INTERROGATING *MIRANDA*'S CUSTODY REQUIREMENT*

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Interrogating officers need only issue Miranda *warnings in "custodial" settings, and a significant degree of psychological coercion makes a setting custodial. This Article asks a question at the heart of* Miranda *caselaw: Have courts applied* Miranda*'s custody trigger consistent with people's real experiences of police questioning? If not, courts are allowing, and justifying, the admission of unwarned self-incriminating statements by deeming those interrogations "noncustodial" even when there is a significant element of compulsion. To compare courts' custody decisions to civilians' perceptions of coercion in interrogations, I surveyed laypeople across two studies using forty interrogation scenarios from jurisdictionally diverse cases spanning from 1969 to 2022. The results reveal that laypeople do not feel free to leave, and even feel functionally arrested by, police interrogations that are held to be noncustodial by courts. This pair of empirical findings shows that* Miranda*'s custody trigger, as applied by courts, leaves civilians stranded in many interrogations without* Miranda *protections. I argue that the first step in improving custody jurisprudence is to clarify the test's content and incorporate social-scientific knowledge into custody determinations. If adopted, these recommendations will not wholly transform, but will enliven,* Miranda*'s protections and reinvigorate public discourse about the proper role of our federal constitutional privilege against self-incrimination.*

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INTRODUCTION

For nearly six decades, *Miranda v. Arizona*[1] has been a hallmark of American criminal justice and procedure. As such, *Miranda* and its progeny have inspired commentary from public figures, academics, and practitioners.

1. 384 U.S. 436 (1966).

Although *Miranda* has never been overturned, many scholars have argued that, functionally, it has been suffering a "death by many cuts."[2] If *Miranda* has been "pronounced dead,"[3] why write about it? This Article makes the case that there may yet be force to *Miranda*, and addressing an untested but foundational assumption at the heart of *Miranda* may breathe new life into it.

Miranda announced that "custodial" interrogations involve inherently coercive psychological pressure, and without the famous *Miranda* warnings, that pressure is impermissible under the Fifth Amendment.[4] And to distinguish between custodial and noncustodial interrogations, courts determine whether, based on the totality of the objective interrogation facts, the person being questioned was functionally arrested.[5] To further assist in determining whether the interrogation amounted to a functional arrest, courts ask whether a reasonable person would have felt free to leave the interaction with the interrogating officers.[6]

Although some scholars have highlighted that *Miranda*'s scope has been limited by narrowing the custody requirement,[7] it is unclear whether this narrowing is limited to factually-bounded strains of custody caselaw—like station house questioning. This Article, in contrast, determines whether the full body of custody caselaw since *Miranda* does what it purports to do: distinguish between interrogations that involve psychological coercion amounting to a significant deprivation of freedom of action and those that do not.

Part I of this Article describes the birth and (functional) death of *Miranda* and highlights that the nature of custody has been understudied relative to other *Miranda* issues. Part I then previews the established body of social-scientific literature on confessions that has yet to be incorporated into custody caselaw,[8] highlighting the promise of empirical investigations of psychological pressure.

2. Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 36 (2010); *see also* Christopher Slobogin, Commentary, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309, 309 (2003) [hereinafter Slobogin, *Toward Taping*] (calling *Miranda* "a hoax").

3. Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519, 1521 (2008) [hereinafter Weisselberg, *Mourning* Miranda] ("Miranda is largely dead. It is time to 'pronounce the body,' as they say on television, and move on.").

4. *Miranda*, 384 U.S. at 444, 448.

5. See Section III.A.1 for a discussion of the development of the functional equivalence aspect of the custody test.

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

7. *See, e.g.*, Leslie A. Lunney, *The Erosion of* Miranda*: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 753 (1999).

8. For a discussion of why courts should incorporate social-scientific literature in custody analyses, see Section IV.C. Survey evidence from judges indicates that when they apply reasonable

Part II describes the first study's experimental survey methodology and primary findings. The findings reveal that courts hold interrogation situations to be noncustodial even when the interrogation contains enough police pressure to make civilians believe they are not free to leave. Specifically, the data establishes in the 17 cases where courts held that the interrogation was noncustodial, over 80% of the times laypeople reviewed the noncustodial interrogations' objective circumstances, they believed they or other people in that situation would not feel free to leave. These results show that *Miranda*'s custody trigger, as applied by courts, strands civilians without *Miranda* warnings in interrogation situations that they do not feel free to physically leave.

Part III then revisits the language of the custody test to highlight the possibility that courts, instead of anchoring on reasonable suspects' perceptions of their freedom to leave, are relying on a higher threshold of situational coercion to determine custody: functional arrest. In fact, since the 1980s, courts have included judicial gloss about the interrogation situation's functional equivalence to arrest, and this judicial gloss implicitly, and at times explicitly, raises the custody threshold.

Part III then describes the second experimental study, which tests interrogation scenarios' functional equivalence to arrest. The study reveals that most people feel functionally arrested by police interrogations, and even in the 12 cases where courts held that the interrogation was noncustodial, participants felt functionally arrested in 67% of the scenarios. Together, the two studies demonstrate that across 40 unique interrogation situations, most people do not feel free to leave *and* most people feel functionally arrested.

Part IV elaborates on the custody test's status quo. The test language lacks clarity and coherence, and when applied, the test contains unrealistic assumptions of people's freedom to withstand psychological coercion. Then, with an eye toward incremental progress, this part recommends one small change and one big change to custody doctrine. The small change is to remove the freedom-to-leave part of the test, focusing instead on whether reasonable suspects would believe they were functionally arrested. This small change clarifies the standard and could reduce reversals on appeal, strengthening case finality.

The big change I recommend for custody doctrine is to incorporate social-scientific knowledge into courts' custody determinations. Incorporating social-scientific findings into the analysis challenges parties' and judges' descriptive

person standards, they do so with the "average" person in mind. *See infra* note 224 and accompanying text.

assumptions about how people think and act in interrogation settings, forcing the doctrine to explicitly consider the normative balancing at play between eliciting confessions to solve crimes and civilians' constitutional criminal procedure protections. Both recommendations stand to improve custody jurisprudence, enliven *Miranda*, and reinvigorate public discourse about the proper role of our federal constitutional privilege against self-incrimination.

I. THE CUSTODY TRIGGER

This part investigates the jurisprudence of coerced confessions. Section A begins with a close examination of the landscape of legal protections for confessions before *Miranda*, and then it describes the *Miranda* Court's new strategy for protecting people during police questioning. Section B summarizes the various ways in which the *Miranda* ruling has been undermined. Section C interrogates the nature of custody, first describing the Supreme Court's early narrowing of the custody test, then distinguishing custody from Fourth Amendment seizure. Section D highlights the social-scientific literature on confessions.

A. Miranda*'s Birth*

The Fifth Amendment prohibits a person from being "compelled in any criminal case to be a witness against himself."[9] Until *Miranda*, the prevailing view was that "compelled" meant *legally* compelled through threats of perjury or contempt of court,[10] and, prior to 1966, the Court's curtailment of police behavior in interrogations emanated from the Fourteenth Amendment's Due Process Clause.[11] Based on the totality of the circumstances, under the due process "voluntariness" test the Court would ask: "Is the confession the product of an essentially free and unconstrained choice by its maker?" or instead was the confession context "inherently coercive?"[12] If the circumstances were inherently

9. U.S. CONST. amend. V.

10. JEROLD H. ISRAEL, YALE KAMISAR, WAYNE R. LAFAVE, NANCY J. KING & EVE BRENSIKE PRIMUS, CRIMINAL PROCEDURE AND THE CONSTITUTION 422 (2017) ("[T]he prevailing pre-*Miranda* view was that compulsion to testify meant *legal* compulsion.").

11. *Id.* ("In none of the dozens of state *or* federal confession cases decided in the 1930s, 40s or 50s had the self-incrimination clause been the basis for judgment (although it had occasionally been mentioned in an opinion).").

12. Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944); *see also* Culombe v. Connecticut, 367 U.S. 568, 602 (1961) ("The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may

coercive, then the confession was deemed involuntary and inadmissible at the confessor's criminal trial.[13]

But, because it was not clear what made interrogation tactics "inherently coercive,"[14] and no single factor in the voluntariness equation was decisive—save police use or threatened use of physical violence[15]—the test offered little guidance to the police and lower courts.[16] So, in a pivot away from sole reliance on the Fourteenth Amendment, just two years before *Miranda*, the Court held the Fifth Amendment applicable to the states by incorporation into the Fourteenth Amendment's Due Process Clause[17] and, in dicta, declared that cases involving confessions are controlled by the Self-Incrimination Clause of the Fifth Amendment.[18] This "shotgun wedding of the [Fifth Amendment] privilege to the confessions rule"[19] laid the groundwork for a more expansive interpretation of "compelled"—one that encompassed more than confessions coerced through threats of legal sanctions like contempt of court.

In 1966, the Supreme Court in *Miranda* ruled that prosecutors may not use statements "stemming from a custodial interrogation" unless "procedural safeguards, effective to secure the privilege against self-incrimination," were administered.[20] One critical way to establish such safeguards, the Court explained, was for police to give suspects a "*Miranda* warning"—that they have "a right to remain silent, that any statement [made] may be used as evidence against [them], and that [they have] a right to the presence of an attorney, either retained or appointed."[21] Importantly, rather than directly remediating Fifth

be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.").

13. Rochin v. California, 342 U.S. 165, 173 (1952) ("Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true.").

14. In his dissent in *Ashcraft*, Justice Jackson writes, "The Court bases its decision on the premise that custody and examination of a prisoner for thirty-six hours is 'inherently coercive.' Of course it is. And so is custody and examination for one hour. Arrest itself is inherently coercive, and so is detention." *Ashcraft*, 322 U.S. at 161 (Jackson, J., dissenting).

15. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 286 (1936); Chambers v. Florida, 309 U.S. 227, 240 (1940); Ward v. Texas, 316 U.S. 547, 555 (1942).

16. ISRAEL ET AL., *supra* note 10, at 410.

17. Malloy v. Hogan, 378 U.S. 1, 8 (1964) ("The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement.").

18. *Id.* at 7; *see also id.* at 8 ("The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement.").

19. Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 465 (1964).

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

21. *Id.*

Amendment violations like it did Fourteenth Amendment voluntariness violations—by deeming the statements inadmissible—the *Miranda* Court instead simply triggered heightened procedural safeguards when coercion was more likely to occur.

To indicate when coercion was more likely to occur, thus triggering the requisite safeguards, the Court coined the term "custodial interrogation" and defined custody as being "in custody at the station or otherwise deprived of freedom of action in any significant way."[22] Although the Court had previously recognized psychologically coercive interrogation tactics in the voluntariness setting,[23] the *Miranda* ruling was the first to expressly identify "psychological coercion" as a primary means of eliciting confessions.[24] In fact, the Court engaged in a full-throated delineation of the wide variety of psychologically coercive tactics that permeate police interrogation practices.[25]

Since *Miranda*'s birth, the custody requirement has not gone unnoticed by scholars. Early commentators noted both the importance and difficulty of assessing whether the questioning situation was "custodial." Yale Kamisar, for example, noted that it is "the most difficult and frequently raised question" in the wake of *Miranda*.[26] What was (and still is) particularly difficult, is determining whether pre-arrest questioning outside the confines of a police station is custodial.[27] And other scholars have noted how the Supreme Court has narrowly applied *Miranda*'s custody requirement.[28] For example, *Berkemer*

22. *Id.* at 477.

23. *See, e.g.*, Chambers v. Florida, 309 U.S. 227, 231 (1940) (describing the isolation of interrogees from friends and family, the use of repeated questioning, and the restriction of their food and rest time).

24. *Miranda*, 384 U.S. at 448–50; ISRAEL ET AL., *supra* note 10, at 410. Moreover, the *Miranda* Court used "coercion" and "compulsion" interchangeably, *see Miranda*, 384 U.S. at 457–58, and while there may be reason to question whether the two words are perfect synonyms, such analysis is beyond the scope of this Article.

25. *Miranda*, 384 U.S. at 448–55 (detailing the various tactics used by officers including isolation, domination, offering legal excuses, trickery, and undermining interrogees' attempts to invoke their rights).

26. Yale Kamisar, *'Custodial Interrogation' Within the Meaning of* Miranda, *in* CRIMINAL LAW AND THE CONSTITUTION 335, 335 (Jerold H. Israel & Yale Kamisar eds., 1968) [hereinafter Kamisar, *Custodial*]; *see also* Lunney, *supra* note 7, at 753 (calling it an "essential inquir[y]").

27. Kamisar, *Custodial*, *supra* note 26, at 382 (arguing that it is only a slight exaggeration that it is all but impossible to decide when *Miranda* rights arise under such circumstances).

28. *See, e.g.*, Lunney, *supra* note 7, at 758 (arguing the Burger Court "substantially restrict[ed] application of the custody trigger beyond the station house" in *Beckwith v. United States*, 425 U.S. 341 (1976)); *id.* at 761 (arguing the trend of narrowing *Miranda*'s trigger circumstances continued in *Oregon v. Mathiason*, 429 U.S. 492 (1977)); Weisselberg, *Mourning* Miranda, *supra* note 3, at 1541 (mentioning *Berkemer v. McCarty*, 468 U.S. 420 (1984), *California v. Beheler*, 463 U.S. 1121 (1983), and *Stansbury v.*

v. McCarty[29] involved a traffic stop and pre-arrest roadside questioning of the driver that resulted in an admission that was later used in his criminal prosecution.[30]

The current traditional legal critiques do not establish, however, whether the rulings that narrowly apply *Miranda*'s custody requirement are representative of custody caselaw as a whole, or whether, being bound by their facts, they are exceptions to the general body of federal and state custody caselaw that less narrowly applies *Miranda*'s custody requirement. These critiques are also silent on the extent to which even a narrow application of *Miranda*'s custody requirement in those cases may be consistent with *laypeople*'s perceptions of the psychological coercion to self-incriminate. This Article answers that silence, finding that only a subset of interrogations that psychologically coerce typical Americans are legally held to be "custodial," in turn demonstrating for the first time that, through the custody doctrine, courts have narrowly applied *Miranda*'s protections.

B. Miranda*'s Many Deaths*

The *Miranda* ruling, even setting aside how it has been applied since 1966, is far from perfect. The Court's new strategy for addressing police interrogation practices not only assumed that such warnings would empower suspects to invoke their Fifth Amendment rights,[31] but it also did not resolve the root question of when coercion overpowers a person's free choice to confess.[32]

Regarding how *Miranda* has been applied, Supreme Court jurisprudence reflects various exceptions to Fifth Amendment protections. Numerous scholars have observed that *Miranda* has been effectively overruled or—more colorfully—suffered "a death by many [Supreme Court] cuts."[33] Barry

California, 511 U.S. 318 (1994) (per curiam)); Eve Brensike Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 14–15 (2015) (arguing that "[t]he Court in subsequent cases glossed [the custody] definition" and "a changing definition of what it means to be a suspect in police custody alters the universe of cases in which *Miranda* actually operates" with particular mention of *Howes v. Fields*, 565 U.S. 499 (2012)).

29. 468 U.S. 420 (1984).

30. *Id.* at 423–24 (describing that after the trial court refused to exclude defendant's admission during roadside questioning, he pled guilty).

31. Weisselberg, *Mourning* Miranda, *supra* note 3, at 1577–90.

32. Albert W. Alschuler, Miranda*'s Fourfold Failure*, 97 B.U. L. REV. 849, 850–51 (2017).

33. Friedman, *supra* note 2, at 36; *see also* Slobogin, *Toward Taping*, *supra* note 2, at 309 (calling Miranda "a hoax"); Weisselberg, *Mourning* Miranda, *supra* note 3, at 1521 ("Miranda is largely dead. It is time to 'pronounce the body,' as they say on television, and move on."); George C. Thomas III, Miranda*'s Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1092 (2003) (reviewing WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS (2001)) (calling *Miranda* a

Friedman, for example, has argued that the *Missouri v. Seibert*[34] decision allowing the admission of statements obtained using "question-first-warn-later" tactics and the *United States v. Patane*[35] decision allowing the admission of fruits derived from unwarned statements are prime examples of the Court stealthily overruling the practical impact of *Miranda*.[36] Other scholars, also emphasizing the futility of *Miranda* as applied, focus on the fact that even if *Miranda* warnings are proffered, it is extremely difficult for the average person to properly invoke their Fifth Amendment rights.[37] Yet others highlight the fact that most people actively waive their Fifth Amendment rights even after being given *Miranda* warnings.[38]

The goal of this Article is not to solve all of *Miranda*'s woes. Rather, the goal is to systematically interrogate one understudied aspect of *Miranda* doctrine—the custody requirement—to determine whether it, too, has contributed to *Miranda*'s functional demise.

"spectacular failure"); Sandra Guerra Thompson, *Evading* Miranda*: How* Seibert *and* Patane *Failed to "Save"* Miranda, 40 VAL. U. L. REV. 645, 647 (2006) ("*Seibert* and *Patane* represent the coup de grace for the demise of *Miranda*.").

34. 542 U.S. 600 (2004).

35. 542 U.S. 630 (2004).

36. Friedman, *supra* note 2, at 21–22.

37. *See* Berghuis v. Thompkins, 560 U.S. 370, 381 (2010) (requiring an unambiguous invocation of the right to remain silent); *see also* Richard Rogers, Kimberly S. Harrison, Daniel W. Shuman, Kenneth W. Sewell & Lisa L. Hazelwood, *An Analysis of* Miranda *Warnings and Waivers: Comprehension and Coverage*, 31 LAW & HUM. BEHAV. 177, 189–90 (2007); Kyle C. Scherr & Stephanie Madon, *You Have the Right to Understand: The Deleterious Effect of Stress on Suspects' Ability to Comprehend* Miranda, 36 LAW & HUM. BEHAV. 275, 279 (2012) (addressing the effect of stress on comprehension of *Miranda* warnings).

38. *See, e.g.*, Tonja Jacobi, Miranda *2.0*, 50 U.C. DAVIS L. REV. 1, 3 (2016) (noting *Miranda*'s "limited effectiveness, high costs, and possible displacement of more effective mechanisms of protection"); Ronald J. Allen, Miranda*'s Hollow Core*, 100 NW. U. L. REV. 71, 75 (2006) (stating that after *Miranda*, "things went on more or less as before, with the primary difference that the police henceforth had to recite the warnings before obtaining waivers and proceeding to the interrogation"); *see also* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 402 (1999) ("During the first few years after *Miranda*, empirical studies suggested that *Miranda*'s impact on law enforcement was minimal."). Approximately 80% of people who receive *Miranda* warnings waive their rights. *See* DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 224 n.117 (2003); GEORGE C. THOMAS III & RICHARD A. LEO, CONFESSIONS OF GUILT: FROM TORTURE TO *MIRANDA* AND BEYOND 188 (2012). Rapport developed between interrogator and interrogee as well as the interrogator's control of the situation make the interrogee feel less willing to disengage. *See* Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1215 (2001).

C. *The Nature of Custody*

The Supreme Court's primary motivation for its holding in *Miranda* was to reduce the use of coerced confessions in criminal trials.[39] To achieve this goal, the Court required police, in interrogation situations containing strong coercive force, to warn suspects of their rights.[40] The Court labeled the interrogation situations containing such coercive force "custodial."[41] This section summarizes the legal test for determining whether an interrogation is "custodial," which is an integral trigger for Fifth Amendment protections.

As noted above, the Supreme Court in *Miranda* defined a custodial interrogation[42] as a "police interrogation while in custody at the station" or while a suspect is "otherwise deprived of his freedom of action in any significant way."[43] Early debates centered on the scope of this definition: Is formal arrest necessary? Is presence at a police station necessary?[44] Since these initial debates, Supreme Court precedent has made clear that neither formal arrest nor station house questioning is necessary to satisfy the custody trigger. Instead, any significant deprivation of freedom of action satisfies the requirement, given *Miranda*'s catchall language, "or otherwise deprived of his freedom of action in any significant way."[45] The next section will describe how the Court's judicial gloss on this "freedom of action" catchall functionally narrowed the broad 1966 language.

1. Early Supreme Court Narrowing of the Custody Test

The 1970s and '80s were marked by a narrowing of *Miranda*'s custody test.[46] This narrowing was performed in two ways: through the development of

39. Miranda v. Arizona, 384 U.S. 436, 441–43 (1966) (indicating that granting certiorari in the case was done to further explore the rights enshrined in our Constitution, which were themselves a reaction to iniquities seen in the old English inquisitorial system of questioning a prisoner).

40. *Id.* at 444 (mentioning procedural safeguards "devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it").

41. *Id.*

42. The Court has outlined the meaning of "interrogation." Interrogation is direct questioning or the functional equivalent of questioning that the police should know is reasonably likely to elicit an incriminating response. *See* Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).

43. *Miranda*, 384 U.S. at 477.

44. Kamisar, *Custodial*, *supra* note 26, at 338 ("The rationale of *Miranda* has no relevance to inquiries conducted outside *the allegedly hostile and forbidding atmosphere surrounding police station interrogation* of a criminal suspect." (quoting Mathis v. United States, 391 U.S. 1, 7–8 (1968) (White, J., dissenting))).

45. *Miranda*, 384 U.S. at 477.

46. Yale Kamisar, *The* Miranda *Case Fifty Years Later*, 97 B.U. L. REV. 1293, 1294–95 (2017) (describing President Nixon's appointments of Justices Burger, Blackmun, Powell and Rehnquist and their pro-police leanings); Lunney, *supra* note 7, at 746 (describing how the liberal, activist members of the Court were increasingly at odds with other members in the 1970s).

formalistic judicial gloss and by deeming certain facially coercive interrogation facts irrelevant to the analysis.

The Court's first explicit application of *Miranda*'s custody test was not until eleven years later in *Oregon v. Mathiason*.[47] The majority in *Mathiason* cited *Miranda*'s "freedom of action" language and reasoned that, because the interrogee voluntarily came to the police station to discuss a burglary with officers and then left the station after the thirty-minute interview, the interrogation was noncustodial.[48]

Importantly, there was disagreement among the Justices about what facts were relevant to the custody analysis, and the majority's interpretation led to a narrowing of the custody test by deeming certain facts irrelevant to the analysis.[49] In particular, the majority concluded that the fact that an officer made a false statement about finding the interrogee's fingerprints at the scene of the burglary during the interrogation was irrelevant to the question of custody.[50] In his dissent, Justice Marshall reasoned differently:

> [I]f respondent entertained an objectively reasonable belief that he was not free to leave during the questioning then he was "deprived of his freedom of action in a significant way." Plainly, the respondent could have so believed, after being told by the police that they thought he was

47. 429 U.S. 492 (1977) (per curiam). In both *Mathis* and *Orozco v. Texas*, 394 U.S. 324 (1969), the Court made implied custody holdings. *See Mathis*, 391 U.S. at 4; *Orozco*, 394 U.S. at 326 (holding "that the use of these admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*"); *see also* Yarborough v. Alvarado, 541 U.S. 652, 661 (2004) ("After *Miranda*, the Court first applied the custody test in *Oregon v. Mathiason*."). The majority in *Mathiason* cited *Miranda*'s "freedom of action" language and clarified that "a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" *Mathiason*, 429 U.S. at 495. Later, in *California v. Beheler*, 463 U.S. 1121 (1983), the Court described "the ultimate inquiry [a]s simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.* at 1125 (quoting *Mathiason*, 429 U.S. at 495); *see* George M. Dery III, *The Supposed Strength of Hopelessness: The Supreme Court Further Undermines* Miranda *in* Howes v. Fields, 40 AM. J. CRIM. L. 69, 73 (2012) (calling *Beheler*'s definition of custody a "truncated" one, relying more on *Mathiason* than *Miranda*).

48. *Mathiason*, 429 U.S. at 495.

49. *Id.* at 495–96 ("Whatever relevance [the officer's statement about finding defendant's fingerprints] may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule.").

50. *Id.* Notably, the *Miranda* Court mentioned lies and ruses as coercive tactics. *Miranda*, 384 U.S. at 453 (describing a situation where fake witnesses are brought in to identify the interrogee for other offenses). But lying about fingerprints was inexplicably different in *Mathiason*. *See Mathiason*, 429 U.S. at .495–96.

> involved in a burglary and that his fingerprints had been found at the scene.[51]

Thus, in its first explicit application of the custody test, the Court narrowed the application of custody's scope by excluding interrogation facts from the purview of the analysis that are demonstrably psychologically coercive. The Court made a similar move in *California v. Beheler*.[52] Again, it noted that certain facts considered by the lower court had "no relevance to the inquiry."[53] Specifically, the majority summarily dismissed the following facts as irrelevant to the custody inquiry: (1) that the interrogee had spoken to law enforcement earlier in the investigation and (2) the long period of time between the crime and the interview.[54]

Furthermore, the Court in *Beheler* added judicial gloss to the *Miranda* Court's custody definition that seemingly heightened the standard, narrowing its application further. In *Miranda*, custody was defined using the catchall phrase: "otherwise deprived of freedom of action in any significant way."[55] In *Beheler*, the Court described "the ultimate inquiry [a]s simply whether there is a 'formal arrest or restraint on freedom of movement' *of the degree associated with a formal arrest*."[56] In so doing, the Court in *Beheler* imbued the broad catchall definition with a heightened threshold, such that in order to be deprived of freedom of action in *a significant* way, a person's restraint must be akin to formal arrest.[57] This characterization of custody has been accurately described as a "truncated" one, relying more on *Mathiason* dicta than *Miranda*'s definition of custody.[58]

Nonetheless, this definition solidified in *Berkemer*, when the Court instructed that for an interrogation to qualify as custodial, the interrogee must be formally arrested *or* be in a situation that is the "functional equivalent of

51. *Mathiason*, 429 U.S. at 496–97 (Marshall, J., dissenting) (quoting United States v. Hall, 421 F.2d 540, 544 (2d Cir. 1969)).

52. 463 U.S. 1121 (1983) (per curiam).

53. *Id.* at 1125.

54. *Id.*; *see also* Daniel Yeager, *Rethinking Custodial Interrogation*, 28 AM. CRIM. L. REV. 1, 17 (1991) ("Perhaps interested in developing a finite list of in-custody factors, the Court [in *Beheler*], as in *Mathiason*, eliminated from consideration numerous potentially relevant facts from a necessarily fact-based judgment about the level of constraint.").

55. *Miranda*, 384 U.S. at 477.

56. *Beheler*, 463 U.S. at 1125 (quoting *Mathiason*, 429 U.S. at 495) (emphasis added).

57. Mark A. Godsey, *When* Terry *Met* Miranda*: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715, 719 (1994) ("Thus, *Beheler* appeared to make the Fifth Amendment parallel to the Fourth Amendment—a suspect would not be considered in 'custody,' and therefore *Miranda* would not be triggered, until the level of police force or intimidation could be considered an arrest for purposes of the Fourth Amendment.").

58. *See* Dery, *supra* note 47, at 73.

formal arrest."[59] And the Court also clarified that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation"[60] and depends "not on the subjective views harbored by *either* the interrogating officers *or* the person being questioned."[61] Instead, the full inquiry is whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave,"[62] based on the interrogation's objective circumstances.

In sum, *Miranda*'s definition of custody was narrowed—limited only to interrogation situations that are analogous, or functionally equivalent, to formal arrest based on a reasonable suspect's beliefs. In part, the functional equivalence language in *Berkemer* was used to distinguish the facts in *Miranda*, which involved station house questioning, from the facts in *Berkemer*, which involved a relatively routine traffic stop.[63] However, as the Court in *Berkemer* acknowledged, there are important doctrinal and factual parallels between Fifth Amendment custody and Fourth Amendment seizure standards.[64] The next section first summarizes Fourth Amendment (un)reasonable seizure doctrine, which is implicated in traffic stops. The section then highlights that when officers begin an interrogation during such stops, courts have to thread a needle between the two constitutional standards, each involving an assessment of a reasonable person's belief about their freedom to leave.

59. Berkemer v. McCarty, 468 U.S. 420, 442 (1984); *see* Yeager, *supra* note 54, at 24 (calling such a situation the "amorphous functional equivalent" of custody).

60. *Berkemer*, 468 U.S. at 442. Interestingly, prior to *Berkemer*, there was no Supreme Court precedent for a reasonable-suspect custody test. And the Court in *Berkemer* merely quoted a state court on the utility of an objective rather than subjective inquiry. *See id.* at 442 n.35 ("[A]n objective, reasonable-man test is appropriate because, unlike a subjective test, it 'is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question.'" (quoting People v. P., 233 N.E.2d 255, 260 (N.Y. 1967)). But as Justice Marshall's mention of "reasonable belief" in his dissent in *Oregon v. Mathiason*, 429 U.S. 492 (1977), suggests, the Justices may have been implicitly applying an objective test prior to *Berkemer*. *Id.* at 496–97 (Marshall, J., dissenting). And, as the Court in *Berkemer* noted, the Courts of Appeals may have started applying an objective standard before *Berkemer*. 468 U.S. at 425 n.4 (citing McCarty v. Herdman, 716 F.2d 361, 362 n.1 (6th Cir. 1983)); *see* Brandon L. Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 79 (2017) (describing the development of reasonableness standards in 42 U.S.C. § 1983 and Fourth Amendment contexts).

61. Stansbury v. California, 511 U.S. 318, 323 (1994) (per curiam) (emphasis added).

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

63. *Compare* Miranda v. Arizona, 384 U.S. 436, 440 (1966) (noting that all four consolidated cases involved a defendant taken to the police station for interrogation), *with Berkemer*, 468 U.S. at 438 ("[Q]uestioning incident to an ordinary traffic stop is quite different from stationhouse interrogation.").

64. *Berkemer*, 468 U.S. at 436–39.

2. Distinguishing Custody from Seizure

An encounter between a police officer and a civilian is considered a seizure within the meaning of the Fourth Amendment "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[65] Although largely conceptually overlapping with the custody test, there are important (and relatively subtle) differences between Fourth Amendment seizure and Fifth Amendment custody.

The comparison becomes particularly murky when considering the different types of Fourth Amendment seizures: a detention (or stop) and an arrest. If a "custodial" interaction is the functional equivalent of arrest, then the "custodial" interaction is clearly on the upper end of the spectrum of Fourth Amendment seizures, closer to arrest. And when a suspect is questioned after being formally arrested, it is clear that the interrogation will very likely be deemed custodial.[66] So the murkiest water is no-arrest situations when the interrogating officers have legitimate Fourth Amendment reasons to seize a person.[67] To conclude such an interrogation is noncustodial, a court has to thread a fine needle[68]: the interrogation is a situation that reasonable people do not believe that they are free to leave (for Fourth Amendment purposes) but reasonable people *do* believe, *about the same situation*, that they are not functionally arrested.

In *Berkemer*, the Supreme Court confronted an interrogation scenario that occurred during a traffic stop and involved questioning about the driver's use of intoxicants.[69] The Court acknowledged that under the classic freedom-to-leave custody analysis, the driver's freedom to leave was curtailed.[70] But the Court reasoned that a traffic stop "is more analogous to a . . . '*Terry* stop' . . . than to a formal arrest" and concluded that the traffic-stop in *Berkemer* was

65. 4 BARBARA E. BERGMAN, THERESA M. DUNCAN & MARLO CADEDDU, WHARTON'S CRIMINAL PROCEDURE § 23:4 (14th ed. 2023) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

66. However, police very often recite the Miranda warnings upon arrest, so the issue of custody arises much less frequently in those situations.

67. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 38 (1968).

68. *See* David A. Moran, *Traffic Stops, Littering Tickets, and Police Warnings: The Case for a Fourth Amendment Non-Custodial Arrest Doctrine*, 37 AM. CRIM. L. REV. 1143, 1150 (2000); Timothy P. O'Neill, *Rethinking* Miranda*: Custodial Interrogation as a Fourth Amendment Search and Seizure*, 37 U.C. DAVIS L. REV. 1109, 1122 (2004).

69. *Berkemer*, 468 U.S. at 423.

70. *Id.* at 436 ("It must be acknowledged at the outset that a traffic stop significantly curtails the 'freedom of action' of the driver and the passengers, if any, of the detained vehicle.").

noncustodial.[71] In distinguishing Fourth Amendment detention from Fifth Amendment custody, the Court reasoned that "[t]wo features of an ordinary traffic stop mitigate the danger that a person questioned will be induced 'to speak where he would not otherwise do so freely.'"[72] First, "a traffic stop is presumptively temporary and brief," and people "expect[] . . . that in the end [they] most likely will be allowed to continue on [their] way."[73] Second, because traffic stops are public, the unscrupulous officer is less likely to use illegitimate means of coercing confessions.[74] As will be discussed in Section III.A, this reasoning permeated lower courts' custody decisions in both traffic and nontraffic cases, expanding its influence in custody doctrine.[75]

Next, to further highlight the importance of continued judicial oversight of police interrogation practices, the next section summarizes the large body of social-scientific literature that demonstrates (a) the modern prevalence of interrogation tactics that the *Miranda* Court itself described as psychologically coercive and (b) that those tactics produce confessions. This social-scientific literature highlights that potentially coercive interrogation tactics are still used very frequently by interrogating officers, and that those tactics are consequential in criminal cases. Those tactics produce confessions, which in turn increase the chance of a conviction.

D. *Confessions Are Still Elicited Using Worrisome Tactics*

Courts assume that "the element of 'custody' would distinguish interrogations that contain compelling pressures from those that do not."[76] Social scientists have studied confessions, and especially the determinants of false versus true confessions, for decades. Far from an exhaustive account of that body of scientific literature, this section showcases the real-world prevalence of psychologically coercive interrogation tactics and their effect on suspects—eliciting confessions—to demonstrate that the need for protections has not fundamentally changed since *Miranda*'s inception.

First, research has demonstrated that many of the interrogation tactics of central concern to the Court in *Miranda* are still widely used in the United

71. *Id.* at 439, 442 (citing *Terry*, 392 U.S. 1).

72. *Id.* at 437 (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).

73. *Id.*

74. *Id.* at 438 ("Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse.").

75. *See infra* Section III.A.

76. Weisselberg, *Mourning* Miranda, *supra* note 3, at 1527 (emphasis omitted).

States. The psychologically coercive tactics that motivated the Court in *Miranda* include isolation of suspects and deprivation of outside support,[77] confident assumption of the suspect's guilt,[78] and dogged focus on why the suspect committed the act.[79] Researchers have observed law enforcement interrogations and surveyed police about their interrogation practices and beliefs, revealing that these psychologically coercive tactics are still used.[80] For example, a survey of law enforcement across various jurisdictions revealed that isolating suspects is almost always used as an interrogation technique.[81] The same survey found the practices of assuming and demonstrating the suspect is guilty as well as focusing on the justifications and reasons for the offense occurred frequently.[82] Observational studies, too, confirm that maximization strategies, including confronting suspects with (false) evidence of guilt, were used in over 80% of interrogations.[83] Thus, the landscape of psychological tactics used by interrogators while questioning suspects has not fundamentally changed since 1966.

Second, in highly controlled experiments, the use of these tactics has caused people to confess.[84] These experimental findings demonstrate that deeming situations noncustodial has serious consequences: it not only allows such tactics to persist in police practice but also sanctions the use of the resulting confession evidence. In particular, "minimization and maximization techniques manipulate the suspect's perceptions of the consequences of confessing" and, in

77. *Miranda*, 384 U.S. at 449–50, 455.

78. *Id.* at 455 ("The aura of confidence in his guilt undermines his will to resist.").

79. *Id.* at 451–52 (noting the practice of offering legal excuses).

80. Saul M. Kassin, Richard A. Leo, Christian A. Meissner, Kimberly D. Richman, Lori H. Colwell, Amy-May Leach & Dana La Fon, *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 LAW & HUM. BEHAV. 381, 389 (2007) [hereinafter Kassin et al., *Police Interviewing and Interrogation*]; Weisselberg, *Mourning* Miranda, *supra* note 3, at 1530–33 (summarizing a review of the Reid technique tactics and the prevalence of those tactics).

81. Kassin et al., *Police Interviewing and Interrogation*, *supra* note 80, at 388 tbl.2 (reporting that on a scale of 1 = *never used* to 5 = *always used* isolating suspects had a mean score of 4.49).

82. *Id.* (reporting that on a scale of 1 = *never used* to 5 = *always used* confrontation with evidence of guilt had a mean score of 3.90; offering sympathy, moral justifications, and excuses had a mean score of 3.38; implying or pretending to have independent evidence of guilt had a mean score of 3.11; and minimizing the moral seriousness of the offense had a mean score of 3.02).

83. *See, e.g.*, Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 268, 275–77, 278 tbl.5 (1996) (reporting that confrontation with evidence of guilt occurred in 85% of the 182 interrogations he either watched in person or on videotaped recordings); Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. CRIM. L. & CRIMINOLOGY 219, 248–49, 263 (2006) (reporting that 89% of the 66 juvenile interrogation files he reviewed contained maximization techniques).

84. Allyson J. Horgan, Melissa B. Russano, Christian A. Meissner & Jacqueline R. Evans, *Minimization and Maximization Techniques: Assessing the Perceived Consequences of Confessing and Confession Diagnosticity*, 18 PSYCH., CRIME & L. 65, 65 (2012).

turn, increase the chances that a suspect confesses.[85] Minimization techniques create an expectation of leniency if a confession is provided, and maximization techniques create an expectation of harsher punishment if no confession is provided.[86] Confronting suspects with evidence of guilt is a classic maximization technique that implies that the police already have enough evidence of guilt, so not confessing will be used against the suspect to punish them.[87] These confrontational maximization techniques may be combined with a minimization technique, justifying the crime or minimizing the seriousness of the offense and implying that confessing will result in leniency.[88] Jointly, these tactics are sometimes called "accusatorial" methods, and they increase the likelihood of suspects' confessions.[89] But there is nothing (legally) wrong with tactics that elicit confessions so long as they do not do so in a problematically coercive way. What makes a tactic problematically coercive?

Arguably, one of the most persuasive measures of what constitutes a problematic degree of coercion is when the tactics being used cause innocent people to confess. By definition, when an innocent person confesses, it is a *false* confession. Very few people would lie about committing a crime without feeling forced, or coerced, to do so. The trouble for courts making custody determinations is that it is impossible to know with perfect certainty whether *this* defendant is guilty or innocent. But the scientific consensus on the determinants of confessions reveals that the use of accusatorial methods causes both true *and* false confessions.[90]

Yet this evidence has not been utilized in any systematic way by courts or parties to evaluate the assumption at the heart of the custody test. The Court assumes, without reference to the relevant scientific consensus, that, as Charles Weisselberg put it, "the element of 'custody' would distinguish interrogations

85. *Id.* at 66.

86. Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 LAW & HUM. BEHAV. 233, 247 (1991).

87. Horgan et al., *supra* note 84, at 66. ("Examples of maximization techniques include expressing absolute certainty in the suspect's guilt, shutting down denials, exaggerating the seriousness of the offense, and bluffing about evidence.").

88. *Id.*

89. *See* Christian A. Meissner, Allison D. Redlich, Stephen W. Michael, Jacqueline R. Evans, Catherine R. Camilletti, Sujeeta Bhatt & Susan Brandon, *Accusatorial and Information-Gathering Interrogation Methods and Their Effects on True and False Confessions: A Meta-Analytic Review*, 10 J. EXPERIMENTAL CRIMINOLOGY 459, 460 (2014) (reporting the experimental evidence that the accusatorial style of questioning "increased both true and false confessions," but the information-gathering increased only true confessions). Scholars who have studied real-world interrogations report that police often warn the interrogee that they will be in greater jeopardy if they do not confess and that if they confess, they will receive more lenient treatment. *See* Leo & White, *supra* note 38, at 440.

90. Meissner et al., *supra* note 89, at 479.

that contain compelling pressures from those that do not."[91] This may be because there seems to be a gap between confessions research and the custody test. For example, most of the research applicable to adults focuses on predicting the accuracy of confessions (i.e., whether the resulting confession was true or false) rather than explicitly distinguishing between "interrogations that contain [psychologically] compelling pressures from those that do not."[92] This Article argues that the scientific consensus on confessions should be leveraged and presents two studies that are intended to serve as a keystone that connects current scientific knowledge to judges' assessments of psychological coercion in interrogation situations.

II. FREEDOM TO LEAVE POLICE QUESTIONING

This part describes the empirical methods and key findings of this Article's first study. Section A explains the selection and experimental manipulation of custody case interrogation scenarios. Then, this section details the study procedures and participant sample demographics.

Sections B and C summarize the primary empirical findings. First, Section B determines that the courts' custody test as applied does not distinguish between interrogations that suspects feel free to leave and those they do not. Specifically, the data establishes that laypeople do not feel free to leave interrogation situations, even noncustodial ones, which indicates that courts are leaving those civilians unprotected by *Miranda*.

Section C then explains that this effect is partly—though not wholly—explained by courts' holdings in traffic cases. In traffic cases, laypeople understandably believe they are not free to leave. The section then provides a novel and puzzling account of race-based differences in interrogees' perceptions of freedom. Specifically, this study presents data suggesting that Black American men in traffic stops feel significantly freer to leave police questioning than other race-gender groups. This is partly explained by the fact that the Black men in the study had the highest average socioeconomic status relative to other race-gender groups, and that higher socioeconomic status was associated with increased perceptions of freedom to leave. However, even after accounting for the socioeconomic status differences, the effect persisted, suggesting that Black

91. Weisselberg, *Mourning* Miranda, *supra* note 3, at 1527 (emphasis omitted).

92. *Id.* Confessions doctrine deals with more than simply confession reliability. *See* Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of* Miranda *Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. REV. 1157, 1177–78 (2017) [hereinafter Slobogin, *Manipulation*].

men have a unique perspective regarding their freedom to leave traffic stops. Section D connects the study's main findings to custody doctrine.

A. *Experimental Methodology*

To compare courts' custody determinations to laypeople's perceptions of their freedom to leave interactions with police, I sampled custody caselaw to obtain real case facts.[93] Preparation of the experimental survey materials proceeded in three steps. First, I searched Westlaw for cases where a court made a custody determination (i.e., held that an interrogation was custodial or noncustodial). Second, I extracted the objective circumstances of the interrogations from the opinions' factual background and discussion sections. Third, I manipulated the text of the facts in two key ways, discussed further below: (1) the participant was instructed to imagine either themselves as the interrogee (Second Person condition) or someone else as the interrogee (Third Person condition); and (2) the race of the interrogee was either Black or White. Using these real-world interrogation scenarios, I constructed an online survey experiment to test whether laypeople's perceptions are (in)consistent with courts' holdings.

1. Case Selection

My Westlaw search involved various queries, the full details of which can be found in the Online Appendix.[94] First, I found four paradigmatic custody cases from the U.S. Supreme Court—(1) *Berkemer v. McCarty*, (2) *Orozco v. Texas*,[95] (3) *California v. Beheler*, (4) *Oregon v. Mathiason*—each cited in the

93. All relevant survey research materials, data, and code for this Article's studies are available through UNC's open data repository at Lauren E. Clatch, *Data & Code for Lauren E. Clatch, Interrogating* Miranda*'s Custody Requirement, 103 N.C. L. Rev. 69 (2024)*, UNC DATAVERSE (Jan. 3, 2025), https://doi.org/10.15139/S3/E2ETFN [https://perma.cc/R4AQ-2T75] [hereinafter Clatch, *Data & Code*]. Sampling caselaw is consistent with other empirical efforts to understand the legal concept of consent and societal understandings of privacy in the context of law enforcement searches. *See* Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1983–84, 1992 (2019); Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2263 (2020); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 728 (1993). This is also consistent with the recently growing body of scholarship called empirical, or experimental, jurisprudence. *See* Frederick K. Beutel, *Some Implications of Experimental Jurisprudence*, 48 HARV. L. REV. 169, 175–76 (1934); Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735, 744–50 (2022).

94. *See* Clatch, *Data & Code*, *supra* note 93.

95. 394 U.S. 324 (1969).

custody-relevant sections of two criminal procedure treatises.[96] These four Supreme Court cases involve varied interrogation situations including a roadside stop,[97] questioning in a bedroom,[98] and the voluntary arrival at a police station.[99] Next, to sample state and lower federal courts' custody decisions, I searched cases that cited either *Berkemer* or *Howes v. Fields*.[100] From the thousands of cases citing one of those two Supreme Court cases, I randomly selected 20 appellate court cases (10 that cited *Berkemer* and 10 that cited *Fields*).[101]

Thus, the caselaw selection process produced 24 opinions, the 4 paradigmatic opinions plus the 20 randomly selected opinions, published

96. DAVID M. NISSMAN & ED HAGEN, LAW OF CONFESSIONS § 4:1 (2d ed. 2022) (citing *Berkemer v. McCarty*, 466 U.S. 420, 422 (1984)); *id.* § 4:3 (citing *Orozco*, 394 U.S. 324); *id.* § 4:5 (citing *Oregon v. Mathiason*, 429 U.S. 492 (1977), and *California v. Beheler*, 463 U.S. 1121 (1983) (per curiam)); 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 6.6(c) (4th ed. 2023) (citing *Orozco*, 394 U.S. 324, *Berkemer*, 466 U.S. 420, and *Mathiason*, 429 U.S. 492); *id.* § 6.6(e) (citing *Beheler*, 463 U.S. 1121).

97. *Berkemer*, 468 U.S. at 423.

98. *Orozco*, 394 U.S. at 325–26.

99. *Mathiason*, 429 U.S. at 493–94; *Beheler*, 463 U.S. at 1122.

100. 565 U.S. 499 (2012). *Fields* is one of the most recent Supreme Court cases that engages deeply with the language of the custody test. *See id.* at 509–12. In deciding which cases should anchor my case selection process, I wanted to make sure I narrowed my population to only those cases that reflected the most crystallized version of the custody test. And, as discussed in Section I.C.1, *Berkemer* solidified the "functional equivalence of arrest" test. So, because *Mathiason*, *Orozco*, and *Beheler* preceded *Berkemer*, I used *Berkemer* as my early anchor and *Field* as my later anchor.

101. Appellate decisions were used because trial courts vary much more than appellate courts in the formality of their treatment of the issue. Trial courts may have only oral pronouncements from the bench rather than written reasoning. As *a priori* inclusion criteria, I also required that any opinion to be used in the final sample of cases met the following criteria: (1) the court made an explicit holding about custody and (2) the court at least assumed (and at most held) that the police interaction was an interrogation. *People v. Mathews*, No. 348155, 2021 WL 4024276 (Mich. Ct. App. Sept. 2, 2021), for example, was randomly selected from the citing-to-*Berkemer* Westlaw search list, but there was no testimonial evidence described in the opinion. And despite citing *Berkemer* and *Miranda*, the opinion turned on the search of defendant's person and the inventory search of his vehicle. *Id.* at *1–2, *5. Thus, *Mathews* had no custody holding and was excluded. Additionally, in order to claim that the inconsistency between courts' and lay perceptions of custody is consequential, the defendant's admission or confession had to have been admitted into evidence. And in order for that to be true, the court has to conclude that the defendant was in a custodial interrogation. If a court concludes the defendant was in custody but was not interrogated, then the court can admit the self-incriminating evidence. *See* Miranda v. Arizona, 384 U.S. 436, 475–76 (1966). Thus, I focused on cases where the custody determination was the determinative issue for the admission of evidence at trial because that is when the determination has the greatest impact. *McGinty v. State*, 723 S.W.2d 719 (Tex. Crim. App. 1986) is a case that was randomly selected from the citing-to-*Berkemer* list, but the court admitted appellant's admission on the basis that appellant "was not [in] an interrogation." *Id.* at 722. These two *a priori* inclusion criteria were integral to filtering search results to only those opinions that are relevant to the research. In other words, I used these criteria to systematically constrain the population of opinions from which I randomly selected.

between 1969 and 2022. Eleven of the 24 opinions were federal appellate decisions and 13 were state appellate decisions. Of the 24 opinions, the court concluded that the interrogation was noncustodial in 17 cases and custodial in 7 cases.

2. Interrogation Excerpt Manipulation

Next, I extracted the objective facts of the interrogation situations from the court's opinion, using the court's own description of the interrogation setting. I started the scenarios at the beginning of the contact between law enforcement and the interrogee and ended the scenario immediately before there was a confession from the interrogee because the nature of the interrogation situation's objective circumstances was exactly the question before the court—not the existence or the content of a confession. I also ended all factual scenarios before *Miranda* warnings were given, because the legal issue of custody only arises when statements are made without *Miranda* warnings. Lastly, I manipulated the language in the interrogation scenario for the participant to either imagine themselves as the interrogee or another person as the interrogee.

For example, in *Berkemer*, the Court described how Berkemer attracted the attention of a highway patrol officer because he was weaving in and out of the lanes.[102] Berkemer was pulled over, and the officer conducted a field sobriety test and asked Berkemer if he had been using intoxicants.[103] The Second Person version of this scenario appeared to participants as follows:

> One evening, Trooper Williams observed your car weaving in and out of a lane on an interstate highway. After following your car for two miles, Williams forced you to stop and asked you to get out of the vehicle. When you complied, Williams noticed that you were having difficulty standing. Williams then asked you to perform a field sobriety test, commonly known as a "balancing test." You could not do so without falling. While still at the scene of the traffic stop, Williams asked you whether you had been using intoxicants.[104]

The Third Person version of the scenario varied based on whether the participant was White or Black. White participants saw scenarios with stereotypically White interrogee names (i.e., Timothy, Matt, Justin, Gary,

102. *Berkemer*, 468 U.S. at 423.

103. *Id.*

104. For exact language from this case and others as well as the changes I made to the text for each scenario, see Clatch, *Data & Code*, *supra* note 93.

Norman Jr.).[105] Black participants saw scenarios with stereotypically Black interrogee names (i.e., Demetrius, Terrell, Lamar, Deon, Jermaine).[106] This was done so that there was only one meaningful difference between the Second and Third Person conditions[107]—the perspective taken by participants.

The end result of case selection and scenario construction was a pool of 17 noncustodial interrogation scenarios and 7 custodial interrogation scenarios to represent the body of Fifth Amendment custody caselaw from *Miranda* to the present.

3. Experimental Procedure and Participant Sample

The present study consisted of an online experimental survey where participants were randomly assigned to either the Second Person or Third Person condition[108] and randomly assigned to read 5 (of the 24) interrogation scenarios in that perspective.[109] After reading each scenario, the participants reported whether the interrogee would have felt free to physically leave the interaction with the officers (Yes/No), and to what extent (0 *not at all free* to 100 *entirely free*).

After reading the 5 interrogation scenarios[110] and answering questions about those specific scenarios, the participants answered general questions including (a) their experiences interacting with police officers; and (b)

105. Based on previous research, I selected five White male names and five Black male names that each had stereotypicality ratings above 2 (on a scale from 0 to 4) and a uniqueness rating below the midpoint of 3 (on a scale from 0 to 5). *See* Dushiyanthini (Toni) Kenthirarajah, Nicholas P. Camp, Gregory M. Walton, Aaron C. Kay & Geoffrey L. Cohen, *Does "Jamal" Receive a Harsher Sentence Than "James"? First-Name Bias in the Criminal Sentencing of Black Men*, 47 LAW & HUM. BEH. 169, 174–75 (2023).

106. *See id.*

107. If I allowed participants to make cross-race judgments, then there would be two meaningful differences between the Second and Third Person conditions—the perspective taken *and* whether participants made same-race judgments (Second) or cross-race (Third) judgments. Only a single difference between experimental conditions is necessitated by proper experimental manipulation methods. *See* GUSTAV LEVINE & STANLEY PARKINSON, EXPERIMENTAL METHODS IN PSYCHOLOGY 362 (Psych. Press 2014) (1994).

108. White participants in the Third Person condition saw a White person's name, and Black participants in the Third Person condition saw a Black person's name. Using the pre-screener function on *Prolific*, I could determine each participant's race before they began the study.

109. The study's design and hypotheses were pre-registered before data collection. *See* Clatch, *Data Code*, *supra* note 93. Various statistical analyses were pre-registered (e.g., comparison between cases with "custodial" and "noncustodial" holdings); the analyses resulting from initial findings were not pre-registered with equal specificity (e.g., group differences' mechanisms). *See* Anna Elisabeth van 't Veer & Roger Giner-Sorolla, *Pre-Registration in Social Psychology—A Discussion and Suggested Template*, 67 J. EXPERIMENTAL SOC. PSYCH. 2, 4 (2016).

110. Note that participants saw at most a single DUI scenario because of concerns about participants' unique, and possibly strong, reactions to DUI cases.

demographic questions including race, gender, age, socioeconomic status, and political orientation.[111]

A total of 462 participants responded to the survey.[112] But after data quality was assessed, 3 participants were removed from the data, leaving 459 participants in the final dataset.[113] The sample was collected on *Prolific* in June 2023.[114] The participant sample consisted of 236 (51.42%) White Americans and 223 (48.58%) Black Americans. Of the 459 participants, 48.81% were women, 49.67% were men, and 1.52% identified with another gender. The sample had a mean age of 40.7 years old, and 99.8% reported being either a U.S. citizen or resident.[115]

B. *People Do Not Feel Free to Leave Police Interrogations, Even Noncustodial Ones*

Across all interrogation scenarios, 78.6% of the times that participants reviewed such scenarios, they reported that the interrogee would *not* have felt free to leave.[116] The selected sample of cases, like the population of custody caselaw, however, is not balanced: courts more often concluded that the interrogation was noncustodial than custodial. So, the central question is

111. The full survey can be found in the Online Appendix. *See* Clatch, *Data & Code*, *supra* note 93.

112. The online materials include the dataset with the 2,310 rows of data from the original 462 participants. *See id.*

113. The data quality was assessed using a comprehension check and manipulation check for each scenario. *See id.* The Online Appendix shows the distribution of correct responses for each measure. *See id.* (Every participant responding to 5 scenarios produced 5 observations. I excluded the scenario-specific observations of participants that incorrectly answered both the manipulation check and comprehension check for that scenario. That cutoff excluded 240 of 2,310 total observations and excluded 3 of the 462 participants (because those 3 participants failed at least one of the checks for all 5 scenarios they viewed). Accordingly, the final sample consisted of 459 participants, and 2,070 scenario-specific observations were used for analyses.).

114. *Prolific* is an online platform that has been used for collecting data in the social and economic sciences. *See* PROLIFIC, https://www.prolific.co/ [https://perma.cc/4GRW-5978]; *see, e.g.*, Stefan Palan & Christian Schitter, *Prolific.ac—A Subject Pool for Online Experiments*, 17 J. BEHAV. & EXPERIMENTAL FIN. 22, 22 (2018); James Armitage & Tuomas Eerola, *Reaction Time Data in Music Cognition: Comparison of Pilot Data from Lab, Crowdsourced, and Convenience Web Samples*, 10 FRONTIERS PSYCH. 2883, 2883 (2020); Nathaniel R. Greene & Moshe Naveh-Benjamin, *Online Experimentation and Sampling in Cognitive Aging Research*, 37 PSYCH. & AGING 72, 80 (2022).

115. Additional details about the sample's demographics are presented in the Online Appendix. *See* Clatch, *Data & Code*, *supra* note 93.

116. *See id.* (Out of the total 2,070 observations in the final dataset, 1,627 observations made up this 78.6%. And 443 observations made up the 21.4% of reports that the interrogee would have felt free to leave. Because each participant read 5 interrogation scenarios, the number of observations exceeds the number of participants.).

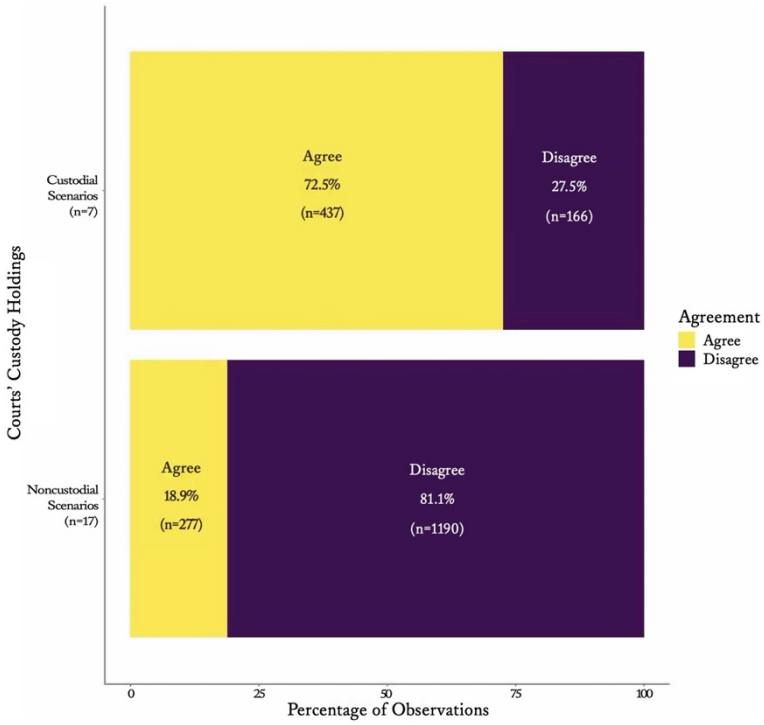
whether participants reported that the interrogee would feel free to leave interrogations that courts deemed noncustodial.

In the 17 cases where courts held that a reasonable person *would* have felt free to leave—that is, that the interrogation was noncustodial—laypeople mostly disagreed with courts. Specifically, 81.1% of the times that participants reviewed noncustodial interrogations' objective circumstances, they reported that the interrogee would not feel free to leave.[117]

Figure 1 shows the number and percentage of times that participants (dis)agreed with courts' custody determinations. The yellow portions in Figure 1 represent lay responses that were consistent, or in agreement, with courts' holdings, and the dark purple portions represent disagreement. As just mentioned, participant agreement with courts' assessments of noncustodial scenarios means that participants reported that the interrogee would feel free to leave, and disagreement for these scenarios means that participants reported that the interrogee would *not* feel free to leave. In contrast, participant agreement with courts' assessments of *custodial* scenarios means that participants reported that the interrogee would *not* feel free to leave, and disagreement for these scenarios means that participants reported that the interrogee *would* feel free to leave.

117. *See id.* (From the total of 1,467 observations associated with the 17 noncustodial interrogation scenarios, 1,190 observations made up this 81.1%. And 277 observations made up the 18.9% of reports that the interrogee in the noncustodial interrogations would have felt free to leave. This pattern was similar across Second and Third Person conditions with 78.4% of observations (n = 594) from people imagining themselves as the interrogee not feeling free to leave and 84.1% of observations (n = 596) from people imagining an interrogee from their racial group not feeling free to leave.).

Figure 1. Court-Layperson (Dis)Agreement About Interrogation Scenarios



Notably, presented in the yellow portion of Figure 1's top bar, in the 7 cases where courts held that the interrogation was custodial, laypeople mostly agreed with courts: 72.5% of the times that participants reviewed these custodial interrogation scenarios, they reported that they or other people in that situation would not feel free to leave.[118] This large amount of agreement, however, is

118. *See id.* (From the total of 603 observations associated with the 7 custodial interrogation scenarios, 437 observations made up this 72.5%. And 166 observations made up the 27.5% of reports that the interrogee in the custodial interrogations would have felt free to leave. This pattern was similar across Second and Third Person manipulations of the 7 custodial interrogation scenarios. In the Second Person condition, most of the time (69.0% of observations, n = 220) when imagining themselves as the interrogee, participants reported that they would not feel free to leave. In the Third Person condition, too, most of the time (76.4% of observations, n = 217) when imagining an interrogee from their racial group, participants reported that the interrogee would not feel free to leave.).

limited to the custodial interrogation cases: the percentage of agreement dropped to 18.9% in the yellow portion of Figure 1's bottom bar representing court-layperson agreement in the noncustodial scenarios.

When laypeople disagree with courts' determinations, there are two types of disagreement possible. On the one hand, when courts conclude that an interrogation is custodial but laypeople report that they would feel free to leave (purple portion of Figure 1's top bar), this demonstrates that courts may be *over*applying *Miranda*. That is, courts are applying *Miranda* to scenarios that laypeople find noncoercive enough that they report they would feel free to leave. On the other hand, when laypeople disagree with courts' determinations that an interrogation is noncustodial (purple portion of Figure 1's bottom bar), this demonstrates that courts may be *under*applying *Miranda*. That is, courts are not applying *Miranda* to interrogation situations that laypeople find psychologically coercive enough that they report they would not feel free to leave.

The data presented in Figure 1 suggest that courts' underapplication of *Miranda* is the more prevalent form of disagreement. Specifically, only 27.5% of the times that participants reviewed custodial interrogations did they report that the interrogee would feel free to leave. This suggests the courts are overapplying *Miranda* to a degree. But 81.1% of the times that participants reviewed noncustodial interrogations they disagreed with courts. If these results generalize to the body of custody caselaw, and courts' application of the reasonable person standard, they suggest that courts are systematically underapplying *Miranda*. Even when accounting for the different numbers of custodial and noncustodial scenarios in the study (and caselaw), evidence of *under*application was three times more common than evidence of overapplication.[119]

119. *See id.* (There were 166 observations representing the disagreement with custodial interrogations, and there were 7 unique custodial interrogations presented to participants. Dividing the observations by the number of scenarios indicates that there were 23.7 observations per scenario reflecting disagreement with courts' conclusions that an interrogation was custodial. There were 1,190 observations representing the disagreement with noncustodial interrogations, and there were 17 unique noncustodial interrogations presented to participants. Dividing the observations by the number of scenarios indicates that there were 70 observations per scenario reflecting disagreement with courts' conclusions that an interrogation was noncustodial. Because participants were randomly assigned to 5 of the scenarios, participants were proportionally distributed to custodial and noncustodial scenarios. That means that these numbers only change marginally if you divide by the number of participants reading custodial/noncustodial scenarios rather than dividing by the number of unique scenarios: 166 divided by 603 equals 27.5% for custodial scenarios and 1,190 divided by 1,467 equals 81.1% for noncustodial scenarios, still a three-fold difference.).

In sum, across the wide variety of interrogation scenarios, the vast majority of participants believed the interrogee would not feel free to leave. And more importantly, more than 80% of the times that participants reviewed noncustodial interrogation scenarios, they reported that the interrogee would not feel free to leave, which demonstrates that courts' application of the custody test underapplies the Fifth Amendment's protections vis-à-vis *Miranda*.

C. *The Special Case of Traffic Stops and Black American Men's Unique Perspective*

Custody caselaw contains a presumptive carveout for questioning during traffic stops.[120] Traffic stops, according to *Berkemer* and its progeny, are more akin to *Terry* stops than custodial interrogations,[121] and this study empirically confirms that doctrinal relationship. Specifically, the traffic cases used in the study were more likely to be associated with noncustodial court holdings. Eleven of the 12 traffic scenarios were held by courts to be noncustodial, whereas only 6 of the 12 nontraffic cases were held by courts to be noncustodial. The traffic cases in the sample were also fairly diverse. Six involved driving under the influence,[122] 4 involved drugs or drug paraphernalia,[123] 1 involved a money laundering investigation,[124] and 1 involved an illegal gun.[125]

Because of this association between traffic stops and noncustodial holdings, I investigated whether perceptions of freedom to leave differed between traffic and nontraffic scenarios. Traffic stop scenarios were associated with less perceived freedom to leave (M = 11.48, SD = 23.27) relative to nontraffic scenarios (M = 31.24, SD = 35.71).[126] Accordingly, the fact that traffic stop scenarios tend to be found noncustodial by courts demonstrates that this doctrinal tie contributes to the high rate of laypeople's disagreement with noncustodial holdings, presented above.[127] However, even nontraffic cases had large rates of disagreement, so this doctrinal tie does not fully explain the

120. *See* discussion *supra* Section I.C.2.

121. *Id.*

122. Armijo v. State Transp. Dep't, 737 P.2d 552, 553 (N.M. Ct. App. 1987) (involving the analogous "DWI"); State v. Salisbury, 498 S.E.2d 655, 668 (S.C. Ct. App. 1998) (per curiam); Smith v. Kansas Dep't of Revenue, 242 P.3d 1179, 1182 (Kan. 2010); State v. Burke, No. 96CA0074, 1997 WL 440927, at *2 (Ohio Ct. App. July 30, 1997); People v. Archuleta, 719 P.2d 1091, 1091–92 (Colo. 1986); Berkemer v. McCarty, 468 U.S. 420, 423 (1984).

123. State v. Ybarra, 637 S.W.3d 644, 648 (Mo. Ct. App. 2021); People v. Taylor, 41 P.3d 681, 684–85 (Colo. 2002); United States v. Streifel, 781 F.2d 953, 955 (1st Cir. 1986); Dolph v. Davis, 765 F. App'x 986 (5th Cir. 2019) (per curiam) (involving drugs and a gun).

124. United States v. Acosta, 363 F.3d 1141, 1143 (11th Cir. 2004).

125. United States v. Coulter, 41 F.4th 451, 454–55 (5th Cir. 2022).

126. *See* Clatch, *Data & Code*, *supra* 93 (B = -20.15, SE = 1.24, p < .001).

127. *See* discussion *supra* Section II.B.

discrepancy between laypeople's perceptions of freedom to leave and custody caselaw.[128] In sum, traffic stops, in which laypeople perceive less freedom to leave than nontraffic situations, tend to be found noncustodial. Although traffic stops' uniqueness does not explain the full extent of disagreement between courts and laypeople, it demonstrates that *Terry* stops' doctrinal link with custody determinations is a source of discrepancy.

Additionally, racial profiling has been a social and legal concern for decades across policing and nonpolicing contexts.[129] Perhaps the context in which there has been the most attention and systematic funding for collecting data on racial profiling is traffic stops.[130] Furthermore, previous research suggests that Black members of the American public have disproportionately high numbers of contact with police[131] and experience more threats or use of force.[132] For example, the Bureau of Justice Statistics reported that Black residents were more likely than White residents to be handcuffed, pushed, grabbed, hit, or kicked, and more likely to have a gun pointed at them or be shot

128. *See* Clatch, *Data & Code*, *supra* note 93. (For traffic cases, there were 5.26% (n = 3) of the observations representing the disagreement with custodial interrogations and 90.79% (n = 838) of the observations representing the disagreement with noncustodial. In nontraffic cases, there were 29.85% (n = 163) of the observations representing the disagreement with custodial interrogations and 64.71% (n = 352) of the observations representing the disagreement with noncustodial.). For the stacked bar graphs, see *id*.

129. GEORGE GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1999, at 238 (1999) (describing that 42% of African-Americans report that police have stopped them just because of their race, 59% of the American public believes that this practice is widespread, and 81% disapprove of the practice); Jeffrey M. Jones & Camille Lloyd, *Black Americans' Reports of Mistreatment Steady or Higher*, GALLUP (July 27, 2021), https://news.gallup.com/poll/352580/black-americans-reports-mistreatment-steady-higher.aspx [https://perma.cc/UL38-MUD8] (addressing contexts of employment, shopping, and healthcare in addition to policing).

130. Cody Mello-Klein, *New Project from Northeastern Professor Could Revolutionize How We Measure Racial Profiling in Police Traffic Stops*, NE. GLOB. NEWS (Mar. 20, 2023), https://news.northeastern.edu/2023/03/20/racial-traffic-stops-police/ [https://perma.cc/J8VZ-PSY8]. In 2005, there were already twenty-six states with legislative funding to track racial profiling in traffic stops. Jeffrey Grogger & Greg Ridgeway, *Testing for Racial Profiling in Traffic Stops from Behind a Veil of Darkness*, 101 J. AM. STATISTICAL ASSOC. 878, 878 (2006). And in 2021, nationwide racial profiling prohibition grants were authorized and are administered at both the federal and state level. *See Section 1906 Racial Profiling Prohibition Grants*, GOVERNORS HIGHWAY SAFETY ASS'N, https://www.ghsa.org/about/federal-grant-programs/1906 [https://perma.cc/J682-R23A].

131. ERIKA HARRELL & ELIZABETH DAVIS, U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2018—STATISTICAL TABLES 3 (stating that 12% of the population of people that came into contact with police in 2018 was White). The 2020 U.S. Census identifies that 12.4% of the U.S. population is made up of Black Americans and 61.6% is made up of White Americans. *Profile of General Population and Housing Characteristics*, U.S. CENSUS BUREAU (2020), https://data.census.gov/table?g=010XX00US&d=DEC+Demographic+Profile [https://perma.cc/8AN2-NPMS].

132. HARRELL & DAVIS, U.S. DEP'T OF JUST., *supra* note 131, at 5 (stating that Black Americans were twice as likely to experience threats or use of force relative to White Americans).

at in their interactions with police.[133] These race-based differences in police interactions warrant serious attention in both scholarship and practice. The courts and many legal scholars have assumed that, at least for most mentally capable adults, custody's reasonable person test accurately captures all groups of interrogees' perceptions of their freedom to leave.[134] This study tests that assumption.

One might expect that the violence experienced by Black Americans at the hands of law enforcement would contribute to Black Americans feeling less free to safely leave police interactions.[135] The survey data puzzlingly demonstrates the opposite.

First, across all interrogation scenarios, Black Americans reported higher perceptions of freedom to leave the interrogation scenarios (M = 24.6, SD = 32.8) than White Americans (M = 19.5, SD = 31.1).[136] Next, because men in police interactions are subject to the threat or actual use of force three times more frequently than women,[137] I assessed whether Black men and women perceive interrogations situations similarly. The data revealed that Black American men perceived that they and other Black male interrogees like them[138] would feel freer to leave police interrogations (M = 28.9, SD = 34.1) than Black

133. *Id.* at 7.

134. *See supra* Section I.C; *cf.* Aliza Hochman Bloom, *Objective Enough: Race Is Relevant to the Reasonable Person in Criminal Procedure*, 19 STAN. J. C.R. & C.L. 1, 1–2 (2023) (arguing that the race of the person interacting with police is relevant in reasonable person determinations for purposes of consent searches, seizure analysis, and custody). *But see* Cynthia J. Najdowski, *Stereotype Threat in Criminal Interrogations: Why Innocent Black Suspects Are at Risk for Confessing Falsely*, 17 PSYCH., PUB. POL'Y & L. 562, 562–63 (2011) (summarizing the converging empirical evidence that minorities may be at particular risk for false admissions); J. Guillermo Villalobos & Deborah Davis, *Interrogation and the Minority Suspect: Pathways to True and False Confession*, *in* 1 ADVANCES IN PSYCHOLOGY AND LAW 1, 3 (Monica K. Miller & Brian H. Bornstein eds., 2016) (summarizing six sources of vulnerability to interrogation-induced confession among racial minorities).

135. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 976–86 (2002) (discussing *Bostick* and racial minorities' heightened vulnerability to police encounters).

136. *See* Clatch, *Data & Code*, *supra* note 93. (conducting a mixed-effects regression, the main effect of participant race was statistically significant (B = 5.41, SE = 1.71, p < .01)).

137. HARRELL & DAVIS, U.S. DEP'T OF JUST., *supra* note 131, at 5.

138. All the Third Person names were men's names.

American women (M = 20.0, SD = 30.9),[139] White American men (M = 20.1, SD = 31.2),[140] and White American women (M = 19.4, SD = 31.4).[141]

Additional follow-up analyses revealed under what circumstances Black American men in the sample feel this way and why. To uncover the circumstances under which Black men might feel differently from other groups, the 24 interrogations were divided into two groups: nontraffic cases and traffic cases. There were significant race-by-case-type interactions. In particular, Black Americans perceived more freedom to leave than White Americans in traffic cases.[142] But groups were no different in how they perceived freedom in nontraffic cases.[143] Thus, another unique feature of traffic-stop cases is that they produce race-based differences in perceptions of freedom to leave.

To explore the reason why the race-based finding was in the opposite direction than expected, I examined socioeconomic status of participants. Participants with higher socioeconomic status reported higher perceptions of freedom to leave interrogations.[144] And Black American men in the sample had the highest average socioeconomic status of the four race-gender groups[145] due to a particularly high representation of Black American men in the $100,000–$150,000 income bracket, shown in Figure 2.

139. *See* Clatch, *Data & Code*, *supra* note 93 (After conducting a mixed-effects regression, the interaction of participant race and participant gender was statistically significant (B = 8.25, SE = 3.42, p < .05). T-tests were then conducted to determine the significance of pairwise comparisons. The difference in means between Black men and Black women was statistically significant, t(947.42) = 4.20, p < .001.).

140. *See id.* (This difference in means was statistically significant, t(999.63) = 4.25, p < .001.).

141. *See id.* (This difference in means was statistically significant, t(1031.2) = 4.73, p < .001. The other sub-group comparisons were nonsignificant: Black women relative to White women (t(964.43) = 0.31, p = 0.76), Black women relative to White Men (t(937.24) = -0.06, p = 0.95), and White men relative to White women (t(1066.5) = 0.38, p = 0.70).).

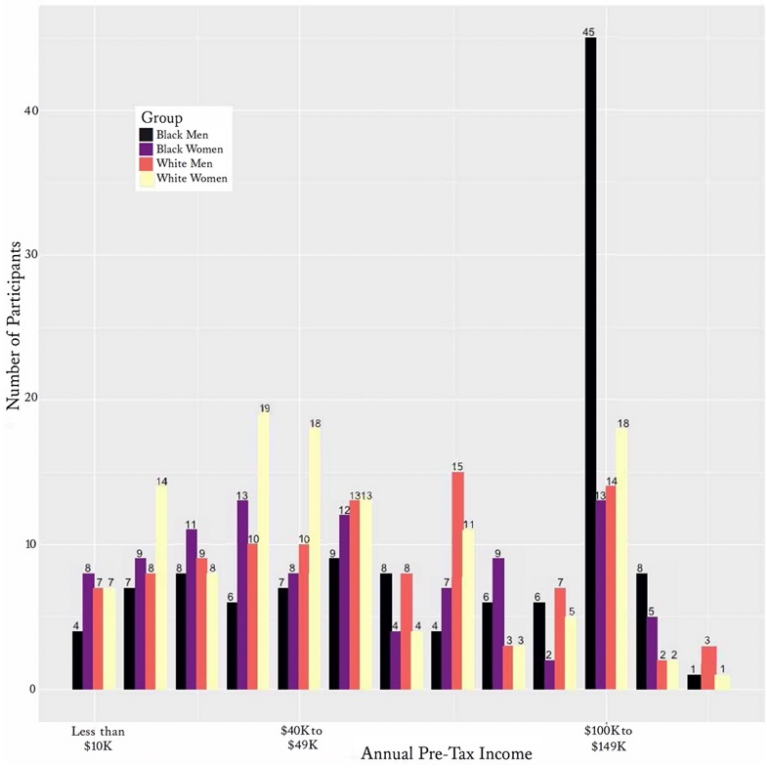
142. *See id.* (After conducting a mixed-effects regression, the interaction of participant race and type of cases (traffic vs. nontraffic) was statistically significant (B = 6.23, SE = 2.51, p < .05). Moreover, after parsing the traffic cases into DUI-traffic and non-DUI-traffic cases, Black Americans perceived greater freedom to leave than White Americans in DUI cases (B = 9.87, SE = 1.98, p < .001) and non-DUI-traffic cases (B = 6.95, SE = 2.36, p < .01).).

143. *See id.* (B = 2.53, SE = 2.57, p = .326).

144. *See id.* (conducting a mixed-effects regression, the main effect of participant socioeconomic status was statistically significant (B = 0.64, SE = 0.25, p < .05)).

145. *See id.* (conducting a linear regression with participant race, participant gender, and their interaction predicting socioeconomic status, the interaction was statistically significant (B = 1.57, SE = 0.30, p < .001)).

Figure 2. Annual Pre-Tax Income by Race Category



One might therefore think that the counterintuitive direction of the race-based differences in the findings are attributable to the socioeconomic status differences between the race-gender groups, particularly because this pattern is counter to the race-socioeconomic status patterns in the American population more generally.[146] However, even after excluding all participants in the upper three socioeconomic categories, the same pattern persisted.[147]

146. *See* David R. Williams, Naomi Priest & Norman B. Anderson, *Understanding Associations Among Race, Socioeconomic Status, and Health: Patterns and Prospects*, 35 HEALTH PSYCH. 407, 407 (2016).

147. *See* Clatch, *Data & Code*, *supra* note 93 (After conducting a mixed-effects regression, with participant race, gender and socioeconomic status as fixed effects, there were no statistically significant interactions (*p*s > .1). Moreover, after excluding all participants in the upper 3 socioeconomic categories, a mixed-effects regression revealed that Black Americans still perceived greater freedom to leave than White Americans (participant race main effect: $B = 7.08$, $SE = 2.49$, $p < .01$) and Black and

In sum, Black American men felt freer to leave interrogation scenarios (but only in traffic cases) than the other three race-gender groups, and this finding is at least partly, but not wholly, attributable to the sampled group's higher socioeconomic status.

D. *Summary of Main Findings*

This study suggests that if courts are primarily using the reasonable-suspect freedom-to-leave test to determine whether an interrogation is custodial, then the courts' "reasonable suspect" is unlike many Americans. This in turn suggests that custody doctrine contains a narrower view of psychological coercion than typical Americans have because most laypeople do not feel free to leave even those interrogations deemed noncustodial by courts.

Moreover, traffic-stop cases seem to be unique in two ways. First, because of their doctrinal link with noncustodial holdings, they are one of the sources of the overall discrepancy between custody caselaw and laypeople's perceptions of interrogations. Second, traffic-stop cases seem more likely to produce demographic-group-based differences in perceptions of freedom. The prevalence of traffic-stop cases, as well as the power of *Berkemer*'s precedent, points to another concept that needs empirical assessment: functional arrest. Part III's experimental study will do just that, but, first, Part III will analyze courts' reasoning about custody to disentangle the reasonable-suspect and functional arrest parts of the custody test.

III. REVISITING THE LANGUAGE OF COURTS' CUSTODY ANALYSIS

This part delves into the content of the custody test's language to better understand the seeming disconnect between courts' and laypeople's perceptions of interrogation situations. In the first study, I found that despite assessing a reasonable suspect's freedom to leave an interrogation, the scenarios that courts determined to be noncustodial interrogations still make people believe they are not free to leave. One potential explanation for this finding is that courts are either implicitly or explicitly applying the functional arrest test. And the functional arrest inquiry is conceptually overlapping but not exactly the same as the reasonable-suspect freedom-to-leave inquiry. Section A takes a closer look at courts' custody analysis and highlights that courts often imbue the

White Americans perceived statistically different degrees of freedom based on case type (interaction: B = -8.06, SE = 2.85, p < .01).). Particularly, a mixed effects regression using only data from the traffic cases revealed that Black Americans perceived greater freedom to leave than White Americans (B = 7.46, SE = 2.04, p < .001); however, there are no race-based differences in nontraffic cases (B = -0.95, SE = 2.86, p = .739). *See id.*

reasonable-suspect freedom-to-leave portion of the test with the functional equivalence of arrest. Other times, the reasonable-suspect freedom-to-leave portion of the test is treated as only necessary but not sufficient to determine custody, requiring a separate analysis of functional arrest.

Then, Section B presents a second study, revealing that most people feel functionally arrested in police interrogations. And even in noncustodial interrogation situations, for which courts conclude *Miranda* is inapplicable, participants felt functionally arrested in 67% of the scenarios. Overall, this part demonstrates that custody jurisprudence, regardless of what test is used, is at odds with many Americans' perceptions of psychological coercion in police interrogations.

A. *The Reasonable-Suspect Test's Role in Custody Analysis*

This section outlines two parallel but distinct patterns of custody-analysis reasoning particularly as it relates to the reasonable-suspect freedom-to-leave test. The first pattern of reasoning is where the analysis of the reasonable suspect's freedom to leave is imbued with an assessment of the interrogation situation's functional equivalence to arrest. In this first pattern of reasoning, the lack of freedom to leave is only *implicitly* treated as necessary but not sufficient for custody. The second pattern is an explicit characterization of the reasonable-suspect's lack of freedom to leave as necessary but not sufficient for finding an interrogation custodial.

1. Reasonable-Suspect Freedom Imbued with Functional Arrest

A useful starting point is the Court's description of the custody test in *Thompson v. Keohane*.[148] Writing for the majority, Justice Ginsburg indicated that the custody test involves

> [t]wo discrete inquiries [that] are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a

148. 516 U.S. 99 (1995).

> formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.[149]

A careful reading reveals that custody's reasonable-suspect test is a means by which courts resolve the ultimate inquiry of whether the suspect was functionally arrested. Thus, even though the reasonable-suspect inquiry anchors on freedom-to-leave language suggestive of a lower threshold for custody more akin to detention than arrest,[150] the freedom-to-leave language is simply imperfect in its lack of precision and is imbued with a higher threshold because it is understood as a means of evaluating whether an interrogation situation was a functional arrest. The sample of cases described in Part II offers textual evidence of this pattern of reasoning about custody.

One version of this pattern of reasoning can be seen directly in how the reasonable-suspect test is laid out by courts. For example, rather than using *Keohane*'s version of the reasonable-suspect test involving "liberty to terminate the interrogation and leave,"[151] various courts imbue their description of the reasonable-suspect test with functional equivalence language. For example, the Court of Appeals of New Mexico, in *Armijo v. State*,[152] described the question as "whether a reasonable person in appellant's situation would have understood himself to be in custody or under restraints comparable to those associated with a formal arrest."[153] Similarly the Supreme Court of Colorado, sitting *en banc*, explained that the custodial nature of an interrogation turns on "whether a reasonable person in the suspect's position would believe himself to be deprived of his freedom of action to the degree associated with a formal arrest."[154]

Other times, the courts faithfully quote *Keohane*'s "at liberty to terminate the interrogation and leave" language but acknowledge that other Supreme

149. *Id.* at 112 (internal quotation marks and footnote omitted). The Court has since confronted two custody cases in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), and *Howes v. Fields*, 565 U.S. 499 (2012). The Court used the *Keohane* custody test in *Yarborough*. *See* Jennifer Park, Yarborough v. Alvarado*: At the Crossroads of the "Unreasonable Application" Provision of the Antiterrorism and Effective Death Penalty Act of 1996 and the Consideration of Juvenile Status in Custodial Determinations*, 95 J. CRIM. L. & CRIMINOLOGY 871, 885–88 (2005) (detailing *Yarborough*'s complex procedural history and applications of the *Keohane* test at various stages of the litigation). Because I exclude scenarios involving prisoner-interrogees in this study, I excluded these cases from analysis.

150. *See* discussion *supra* Section I.C.2.

151. *Keohane*, 516 U.S. at 112.

152. 737 P.2d 552 (N.M. 1987).

153. *Id.* at 554.

154. People v. Taylor, 41 P.3d 681, 691 (Colo. 2002) (en banc) (quoting People v. Polander, 41 P.3d 698, 705 (Colo. 2001)); *see also* United States v. Griffin, 922 F.2d 1343, 1347 (8th Cir. 1990) ("If Griffin believed his freedom of action had been curtailed to a 'degree associated with formal arrest,' and that belief was reasonable from an objective viewpoint, then Griffin was being held in custody during the interrogation." (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam))).

Court precedents instruct further steps in the analysis. For example, in *United States v. Acosta*,[155] the Eleventh Circuit acknowledges that if it applied that "general *Miranda* custodial test literally to *Terry* stops, the result would be that *Miranda* warnings are required before any questioning could occur during any *Terry* stop,"[156] highlighting the court's understanding that the reasonable-suspect custody test is essentially the Fourth Amendment seizure test. The Eleventh Circuit goes on to reason that, because the Supreme Court in *Berkemer* has indicated that seizure is not custody, the custody test's language, if "[p]ut another way" asks if "suspects [are] 'subjected to restraints comparable to those associated with a formal arrest.'"[157] This "put another way" pivot was not an anomaly.[158]

Accordingly, to faithfully apply the custody test, courts across various jurisdictions have had to either blend different language from the Supreme Court's custody test together or characterize the functional equivalence test as essentially what the reasonable-suspect freedom-to-leave test is assessing. And despite origination with *Beheler* and *Berkemer*,[159] which both involved traffic stops—that is, Fourth Amendment seizures—this pattern was seen in both traffic-stop and nontraffic-stop cases. In sum, various courts through different means have analyzed the reasonable-suspect's freedom to leave through the lens of functional equivalence of arrest, imbuing the reasonable-suspect freedom-to-leave test with a higher threshold. This implicitly characterizes the freedom-to-leave inquiry as necessary but not sufficient for a custody determination.

2. Reasonable-Suspect Freedom as Distinct from Functional Arrest

In 2012, the Supreme Court crystallized the idea that custody's reasonable-suspect freedom-to-leave inquiry is only a necessary—and not a sufficient—element of custody. In *Fields*, the Court was asked to assess the custodial nature of the interrogation of a prisoner who was questioned in a prison interrogation room for five to seven hours about criminal activity that occurred outside the prison.[160] The Court's majority concluded that the interrogation was noncustodial and reasoned that "the [reasonable-suspect] freedom-of-movement test identifies only a necessary and not a sufficient condition for

155. 363 F.3d 1141 (11th Cir. 2004).

156. *Id.* at 1148.

157. *Id.* at 1149.

158. United States v. Ludwikowski, 944 F.3d 123, 131 (3d Cir. 2019) (writing "in other words" between two versions of the custody test language); United States v. Coulter, 41 F.4th 451, 458 (5th Cir. 2022) (same).

159. *See* discussion *supra* Section I.C.1.

160. Howes v. Fields, 565 U.S. 499, 502–03 (2012).

Miranda custody."[161] The second question is "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*."[162] The Court's use of the "inherently coercive pressures" language from *Miranda* for this second question, rather than the functional equivalence language from *Berkemer*, helps the Court skirt the fact that this interrogee was in a Michigan prison, serving a sentence for another crime—very much confined in ways associated with formal arrest.[163] But asking whether Field's interrogation environment "presents the same inherently coercive pressures" as that in *Miranda* is not substantially different from assessing whether the environment functionally arrested the interrogee.[164] Accordingly, in *Fields*, the Court codified a two-pronged custody inquiry in precedent.[165]

This two-pronged custody test has permeated lower courts' reasoning, including in cases that do not involve imprisoned interrogees. For example, in *United States v. Woodson*,[166] officers arrived at the defendant's parents' home to execute a search warrant and first interrogated the defendant's brother and then the defendant in a police van parked in front of the house, and the Eleventh Circuit applied *Fields*'s two-pronged approach.[167] The Eleventh Circuit characterized the first prong as assessing the "nature" of the interrogation, whereas the second prong assesses the "degree" of coercion used in the interrogation.[168] The *Fields* two-prong test has also been applied to traffic stops,[169] interrogations at police departments after officers transported the interrogee there,[170] and *Terry* stops of a pedestrian.[171]

Because an interrogation's functional equivalence of arrest is such a prominent feature of custody analysis, the next section describes the findings of

161. *Id.* at 509 (citing Maryland v. Shatzer, 555 U.S. 98, 111 (2010)).

162. *Id.* Notably, the three Justices that dissented on the custody issue, Justices Ginsburg, Breyer, and Sotomayor, used this language from *Miranda*. *See id.* at 518 (Ginsberg, J., concurring in part and dissenting in part) ("Those should be the key questions.").

163. *Id.* at 502. The Court uses "prison" and "jail" to describe where Fields is serving his sentence. *Id.* For consistency, I use "prison."

164. If it were substantially different, then the development of the functional arrest test as described in Supreme Court precedent in Section I.C would have been seen as a break from *Miranda* rather than a clarification or solidification of *Miranda*'s principles and test.

165. *Id.* at 509 ("Determining whether an individual's freedom of movement was curtailed, however, is simply the first step in the analysis, not the last.").

166. 30 F.4th 1295 (11th Cir.), *cert. denied*, 143 S. Ct. 412 (2022).

167. *Id.* at 1301, 1303.

168. *Id.* at 1303.

169. *See, e.g.*, Dolph v. Davis, 765 F. App'x 986, 991 (5th Cir. 2019).

170. People v. Barritt, 926 N.W.2d 811, 816–17 (Mich. Ct. App. 2018).

171. State v. Maciel, 375 P.3d 938, 940–41 (Ariz. 2016).

a second study, designed to test the extent to which interrogations functionally arrest laypeople.

B. *(Even Noncustodial) Interrogations Functionally Arrest People*

This Article's first study demonstrated that judges' custody holdings are not well aligned with the general public's perceptions of their freedom to leave interrogations.[172] This section describes a second experimental survey that investigates whether judges' custody holdings are at least aligned with the general public's perceptions of functional arrest, if not their freedom to physically leave.[173] The key research question was: Do regular people feel functionally arrested by all interrogations or only custodial ones?

The methods used in this second study were substantially similar to those used in the first study, with a few notable differences.[174] Beginning with the similarities, a sample of Americans responded to the online survey that randomly presented each participant with 5 interrogation scenarios. The 20 interrogation scenarios used in this study were extracted from real court opinions, which were selected in a similar way as the first study,[175] and edited in similar ways to extract objective interrogation facts; and based on the courts' holdings in the underlying opinions, the final 20 scenarios consisted of 8 custodial interrogation scenarios and 12 noncustodial scenarios.

There were two primary differences between the first study and this study. First, rather than surveying a participant sample made up of only White and

172. *See supra* Section II.B.

173. The distinction between freedom to leave and functional arrest is not particularly clear; however, anticipated duration of one's physical freedom to leave is likely a key distinguishing factor.

174. All details of the experimental survey methodology can be found on the Online Appendix. *See* Clatch, *Data & Code*, *supra* note 93.

175. I first collected both state and federal case opinions that either cited *Miranda* or *Fields* or were cited in treatise sections pertaining to *Miranda*'s custody requirement. *See id.*; *see also, e.g.*, NISSMAN & HAGEN, *supra* note 96, § 4:2; LAFAVE ET AL., *supra* note 96, §§ 6.5(b), 6.6(c), 6.6(e), 6.6(f). Like the first study, the cases that did not satisfy the following criteria were then excluded from further consideration: (1) the court made an explicit holding about custody and (2) the court at least assumed (and at most held) that the police interaction was an interrogation. *See* Clatch, *Data & Code*, *supra* note 93. Next, the cases were narrowed further by including only cases where the interrogee was not incarcerated because they offered a wider range of situational features involving various locations of questioning and various degrees of police domination. *See id.* Cases where the court described the "nature and setting" of the interrogation with some meaningful specificity were desirable because they offered meaningful description of the interrogation for the participants without researcher intervention. *See id.* Cases were selected in a nonrandom fashion in order to increase the situational breadth of this study's interrogation scenarios. *See id.*

Black Americans, I surveyed a nationally representative sample of Americans.[176] Research findings based on a nationally representative American sample have the benefit of being more generalizable to the full American population, making the findings more applicable to real-world outcomes.

Second, rather than manipulating whether the interrogation scenario was in a second- or third-person perspective, all interrogation scenarios were in third-person. Keeping all scenarios in third-person allows the study to best approximate judges' task of evaluating the nature of another person's experience in an interrogation. Judges are evaluating the degree of coercion experienced by other people—defendants, or at least reasonable suspects in the defendant's shoes—so participants took an analogously third-person perspective.

The manipulation in this study was designed to investigate whether the interrogations evaluated by courts are functionally equivalent to formal arrest in the eyes of laypeople. To assess the extent to which civilians were functionally arrested in scenarios based on real case facts, the text of every interrogation scenario in this study was manipulated to formally arrest the interrogee, resulting in an Arrest (treatment) and No Arrest (control) version of each of the interrogation scenarios. In the Arrest scenarios, the police officer

176. Four hundred eighty-four participants responded to the survey. *See* Clatch, *Data & Code*, *supra* note 93. The sample consisted of a nationally representative sample on the basis of age, gender, and race, except that Black Americans were oversampled. *See id.* Based on the U.S. Census, the age breakdown of the *Prolific* sample was as follows: 10% were 18–24 years old, 21% were 25–34 years old, 21% were 35–44 years old, 15% were 45–54 years old, 18% were 55–64 years old, and 15% were 65 years old or older, and the gender breakdown of the *Prolific* sample was as follows: 51% were women and 49% were men; based on the U.S. Census, plus an oversample of Black Americans, the race breakdown of the *Prolific* sample was as follows: 5% were Asian, 25% were Black, 3% were mixed-race, 64% were White, and 3% were in the Other category. *See id.*; *see also Profile of General Population and Housing Characteristics*, *supra* note 131. The general population's 13% prevalence of Black Americans was increased to the U.S. arrest rate's 25% prevalence. *See Statistical Briefing Book: Arrests by Offense, Age, and Race, 2020*, OFF. JUV. JUST. & DELINQ. PREVENTION (July 8, 2022), https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=2 [https://perma.cc/8NPH-XFU5]. The prevalence of Black Americans held in custodial interrogations is likely close to 25% given that Black Americans are overrepresented in many, if not all, studied points in the criminal process. *See, e.g.*, ELIZABETH HINTON, LASHAE HENDERSON & CINDY REED, AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 7–9 (2018); Allen J. Beck & Alfred Blumstein, *Racial Disproportionality in U.S. State Prisons: Accounting for the Effects of Racial and Ethnic Differences in Criminal Involvement, Arrests, Sentencing, and Time Served*, 34 J. QUANTITATIVE CRIMINOLOGY 853, 854–67 (2018). This oversample was performed to more closely approximate the population of individuals interacting with law enforcement and potentially subject to custodial interrogations. People of color are overrepresented in various stages of the criminal justice system's process. *See, e.g.*, Cassia Spohn, *Race, Ethnicity, and Crime*, *in* THE OXFORD HANDBOOK OF CRIME AND CRIMINAL JUSTICE 321, 323 (Michael Tonry ed., 2011).

told the interrogee that they were under arrest before the questioning began;[177] the No Arrest scenarios reflected the original, real case's interrogation facts without any experimental manipulation.[178]

For example, the original (No Arrest) scenario based on *United States v. Melo*[179] was as follows, and the bracketed text appeared in the manipulated (Arrest) version of the scenario:

> In August 2017, Special Agent Alison Pauley of the FBI and Special Agent Michael Ryan of the United States Department of Homeland Security traveled to a man's home to request an interview with him regarding a November 2015 trip to the Azores (Portuguese islands). The man consented to an interview and invited the agents into his residence. [The officers put the man under arrest once they were inside the house.]
>
> [After that, d]uring the course of the interview, which the man's attorney participated in by phone, the officers asked questions about events including passing out envelopes to other passengers on the trip and to having carried an envelope on a particular flight.[180]

Like the first study, participants were randomly assigned to one of two conditions and read and responded to 5 interrogation scenarios in that condition—here, either 5 Arrest scenarios or 5 No Arrest scenarios.[181]

The first study did not involve an Arrest manipulation, so participants' freedom-to-leave scores were in response to only the original, no-arrest interrogation scenarios as seen in the courts' opinions, which allowed me to test the extent to which courts' reasonable-person freedom-to-leave analysis matched laypeople's perceptions of their freedom to leave. In contrast, this study's experimental Arrest manipulation allowed me to test a different, but still doctrinally-derived, prediction based on courts' functional arrest analysis of interrogation situations. If a court deemed, in discussing the facts of an actual case, that the defendant was in a custodial interrogation, then they were, by definition, considered to be functionally arrested. So, if laypeople agree with

177. This sometimes required the removal of facts like the police officer telling the person they were not under arrest.

178. See Clatch, *Data & Code*, *supra* note 93, for a bar graph showing that, as would be expected, adding a formal arrest to the interrogation scenarios resulted in decreased perceptions of laypeople's freedom to leave—reflected by the fact that the black Arrest bars are below the gray No Arrest bars. After conducting a mixed-effects regression, this main effect of the Arrest manipulation was statistically significant (B = -15.19, SE = 1.65, p < .001). *See id.*

179. 954 F.3d 334 (1st Cir. 2020).

180. *Id.* at 338–39.

181. See Clatch, *Data & Code*, *supra* note 93, for the details of case selection and excerpt editing and manipulation.

courts, then laypeople should feel functionally arrested by interrogations that courts have determined to be custodial but should not feel functionally arrested by interrogations that courts have determined to be noncustodial.

Accordingly, there are two doctrinally-derived predictions that can be made based on the experimental addition of Arrest facts to the scenarios. First, in custodial interrogations—because those interrogations, by definition, reflect functional arrests—the Arrest manipulation (i.e., having officers tell questionees that they are under arrest) should not drastically change laypeople's sense of freedom in those situations.[182] Even without the Arrest language, the questionees are functionally arrested, so the addition of a formal arrest simply reinforces the custodial nature of the situation. This means that participants reading custodial interrogation scenarios involving a formal arrest should only report slightly lower freedom-to-leave scores than participants reading the original (No Arrest) custodial scenarios. Put simply, participants' freedom-to-leave scores for custodial scenarios should largely overlap for the Arrest or No Arrest scenario versions.

The second prediction pertains to noncustodial interrogations. Because those interrogations did *not* functionally arrest the defendant according to the courts, the Arrest manipulation (i.e., having officers tell questionees that they are under arrest) *should* substantially change laypeople's sense of freedom in those situations. Without the Arrest language, the questionees presumably feel considerably more freedom, so the addition of a formal arrest should drastically change the nature of the interrogation situation. This means that participants reading noncustodial interrogation scenarios involving a formal arrest should report much lower freedom-to-leave scores than participants reading the original (No Arrest) noncustodial scenarios. Again, thinking in terms of overlap, participants' freedom-to-leave scores for noncustodial scenarios should not be substantially overlapping for the Arrest or No Arrest scenario versions.

The results reveal evidence to support these two hypotheses as well as offer some surprising nuance. First, however, consistent with the first study's findings, it was clear that participants responding to the 20 real-world (i.e., No Arrest) interrogation scenarios generally felt very little freedom to leave: the

182. Freedom to leave is the best measure of functional arrest because lack of freedom to leave is, based on doctrine, clearly necessary for a determination of functional arrest. *See* discussion *supra* Section III.A. Additionally, it is easily measurable across scenarios, whereas other determinants of functional arrest (e.g., number of officers, location of questioning) vary across scenarios.

most common score on the 0 (*not free at all*) to 100 (*extremely free*) scale was a rating of freedom to leave somewhere between 0 and 5.[183]

Returning to the doctrine-based findings, in custodial interrogations—interrogations that by doctrinal definition reflect functional arrests—the average freedom-to-leave score for the original, No Arrest scenarios was 22.1 on the scale of 0 (*not free at all*) to 100 (*extremely free*); whereas, for the manipulated, Arrest scenarios, the average score was 14.1.[184] Because participants were reading closely and paying attention,[185] it is not surprising that reading that the officer told the interrogee that they were under arrest prior to questioning (vs. not being told they were under arrest) decreased participants' freedom-to-leave scores. But the two averages, with less than a 10-point difference, are notably fairly close to each other.[186]

The closeness of this study's custodial interrogations' averages is especially notable in the context of their comparison to the noncustodial interrogations' averages. In this study's noncustodial interrogations—interrogations that, by doctrinal definition, do not reflect functional arrests—the average freedom-to-leave score for the original, No Arrest scenarios was 37.0, whereas for the manipulated, Arrest scenarios, the average score was 16.7.[187] So the 20-point difference between the noncustodial means is double the difference between the

183. Reading the real, No Arrest interrogation scenarios, 35% of participants had ratings between 5 and 1 on the 0–100 scale, and 27% had ratings of 0. *See* Clatch, *Data & Code*, *supra* note 93. And when participants were responding to the binary question (*yes free to leave* versus *no not free to leave*) after reading the real, No Arrest interrogation scenarios, 67.5% of the time they reported that they would not feel free to leave the interrogation (812 of 1203 total observations). See *id.* for further details.

184. The median freedom-to-leave score for the original, No Arrest custodial scenarios was 9.5 and for the manipulated, Arrest scenarios was 1. *See id.* The difference between the medians and averages highlights the fact that the participants' freedom-to-leave scores were skewed (most responses were low on the 0–100 scale) rather than normally distributed (with most responses being in the middle of the 0–100 scale). This skewness is unsurprising given that participants were asked for their reactions to custodial interrogation situations. Medians and averages are simply two measures of central tendency that offer slightly different information.

185. *See id.* (Over 97% of participants answered the manipulation check correctly, and all observations included in the final dataset (like in Study 1) were associated with either a correct answer to the manipulation check or the comprehension check for the scenario at issue.).

186. The medians are also close together. *See supra* note 184.

187. The median freedom-to-leave score for the original, No Arrest noncustodial scenarios was 25.0 and for the manipulated, Arrest scenarios was 3. *See* Clatch, *Data & Code*, *supra* note 93. Again, the difference between the medians and averages highlights the fact that the participants' freedom-to-leave scores were skewed rather than normally distributed. This skewness is relatively unsurprising given that participants were asked for their reactions to police interrogation situations, which relative to other situations in life (or even other questioning situations), constrain one's sense of freedom to leave.

custodial means.[188] This is basic, descriptive evidence of the doctrine-derived hypotheses and suggests that participants feel more functionally arrested in custodial scenarios than in noncustodial scenarios.[189]

However, this finding obscures an important nuance. Simply because custodial interrogations functionally arrest people more than noncustodial interrogations does not necessarily mean that noncustodial interrogations are not *also* functionally arresting people. Put another way, people could still feel functionally arrested even in the original, no-arrest interrogations that courts deemed noncustodial.

To best understand the full scope of the difference between custodial and noncustodial interrogations, it is important to consider the full range of participant responses rather than focusing exclusively on a single value, such as an average or median. Figure 3 depicts participants' freedom-to-leave scores based on custody holding and Arrest condition, and helps determine the extent to which people felt functionally arrested by custodial and noncustodial interrogation scenarios.

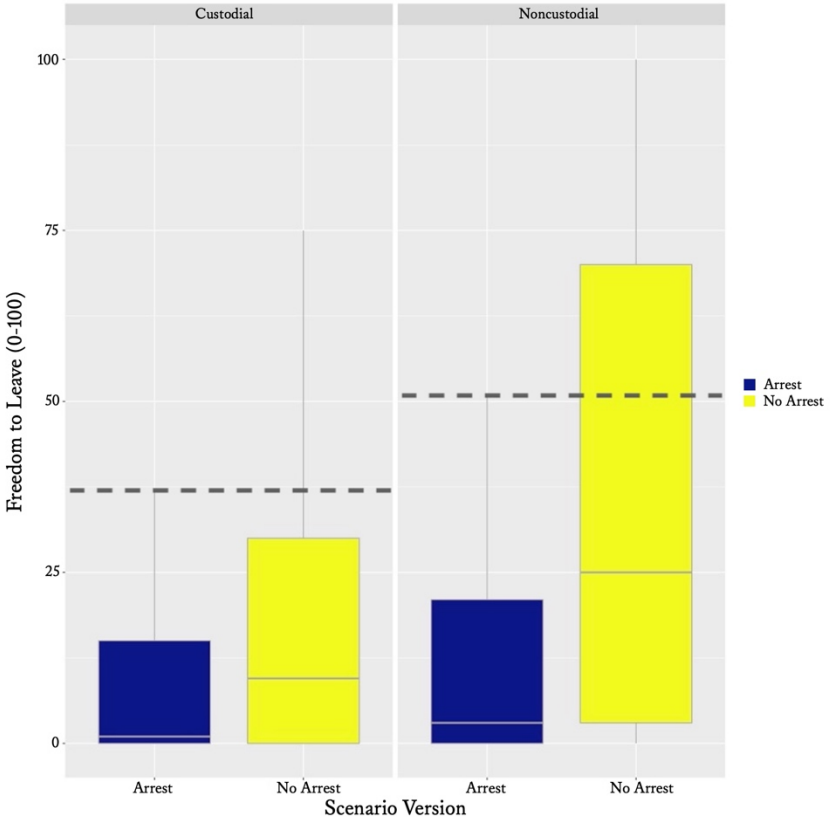
The plot in Figure 3 shows participants' freedom-to-leave responses along the 100-point scale based on whether they were reading custodial or noncustodial scenarios and whether they were randomly assigned to read only the manipulated, Arrest scenarios or only the original, No Arrest scenarios. The dark blue boxplots represent freedom-to-leave scores from participants assigned to the Arrest condition, and the boxplots representing responses from participants in the No Arrest condition appear in yellow. The left two boxplots show participants' responses to custodial scenarios, and the right two show the same for noncustodial scenarios. As is characteristic of box-and-whisker plots, the box and whisker lines extending from each box encompass all nonextreme values.[190]

188. The difference in the medians of the custodial (Arrest and No Arrest) scenarios was also half that of the difference in the medians of the noncustodial (Arrest and No Arrest) scenarios. *See id.*

189. And inferential statistics confirm this descriptive pattern. After conducting a mixed-effects regression, the two-way interaction of the Arrest manipulation and court's custody holding was statistically significant ($B = 12.85$, $SE = 2.30$, $p < .001$). *See id.*

190. The box represents the middle 50% of the distribution of values, with the middle line representing the median. Whiskers are calculated as one-and-a-half times the size of the box, or one-and-a-half times the interquartile range.

Figure 3. Evidence of Functional Arrest by Custody Holding



The most important takeaway from Figure 3 is that there is considerable overlap between the Arrest and No Arrest box-and-whisker shapes regardless of courts' custody holding.

Horizontal gray, dotted lines depict the degree of overlap of participants' freedom-to-leave ratings between the custodial and noncustodial scenarios' two versions: the original, No Arrest version and the manipulated, Arrest version. The gray, dotted line on the left is at 37.5 on the 0-to-100 scale, and that threshold encompasses 86% of participants' responses to the Arrest versions of the custodial scenarios and 77% of participants' responses to the No Arrest versions of the custodial scenarios. The gray, dotted line on the right is at 52.5 on the 0-to-100 scale, and that threshold encompasses 89% of participants' responses to the Arrest versions of the noncustodial scenarios and 67% of participant responses to the No Arrest versions of the noncustodial scenarios.

The last percentage bears repeating. Noncustodial interrogations are situations where we would expect the *least* overlap between the Arrest and No Arrest conditions—because they are interrogations that, by doctrinal definition, do not amount to functional arrests. Yet, 67% of the times that participants read the original, unmanipulated, noncustodial interrogation scenarios, they reported freedom-to-leave ratings in line with participants' ratings of the Arrest versions of those scenarios. So, most of the time, participants' freedom-to-leave scores in response to the original noncustodial scenarios matched participants' scores in response to the Arrest versions of those scenarios. This indicates that most participants felt functionally arrested even by interrogations that courts deemed noncustodial.

This finding is particularly striking considering that this survey study offers a conservative estimate of the real-world effect of interrogation situations on members of the public. Specifically, the study's interrogation scenarios were read, not video recorded or even physically experienced, by participants. Thus, the power of real-world interrogations to functionally arrest interrogees is likely much stronger than the effect captured in this study. In fact, supporting this idea that survey responses are an underestimate of the true effect on real-world interrogees, participants who reported that they have interacted many times with police officers in their lives perceived the study's interrogation scenarios as *especially* akin to functional arrest.[191]

Taken together, the two studies demonstrate that across a wide variety of interrogation situations, most people do not feel free to leave *and* most people feel functionally arrested. Even in noncustodial interrogation situations for which courts conclude *Miranda* is inapplicable, participants felt functionally arrested in 67% of the scenarios. The first study's finding that most laypeople do not feel free to leave noncustodial interrogations was also replicated in this second study using a nationally representative American sample.[192] Next, Part IV develops the normative implications of two aspects of custody jurisprudence's status quo: the convoluted test language and the empirically uncovered gap between court and lay perceptions of psychological coercion in police interrogations. Part IV also proposes two changes to improve *Miranda*'s jurisprudence.

191. A mixed-effects regression using the noncustodial No Arrest data revealed that having experienced multiple interactions with on-duty officers resulted in significantly lower ratings of freedom to leave the scenarios relative to having once interacted with an on-duty officer ($B = 5.47$, $SE = 2.21$, $p < .05$) and relative to having never interacted with an on-duty officer ($B = 7.83$, $SE = 2.31$, $p < .001$). *See* Clatch, *Data & Code*, *supra* note 93

192. *See id.*

IV. RESHAPING THE CUSTODY TEST

This part offers normative conclusions for the previous two parts' descriptive claims. Specifically, Section A highlights that the current custody test lacks clarity and coherence, producing a variety of problematic practical effects including making constitutional civil rights unreachable. The practical effects of the doctrine's lack of clarity can be ameliorated by making a small change to the custody test's language. Specifically, Section B contends that returning to a pre-*Fields* single-prong custody test that does not include an explicit freedom-to-leave inquiry will solve many of the clarity and coherence issues. And Section C argues that, to address the gap between courts' and laypeople's perceptions of psychological coercion in police interrogations, the relevant social-scientific literatures should inform judges' custody analysis regardless of whether the content of the test changes. Both proposed additions would benefit the law by bringing custody doctrine more in line with rule-of-law principles.

A. *The Cost of the Status Quo*

Custody doctrine's status quo involves problems with the test's substance—namely, its lack of clarity and coherence—as well as the test's application. With an eye toward realistic, and incremental, progress in the law, understanding the specific problems with the status quo helps reveal particularized solutions rather than wholesale rejection or reinvention of the law on confessions. This section begins by describing the lack of clarity and coherence in the custody doctrine's content and then highlights that courts' application of *Miranda*'s custody requirement practically weakens *Miranda*'s impact and symbolically undermines the Fifth Amendment's protection against self-incrimination.

First, the custody test lacks clarity, causing confusion in the courts and uncertainty of outcomes. Even in the set of sample cases used in my studies, there is evidence that courts have difficulty deciding whether an interrogation is custodial.[193] There were two clear sources of difficulty. The first is that the doctrine itself is unclear, and the second is that the right outcome of applying the law to particular facts can be unclear. In *United States v. Streifel*,[194] for example, the appellate court highlighted that the district court got caught in the quagmire of the custody doctrine[195] and "mistakenly thought that the principal

193. *See* Kamisar, *Custodial*, *supra* note 26, at 335; *see also* Lunney, *supra* note 7, at 753 (calling it an "essential inquir[y]").

194. 781 F.2d 953 (1st Cir. 1986).

195. *See* discussion *supra* Sections I.C and III.A.

criterion" for *Miranda*'s custody requirement "was whether 'a reasonable person in Defendants' position would have believed he was not free to leave'" rather than whether the interrogation functionally arrested someone in defendant's shoes.[196]

And courts' confusion extends to the custody test's application of the law to facts. In *United States v. Griffin*,[197] another case example from this Article's interrogation scenarios, the Eighth Circuit noted that it undertook "an extended [custody] analysis for the reason that this case presents to us for the third time in as many years a situation where we must overrule a district court's ruling on the question of custody."[198] Admittedly, the custody question's standard of review is de novo,[199] so appellate courts are not encumbered by deference to any lower court's custody decision. But the rate at which the studies' appellate courts reversed the custody decisions of lower courts was markedly high. In the first sample of 24 cases, 50% of the custody decisions were reversals of the lower court, and in the second sample of cases, 40% were reversals.

Reversing custody decisions often requires vacating a criminal conviction and ordering a new trial, so these reversals are not made lightly. This reflects a concerning degree of inefficiency.[200] And reduced efficiency comes with reduced respect for law and legal process.[201] The uncertainty of cases also provides less coherent direction to advise police officers about when to issue

196. *Streifel*, 781 F.2d at 960.

197. 922 F.2d 1343 (8th Cir. 1990).

198. *Id.* at 1355.

199. *See, e.g.*, *Streifel*, 781 F.2d at 962; People v. Przysucha, No. 335272, 2017 WL 1190930, at *1 (Mich. Ct. App. Mar. 28, 2017); State v. Ybarra, 637 S.W.3d 644, 650 (Mo. Ct. App. 2021). *But see* United States v. Melo, 954 F.3d 334, 339 (1st Cir. 2020) ("When reviewing a district court's decision on a motion to suppress, we consider its 'conclusions of law de novo and its factual findings, including its credibility determinations, for clear error.' In the *Miranda* context especially, we are reluctant to disturb the district court's suppression decision, such that '[i]f any reasonable view of the evidence supports the denial of a motion to suppress, we will affirm the denial.'" (citations omitted)).

200. Appellate court reversals of district holdings in other settings have been documented to be lower than the rates here. *See, e.g.*, Joseph L. Smith, *Patterns and Consequences of Judicial Reversals: Theoretical Considerations and Data from a District Court*, 27 JUST. SYS. J. 1, 28, 36 tbl.1 (2006) (reporting in Table 1 an overall percentage of cases overturned was 28.2%).

201. Joshua M. Stewart, William Douglas Woody & Steven Pulos, *The Prevalence of False Confessions in Experimental Laboratory Simulations: A Meta-Analysis*, 36 BEHAV. SCIS. & L. 12, 12 (2018) (describing "primary costs" as false convictions and "secondary costs" as decreases in legal actors' credibility); William Douglas Woody, Krista D. Forrest & Joshua M. Stewart, *False Confessions: The Role of Police Deception in Interrogation and Jurors' Perceptions of the Techniques and Their Outcomes*, *in* CRIME: CAUSES, TYPES AND VICTIMS 1, 6 (A.E. Hasselm ed., 2011) (summarizing evidence of general public distrust and wasting defendant and taxpayer dollars).

Miranda warnings,[202] and "obscure[s] the very notion of a [Fifth Amendment] right" for all Americans.[203]

Furthermore, the custody test is duplicative, making it incoherent. As discussed in Part I, custody's two inquiries—the reasonable-suspect freedom-to-leave analysis and functional equivalence analysis—have been an integral part of the test since the 1980s. But it was not until 2012 that the two inquiries crystallized into a two-pronged test.

Fields's formalized two-pronged custody test makes it apparent that the two prongs are conceptually duplicative.[204] The first prong, assessing a reasonable suspect's perception of their freedom to leave the interrogation based on the objective circumstances of the interrogation, is conceptually duplicative with assessing the second prong, whether the environment is inherently coercive. Even if the court prefers the language referring to whether the environment functionally arrested the interrogee, this holds. It does not matter to which instantiation of the second prong a court cites; both prongs require a court to evaluate the interrogation environment for facts that constrain the interrogee's freedom. And, conceptually, both functional arrest as well as a *Miranda*-like environment with inherently coercive pressures involve more than constraint on an interrogee's freedom to simply leave. Exactly what the "more" is depends on the circumstances but could involve the interrogee's inability to terminate questioning[205] or the more general inability to exert control over any meaningful aspect of the situation.[206] This demonstrates that the reasonable-person freedom-to-leave prong is necessary but not sufficient to satisfy custody's second prong.[207]

202. *See* Garrett, *supra* note 60, at 65 (making a similar notice argument as applied to reasonableness doctrines in Fourth and Sixth Amendment caselaw as it relates to notice for police and defense attorneys).

203. *Id.* at 66.

204. *See* discussion *supra* Section III.A.2.

205. *See* People v. Przysucha, No. 335272, 2017 WL 1190930, at *3 (Mich. Ct. App. Mar. 28, 2017) ("Lieutenant Boyle made additional statements demonstrating that he, and not defendant, was the one in control of determining when the interview would be 'done.'"); *see also* Thompson v. Keohane, 516 U.S. 99, 112 (1995) (describing the full inquiry as whether "a reasonable person [would] have felt he or she was not at liberty to *terminate the interrogation* and leave" (emphasis added)).

206. The *Miranda* Court, for example, emphasized the appellants' indigent status, national and racial minority status, and mental and educational status, Miranda v. Arizona, 384 U.S. 436, 457 (1966), and used general phrases like "overbear the will," *id.* at 469, to signal a more holistic lack of freedom in the station house. And the court in *United States v. Acosta*, 363 F.3d 1141 (11th Cir. 2004) mentioned an interrogee's feeling of being at the "mercy of the police." *Id.* 1149–50.

207. A careful reader might also note that the first prong is explicitly objective, based on a reasonable person standard, whereas it is unclear whether inherently coercive pressures (and functional arrest) are analyzed using a subjective or objective standard. But the objectivity of the entirety of the

The circularity then becomes clear: per *Fields*, the first prong is necessary but not sufficient for finding an interrogation custodial, yet based on the doctrinal analysis offered in this Article, the first prong is also necessary but not sufficient to satisfy the second prong. So, it makes little sense to assess the first prong at all when the second prong's assessment covers the same ground as the first and is determinative of the custody question.

Take, for example, a case from the studies' sample cases, *State v. Maciel*.[208] The Supreme Court of Arizona ruled that a reasonable person would have concluded that their freedom of movement[209] was restrained when experiencing detention outside a vacant building but that the interrogation environment did not evince "inherently coercive pressures."[210] So, if the reasonable-suspect freedom-to-leave analysis answered the custody question, this suspect would have been in custody. But looking at the interrogation environment again, through the "inherently coercive" lens, the court is able to conclude the opposite—that this suspect was not in custody. What, then, is the purpose of a first prong that has its content reassessed in a second prong with a higher factual threshold?

The duplicative nature of the custody test may be a source of courts' confusion and a cause of appellate reversals. But the law's status quo does not only affect judges' ability to apply the custody rule. Most directly, it affects criminal defendants and the law enforcement officers involved in their interrogations. *Miranda* is civilians' best means of constitutional protection from interrogation tactics involving primarily psychological manipulation.[211] And when courts conclude that interrogations are noncustodial, they are

custody determination can be seen even before the test crystallized. Oregon v. Mathiason, 429 U.S. 492, 496–97 (1977) (Marshall, J., dissenting). And the Court in *Berkemer* referenced a "reasonable man in the suspect's position" when analyzing whether the driver "was subjected to restraints comparable to those associated with a formal arrest," that is, the second prong. Berkemer v. McCarthy, 468 U.S. 420, 441–42 (1984).

208. 375 P.3d 938 (Ariz. 2016).

209. The phrase "freedom of movement" is often used as a shorthand for the reasonable-person freedom-to-leave prong. *See, e.g.*, Howes v. Fields, 565 U.S. 499, 509 (detailing the first prong using phrases like "objective circumstances," "freedom of movement," "reasonable person," and "liberty to terminate the interrogation and leave").

210. *Maciel*, 375 P.3d at 942–44 (concluding that, because the interrogation did not occur in isolation or in a location unfamiliar to the interrogee, Maciel's curbside questioning did not present inherently coercive pressures comparable to the station house questioning in *Miranda*).

211. *See* discussion of voluntariness *supra* Section I.A. Finding an interrogation involuntary almost always requires more compulsion and manipulation than finding an interrogation custodial. *See* Slobogin, *Manipulation*, *supra* note 92, at 1164–66 (contextualizing judicial approaches to interrogations after *Miranda*).

holding *Miranda* inapplicable to those interrogation facts, narrowly construing the evinced psychological compulsion.

This narrow construction produces three interrelated practical effects. First, as a legal threshold, it requires *Miranda* warnings in fewer instances of police questioning. This is not necessarily inherently problematic because people may not desire or need the warnings in those instances. Second, however, this Article's studies have shown that courts' construction of psychological compulsion is narrower than laypeople's perception of psychological compulsion—undermining the assumption that people would not desire or need their warnings. So, courts' narrow construction of psychological coercion in custody doctrine leaves civilians feeling unable to leave the interrogation but without a clear idea of how they can terminate the questioning—because they did not receive their *Miranda* warnings. Accordingly, the doctrine requires people who do not feel free to physically leave a police interrogation to invoke their Fifth or Sixth Amendment rights without the reminder that *Miranda* warnings offer. This is an unrealistic expectation of people's gumption given that *Miranda* warnings were intended to empower people to invoke their rights in the first place.

The third practical effect of courts' narrow construction of interrogations' psychological compulsion is that it allows defendants' admissions and confessions made without *Miranda* warnings into evidence at trial. And confessions are powerful sources of evidence that judges and jurors believe are nearly irrefutable evidence of guilt,[212] which in turn impacts their trial decisions.[213] So because courts' construction of "custody" is narrower than laypeople's perception of psychological coercion, courts regulate police interrogation behavior less, leave interrogees unnotified of their rights, admit confessions into criminal trials, and enable more convictions based on that evidence.

212. *See* Woody et al., *supra* note 201, at 19–22 (describing empirical studies showing that jurors do not believe innocent people confess, and when jurors hear confession evidence, they are more likely to convict); *see* Saul M. Kassin, *False Confessions: How Can Psychology So Basic Be So Counterintuitive?*, 72 AM. PSYCH. 951, 956 (2017) (describing experimental research where even experienced judges that report believing a particular confession was involuntary, and said it did not affect their determination of guilt, were more likely to convict the confessor).

213. *See* William Douglas Woody & Krista D. Forrest, *Effects of False-Evidence Ploys and Expert Testimony on Jurors' Verdicts, Recommended Sentences, and Perceptions of Confession Evidence*, 27 BEHAV. SCIS. & L. 333, 334 (2009); Richard A. Leo & Brittany Liu, *What Do Potential Jurors Know About Police Interrogation Techniques and False Confessions?*, 27 BEHAV. SCIS. & L. 381, 381–82 (2009); Dayna M. Gomes, Douglas M. Stenstrom & Dustin P. Calvillo, *Examining the Judicial Decision to Substitute Credibility Instructions for Expert Testimony on Confessions*, 21 LEGAL & CRIMINOLOGICAL PSYCH. 319, 319 (2016).

In sum, courts' narrow construction of "custodial" undermines the original purposes of *Miranda* and weakens its regulatory power. Amidst the various context-specific exceptions that have "killed" *Miranda*,[214] this Article reveals that *Miranda* has been undermined by one of its foundational, triggering requirements. The narrowness of "custodial" interrogations may yet be, at least partially, rectified by a change to the test's language and an expansion of what courts consider when analyzing the psychological coercion of interrogations. The following sections propose changes to the custody test's language and application and describe the likely effects of those changes.

B. *The Small Change: A Hybrid Test*

The custody test's current formulation contains two, conceptually duplicative prongs. Without throwing the test out wholesale, there are three possible solutions for this duplication: (1) remove the reasonable-suspect freedom-to-leave prong, (2) remove the functional-equivalence prong, or (3) merge the two prongs into a single inquiry, removing the conceptually duplicative content. The first two options would functionally overrule the custody tests announced in *Berkemer* and *Beheler*, which is undesirable because that result undermines forty years of *Miranda* caselaw. This section argues that the custody test could be improved without upending precedent going back to the 1980s.

It is the conceptual overlap of freedom-to-leave and functional arrest that causes the duplication of analysis, not the reasonable-suspect lens. Accordingly, the test to determine whether an interrogation is custodial should turn on "whether a reasonable person in the suspect's position would believe himself to be deprived of his freedom of action to the degree associated with a formal arrest."[215]

This change has several benefits. First, it simplifies the test to a single prong focusing on the determinative analysis, which courts and police seemingly need.[216] Second, it removes the freedom-to-leave inquiry, which eliminates the explicit linguistic connection to Fourth Amendment seizure doctrine, potentially clarifying the distinction between the two bodies of

214. Friedman, *supra* note 2, at 22 (arguing that the *Patane* decision to allow the admission of fruits derived from unwarned statements is a prime example of the Court stealthily overruling *Miranda*).

215. People v. Taylor, 41 P.3d 681, 691 (Colo. 2002) (quoting People v. Polander, 41 P.3d 698, 705 (Colo. 2001)). For another example, see *United States v. Griffin*, 922 F.2d 1343, 1347 (8th Cir. 1990) ("If Griffin believed his freedom of action had been curtailed to a 'degree associated with formal arrest,' and that belief was reasonable from an objective viewpoint, then Griffin was being held in custody during the interrogation." (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam))).

216. *See* discussion *supra* Section IV.A.

constitutional criminal procedure doctrine.[217] Third, by retaining the test's reference to a reasonable suspect, the courts can maintain the objectivity offered by reasonable-person analysis. Fourth, the focus on functional arrest puts judges' assessments of interrogations' psychological compulsion at least *more* in line with laypeople's perceptions since fewer people felt functionally arrested than felt not free to physically leave the noncustodial questioning situations.[218]

In sum, the courts should clarify and simplify the custody test to focus on a reasonable suspect's belief about their functional arrest given the interrogation situation. This "small" change does not require overturning precedent and is associated with various benefits, including increased clarity and coherence and reduced confusion, as well as the possibility of fewer appellate reversals, resulting in increased efficiency and case finality. As will be discussed further in Section IV.D, it is far from a foregone conclusion that the proposed changes will drastically expand *Miranda*'s applicability. In fact, the small change of clarifying and simplifying the test, because it simply removes duplicative analysis, is unlikely to significantly impact outcomes. Incorporation of social-scientific knowledge, to be discussed next, may be another story.

C. *The Big Change: The Incorporation of Social-Scientific Knowledge into Courts' Custody Analysis*

This section argues that relevant social-scientific literatures should inform custody analysis regardless of whether the test's language is simplified. There are two broad ways in which relevant social-scientific literatures can inform courts' custody analysis. The first cluster of social-scientific findings, outlined in Section C.1, are useful because they "provide judges and juries with a general background or context" about the power of authority figures to elicit people's compliance.[219] This body of science offers useful context because it might broadly influence how judges expect reasonable suspects to act with police

217. Of course, courts would still be analyzing whether the interrogee's freedom to physically leave was restrained. That analysis would be performed on a more granular level within their multi-factored totality of circumstances tests rather than baked into the definition of custody. Jurisdictions have their own conceptually overlapping, but technically distinct, multi-factor tests for evaluating whether an interrogation is custodial. For example, the First Circuit's factors include "whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." United States v. Jones, 187 F.3d 210, 218 (1st Cir. 1999) (quotation marks and internal citations omitted). The physical restraint would be on the definitional level as that of custody.

218. *Compare* Section III.B's 49% of participants that felt functionally arrested by the noncustodial interrogations, *with* Section II.B's 81% of participants that felt not free to leave noncustodial interrogations (Study 1).

219. John Monahan & Laurens Walker, *Twenty-Five Years of Social Science in Law*, 35 LAW & HUM. BEHAV. 72, 77 (2011) [hereinafter Monahan & Walker, *Twenty-Five*].

interrogators. The Section C.2 describes how particular interrogation tactics cause false confessions, offering fact-specific red flags to judges and advocates.

As an initial matter, however, one might question why social-scientific knowledge should be referenced at all in courts' custody analysis. There are two main reasons. The first is that courts' custody analysis is particularly well suited to social-scientific insights. The second reason is that social-scientific knowledge has been found useful to legal decision-makers for over a century.[220]

Starting with what makes custody analysis particularly well-suited for social-scientific influence, all reasonable-person standards require legal decision-makers to implicitly assume how the average or typical person would act.[221] Objective,[222] social-scientific findings can be used to inform this implicit assumption.[223] Indeed, survey evidence from judges indicates that when they apply reasonable person standards, they do so with the "average" person in mind.[224] But who is this average person, and what characteristics do they have? Needless to say, judges often do not have the relevant objective empirical findings about how people think or act, so they are forced to guess.

For example, even in the test-crystallizing case of *Berkemer*,[225] the U.S. Supreme Court appeared to at least implicitly consider descriptive or empirical facts about human behavior in determining whether an interrogation was custodial.[226] The Court noted: "Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without

220. *Id.* at 73; Niels Petersen, *Avoiding the Common-Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication*, 11 INT'L J. CONST. L. 294, 294 (2013); *see* Monahan & Walker, *Twenty-Five*, *supra* note 219, at 75–79 (offering examples of the various areas of law influenced by social science including discrimination suits, tort law, and criminal law).

221. *See infra* notes 222–27.

222. The social-scientific findings of this Article's studies, or the studies summarized in this section, cannot be dismissed as reflecting an individual's subjective belief. Instead, like other social and cognitive sciences, the scientific findings summarized in this part reflect general empirical patterns of how humans tend to think and act. These types of empirical patterns are particularly useful for custody analysis because the legal test is objective, not subjective, and it explicitly queries the psychological impact of police interrogations.

223. *See* Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure—And Three Answers*, 2002 U. ILL. L. REV. 851, 855 (discussing balancing tests that are the hallmark of Fourth, Fifth, and Sixth Amendment cases); Tobia, *supra* note 93, at 738–41 (explaining various intuitive approaches to defining reasonableness); *see also supra* note 220 and accompanying text; *infra* notes 224–27 and accompanying text.

224. Fabiana Alceste & Saul M. Kassin, *Perceptions of Custody: Similarities and Disparities Among Police, Judges, Social Psychologists, and Laypeople*, 45 LAW & HUM. BEHAV. 197, 208 (2021) (reporting that nearly 65% of the respondents defined "reasonable person" as someone that is "average" or "ordinary").

225. *See* discussion *supra* Section I.C.1 (explaining *Berkemer*'s definition of custody).

226. *See* Meares, *supra* note 223, at 855 ("The Supreme Court, in deploying such [balancing test] analyses, often makes empirical statements.").

being told they might do so."[227] The use of "*few* motorists" highlights the Court's implicit descriptive claim about how typical, or most, motorists think and act in the face of an officer's directive to pull over.[228] And the Court relied on this descriptive assumption to conclude that "a traffic stop significantly curtails the 'freedom of action' of the driver."[229] Even if a court's descriptive assumption turns out to be empirically true, there is no guarantee that all judges assume the same thing to support the same conclusion about the same, or similar, facts. The use of social-scientific knowledge may stabilize and unify the doctrine by offering empirical baselines, removing, or at least minimizing, the need for individual judge's assumptions in custody analysis.

The second reason why social-scientific knowledge should be referenced in custody analysis is, essentially, that social-scientific insights have been utilized by legal decision-makers for a long time.[230] But social science's utility in legal decision-making is not uncontroversial.[231] To address all the concerns

227. Berkemer v. McCarty, 468 U.S. 420, 436 (1984).

228. Additionally, in *Fields*, the Court reasoned that a person "not physically restrained or threatened" who was "interviewed in a well-lit, average-sized conference room . . . would have felt free to terminate the interview and leave." Fields v. Howes, 565 U.S. 499, 515 (2012). The use of the word "would" indicated a descriptive claim, whereas "should" would indicate a purely prescriptive claim. Furthermore, although in the context of juvenile interrogees, rather than *all* interrogees, the U.S. Supreme Court has used social science to inform the custody analysis. *See* J.D.B. v. North Carolina, 564 U.S. 261, 279–81 (2011).

229. *Berkemer*, 468 U.S. at 436. "Freedom of action" is another way courts characterize the first prong. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 477 (1966) ("The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way."); People v. Taylor, 41 P.3d 681, 691 (Colo. 2002) (stating that an officer's "beliefs are only relevant to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action" (internal quotations omitted)).

230. Monahan & Walker, *Twenty-Five*, *supra* note 219, at 72 (noting that in 1985 "courts' reliance on social science was often confused and always contested" whereas "[n]ow, courts' reliance on social science is so common as to be unremarkable"). For at least a decade, the scholarly debate has shifted from whether to use empirical information to how best to incorporate it into legal decision-making. *Id.* at 80; Meares, *supra* note 223, at 855 ("[J]udges increasingly have suggested in opinions that they would *like* to see empirical work that is relevant to the issues presented to them—especially in the criminal procedure area."). And the scientific study of the criminal justice system may be particularly persuasive to the Justices. *See, e.g.*, Rachel E. Barkow, *Justice Sotomayor and Criminal Justice in the Real World*, 123 YALE L.J.F. 409, 412 (2014) (discussing how Justice Sotomayor appears to find "empirical studies" and a "deep knowledge of the criminal justice system" to be persuasive); Meares, *supra* note 223, at 870–71 (discussing *United States v. Leon*'s issue of an invalid search warrant and deterring police misconduct).

231. John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 LAW & HUM. BEHAV. 571, 574–75 (1991) (exemplifying two reasons why relying on social science could be detrimental); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 478 (1986); Stewart et al., *supra* note 201, at 13 (highlighting the common concern about battling experts that cite studies showing different results).

with such a marriage is beyond the scope of this Article. However, it is worth noting that many concerns about incorporating social-scientific knowledge into legal decision-making are assuaged when a body of scientific investigation has sufficiently matured, resulting in scientific consensus.[232] Although "scientific consensus" may be difficult to know or measure with certainty, the presence of systematic reviews and meta-analyses are key signals of such consensus.[233] And, luckily, the social science on confessions and police interrogations has such benchmarks of consensus.[234]

To date, however, courts and parties have largely ignored the bodies of social science that might productively inform custody determinations. This Article aims to pave the way for more integration of social science in courts' custody analysis. The following sections argue that the recent custody-specific studies, combined with the more general literatures on confession accuracy and compliance with authority figures, should inform custody determinations through advocate argument and expert testimony.[235]

The first section summarizes a body of findings encompassing custody-specific studies, people's compliance with authority figures generally, and how third-party observers blame people for complying with authority figures.

232. Daniel L. Rubinfeld & Joe S. Cecil, *Scientists as Experts Serving the Court*, 147 DAEDALUS 152, 153 (2018) (describing the time-honored methods of judges' evidentiary procedural techniques for ferreting out battling experts' disagreement and inconsistencies with scientific consensus). For a similar argument in the context of *Daubert* decisions, see Edward K. Cheng, *The Consensus Rule: A New Approach to Scientific Evidence*, 75 VAND. L. REV. 407, 407 (2022).

233. MeowLan Evelyn Chan & Richard D. Arvey, *Meta-Analysis and the Development of Knowledge*, 7 PERSPECTIVES PSYCH. SCI. 79, 80 (2012) (describing the benefits of meta-analyses and the limits of meta-analyses that are less troubling than other single, primary study methods).

234. *See, e.g.*, Stewart et al., *supra* note 201, at 23–24 (evaluating research findings and explaining that false-evidence ploys "have been implicated in the vast majority of documented police-induced false confessions"); Saul M. Kassin, Hayley M.D. Cleary, Gisli H. Gudjonsson, Richard A. Leo, Christian A. Meissner, Allison D. Redlich & Kyle C. Scherr, Police-Induced Confessions, 2.0: Risk Factors and Recommendations 34 (July 2023) (unpublished manuscript) [hereinafter Kassin et al., Police-Induced Confessions] (citing multiple studies that discuss the common use of minimization tactics by police) (on file with the North Carolina Law Review); Mary Catlin, David B. Wilson, Allison D. Redlich, Talley Bettens, Christian A. Meissner, Sujeeta Bhatt & Susan Brandon, *PROTOCOL: Interview and Interrogation Methods and Their Effects on True and False Confessions: An Update and Extensio*n, 19 CAMPBELL SYSTEMATIC REVS. 1, 4 (2023) (summarizing recent research findings related to interrogation techniques).

235. *See* Slobogin, *Manipulation*, *supra* note 92, at 1182–83; David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417, 421 (2014) (defining framework and diagnostic evidence as two different ways in which experts may inform factfinders using scientific evidence).

1. The Social-Scientific Context: How Authority Figures Constrain Free Choice

The scientific findings summarized in this section are useful because they "provide judges and juries with a general background or context"[236] to encourage a fuller appreciation of the extent to which people tend to comply with authority figures as well as the extent to which we blame people for doing so. This body of science might be especially useful to judges currently making implicit assumptions about how reasonable suspects act with police interrogators. This Article's empirical findings bolster recent realistic behavioral experiments where participants come into a laboratory and, partway through another task, are introduced to and questioned by an authority figure investigating some wrongdoing. These behavioral studies have demonstrated that, regardless of whether police are using questioning tactics legally understood as creating a noncustodial environment[237] or tactics acknowledged to create a custodial environment,[238] the person being questioned usually feels that they are not free to leave.[239] Yet most third-party judges that watched videos of the questioning situations believed the person being questioned in the noncustodial interview was free to leave.[240] So, watching someone else being questioned makes one assume the questionee feels more free than they actually do.

The particular strengths of these behavioral studies are that they involved a realistic assessment of how people actually behave in interrogation situations (not just how they say they would think, feel, or act) and that the questioning's degree of coerciveness was based on real-world interrogator training and tactics.[241] These studies, however, involved only a single, hypothetical theft situation. The studies presented in this Article, on the other hand, have different strengths. Specifically, the studies presented in this Article capture a diverse and largely randomly selected sample of 40 real interrogation situations

236. Monahan & Walker, *Twenty-Five*, *supra* note 219, at 77.

237. Fabiana Alceste, Timothy J. Luke & Saul M. Kassin, *Holding Yourself Captive: Perceptions of Custody During Interviews and Interrogations*, 7 J. APPLIED RSCH. MEMORY & COGNITION 387, 390 (2018) (asking participants open-ended questions in a space not dominated by police).

238. *Id.* at 390 (directly accusing participants of wrongdoing and asking close-ended questions in a police-dominated space).

239. *Id.* at 391 ("Overall, only 19 participants (31.7%) said that they were free to leave. Interestingly, the perception of non-freedom was the norm not only in the accusatory interrogation but also in the more neutral interview.").

240. *Id.* at 392 (summarizing the Observer beliefs).

241. *Id.* at 388 (acknowledging "context and manner in which police question a suspect"); *id.* at 390 (noting that the article's first author and researcher was certified in the Reid technique).

in which a court has ruled on the issue of custody.[242] Both this Article's survey studies and the behavioral experiments evaluated lay perceptions of compulsion as measured by their freedom to leave interrogations, and importantly, both studies agree on a foundational finding: most people being questioned by law enforcement[243] do not feel free to leave, regardless of the legal distinction between custodial and noncustodial situations.[244] The fact that methodologically very different studies produced the same basic finding adds confidence to the conclusion that people feel physically trapped in interrogation situations.

Moreover, these custodial-interrogation-specific studies are consistent with the more general literature on people's compliance with and obedience to authority figures.[245] In his well-known studies on obedience and compliance, Stanley Milgram sought to understand why people comply with authority figures who instruct them to physically harm others.[246] Milgram's finding of high levels of compliance in administering electric shocks has been replicated across many samples and in different countries.[247] Although Milgram's findings

242. By presenting written scenarios to participants, the studies also generalize to courts' decisions that are made based on a written record. Though recording interrogations is increasingly common, recording is much less common in situations where officers do not Mirandize interrogees. Body-worn cameras may slowly change this. Regardless, it is a combined strength of the freedom-to-leave literature that it involves different modalities of presenting the interrogation situation. *See* Felicity Deamer, Emma Richardson, Nabanita Basu & Kate Haworth, *For the Record: Exploring Variability in Interpretations of Police Investigative Interviews*, 9 LANGUAGE & L. 25, 39 (2022) (finding that converting investigative interviews from video recordings to written records causes people to perceive the interviewee as less trustworthy, more agitated and defensive, and more likely to be lying).

243. And the participants in the behavioral study were only questioned by a security guard in plain clothes. Alceste et al., *supra* note 237, at 389.

244. *Id.*

245. Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 1 POL'Y INSIGHTS FROM BEHAV. & BRAIN SCIS. 112, 115 (2014) (calling interrogation processes "Milgram-like").

246. Ludy T. Benjamin Jr. & Jeffry A. Simpson, *The Power of the Situation: The Impact of Milgram's Obedience Studies on Personality and Social Psychology*, 64 AM. PSYCH. 12, 13 (2009); *see* Robin Martin & Miles Hewstone, *Social-Influence Processes of Control and Change: Conformity, Obedience to Authority, and Innovation*, *in* THE SAGE HANDBOOK OF SOCIAL PSYCHOLOGY 347, 349–51 (Michael A. Hogg & Joel Cooper eds., 2003). For responses to recent validity critiques of the studies, see generally John M. Doris, Laura Niemi & Edouard Machery, *True Believers: The Incredulity Hypothesis and the Enduring Legacy of the Obedience Experiments*, 28 PHILOSOPHIA SCIENCIÆ 53 (2024) (refuting the claim that Milgram's findings can be explained away by the Incredulity Hypothesis); Kudret E. Yavuz & Sultan Tarlaci, *Neurobiology of the Milgram Obedience Experiment*, 2 J. NEUROPHILOSOPHY 204 (2023) (presenting a comprehensive overview of the neurobiology of the Milgram Obedience Experiment); Nestor Russell & Robert Gregory, *Are Milgram's Obedience Studies Internally Valid? Critique and Counter-Critique*, 9 OPEN J. SCIS. 54 (2021) (challenging criticisms of Milgram's obedience studies by arguing that the studies are internally valid); Emilie A. Casper, *A Novel Experimental Approach to Study Disobedience to Authority*, 11 SCI. REPS. 1 (2021) (presenting a novel approach to the study of disobedience to authority using Milgram-like paradigms).

247. *See* Martin & Hewstone, *supra* note 246, at 350.

involve an authority figure's instruction to cause another person harm[248]—not instruction to confess—they inform the custody issue because they demonstrate that people's tendency to comply with an authority figure's requests extend even to (a) physically harming another person and (b) non-law-enforcement authority figures.

Additionally, people who comply with authority have a different experience in the situation than outside observers assume. For example, John Harvey and colleagues, in replicating Milgram's shock experiments, found that participants who were asked to shock another person considered themselves less free to determine their own behavior and less responsible for their actions.[249] But when observers saw the shock-inducing participants' actions, the observers attributed more freedom of action to the actors and, accordingly, more responsibility for issuing the shocks.[250] Simply put, when it is you that is complying with an instruction, you complied because someone made you; but when you see another comply, it is because they chose to do so.[251] This finding is particularly relevant to custody determinations because third parties, judges, are assessing the extent to which another person, the defendant-interrogee, complied because law enforcement made them or because they chose to do so without being compelled to do so.[252] Together with the custody-specific findings that people do not feel free to leave and in fact feel functionally arrested by many interrogation scenarios, this finding suggests that judicial observers, regardless of whether anchoring on freedom-to-leave or functional-arrest analysis, will tend to blame confessions on defendants rather than interrogation tactics. But simply making judges aware of these scientific findings may help them critically assess this tendency in their own decision-making.

In sum, both the nascent custody-specific research and the well-established body of literature regarding how we comply with authority figures are relevant and applicable to courts' custody decisions and can be raised in both party briefs and through expert testimony.[253] Having social-scientific research as contextual information may increase judges' awareness of the general psychological

248. *See* Benjamin & Simpson, *supra* note 246, at 17.

249. John H. Harvey, Ben Harris & Richard D. Barnes, *Actor-Observer Differences in the Perceptions of Responsibility and Freedom*, 32 J. PERSONALITY & SOC. PSYCH. 22, 26–27 (1975).

250. *Id.*

251. This finding is an example of the "fundamental attribution error." *See* Alceste & Kassin, *supra* note 224, at 199.

252. *See* Alceste et al., *supra* note 237, at 394 ("This actor-observer difference casts serious doubt on the ability of observers—police, judges, juries, and appeals courts—to correctly judge the state of mind of suspects."); *see* discussion *supra* notes 236–44.

253. Slobogin, *Manipulation*, *supra* note 92, at 1182–83.

tendency to comply with authority and yet blame others for their "choice" to do so.

2. Interrogation Tactics That Elicit False Confessions

Different from the science generally relevant to the custody issue, this section summarizes scientific literature that pertains to particular interrogation tactics and their practical consequence—that they elicit self-incriminating statements. There are robust scientific findings that minimization tactics and false-evidence ploys cause false confessions, which offer fact-specific red flags to judges and advocates.

Why are false confessions relevant to the custody analysis? First, the reliability of a confession is always a relevant inquiry for a judge to make when deciding whether to admit evidence. Second, what better proof is there that a particular tactic is coercive than that the tactic causes *innocent* people to say that they are guilty? Because the false confessions literature shows which tactics lead even innocent people to confess, judges evaluating interrogations involving such tactics should be required to assess these scientific findings when determining whether the interrogation was custodial.

There are two primary areas of the false confessions literature that are particularly ripe to be used in cases where certain tactics arise: false-evidence ploys and minimization techniques. Different from the generally applicable science, these require particular factual triggers to be relevant to a case. These areas are ripe for use because the science has matured to the stage that meta-analyses (studies analyzing the reliability of false confession studies' findings) have confirmed that the effects are robust. This means that concerns about battling experts[254] are less controlling.

The first body of findings, verified by a meta-analysis, reveals that false-evidence ploys cause a significant increase in false confessions—that is, they make innocent people say they are guilty.[255] And, beyond being a part of a meta-analysis, a survey of eighty-seven confession experts revealed that this finding reflects a consensus of the scientific community.[256] A false-evidence ploy

254. *See, e.g.*, Lora M. Levett & Margaret Bull Kovera, *The Effectiveness of Opposing Expert Witnesses for Educating Jurors About Unreliable Expert Evidence*, 32 LAW & HUM. BEHAV. 363, 371 (2008) (discussing the phenomenon of battling experts that lead to legal decision-maker confusion).

255. Stewart et al., *supra* note 201, at 23–24; Kassin et al., Police-Induced Confessions, *supra* note 234, at 34–36; Catlin et al., *supra* note 234, at 4.

256. Saul M. Kassin, Allison D. Redlich, Fabiana Alceste & Timothy J. Luke, *On the General Acceptance of Confessions Research: Opinions of the Scientific Community*, 73 AM. PSYCH. 63, 72 (2018) [hereinafter Kassin et al., *General Acceptance*] (noting that 94% of the experts agreed that false evidence increases the risk of false confessions).

involves an officer's presentation of described or actual fabricated evidence to an interrogee.[257] A classic example of a false-evidence ploy is in *Mathiason*, where the interrogating officer told the defendant that police had his fingerprints at the scene of the burglary.[258] The U.S. Supreme Court in *Mathiason* deemed the officer's deception irrelevant to the custody analysis.

Deeming an objective interrogation fact, such as an interrogator's use of false evidence, irrelevant assumes that the interrogation fact does not impact the legal analysis at issue.[259] This is a false assumption for two reasons. First, although it is true that custody determinations do not grapple with confession reliability on their face, courts have long been concerned about tactics that evoke untrustworthy, unreliable confessions.[260] Second, even taking a formalistic stance—that unreliability of a confession may be relevant to the broader question of confession admissibility but not relevant to whether the interrogation situation functionally arrested the suspect—false evidence ploys are still relevant to assessing situational coercion.

Logically, when interrogators indicate that they have evidence of one's guilt, it communicates imminent formal arrest. As Justice Marshall argued, "the respondent could have [reasonably] believed [that his freedom to leave was significantly curtailed], after being told by the police that they thought he was involved in a burglary and that his fingerprints had been found at the scene."[261] Pushing Justice Marshall's logic a step further and couching it in modern functional-arrest language, with the imminence of formal arrest looming, interrogators essentially obtain functional control over an interrogee's movements, which is arguably paradigmatic of arrest's functional equivalent.[262]

Because of false-evidence ploys' conceptual relevance to interrogations' coerciveness—as well as the scientific evidence of their practical ill effect of

257. Stewart et al., *supra* note 201, at 23 n.3.

258. Oregon v. Mathiason, 429 U.S. 492, 495–96 (1977) (per curiam).

259. It is possible that judges may consider facts like an interrogator's use of false evidence *more* applicable to other inquiries, such as whether the questioning situation was an interrogation. However, deeming a fact relevant to the interrogation prong does not itself preclude the fact's relevance to the custody inquiry.

260. ISRAEL ET AL., *supra* note 10, at 401; Miranda v. Arizona, 384 U.S. 436, 455 n.24 (1966) ("[Custodial] interrogation procedures may even give rise to a false confession."); *id.* at 538–39 (White, J., dissenting) (discussing the reliability of confessions).

261. *Mathiason*, 429 U.S. at 496–97 (Marshall, J., dissenting).

262. This is consistent with Justice Marshall's reasoning in his *Mathiason* dissenting opinion. *See* discussion *supra* Section I.C.1. One might take issue with equating "functional" with imminent, arguing instead that "functional" indicates a *current* arrest-like constraint of the individual. My point is that the practical effect is the same: interrogators have control over an interrogee's freedom.

causing an increase in false confessions[263]—as an initial matter, parties and courts should acknowledge that false-evidence ploys are relevant to the custody inquiry. Jurisdictions open to using this body of science in their reasoning have two primary options. The first is to conclude that the use of false-evidence ploys makes an interrogation de facto coercive—in other words, makes it determinative of the custody issue.[264] The second option is to conclude that the ploys are relevant to the totality of the interrogation's circumstances, and weigh in favor of finding an interrogation custodial, but not necessarily determinative of the issue.

The de facto, determinative, use of false-evidence-ploy research has the benefit of sending a clear message to police officers that the use of false-evidence ploys inherently sullies confession evidence, which will more directly deter their use. Because jurisdictions have adopted their own versions of totality-of-the-circumstances nonexhaustive list of factors,[265] it may be difficult for judges to adapt the legal test in this manner without legislative action. But jurisdictions are always able to offer criminal defendants more protections than the floor-level of federal constitutional privileges. The second option, in contrast, to use false-evidence-ploy science as a weight in favor of finding an interrogation custodial, is completely in the realm of judicial power but can also be proscribed by particular legislatures. Evidence's reliability is always under the purview of judges, reliability has featured in confessions doctrine since the early days,[266] and the *Miranda* Court's carefully designed remedy, exclusion of confession evidence, is a prototypical remedy for unreliable evidence.[267]

Another factor identified to increase false confessions is the presence of "minimization" tactics,[268] but courts have not explicitly focused on these tactics.

263. Future experimental research should explicitly manipulate false evidence to demonstrate that it influences interrogees' perceptions of their freedom to leave in addition to evoking (false) confessions. This prediction makes logical sense since falsely confessing likely requires more pressure than simply feeling temporarily detained, but it should be experimentally demonstrated to close the inferential gap.

264. *See* Kassin et al., Police-Induced Confessions, *supra* note 234, at 21–33.

265. *See* discussion *supra* note 217.

266. *See* Slobogin, *Manipulation*, *supra* note 92, at 1180 (arguing false confessions can be challenged on their probative value as a separate evidentiary matter); ISRAEL ET AL., *supra* note 10, at 401 (describing the "untrustworthiness" rationale to excluding confessions); Miranda v. Arizona, 384 U.S. 436, 455 n.24 (1966) ("[Custodial] interrogation procedures may even give rise to a false confession.").

267. FED. R. EVID. 401, 403 (defining evidence relevance based on the probability of making a consequential fact more or less likely to be true and exclusion of even probative evidence if outweighed by an identified danger).

268. *See* discussion *supra* Section I.B.

By offering interrogees justifications for the offense, suggesting leniency,[269] both true and false confessions increase.[270] Importantly, however, false confessions increase *more* than true confessions, which means using this tactic affects innocent suspects (causing them to falsely confess) more than it affects guilty suspects (causing them to honestly confess).[271] So, confessions evoked through the use of minimization tactics are even more ripe for attacks on reliability grounds, which could result in outright exclusion of a confession.[272] Defense attorneys should raise the issue with particular evidence of police interrogations' explicit and implicit suggestions of leniency, and courts should carefully scrutinize those facts. When interrogators explicitly use minimization tactics, legal professionals can be especially persuasive on this point by combining the minimization-tactics literature with the legal precedent generally excluding confessions elicited through explicit promises of lenience.[273]

Moreover, minimization tactics should be factored into courts' custody analysis even when the leniency is implicit. When implicit, these tactics seem "benign at first glance, yet hidden beneath the harmless exterior is a veritable army of coercion, manipulation, and persuasion."[274] For example, suspects intuitively know that answering interrogators' questions to the interrogators' satisfaction will end the questioning session and allow them to go home, and sometimes suspects are even told so explicitly.[275] So, the implicit message is one of *quid pro quo*: a statement about something that happened in exchange for the suspect's release at the conclusion of questioning. And because courts assess all police statements under the totality-of-the-objective-circumstances standard,

269. Horgan et al., *supra* note, at 67 (2012); Timothy J. Luke & Fabiana Alceste, *The Mechanisms of Minimization: How Interrogation Tactics Suggest Lenient Sentencing Through Pragmatic Implication*, 44 LAW & HUM. BEHAV. 266, 267–68 (2020).

270. Melissa B. Russano, Christian A. Meissner, Fadia M. Narchet & Saul M. Kassin, *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCH. SCI. 481, 484–85 (2005).

271. This finding, too, has been subjected to meta-analytic review, confirming its robustness. Catlin et al., *supra* note 234, at 4. And there is consensus, reflected by 91% of experts agreeing on the impact of these tactics. Kassin et al., *General Acceptance*, *supra* note 256, at 72.

272. *See* Slobogin, *Manipulation*, *supra* note 92, at 1168–70 (arguing that statements that implicitly or explicitly condition better legal treatment on a confession should be considered coercive under the Fifth Amendment and thus require exclusion of the confession).

273. *See id.* at 1170 (citing a string of pre- and post-*Miranda* Supreme Court cases).

274. Laura Fallon & Brent Snook, *Minimization, the Trojan Horse of Interviewing? Measuring Perceptions of Witness Interviewing Strategies*, 48 CRIM. JUST. & BEHAV. 1805, 1820–21 (2021).

275. *See, e.g.*, People v. Przysucha, 2017 WL 1190930, at *3–4 (Mich. Ct. App. Mar. 28, 2017) ("Lieutenant Boyle also stated, 'I told you you're leaving here, and I'm a man of my word. I mean it. But I'm not going to let you go out there all depressed and worried about yourself.' He also stated, 'I told you you're going to be able to leave here and that you're not going to jail. I told you that. But I can't let you sit by yourself at home.'").

scrutinizing the implied leniency of officer statements can seamlessly be added into custody analysis.[276]

In sum, based on the current body of science on false confessions, parties and judges should begin citing false-evidence-ploy and minimization-tactic research, which are tactics that are still commonly used by interrogators.[277] The next section describes the anticipated effects of simplifying the custody test's language and including social-scientific knowledge in courts' custody analysis.

D. *Likely Effects of These Changes*

The combination of adopting a reasonable-person functionally-arrested test for custody and incorporating objective social-scientific findings into custody analysis is likely to produce nuanced effects. If the changes proposed herein were adopted, it may result in an expansion of judges' definitions of psychological coercion, which unless tempered by additional police-friendly prescriptive considerations, would extend *Miranda*'s applicability to more interrogations.

Removing the freedom-to-leave standard from consideration might, on its face, seem to be heightening the custody standard. But as described in Part III, whether the suspect was functionally arrested has been the operative and determinative part of the custody test since the 1980s, making it possible that there is little to no effect of the language change. And since the social-scientific literature on confessions indicates that judges, and other third-party observers, take a particularly narrow view of psychological coercion, incorporating that literature may effectively lower the functionally-arrested custody threshold. Whether the custody threshold will be lowered is not a foregone conclusion, however. Courts may conclude that the social-scientific literature demonstrates that particular interrogation tactics produce impermissibly heightened risk to a confession's reliability[278] or voluntariness[279] and thus exclude it on those grounds, rather than analyzing whether an interrogation situation functionally arrested the defendant. This would essentially circumvent a traditional *Miranda* custody analysis.

276. For example, jurisdictions often have an explicit but broad factor like "the nature of questioning" in their nonexhaustive list of factors that can be considered in the totality-of-the-circumstances standard. *See, e.g.*, United States v. Jones, 523 F.3d 1235, 1241 (10th Cir. 2008).

277. *See* discussion *supra* Section I.B.

278. *See* Slobogin, *Manipulation*, *supra* note 92, at 1177–82.

279. *Id.* at 1169–70 (highlighting pre- and post-*Miranda* Supreme Court caselaw consistent with the admonition against telling a suspect that a confession is the only way to avoid significant criminal liability or physical detention).

For parties and courts that choose to assess the custodial nature of an interrogation situation directly, the proposed changes in this Article would likely lead to an expansion of *Miranda*'s applicability tempered by any explicit normative, prescriptive considerations that courts may add to custody analysis.[280] Specifically, without the addition of normative, prescriptive considerations, incorporating the social-scientific findings into custody analysis will likely lower courts' threshold for what qualifies as functional arrest because it will broaden their understanding of how interrogations can compel self-incriminating statements. All the social-scientific findings point in the same direction. People comply with authority figures across various settings,[281] and during questioning they do not leave and they answer questions. And subtle aspects of interrogation situations can even elicit false confessions and make most suspects feel unable to leave.[282]

Incorporating social-scientific findings into custody analysis need not lower the custody threshold, however. The reasonable-person standard in law is not meant to solely capture how people actually think and act but also how they *should* think and act according to law.[283] As such, the reasonable-person aspect of the test may temper the lowering of the custody threshold by allowing courts an avenue for incorporating police-friendly prescriptive considerations into the custody analysis. This result would still improve custody doctrine because it would mean that courts must describe the contours of custody based on realistic, descriptive conclusions about when people are functionally arrested and then determine how other prescriptive considerations weigh in.[284] The key benefit of this is that it clarifies the legal nature of custody and offers an opportunity for fruitful discussion about the relationship between police, the courts, and civilians.[285]

It may be, for example, that despite the fact that most people do not feel free to leave and in fact feel functionally arrested in various police interrogation

280. Meares, *supra* note 223, at 871 ("[T]he use of empiricism will not inevitably favor one conclusion over another or one ideological predisposition over another.").

281. *See* discussion *supra* Section IV.C.3.

282. *See* discussion *supra* Sections IV.C.2–3.

283. *Cf.* George P. Fletcher, *The Nature and Function of Criminal Theory*, 88 CALIF. L. REV. 687, 689 (2000) (arguing all criminal law theory is humanistic rather than empirical). *See generally* Tobia, *supra* note 93 (arguing that empirical understanding of people's beliefs and behaviors often serve as an implicit basis for law and can inform and improve the law).

284. For a similar argument for Fourth and Sixth Amendment reasonableness doctrines, see Garrett, *supra* note 60, at 91, 113–17 (arguing for improving reasonableness by making more defined the standards and by including empirical evidence).

285. Tobia, *supra* note 93, at 781 (arguing that empirical jurisprudence methods assist scholars in answering two broad jurisprudential questions: "(i) [w]hat is the relationship between ordinary and legal concepts" and "(ii) [w]hat are the criteria of the legal concepts?").

settings, the courts nonetheless conclude that, as a normative matter, police *should* still be able to ask people questions without providing *Miranda* warnings.[286] That may well be, but the discussion is transformed into a more honest, transparent one about the normative considerations implicated in the various settings rather than being buried behind implicit descriptive conclusions about human behavior. Why should officers at traffic stops, for example, after asking for identification, not Mirandize people when they want to ask follow-up questions? What normative goals are satisfied by allowing this? What normative goals are deprioritized?[287]

The key benefit, which is really a cluster of interrelated benefits, of incorporating social-scientific findings into reasonable-suspect analysis can be seen by reference to rule-of-law principles. According to these, law ideally reflects publicity, clarity, coherence, and stability.[288] And incorporating the proposed changes would make custody caselaw better based on each of those ideals.

The custody test's publicity, clarity, coherence, and stability could all be improved. Specifically, the custody test's doctrine does not make the psychological compulsion required to trigger *Miranda* warnings plain to the public;[289] the quagmire of freedom-to-leave and functional-arrest language is unclear to courts and the public alike;[290] the test's duplicative prongs reduce coherence;[291] and the test's foundation being various judges' disparate assumptions of human behavior is likely to be unstable without reference to social-scientific consensus.

Simplifying the test and incorporating social-scientific findings ameliorates these woes. Focusing on the normative goals of requiring *Miranda*

286. This is an example of a court incorporating a police-friendly prescription into custody analysis.

287. Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 123 (1998) ("One cannot read the majority opinion in *Miranda* to describe anything other than a normative vision about the constitutional limits on a custodial interrogation."); Meares, *supra* note 223, at 869 ("Adjudication that expressly and openly discusses the normative judgement at the core of constitutional criminal procedure is transparent."). Similar discussion has occurred in the Fourth Amendment context. *See, e.g.*, Matthew Tokson, *The Normative Fourth Amendment*, 104 MINN. L. REV. 741, 743 (2019).

288. *See* LON L. FULLER, THE MORALITY OF LAW 21, 27–28 (1965); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 781–82 (1989); JOSEPH RAZ, *The Rule of Law and its Virtue*, *in* THE AUTHORITY OF LAW 210, 212–13 (1979). *See generally* John Tasioulas, *The Rule of Law*, *in* THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW 117, 117–18 (2019) (tracing interpretations of what good law aims to achieve); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985) (same).

289. *See* Meares, *supra* note 223, at 869 (discussing the express, open, and transparent discussion of courts' interpretive choices).

290. Clarity and transparency are often interconnected. *See id.*

291. *See* discussion *supra* Section IV.A.2.

warnings only in certain settings forces the custody test out from behind its impliedly descriptive mask, making its explanation more transparent and thus publicly accessible;[292] it makes the custody rule clearer and removes the logical flaw, boosting coherence; and it enables stability by reducing judicial discretion and assumption from the heart of the test. Thus, simplifying the test's language and incorporating descriptive, social-scientific findings into custody analysis would improve the law by aligning it more closely with rule of law principles with the added benefit that the law may be perceived as more credible.[293]

Furthermore, the democratic view of law, which is especially associated with criminal law, suggests that citizens should be allowed and able to provide democratic input into the system of law.[294] To the extent that custody caselaw is inconsistent with the majority of laypeople's perceptions of law enforcement's permissible use of psychological compulsion, a legal rule forced to make plain why that inconsistency is justified allows for greater democratic involvement because a community's normative concerns can be directly juxtaposed against the courts'.

In sum, it harms the law to allow custody doctrine to hide behind convoluted test language and the guise of descriptive assumptions of human behavior. Requiring judges to use social-scientific findings about laypeople's perceptions of freedom and functional arrest in police interrogations improves the law by tying it more closely to rule-of-law principles and making *Miranda*, an infamous icon of constitutional criminal procedure, more democratically accessible.

CONCLUSION

This Article identifies and tests the custody requirements' underlying concepts: the reasonable suspect's freedom to leave and the interrogation situation's functional equivalence to arrest. Both legal and empirical analysis reveal the gap between custody doctrine and people's experiences in police interrogations. In order to improve the doctrine, I recommend simplifying the custody test's language and incorporating social-scientific knowledge into custody analysis. If adopted, these recommendations will

292. Meares, *supra* note 223, at 858–59 (describing other scholars' dismissals of the utility of empiricism in criminal justice, which impliedly reason that hidden decision-making promotes law's legitimacy more than accuracy does).

293. *Id.* at 856 (contending that if courts use empirical data to back their empirical statements it would lend their decisions increased credibility and legitimacy); *see* Woody et al., *supra* note 201, at 6.

294. Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1565 (2017); *see, e.g.*, Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1367 (2017).

not wholly transform, but will enliven, *Miranda*'s protections and reinvigorate public discourse about the proper role of our federal constitutional privilege against self-incrimination.