Court held, an unambiguous waiver aids courts and law enforcement because it “‘avoid[s] difficulties of proof and ... provide[s] guidance to officers on how to proceed in the face of ambiguity,’”²⁷⁵ and avoids requiring to police to engage in a guessing game.

The Court’s concerns for clarity in the waiver context, like the objective approach to custody rules, run counter to the emerging law about *Miranda* rights in dual civil and criminal immigration interrogations. The updated *Miranda-Edward* waiver rights also highlights an important issue with regard to the *Miranda* safeguards in dual civil and criminal immigration context: the Court’s rule requires that if a suspect asserts their right to counsel or silence, not only must the current interrogation cease, but the suspect may not be approached for further interrogation “until counsel has been made available to him.”²⁷⁶ These rules apply to any subsequent officer; knowledge about a suspect’s invocation of counsel is imputed to any subsequent official who interrogates the suspect, who is required to respect any invocation.²⁷⁷ If Courts are inconsistent in whether *Miranda* applies, it sends a mixed message to law enforcement officials about whether they are required to ascertain and respect the right of an inmate who has invoked his or her right to counsel or remain silent when questioned about immigration status.²⁷⁸ With the current inconsistencies, immigrants’ protections

²⁷¹ *Id.* at 1222-23.

²⁷² 130 S. Ct. 2250 (2010).

²⁷³ 512 U.S. 452, 461 (1994).

²⁷⁴ 130 S. Ct. 2250 (2010).

²⁷⁵ *Id.* at 2260 (internal citation and quotations omitted).

²⁷⁶ *Edwards*, 451 U.S. at 484-485.

²⁷⁷ *Arizona v. Roberson*, 486 U.S. 675 (1988) (suppressing statements suspect made in second interrogation about separate crime without counsel following his invocation of his right to counsel in initial interrogation where second officer unaware that suspect had invoked his right to counsel).

²⁷⁸ *Moran v. Burbine*, 475 U.S. 412, 425 (1986) (quoting *Miranda*, *id.*, at 473-474) (“Beyond this duty to inform, *Miranda* requires that the police respect the accused's decision to exercise the

under the *Miranda-Edwards* rules are at risk.

3. Eliminating the Right and the Centrality of Warnings

The strongest and most lasting import of the Court's decision in *Miranda* is that warnings are required prior to custodial interrogation to ensure that suspects are not coerced into confessing and fair notice to provide suspects with the ability to exercise their rights.²⁷⁹ Absent other fully effective procedures, police are required to provide the suspect four warnings prior to any custodial questioning: she has the right to remain silent, anything she says can be used against her in a court of law, she has the right to the presence of an attorney, and if she cannot afford an attorney one will be appointed for her prior to any questioning if she so desires.²⁸⁰ Since *Miranda*, the Court has underscored the centrality of warnings as the core protection in custodial interrogation and to maintain clarity and protect suspects' Fifth Amendment rights. By not mandating warnings in the immigration context or conditioning them on subjective factors, lower courts are undermining a fundamental protection designed to protect individuals from police overreaching.

The *Miranda* warnings are designed to counteract the coercive pressures inherent²⁸¹ in custodial interrogation and give individuals have some measure of control by providing information about their Fifth and Sixth Amendment rights.²⁸² They ensure that that a suspect's decision to submit to custodial interrogation is an intentional relinquishment of a known right to silence and to counsel, and that she is not obliged to participate in an interrogation that can incriminate him, and to allow him to clearly waive his rights.²⁸³ Thus, *Miranda* warnings allow suspects the "right to choose between silence and speech ... throughout the interrogation process."²⁸⁴ Warnings are also intended "to make the individual more acutely aware that he is faced with a phase of the adversary system-that he is not in the presence of persons acting solely in his interests."²⁸⁵ The "per se"

rights outlined in the warnings. 'If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, [or if he] states that he wants an attorney, the interrogation must cease.'").

²⁷⁹ See, e.g., *Berkemer*, 104 S.Ct. at 3147; *Henry*, 447 U.S. at 273-74.

²⁸⁰ *Miranda*, 384 U.S. at 479.

²⁸¹ *Miranda* and its progeny accept as a basic premise that "the compelling influence of the interrogation" could eventually "force[]" a suspect to make a statement even if he never intended "voluntary relinquishment of the privilege." 384 U.S. at 476.

²⁸² *Berghuis*, 130 S.Ct. at 2260.

²⁸³ See e.g., *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (*Miranda*'s "fundamental purpose [is] to assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process."); *Moran*, 475 U.S. at 426 (" *Miranda* ... giv[es] the defendant the power to exert some control over the ... interrogation").

²⁸⁴ *Miranda* 384 U.S. at 469.

²⁸⁵ *Id.*

rules in *Miranda* requiring warnings and that interrogation cease once a suspect invokes his right to an attorney are also “based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation.”²⁸⁶ As the *Miranda* Court recognized, lawyers have a special role once a suspect “ becomes enmeshed in the adversary process,” and “the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system,”²⁸⁷ and “helps guard against overreaching by the police,”²⁸⁸ that *Miranda* sought to avoid. While this mechanism does not per se eliminate coercion, it is the central safeguard to has made his own assessment of the risks and benefits of submitting to a custodial interrogation without the assistance of counsel.

Whether expanding or limiting the rights of suspects, the right to warnings has been the most persistent legacy of the Court’s decision also because of the clarity of its rule.²⁸⁹ In *Berkemer v. McCarty*,²⁹⁰ the Court relied on this principle to unanimously invalidating a state law allowing a misdemeanor exception to *Miranda* because it would result in “byzantine” unclear rules and “doctrinal complexities,” that the Supreme Court sought to avoid in deciding *Miranda*.²⁹¹ The Court also reasoned that a misdemeanor exception “would substantially undermine th[e] crucial advantage”²⁹² of the “clarity” of the *Miranda* warnings because it is unreasonable to expect “police to make guesses as to the nature of the criminal conduct at issue before deciding how they may interrogate the suspect.”²⁹³ And in invalidating the Court observed in *Berghuis*, the Court observed that allowing a suspect to invoke his right to silence by a more equivocal act may “add marginally to *Miranda* 's goal of dispelling the compulsion inherent in custodial interrogation,” but found its less-protective ruling was appropriate because “as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process.”²⁹⁴

The centrality of warnings has been reflected in the Court’s recent

²⁸⁶ *Fare*, 442 U.S. at 719.

²⁸⁷ *Miranda*, 384 U.S. at 469.

²⁸⁸ *Fare*, 442 U.S. at 719.

²⁸⁹ See, e.g., *Id.*; *Berkemer*, 468 U.S. at 437 (“One of the principal advantages the principal advantages of the [*Miranda*] doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule.”).

²⁹⁰ 468 U.S. at 437.

²⁹¹ *Id.* at 437.

²⁹² *Id.* at 430.

²⁹³ *Id.*

²⁹⁴ *Berghuis*, 130 S.Ct. at 2260 (quoting *Burbine*, 475 U.S. at 425).

decisions. In upholding the constitutional underpinnings of *Miranda* in *Dickerson v. United States*,²⁹⁵ in 2000, the Court made clear that a principal purpose of the *Miranda* warnings is to permit the suspect to make an intelligent decision as to whether to answer the government agent's questions.²⁹⁶ There, the Court recognized that the *Miranda* warnings have “become embedded in routine police practice to the point where the warnings have become part of our national culture.”²⁹⁷ And in 2001, the Court emphasized in *Texas v. Cobb*²⁹⁸ that “there can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation.”²⁹⁹ Thus, while the warnings do not require police to disclose all of the information that a person might want before choosing between speech and silence,³⁰⁰ or be precise,³⁰¹ the Court has consistently held that without warnings, no waiver of the privilege can be deemed informed.³⁰²

Lower court decisions in the dual civil and criminal immigration context depart from the Court’s consistent rule that warnings remain central for suspects in an adversarial setting to understand their rights. Without warnings, suspects have no knowledge that they are being asked a question that could incriminate them and are unable to make an intelligent or informed decision as to how to answer the government agent's questions, which is a prerequisite to the rights safeguarded under *Miranda*.³⁰³ The absence of warnings deny individuals the important purpose of *Miranda* warnings “to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interests.”³⁰⁴ When police and jail officials ask inmates about their nationality or immigration status, they do so for the express purpose of referring the inmate to ICE, which as described below can and frequently does result in criminal prosecutions related to violations of immigration laws. Nationality, immigration status and place of birth all have a direct bearing on potential federal prosecution for immigration crimes. Given the broad scale and systematic levels of criminal prosecutions for immigration crimes as discussed in the next section, courts’ analysis that the answers to such

²⁹⁵ 530 U.S. 428 (2000).

²⁹⁶ *Miranda*, 384 U.S. at 467 (stating that “the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored”).

²⁹⁷ *Dickerson*, 530 U.S. at 443.

²⁹⁸ 532 U.S. 162 (2001).

²⁹⁹ *Id.* at 162.

³⁰⁰ See, e.g., *Colorado v. Spring*, 479 U.S. 564, 573-77 (1987) (officers do not have to divulge the subject matter of the interrogation).

³⁰¹ *Duckworth*, 492 U.S. at 203.

³⁰² See *Miranda*, 384 U.S. at 468-72.

³⁰³ *Estelle*, 451 U.S. at 467.

³⁰⁴ *Id.*

questions are not “reasonably likely to elicit an incriminating response,”³⁰⁵ or that officers obtain a “knowing and voluntary”³⁰⁶ waiver of these rights is inconsistent with *Miranda* and its progeny.

The new exceptionalism in immigrants’ *Miranda* rights has implications for immigrants in the criminal context beyond the Fifth Amendment. This was most recently reflected by the Court’s 2009 decision in *Montejo v. Louisiana*³⁰⁷ which made *Miranda* warnings and waivers relevant to the application of the Sixth Amendment right to counsel in criminal proceedings. The transformation of *Miranda* rules for immigrants in the criminal context marks a new inroad into an already weakened *Miranda* jurisprudence that risks eroding mechanisms the court has left intact in *Miranda* and undermine the balance the Court has achieved to protect against coerced confessions. Courts are developing an entirely distinct jurisprudence for immigrants at odds with fundamental principles in *Miranda*, and, threatens to backpeddle to an era of judicial inconsistency and confusion among courts, institutional actors and suspects alike.

III. Broader Implications for Noncitizens, Local Law Enforcement and Immigrant Protections

As described above, *Miranda* represented an attempt by the Court to protect individual rights by “providing guidance to primary actors (law enforcement personnel)” in terms that were “sufficiently specific” to generate “self-regulating official behavior.”³⁰⁸ By departing from well-established *Miranda* principles for immigrants, courts are compounding institutional structures that are incentivizing these primary actors to deprive noncitizen suspects of their criminal procedural protections on a broad scale. This section describes two trends that exacerbate the confusion among lower courts on the ground. First, there has been an unprecedented increase in federal prosecution of immigration crimes. Second, while local law enforcement officials are authorized, but are not required to, to arrest and detain persons suspected of violating the criminal provisions of federal immigration law, they have been recently in record numbers; untrained local law enforcement serve as the new front line in criminal and civil immigration enforcement. The Federal government has institutionalized this arrangement by providing substantial financial incentives for local law enforcement to identify criminal aliens subject to dual civil and criminal penalties; almost every jurisdiction in the country participates in criminal and civil immigration interrogations of individuals for purposes of identifying and referring “criminal aliens” to ICE for prosecution and deportation.

³⁰⁵ *Innis*, 446 U.S. at 301.

³⁰⁶ *Miranda*, 384 U.S. at 474.

³⁰⁷ *Montejo v. Louisiana*, 556 U.S. 778 (2009).

³⁰⁸ Henry P. Monaghan, *The Supreme Court, 1974 Term--Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 26 (1975).

A. Unprecedented Changes in Criminal Immigration Enforcement

Historically, the federal government has not used criminal provisions of the INA in its immigration enforcement efforts. In 1972, scholars noted the “de minimis policy” of U.S. criminal immigration enforcement, which was characterized by a period when U.S. Attorneys would “prosecute smugglers, but not the illegal entrants themselves.”³⁰⁹ However, the number of federal prosecution of immigration crimes has grown significantly since the 1980s.³¹⁰ In addition, since the 1980s, Congress began increasing the number and scope of immigration-related crimes have increased substantially and in the 1990s, Congress increased the penalties of immigration crimes.³¹¹

Since Congress began expanding the scope and penalties of criminal provisions in the INA, the number of federal prosecution of immigration-related crimes has grown significantly. However, it is only since 2005 that the government has sharply increased its focus on criminally prosecuting immigrants for immigration violations.³¹² Federal immigration-related have spiked in recent years, and are now at record highs, which began increasing during the Bush administration in 2005.³¹³ By 2008, his last year of office, federal prosecution of immigration crimes doubled over the previous year to more than 70,000 prosecutions, and has continued to rise with the Obama administration until last year. From 1997 to 2009, immigration prosecutions grew more than ten-fold.³¹⁴

Today, more than half of the federal docket is now comprised of prosecutions to immigration-related crimes, with 54% of all federal criminal

³⁰⁹ Regarding immigration offenses, where the major violation is illegal entry into the country, a de minimis policy of prosecuting only repeat violators is used in combination with the administrative remedy of deportation to help keep the caseload within manageable proportions.

³¹⁰ Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 Interpreter Releases 1317, 1317 (1997).

³¹¹ Stumpf, *The Crimmigration Crisis*, *supra*, at 376; Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 613 (2003) (“Since the 1980s, Congress has passed legislation subjecting more and more acts associated with migration to criminal penalties, or increasing the severity of criminal sanctions imposed for the commission of those acts.”).

³¹² Sklansky, *Ad Hoc Instrumentalism*, *supra* at __

³¹³ Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2094 (2008) (“Starting around 2005, federal prosecutors have prosecuted immigration-related crimes more frequently, to the point that immigration-related prosecutions accounted in February 2008 for the majority of new federal criminal cases.”).

³¹⁴ BJS' Federal Justice Statistics Program website, Data Source: Administrative Office of the U.S. Courts - AOUSC Criminal master data file: FY 1999 - FY2009, *available at* <http://bjs.ojp.usdoj.gov/fjsrc/> (last accessed June 2, 2012). *See also* Sklansky, *Ad Hoc Instrumentalism*, *supra* at 223.

cases, up from 24% of all federal convictions in 2007 and just 7% in 1991.³¹⁵ While federal immigration prosecutions declined slightly in 2010, the most recent data available indicate that immigration prosecutions accounted for 59 percent of all federal criminal charges in April 2012.³¹⁶ Last year, the federal government filed 89,000 federal immigration criminal charges, an average of 7,088 a month.³¹⁷

The overlap between civil and criminal immigration enforcement is substantial.³¹⁸ The most commonly prosecuted immigration crimes are those for which immigrants can also be deported: improper entry, followed by illegal reentry after a removal order and felony reentry, which carries a sentence of up to 20 years if previous conviction was for an aggravated felony.³¹⁹ In 2011, improper reentry was the most frequently recorded lead charge.³²⁰ In total, more than 90% of all immigration convictions, or 72,000 individuals were convicted of illegal entry or reentry—more prosecutions than all other federal crimes combined.³²¹

As a result, the likelihood that an immigrant who has a status-related issue will be criminal prosecuted has increased sharply. In 2011, for example, around 20 percent of all apprehensions by the Customs and Border Patrol (CBP) resulted in an immigration criminal prosecution — up from 2 percent in 2006.³²² During this same period, the total number of CBP apprehension fell by more than half, while CBP-referred criminal prosecutions tripled. Immigrants are more likely than ever to face criminal charges.

This unprecedented increase in criminal immigration prosecutions has been due in part to “zero tolerance” programs adopted under the Bush administration, designed to criminally prosecute all apprehended undocumented immigrants in the Southwest border. To implement this strategy, around 2004, DHS directed and provided funds to federal and local agencies through program

³¹⁵TRAC, *FY 2009 Federal Prosecutions Sharply Higher* (2009) [hereinafter “TRAC FY 2009 Federal Prosecution Report”], available at <http://trac.syr.edu/tracreports/crim/223/> (last accessed June 2, 2012); TRAC, *Immigration Prosecutions at Record Levels in FY 2009* (2009), available at <http://trac.syr.edu/immigration/reports/218/> (last accessed June 3, 2012).

³¹⁶ TRAC, *2012 Immigration Prosecutions*, *supra*; TRAC, *Federal Prosecution Data for April 2012 Released*, (July 9, 2012) available at <http://trac.syr.edu/whatsnew/email.120709.html> (last accessed Aug. 4, 2012).

³¹⁷ Eagly, *supra* *Prosecuting Immigration*, *supra* at 1294; Lydgate, *A Review of Operation Streamline*, *supra* at 511.

³¹⁸ See, e.g., Kanstroom, *Hello Darkness*, *supra* at 599-600.

³¹⁹ See *infra*

³²⁰ TRAC, *2011 Illegal Reentry*, *supra*.

³²¹ *Id.* Grassroots Leadership, *Green Paper, Operation Streamline: Drowning Justice and Draining Dollars along the Rio Grande*, at 3 (July 2010), available at www.grassrootsleadership.org.

³²² TRAC, *2012 Immigration Prosecutions*, *supra*

called “Operation Streamline.”³²³ Streamline has involved expedited and consolidated processing of illegal entry and reentry cases, which has resulted in mass criminal proceedings, and guilty pleas. In some jurisdictions, this federal mass-prosecution programs has resulted in fifty to one hundred defendants are prosecuted for illegal entry every single day.³²⁴ As a result, between 2002 and 2008, prosecutions for first time illegal entry in border district courts increased 330%.³²⁵

The rapid growth in federal immigration prosecutions has also resulted from increased law enforcement efforts outside the Southwest Border. In his rich analysis of criminal immigration enforcement, Professor David Alan Sklansky found that a quarter of all federal prosecutions in Idaho, Oregon, Utah, Washington, Arkansas, Vermont and North Dakota are immigration cases.³²⁶ From 2007 to 2010, criminal immigration prosecutions in non-border states increased by 31 percent.³²⁷

The rise in prosecutions of federal immigration crimes has lead scholars to voice significant concerns that the government has entered into a new era of using criminal law to regulate immigration, similar to those in the emerging *Miranda* jurisprudence for immigrants.³²⁸ While immigration and criminal law has long operated as separate systems, this convergence has resulted in the disruption of the rule of law for immigrants and a unitary criminal justice system.³²⁹ The federal government has been able to borrow law enforcement tools from the civil system in an ad hoc manner, despite the fact that the immigration system operates with different objectives, and under different constitutional rules.³³⁰ The ability of the government to choose between civil or criminal laws has resulted in an absence of accountability and ultimately in an unequal criminal justice system for immigrants. On the ground, the convergence of immigration and criminal law enforcement has resulted in reports of systemic criminal procedural violations of immigrants’ rights, by law enforcement agents, prosecutors and judges, including mass guilty pleas.³³¹

³²³ *Id.* at 169-170; Chacon, *Managing Migration*, *supra* at 142-143.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ Sklansky, *Ad Hoc Instrumentalism*, *supra* at 167.

³²⁷ TRAC, *Federal Criminal Enforcement and Staffing: How Do the Obama and Bush Administrations Compare?* (2011) available at <http://trac.syr.edu/tracreports/crim/245/>

³²⁸ Motomura, *Immigration Outside the Law*, *supra*, at 2094.

³²⁹ Eagly, *Prosecuting Immigration*, *supra* at 1292-1304.

³³⁰ *Id.*; Sklansky, *Ad Hoc Instrumentalism*, *supra* at 167.

³³¹ *See, e.g., United States v. Roblero-Solis*, 588 F.3d 692 (9th Cir. 2009) (describing one particular mass plea agreement and noting that “in twelve months’ time the court has handled 25,000” of these pleas).

Significantly, the growth in federal prosecution crimes has also had a disproportionate impact on Latino communities, who in 1991 accounted for 24 percent of those convicted of federal crimes, compared to 40% in 2007. Among those sentenced for immigration offenses in 2007, 80% were Hispanic. According to the Pew Research Center, much of the increase in the number of Hispanics sentenced in federal courts is the result of the rise in the number of offenders sentenced for immigration offenses between 1991 and 2007. Since 1991, the number of sentenced offenders who were Hispanic nearly quadrupled and accounted for more than half (54%) of the growth in the total number of sentenced offenders. In 2007, 75% of Latino offenders sentenced for immigration crimes were convicted of entering the U.S. unlawfully or residing in the country without authorization, and among sentenced non-citizen Latino immigration offenders and more than 81% were convicted of entering unlawfully or residing in the U.S. without authorization.³³²

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

There has been another significant shift in immigration regulation which is affected by the emerging immigration exceptionalism in *Miranda* jurisprudence: the federal government's increased reliance on local law enforcement to enforce both civil and criminal immigration laws.³³³ Prior to September 11, criminal and civil immigration laws were primarily enforced by federal immigration officials trained in immigration law and procedure, with limited assistance from local police.³³⁴ However, in the last decade, the federal government has developed a number of programs and strengthened old ones to effectively enlist state and local actors to be the front line of both civil and criminal immigration enforcement. Scholars have provided thoughtful analysis to the scope and questions raised by the state and local officials involved in civil immigration enforcement, until recently, but there has been less attention paid to the role local law enforcement agents are playing in criminal immigration enforcement.³³⁵ In this section, I describe the scope and changing federal institutional structures that have incentivized and promoted the role of state and local actors in criminal immigration enforcement by using new data obtained from the Department of Justice and ICE, and examine the implication of these shifts in light of the

³³² Lopez, M. and M. Light, *A Rising Share: Hispanics and federal Crime*. Pew Research Center. (2009), available at <http://pewhispanic.org/files/reports/104.pdf>

³³³ See, e.g., Kalhan, *Interior Immigration Enforcement*, *supra* at 1161-63; Wishnie, *State and Local Police Enforcement*, *supra* at 1084-88.

³³⁴ *Id.*; The power to regulate admission, exclusion, and removal (deportation) lies exclusively with the federal government. See *DeCanas v. Bica*, 424 U.S. 351, 354 (1976).

³³⁵ Professor Hiroshi Motomura recently broke new ground in this area by exploring the allocation of authority between local and state police officials to make federal criminal arrests and the broader implications for immigration enforcement. See Motomura, *The Discretion That Matters*, *supra* at 1845.

doctrinal transformation of *Miranda* for immigrants. As a result of these changes, almost every local law enforcement agency in the nation is involved with criminal and civil immigration enforcement through substantial financial incentives, totaling \$2.85 billion dollars over the last three years.³³⁶

The federal government has simultaneously been both proactive in involving local law enforcement officials in immigration enforcement, while at the same time deeply critical of and aggressive in challenging the involvement of local actors in immigration enforcement. On the one hand, the U.S. government recently filed suit against Arizona and five other states that passed state immigration laws, arguing that local law enforcement was preempted because increasing local enforcement of immigration would distort and undermine federal immigration priorities and raise civil rights issues.³³⁷ At the same time, since September 11, the federal government has launched numerous federal-local partnership programs to strengthen and leverage ICE's enforcement capacity under a "force multiplier theory."³³⁸ As Professor Motomura has described, the federal government has effectively conceded its authority and enforcement discretion to state and local actors.³³⁹ These programs, including Secure Communities, 287(g) partnerships, and the Criminal Alien Program have formally, and informally put local law enforcement officials on the front lines of civil and criminal immigration enforcement.³⁴⁰

One such federal-state partnership that has both incentivized and conscripted local officials into criminal and civil immigration enforcement--and at the forefront of conducting dual civil and criminal custodial interrogations about immigration status--is the little-known State Criminal Alien Assistance Programs ("SCAAP"). Originally designed in 1994 to provide federal funds to local jurisdictions to defray the cost of detaining "undocumented criminal aliens," it has evolved into the central referral tool for incorporating local law enforcement agencies into civil and criminal immigration enforcement.³⁴¹ The SCAAP

³³⁶ 8 U.S.C. § 1231(i)(5)(A)-(C) (setting SCAAP appropriations at \$950 million for fiscal years 2008-2011).

³³⁷ See, e.g., *Arizona v. United States*, 567 U.S. ___, 132 S.Ct. 2492, 2516 (2012).

³³⁸ Marc A. Rosenblum, *Interior Immigration Enforcement: Programs Targeting Criminal Aliens*, Congressional Research Service, 27 (2011) available at <http://www.fas.org/sgp/crs/homsec/R42057.pdf> (last accessed August 3, 2012). ("Because there are about 150 times more state and local law enforcement officers in the United States ... any policies that forge connections between state and local law enforcement agents and ICE have the potential to increase ICE's presence in U.S. communities and may be substantial force multipliers for ICE.").

³³⁹ Motomura, *The Discretion That Matters*, *supra* at 1845, 1851.

³⁴⁰ *Id.* at 1845; Wishnie, *State and Local Police*, *supra* at 1084-88.

³⁴¹ The State Criminal Alien Assistance Program was created by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 1823-24 (1994) (codified as amended at 8 U.S.C. §1231(i) (2006)).

program provides federal funds to states and localities for detaining, identifying and referring to ICE certain “undocumented criminal aliens.”³⁴² The authorizing statute defines eligible aliens to include individuals who are expressly subject to both criminal and civil immigration charges, i.e., undocumented individuals who entered the U.S. without inspection or failed to maintain their immigration status.³⁴³ Notably, SCAAP does not compensate local agencies for detaining individuals for federal immigration charges, but rather for the all pre-trial and post-conviction time eligible inmates serve on their *state criminal sentences*—detention costs that local agencies would normally pay for inmates, regardless of immigration status.³⁴⁴

Participation in SCAAP is conditioned on local law enforcement officials using “due diligence” to identify and report eligible undocumented individuals to ICE for processing.³⁴⁵ Once ICE receives information from local agencies, it categorizes inmates in three categories: SCAAP eligible, unknown, or not eligible, meaning the individual is a U.S. Citizen or legal resident.³⁴⁶ DOJ then reimburses the agency for correctional officer costs associated for all pre-trial and post-conviction time served incarcerating all SCAAP-eligible inmates on a per diem rate.³⁴⁷

By conditioning funding on identifying immigrants who could be subject to civil or criminal violations, SCAAP has effectively delegated to local actors front-line authority to interrogate suspects for information that can be used for both criminal and civil prosecutions. The inclusion of federal crimes involving illegal entry ensures that some of the eligible individuals referred to ICE through SCAAP are at risk of facing civil and criminal penalties; as described *infra* in IIIA, illegal entry and reentry is currently the highest recorded lead federal

³⁴² 8 U.S.C. § 1231(i).

³⁴³ Bureau of Justice Assistance, State Criminal Alien Assistance Program (SCAAP), U.S. DEPT OF JUSTICE, [http:// www.ojp.usdoj.gov/BJA/grant/scaap.html](http://www.ojp.usdoj.gov/BJA/grant/scaap.html) (last visited July 20, 2012). SCAAP also requires that eligible aliens are (1) convicted of a felony or two misdemeanors, and (2) detained four or more consecutive days. *Id.*

³⁴⁴ Until last year, BJA also reimbursed jurisdictions for incarcerating “unknown” criminal aliens. *Id.*

³⁴⁵ Bureau of Justice Assistance, State Criminal Alien Assistance Program: FY 2011 Guidelines, at 2-3, *available at* https://www.bja.gov/Funding/11SCAAP_Guidelines.pdf. To be reimbursed, state and local agencies must provide “required information on undocumented criminal aliens,” which includes the alien registration number, name and the date of and country of birth. *Id.* at 4.

³⁴⁶ U.S. Office of Management and Budget, *State Criminal Alien Assistance Program Assessment*, 2008 PERFORMANCE REPORT OF THE FEDERAL GOVERNMENT (2008) [hereinafter *OMB SCAAP Assessment*] *available at* <http://georgewbush-whitehouse.archives.gov/omb/expectmore/detail/10001096.2003.htm>. According to the OMB, “many of the ‘unknowns’ also are U.S. citizens or lawfully in the U.S.” *Id.*

³⁴⁷ Until last year, BJA also reimbursed jurisdictions for incarcerating “unknown” criminal aliens. *Id.*

criminal charges.³⁴⁸ While SCAAP was enacted to be a “reimbursement program,” as government officials have acknowledged, it operates as one of the largest enforcement mechanisms to identify criminal aliens.³⁴⁹

A review of government reports and SCAAP data obtained through FOIA reveals several trends relevant to local criminal immigration enforcement and the emerging *Miranda* jurisprudence. First, the scope of local participation and federal investment in this program is substantial. According to an audit by the Inspector General of the Department of Justice (“OIG”), the rate that local agencies are participating in SCAAP appears to be 100%.³⁵⁰ This is a substantial increase from the 1990s, when a 1997 Government Accounting Office (“GAO”) study indicated that ICE screened only one-third of foreign-born prisoners.³⁵¹ Similarly, the number of agencies participating in the program has more than doubled since September 11, increasing from 412 local law enforcement agencies in 2000 to 934 in 2011.³⁵²

Local law enforcement officials frequently directly question arrestees about their immigration status to comply with SCAAP, although the circumstances and content of questioning varies. The OIG audit found that a majority of the participating agencies comply with SCAAP by directly asking arrestees about their immigration status.³⁵³ Other agencies indicated that they asked suspects about their country of birth or nationality, or only inquired about immigration status upon suspicion that a detainee was undocumented, or arrested for a felony.³⁵⁴ Some agencies reported that they interrogated suspects about their immigration status upon arrest, while others indicated they asked the suspect

³⁴⁸ TRAC, *2011 Illegal Reentry*, *supra* ; Sklansky, *Ad Hoc Instrumentalism*, *supra* at 167-168.

³⁴⁹ See, e.g., Isaac Wolf, *U.S. program pays municipalities to identify illegal immigrants*, SCRIPPS NEWS available at <http://www.scrippsnews.com/node/55518> ; Chris Rizo, *AG criticizes Obama over proposed budget cuts*, LEGAL NEWSLINE, May 8, 2009 (quoting Colorado Attorney General John Suthers as stating: “The State Criminal Assistance Program is one of the important ways the federal government helps states pay for enforcing federal immigration law and incarcerating illegal immigrants.”); Jonathan Clark, *Immigration overhaul bill dead, so what is next?*, DOUGLAS DISPATCH, July 5, 2007 (reporting County Sheriff is interested in more SCAAP money, but “would prefer to focus on local problems like methamphetamine and domestic abuse and leave border enforcement up to the federal government”).

³⁵⁰ U.S. Department of Justice, Office of the Inspector General, Audit Division, *Cooperation of SCAAP Recipients in the Removal of Criminal Aliens From the United States* at 11, January 2007 [hereinafter “2007 OIG SCAAP Audit”].

³⁵¹ See Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, VA. J. SOC. POL’Y & L 606, 661 n. 238, available at <http://www.jacquelinestevens.org/StevensVSP18.32011.pdf>

³⁵² See U.S. Department of Justice, Bureau of Justice Assistance [hereinafter “BJS”], *FY 2011 SCAAP Awards*, 2011 SCAAP Data; BJS, *FY 2000 SCAAP Awards*, 2000 SCAAP Data. (on file with author).

³⁵³ 2007 OIG SCAAP Audit, *supra* note 371, at 11.

³⁵⁴ *Id.* at vi, 11-12, 19.

during booking.³⁵⁵ While almost all jurisdictions were “cooperative” with ICE, a number of local agencies expressed discomfort with questioning individuals about their immigration status and enforcing immigration law, prompting some to limit immigration-related inquiries as part of the jail booking process.³⁵⁶

Third, there has been a sharp increase in local SCAAP referrals to ICE that tracks the increase in federal immigration prosecutions. Between 2005 and 2010, the number of SCAAP referrals increased by almost 30%, from 270,807 to 350,197.³⁵⁷ During this same period, federal payments to local jurisdictions for SCAAP referrals grew from \$287 million in 2005 to \$324 million in 2010. In total, the federal government allocated \$4.65 billion for SCAAP payments to local jurisdictions,³⁵⁸ and local agencies identified and referred 1.65 million arrestees to ICE in the last five years.³⁵⁹

Data from ICE also confirms that local law enforcement agencies have become involved in immigration enforcement process at unprecedented rates during this period. The ICE Local Law Enforcement Center (“LESC”), which is primarily used by “state and local law enforcement officers seeking information about aliens encountered in the course of their daily enforcement activities,” reported receiving 1,278,219 electronic requests for information in 2011, more than twice the number of inquiries it received in 2004.³⁶⁰

Significantly, local law enforcement agencies have had a low accuracy rate on referring eligible individuals it refers to ICE for SCAAP reimbursement, and has referred to ICE a substantial number of legal residents and U.S. Citizens. Only about one-third of the 1.8 million local agency referrals made for SCAAP purposes from 2005-2010 were deemed to be SCAAP-eligible.³⁶¹ Despite federal

³⁵⁵ *Id.* In Shelby County, TN every inmate is interviewed about their immigration status upon booking. See, e.g., Kristina Goetz, *Shelby County Jail screens inmates' immigration statuses*, COMMERCIAL APPEAL, Aug. 1, 2010 available at <http://www.commercialappeal.com/news/2010/aug/01/jail-screens-inmates-statuses/?print=1>

³⁵⁶ 2007 OIG Report at 19.

³⁵⁷ See BJS, *FY 2005-2010 SCAAP Awards*, SCAAP Data Masterfile.

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

³⁵⁹ See BJS, *FY 2007-2011 SCAAP Awards*, SCAAP Data Masterfile.

³⁶⁰ Immigration and Customs Enforcement, *Fact Sheet: Law Enforcement Support Center* (May 29, 2012) available at <http://www.ice.gov/news/library/factsheets/lesc.htm> (last accessed Aug. 13, 2012); Michael Garcia, Assistant Secretary for ICE, *Statement Before Senate Appropriations Committee, Subcommittee on Homeland Security* at 6 (March 2, 2004) available at <http://www.ice.gov/doclib/news/library/speeches/garcia030205.pdf> (last accessed Aug. 13, 2012). *Id.* The LESC provides immigration status information and assistance to local, state, and federal law enforcement agencies on noncitizens suspected, arrested or convicted of criminal activity. *Id.*

³⁶¹ *Supra* note 378.

rules instructing that U.S. citizens should not be reported through SCAAP,³⁶² in the last five years local actors referred close to 1.2 million individuals who were not verified to be criminal aliens, including more than 300,000 U.S. Citizens or legal permanent residents.³⁶³

Despite these errors, SCAAP and ICE statistics suggests that local agencies are referring large numbers of individuals that could be subject to civil or criminal violations through SCAAP. In the last five years, local agencies referred more than 660,000 eligible criminal alien inmates to ICE, a 60% increase in 2011 over 2004.³⁶⁴ A 2011 GAO Criminal Aliens study found that 65%, or 161,850, of the 249,000 criminal aliens in a study population comprised primarily of SCAAP eligible detainees had been previously arrested at least once for a criminal or civil immigration offense prior to their referral.³⁶⁵ This data suggests that a large number of individuals could subject a large to an illegal entry or reentry offense.³⁶⁶

Finally, data obtained from ICE confirms that state and local police have been playing a growing role in criminal immigration enforcement and comprising a bigger share of referrals. A recent analysis by Professor Sklansky revealed that the share of criminal immigration cases resulting from state and local referrals increased from 5.4% of all ICE Criminal cases to 10% by 2009. In total, more than 46,000 federal criminal immigration cases resulted from state and local referrals last year.³⁶⁷ With local actors increasingly contributing to the growth in criminal immigration prosecutions and referring to ICE individuals subject to criminal and civil immigration violations under SCAAP at record numbers, the government's "force multiplier" theory is being realized in the criminal immigration context as well.

³⁶² BJA, *SCAAP FY 2011 Guidelines*, *supra* note ____.

³⁶³ *Supra* note 378.

³⁶⁴ See BJS, *FY 2006-2011 SCAAP Awards*

³⁶⁵ GAO, *Criminal Alien Statistics: Information on Incarcerations, Arrests, and Costs*, at 19 (March 2011 GAO-11-187) available at <http://www.gao.gov/new.items/d11187.pdf>. The study population was based on a random sample of 249,000 individuals, approximately 81%, of whom were SCAAP eligible inmates referred by local law enforcement agencies to ICE 2004 to 2008. The remaining 19% were the population of aliens incarcerated in federal prisons as of December 27, 2008. Even if the entire sample of federal BOP prisoners all fell into this category, 113,850, or 56% of the SCAAP-referred individuals fell into this category. *Id.* at 50-52.

³⁶⁶ 8 U.S.C. §§ 1325, 1326. While it is impossible to discern how many of the 660,599 eligible immigrants referred through SCAAP fell into either of the two categories for compensation that subject SCAAP-eligible inmates to civil and criminal charges, the GAO report suggests a high probability that many of them did. GAO, *Criminal Alien Statistics* at 19.

³⁶⁷ David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism* [draft of August, 18 2011] (on file with author). Professor Sklansky shared the underlying documents he obtained from ICE through a FOIA in response to an email request. 11-FOIA-2143. Email from David Sklansky to author, Aug. 20, 2012 (email and documents on file with author).

The court's emerging exceptionalism for immigrants is particularly serious given the widespread custodial criminal and civil custodial interrogations of immigration status, which is compounded by the substantial financial incentives local agencies receive for identifying and referring to ICE individuals subject to criminal and civil immigration penalties. Local law enforcement officials receive a considerable amount of money for each day they detain a qualifying "criminal alien," thereby creating strong incentives to interrogate as many individuals as possible about their immigration status to maximize the number of qualifying aliens it refers to ICE.³⁶⁸ Government reports have criticized SCAAP for an absence of accountability for how local agencies obtain immigration status information and how jurisdictions use the money,³⁶⁹ and audits have confirmed that local agencies have engaged in fraudulent reporting of inmates, and referred a high number of U.S. Citizens and legal residents to obtain additional funds.³⁷⁰ Although there have been reports that SCAAP is insufficient to cover costs for incarcerating criminal aliens in certain jurisdictions, there have been numerous reports of local agencies spending reimbursements for costs wholly unrelated to detaining "criminal aliens," including expanding general prison services and programs,³⁷¹ cover local budget shortfalls, and even for fraudulently for personal use.³⁷² The high level of fraudulent and erroneous referrals and misuse of SCAAP funds raise concerns that local jurisdictions may disregard suspects' rights in order to maximize their financial gain from the program.

This year, ICE leveraged SCAAP to increase incentives for local agencies to get involved in other immigration enforcement initiatives--and penalize agencies that don't fall in line. ICE Director John Morton threatened to withhold SCAAP funds to jurisdictions that refuse to collaborate in controversial

³⁶⁸ *OMB SCAAP Assessment, supra* note ____.

³⁶⁹ *Id.*

³⁷⁰ *Id.*; California State Auditor, *State of California Internal Control and State and Federal Compliance Audit Report for the Fiscal Year Ended June 30, 2011*, 65 (March 2012) available at <http://www.bsa.ca.gov/pdfs/reports/2011-002.pdf> (reporting audit of California Department of Corrections submitted nearly 2,000 ineligible inmate records for inmates with multiple registration numbers, and review of 29 submitted records revealed inmates were U.S. Citizens or LPRs).

³⁷¹ *See, e.g.,* Jeremy Redmon, *Illegal Immigration*, Atlanta Journal Constitution, Mar. 8 2012 (reporting that DeKalb County Sheriff used SCAAP money "to pay for employee salaries and prevent furloughs amid a county funding gap last year, replace doors in the county jail and pay for rehabilitation programs for inmates to prevent recidivism"); Steven Butler, *Board recognizes sheriff, senator*, CULPEPER STAR-EXPONENT, Va December 7, 2011 (SCAAP grant used to pay for contract nursing services); *Newton Detention Center inmates graduate from self-improvement classes*, *The Newton Citizen*, June 11, 2012 (anger management classes); Kyle Siegel, *Security cameras coming to Pettis County Courthouse*, SEDALIA NEWS JOURNAL, June 13, 2012 (courthouse security cameras).

³⁷² *See, e.g.,* Brittany Wallman, *Disgraced Sheriff's \$1.6 Million Office Detailed*, SUN SENTINEL, June 5, 2011 (describing how Broward County Sheriff spent \$1.6 million of SCAAP funds for private office).

enforcement efforts such as Secure Communities and immigration detainers, even though SCAAP does not cover these costs.³⁷³ Similarly, the DOJ modified SCAAP to only provide funding for DHS-verified unauthorized aliens and exclude payment for “unverified inmates,” which in past years have comprised up to 45% of all referrals.³⁷⁴ To maximize SCAAP funding levels, DOJ has encouraged jurisdictions to participate more directly in immigration enforcement measures such as Secure Communities and 287(g).³⁷⁵

The widespread involvement of untrained local and state police in immigration enforcement and considerable financial advantages also heighten the risks that state and local law enforcement to engage in unconstitutional policing³⁷⁶ Scholars and leading police organizations have leveled serious criticism about the expanding role of local police in prosecuting federal immigration crimes because immigration enforcement is both highly complex and distinct from their primary duties.³⁷⁷ Local officials lack the knowledge, experience and training on immigration law on how to detect criminal or civil violations of federal immigration laws or on immigrants’ procedural protections, compared to intensive training federal immigration agents receive, that is necessary to protect civil rights.³⁷⁸ Studies have found that even unfunded federal programs incorporating untrained local police into immigration enforcement have a track

³⁷³ See, e.g., Rob Margetta, *ICE Director Says '287(g)' Decision in Arizona was Apolitical, Crackdown on 'Sanctuary' County Coming*, CQ HOMELAND SECURITY, July 12, 2012 (ICE Director threatening to withhold SCAAP funds to Cook County for sanctuary measures and refusal to participate in Secure Communities); National Immigration Project, *Four letters between ICE Director John Morton and Cook County Board President Toni Preckwinkle* . (January 4, 2012 to April, 9, 2012), available at <http://nationalimmigrationproject.org/community/All%20in%20One%20Guide%20Appendix%204.pdf>.

³⁷⁴ Andorra Bruno, *Immigration Legislation and Issues in the 112th Congress*, 13 Congressional Research Service, Sept. 30, 2011, available at <http://www.fas.org/sgp/crs/homsec/R42036.pdf>

³⁷⁵ *Id.*

³⁷⁶ See, e.g., Chacon, *A Diversion of Attention?*, *supra*, at 1618 (“[R]acial profiling ... has a long history of surfacing when local law enforcement becomes engaged in immigration enforcement.”). Several states have called local officials to identify more “criminal aliens” to obtain additional SCAAP funding with local budget cuts. See, e.g., Joseph Billy, et. al., *Final report of the Corrections and Homeland Security Committee* at 8 (Jan. 5, 2010) available at <http://www.state.nj.us/governor/news/reports/Corrections%20&%20Homeland%20Security.pdf> (recommending that local officials “redouble its efforts to identify and record foreign nationals,” because payments “are below expected levels.”).

³⁷⁷ See, e.g., Craig E. Ferrell, *Enforcing Immigration Law: The Role of State, Tribal, and Local Law Enforcement*, Int’l Assoc. of Chiefs of Police, Nov. 30, 2004, available at <http://www.theiacp.org/Portals/0/pdfs/Publications/ImmigrationEnforcementsconf.pdf> (“Whether or not a person is in fact remaining in the country in violation of federal civil regulations or criminal provisions is a determination best left to these agencies and the courts designed specifically to apply these laws and make such determinations after appropriate hearings and procedures. The local patrol officer is not in the best position to make these complex legal determinations.”)

³⁷⁸ *Id.*

record of increased racial profiling.³⁷⁹ For example, when ICE introduced the Criminal Alien Program in Irving, Texas, which placed ICE officials in the local jail, but provided no financial benefit to the local agency, there was marked rise in low-level criminal arrests of Hispanics.³⁸⁰ In this sense, these institutional arrangements and structural shifts effectively serve to normalize the effect of emerging doctrinal exceptionalism and absence of clarity in *Miranda* jurisprudence for immigrants.

With courts inconsistently protecting immigrants' rights to *Miranda* warnings and creation of vague and unworkable rules, there is no guidance for police operating in a complicated terrain, and in many jurisdictions, no disadvantage for local officials to *not* providing *Miranda* warnings. By conditioning the warnings on an officer's stated intent, courts are giving officers an easy way to circumvent the warnings. The current law creates a tenuous dynamic that affirms local actors to not respect immigrants' *Miranda* rights during custodial interrogations about immigration status for criminal and civil purposes. As a result, the hundreds of thousands of suspects that are questioned about their immigration status for civil and criminal purposes under SCAAP each year are at risk of not knowing that they have the right to remain silent, to an attorney, or that they are in an adversarial position, thereby utterly deprived of the choices the Court of *Miranda* sought to secure. The absence of clarity, combined with the pressures for funding, also opens the door for direct coercion by local officials. According to Morris County Jail officials, individuals who remain silent in response to SCAAP referral questioning are placed into isolation until they respond.³⁸¹

These doctrinal and institutional shifts have implications for all individuals in the criminal justice system, regardless of alienage.³⁸² As the

³⁷⁹ See, e.g., Letter from Thomas E. Perez, Ass't Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Bill Montgomery, Maricopa Cnty. Attorney, Arizona, at 2, 11 (Dec. 15, 2011), available at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf. (finding widespread racial profiling by the Maricopa County Sheriffs Office, that targeted people who spoke Spanish or had "dark skin,"); Tennessee Immigrant and Refugee Rights Coalition, *Citations/Warrants for No Drivers License by Ethnicity and Race: Comparing the Year Prior to 287(g) and the Year Following 287(g)* (2008), available at http://www.tnimmigrant.org/storage/misc/No_Drivers_License_1_year_overview%206-2008.pdf (noting a statistically significant increase in arrests of Latinos for driving without a license after implementation of 287(g) program).

³⁸⁰ See, e.g., Trevor Gardner II & Aarti Kohli, Chief Justice Earl Warrant Institute on Race, Ethnicity & Diversity, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, 1, 5, 8 (2009), available at http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

³⁸¹ Morris County Undersheriff Interview, *supra* note 14.

³⁸² Nationally, about 70 percent of immigrants are legal permanent residents or American citizens. Nancy Morawetz & Alina Das, *Legal Issues in Local Police Enforcement of Federal Immigration Law*, The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties, (Police Foundation Conference, Washington, DC, Aug. 21, 2008).

SCAAP data indicates, placing local officials on the front line of immigration enforcement has resulted in a large number of errors in the identification of criminal aliens, with local agencies misidentifying upwards of 300,000 individuals to ICE in the last few years. There have also been documented reports of inaccurate referrals to ICE through SCAAP that have resulted in U.S. Citizens enduring prolonged immigration detention and removal proceedings.³⁸³

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

IV. Proposals

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

The federal government has several options to address their problem. First, the Department of Homeland Security should uniformly expressly classify questioning of incarcerated individuals about their immigration status as a custodial interrogation with criminal consequences in its federal-local partnerships, such as the SCAAP and 287(g) program. Local law enforcement agents, therefore, would be on notice that they are required to inform suspects that any information they provide as part of the investigation may be later used against them in criminal proceedings.

Furthermore, the way in which local law enforcement officials identify nationality and immigration status must be lawful and preceded by a Miranda warning. Before asking questions for purposes of ICE referral, local officials who ask ICE-referral questions would also be required to determine whether individuals have invoked their right to counsel or silence. The SCAAP program has proliferated to unprecedented proportions. A critical response to immigration inquiries is to provide Miranda warnings if questioning about immigration status

³⁸³ Stevens, *Deporting U.S. Citizens*, *supra* note at 663-674.

on intake forms at jails. Miranda warnings should be implicated when immigration is questioned because a noncitizen should be granted the right to understand the consequences that would ensue in both the immigration and criminal justice system if they listed a place of birth on an intake form.

Promulgating such rules would promote uniformity within the administration of these programs and create a solution that satisfies the various tests used by lower courts. Such a solution would not be especially resource intensive, because local law enforcement agencies must comply with regulations as a condition of SCAAP;³⁸⁴ if SCAAP can be used to incentivize enforcement, it can also be used to ensure immigrants' constitutional rights are respected. This solution may be overinclusive, but the government could use this approach in programs that encompass identifying immigrants that could be subject to criminal immigration penalties, such as the SCAAP program.

This approach has been adopted in the tax and securities context even in non-custodial interrogations. The SEC and the IRS provides Miranda-type warnings to interviewees during non-custodial information and requires that individuals sign forms ensuring they are aware of their rights and have validly waived them before questioning. The SEC provides all interviewees and witnesses who testify a form that informs them that they may assert their Fifth Amendment privilege against self-incrimination and that any information provided may be used against them.³⁸⁵ Under IRS guidelines, agents must provide similar warnings prior to custodial and noncustodial interrogation, entitled a Non-Custody and an In-Custody Statement of Rights.³⁸⁶ The In-Custody statement tracks *Miranda*, while the noncustodial warnings generally inform interviewees of their privilege against self-incrimination and inform them that their statements may be used against them.³⁸⁷

³⁸⁴ BJA, *SCAAP FY 2011 Guidelines*, *supra* note ____.

³⁸⁵ The SEC's warnings are contained on SEC Form 1662. SEC Form 1662, *available at* [http:// www.sec.gov/about/forms/sec1662.pdf](http://www.sec.gov/about/forms/sec1662.pdf) (the form provides that: "[i]nformation you give may be used against you in any federal, state, local or foreign administrative, civil or criminal proceeding brought by the Commission or any other agency. You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment to the Constitution of the United States, to give any information that may tend to incriminate you or subject you to fine, penalty or forfeiture."). *See also United States v. Stringer*, 408 F. Supp. 2d 1083, 1086 (D. Or. 2006), *vacated in part and rev'd in part*, 521 F.3d 1189 (9th Cir. 2008).

³⁸⁶ Internal Revenue Manual (hereinafter IRM) Special Agents Handbook §§ 342.132, 342.133, 9447.3 (procedures for custodial interrogation); IRM § 9384.2 (noncustodial interrogation). *See* IRS, Dep't of the Treasury, In-Custody Statement of Rights (2001), *available at* <http://www.irs.gov/irm/part9/36208003.html>; IRS, Dep't of the Treasury, Non-Custody Statement of Rights, *available at* [http:// www.irs.gov/irm/part9/36208004.html](http://www.irs.gov/irm/part9/36208004.html).

³⁸⁷ The IRS noncustodial statement of rights provides as follows:

In connection with my investigation of your tax liability (or other matter) I would like to ask you some questions. However, first I advise you that under the Fifth Amendment to the Constitution of the United States I cannot compel you to answer any questions or to submit any information if such answers or information might tend to incriminate you in any way. I

In addition to providing warnings, the government should ensure that there is a suppression remedy available to deter the use of these statements. Notably, because the IRS and SEC warnings are not constitutionally required, several courts have found that the agencies' failure to inform individuals of their rights will have no bearing on the admissibility of any self-incriminating statements.³⁸⁸ The Court has also weakened the *Miranda* remedy within its own jurisprudence. Given these constraints, DHS and the Department of Justice should develop a policy that it will not prosecute individuals who did not receive adequate warnings prior to dual civil and criminal immigration inquiries.

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

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

IV. Conclusion

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

also advise you that anything you say and any documents which you submit may be used against you in any criminal proceeding which may be undertaken. I advise you further that you may, if you wish, seek the assistance of an attorney before responding.

Special Agents Handbook §§ 342.132, 342.133

³⁸⁸ In *United States v. Caceres*, 440 U.S. 741, 744 (1979) for example, the Supreme Court found that the IRS's failure to follow its internal procedures regarding authorization for electronic surveillance did not call for suppression of defendant's recorded statements.

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

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

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