APPLYING THE 'CUFFS: CONSISTENCY AND CLARITY IN A BRIGHT-LINE RULE FOR ARREST-LIKE RESTRAINTS UNDER *MIRANDA* CUSTODY

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INTRODUCTION

Consider the following hypothetical. Police officers conduct a lawful search of a house belonging to a suspected drug dealer. During the search, the police escort the suspect and two other occupants—a male and a female—outside. Officers place the suspect into the backseat of a police cruiser and then separate and handcuff the two occupants.

A few minutes later, a detective approaches the female occupant while she is still handcuffed and begins to question her. He assures her that she is not under arrest and that the restraints are only for safety. What starts off as an ordinary identification inquiry leads to more investigatory questions, and eventually, she makes an incriminating statement. While the female occupant is being questioned, another detective approaches the suspect, who is still in the backseat of the police cruiser, and begins to question him. Eventually, he, too, provides incriminating information.

After officers finish questioning the suspect and the female occupant, they release the male occupant from handcuffs. The police begin to ask him a few identification questions. Suddenly, the male occupant starts to pull something out of his pocket—presumably his driver's license to prove his identification—and the police draw their weapons. They order him to lie flat on the ground, and with their

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weapons still drawn, one of the officers pats him down while another asks if he has any weapons on him. The male occupant responds that his weapon is not on him and that it is back in the house.

At no time do the police read any of the three individuals their *Miranda* rights.[1] Are any of them considered to be in custody for purposes of *Miranda* at any time in the hypothetical? Many courts would vary on this analysis but would likely arrive at the same conclusion: all three individuals were in custody at the time of the questioning and therefore were entitled to *Miranda* rights. However, most of those courts would also find that the application of the handcuffs, the placement of the suspect into the backseat of the police cruiser, and the officers' drawing of weapons are not dispositive factors; instead, each is only one factor among several to consider in custody determinations.

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself . . . ."[2] It was not until *Miranda v. Arizona*, however, that the United States Supreme Court concluded that the Fifth Amendment privilege against self-incrimination is guaranteed outside of court proceedings and that procedural safeguards are necessary to protect this constitutional privilege during inherently coercive custodial interrogations.[3] The Court would later come to define "custodial interrogation"—discussed in greater length in Part I of this Note—as an "interrogation" of an individual who is taken into "custody."[4]

This Note will focus primarily on "custody," its development through the common law, and the particular coercive actions taken by law enforcement that are commonly associated with formal arrest—or arrest-like restraints. Courts have consistently held that arrest-like restraints, such as those described in the hypothetical, do not necessarily render a suspect in custody for purposes of *Miranda*.[5] This assertion is flawed in many respects and would strike a reasonable person as rather odd, not to mention that it is contrary to the

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1. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

2. U.S. CONST. amend. V.

3. *See Miranda*, 384 U.S. at 444, 467 ("[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.").

4. *See* Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980) (holding that "*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.").

5. *See infra* Part II.

purposes behind *Miranda*. If a suspect has been subjected to these or other arrest-like restraints, it is more likely that he or she is "in custody" for purposes of *Miranda*, yet an exception to the general rule may be available that still allows for the admissibility of his or her statements. It is also possible for a suspect to be taken out of custody if the arrest-like restraint has been removed prior to any questioning.

Part I of this Note explains the legal developments that led to the current test for custodial interrogation. The Court has come to distinguish custody and arrest, interpreting custody as being more than just the physical restraint on the freedom of movement associated with arrest and including the circumstances surrounding the interrogation.[6] Part II demonstrates how federal and state courts have applied, under various interpretations, the test for custody. Part III proposes a bright-line rule governing arrest-like restraints and explains how the current exceptions to *Miranda* remedy any issues posed by a bright-line rule, such as over- and under-inclusiveness.

I. INTRODUCTION TO CUSTODIAL INTERROGATION

Part I.A provides a brief overview of the decisions that have ultimately led to the current test for custody under *Miranda*. It is important to discuss Fourth Amendment jurisprudence,[7] as it plays a significant role in custody determinations. Acknowledging this importance, Part I.B discusses the development of certain cases in the Fourth Amendment context that have impacted Fifth Amendment jurisprudence, and it further stresses the important distinctions between custody in the Fifth and Fourth Amendment contexts.

A. Miranda and Its Progeny

The landmark decision of *Miranda v. Arizona*[8] represented the beginning of greater protection for the rights of suspects during police investigations. The decision stood for the proposition that the prosecution may not introduce statements made by a criminal defendant during a custodial interrogation unless the prosecution can demonstrate that procedural safeguards were employed to apprise the defendant of his rights prior to any questioning and that after

6. *See* Howes v. Fields, 132 S. Ct. 1181, 1189 (2012).

7. *See generally* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

8. *Miranda* was an aggregate decision of four separate cases, each one involving an individual who had been questioned by police after being deprived of his freedom of movement in a significant way without first being apprised of his rights. *See Miranda*, 384 U.S. at 444, 491-99.

such warning was given, the defendant made a knowing and intelligent waiver.[9] Chief Justice Warren, writing for the Court, explained that a suspect must be informed that he has the right to remain silent, that any statement he makes may be admissible in court, that he has the right to legal counsel both before and during questioning, and that the government will appoint him counsel if he cannot afford it.[10] The suspect must be afforded the opportunity to exercise any of these rights throughout the interrogation, and if he chooses to do so, the police must scrupulously honor his invocation.[11] The Court recognized that the modern practice of custodial interrogation could be psychologically coercive, rather than just physical, and the four cases before it in *Miranda* illustrated how such practice had the potential to elicit involuntary confessions.[12]

The Court also held that the Fifth Amendment privilege against self-incrimination applies to areas outside of court proceedings and extends to all settings where an individual's freedom of movement is curtailed in any significant way.[13] However, the Court failed to identify the circumstances in which an individual's freedom of movement is curtailed in a significant way. In the cases addressed in the *Miranda* decision, there was very little doubt that the individual defendants were in custody and that their incriminating statements had been the results of direct questioning.[14] The Court later elaborated in *Rhode Island v. Innis*, noting that *Miranda* warnings are required when an individual is taken into custody and is subjected to interrogation, or more specifically, "express questioning or its functional equivalent."[15] When analyzing whether interrogation has occurred, the Court will not only examine the express questioning, it will also examine whether the police should have known that their words and actions were reasonably likely to elicit an incriminating response from the defendant.[16]

In the years following the *Miranda* decision, custody in the Fifth Amendment context was presumed when a suspect's freedom to leave was restricted in any way.[17] In *California v. Beheler*, the Court nar-

9. *Id.* at 444, 479. The Court has further established that information unknown to a suspect has no bearing on whether he "knowingly" waived his *Miranda* rights, even if that information would have changed his decision to waive. *See* Moran v. Burbine, 475 U.S. 412, 422 (1986).

10. *See Miranda*, 384 U.S. at 467-70.

11. *See id.* at 444-45.

12. *See id.* at 448.

13. *Id.* at 467.

14. Leslie A. Lunney, *The Erosion of* Miranda*: Stare Decisis Consequences*, 48 CATH. U. L. REV. 727, 753-54, 768 (1999).

15. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980).

16. *Id.* at 301.

17. *See* Oregon v. Mathiason, 429 U.S. 492, 494-95 (1977).

rowly construed the test for custody as whether, under the totality of the circumstances, there had been "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[18] The rationale behind this decision was that every interview of a suspect by a police officer will naturally carry certain coercive aspects, "simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."[19] The Court alluded to the fact that this narrow test would not be the only focus when determining whether a suspect was in custody but that it would be the "ultimate inquiry."[20]

The Court modified the *Beheler* test for custody in *Thompson v. Keohane*, focusing on the added inquiry of whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave."[21] The Court reiterated that the "ultimate inquiry" still rested on that of the original *Beheler* test: whether freedom of movement had been restricted to the degree of formal arrest.[22]

Beheler remained the test for nearly three decades, and courts remained divided on what constituted "restraint on freedom of movement of the degree associated with a formal arrest."[23] In 2012, the Court reexamined the test for custody in *Howes v. Fields* and found that "custody" is simply a term of art used to specify the circumstances under which the danger of coercion is likely to be present.[24] *Howes* involved Randall Fields, a prisoner who was serving a sentence in a Michigan jail and who was believed to have engaged in sexual conduct with a child before he came to prison.[25] Police interviewed Fields in a conference room where they told him he was free to leave and return to his cell; they did not restrain him, and although the police were armed, weapons were never drawn.[26] Fields confessed during the interview after being confronted with the allegations.[27]

Justice Alito, writing for the majority, expressed that the *Keohane* inquiry of whether a reasonable person would have felt free to leave

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18. California v. Beheler, 463 U.S. 1121, 1125 (1983) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)).

19. *Id.* at 1124.

20. *Id.* at 1125.

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

22. *Id.*

23. *Beheler*, 463 U.S. at 1125 (quoting *Mathiason*, 429 U.S. at 495) (internal quotation marks omitted).

24. Howes v. Fields, 132 S. Ct. 1181, 1189 (2012).

25. *Id.* at 1185.

26. *Id.* at 1186.

27. *Id.*

is the initial step for determining whether a person is in custody.[28] This requires a court to examine the circumstances surrounding the interrogation, considering all relevant factors, such as location, duration, the use of physical restraints, whether the suspect was permitted to leave after questioning, and the statements made during the interview.[29] The Court explained that not all restrictions on the freedom of movement would amount to custody.[30] In fact, restraint on freedom of movement "identifies only a necessary and not a sufficient condition for *Miranda* custody."[31] It is the restraint on freedom of movement coupled with the same inherently coercive pressures as the type of station-house questioning present in *Miranda* that amounts to Fifth Amendment custody.[32]

It is not certain how much the *Howes* test for custody will impact the overall analyses of both federal and state courts in determining custody. However, the underlying rationale established in *Howes*—that restriction on the freedom of movement is a necessary, but not a sufficient, factor, and that the overall coerciveness of the interrogation is the main focus—only strengthens the argument for finding custody in almost every case where arrest-like restraints are present.

B. Terry Stops and Fourth Amendment Jurisprudence

Fourth Amendment jurisprudence has been vastly intertwined with *Miranda* and Fifth Amendment jurisprudence. Unsurprisingly, only two years after the Warren Court decided *Miranda* and shifted the scales in favor of protecting the rights of suspects, the Court delivered another landmark decision in *Terry v. Ohio*, shifting the scales back in favor of crime control.[33] In *Terry*, the Court held that where a police officer has a reasonable and articulable suspicion that criminal activity is occurring in his presence, it is reasonable for him to stop and temporarily detain the suspect until his suspicion has been dispelled.[34] *Terry* also provided that an officer who reasonably believes that a suspect is armed and dangerous may conduct a limited search, or "frisk," of the suspect's outer garments for the purpose of confiscating any weapons that may be used to harm him or others.[35] Both the "stop"—a warrantless seizure—and the "frisk"—a

28. *Id.* at 1189.

29. *Id.*

30. *Id.*

31. *Id.* at 1190 (quoting Maryland v. Shatzer, 559 U.S. 98, 112 (2010)) (internal quotation marks omitted).

32. *See id.* at 1189-90.

33. 392 U.S. 1 (1968).

34. *Id.* at 30.

35. *Id.*

warrantless search—are deemed reasonable under the Fourth Amendment.[36] The holding in *Terry* struck a balance between the competing interests of individual Fourth Amendment liberties and effective crime prevention and public safety.[37]

The Court expanded the *Terry* doctrine to traffic stops in *Berkemer v. McCarty*.[38] Justice Marshall, writing for the majority, explained that an ordinary traffic stop was different from a stationhouse interrogation in many respects, particularly duration and intimidation.[39] *Berkermer* began to draw some of the most important distinctions between Fourth and Fifth Amendment jurisprudence. Although a motorist's freedom of movement is curtailed during a traffic stop, the atmosphere surrounding the stop is much less coercive than the kinds of interrogation at issue in *Miranda*.[40] The motorist in a traffic stop has been "seized" of his person for purposes of the Fourth Amendment; however, he is not in custody for purposes of *Miranda*.[41] This is not to say that a traffic stop cannot elevate into a custodial stop, which would warrant full protections to the motorist under *Miranda*.[42] *Berkemer* led to the expansion of *Terry*, which some courts have come to interpret as standing for the proposition that *Miranda* warnings are almost never required to be given during an investigatory stop,[43] further contributing to the confusion over when a suspect is considered to be in custody.

The Court's decision in *Howes* aptly pointed out the significant difference between custody in the Fourth Amendment context and custody in the *Miranda* context.[44] The Court recognized that *Berkemer* declined to extend the protections of *Miranda* to routine traffic stops because the detention was nonthreatening, relatively brief, and unlikely to raise the same concerns regarding coerciveness present in *Miranda*.[45] It is this subtle difference that weighs so heavily in favor of courts finding *Miranda* custody when a suspect is subjected to arrest-like restraints. *Keohane* modified the *Beheler* test, adding the additional inquiry of whether a reasonable person would have felt free to leave.[46] *Howes* took a less formalistic approach by introducing

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36. *See id.* at 30-31.

37. *Id.* at 22-24.

38. 468 U.S. 420, 439-40 (1984).

39. *Id.* at 437-38.

40. *See id.* at 438-39.

41. *See id.* at 436-37, 441.

42. *See id.* at 440.

43. *See* Katherine M. Swift, *Drawing a Line Between* Terry *and* Miranda*: The Degree and Duration of Restraint*, 73 U. CHI. L. REV. 1075, 1083-84 (2006).

44. *See* Howes v. Fields, 132 S. Ct. 1181, 1190 (2012).

45. *See id.* at 1189-90.

46. *See* Thompson v. Keohane, 516 U.S. 99, 112 (1995).

a more subjective analysis with relevant factors that take into account the circumstances surrounding the actual interrogation.[47] It is unlikely that a driver or passenger would feel free to leave during a traffic stop, for doing so would be a crime.[48] Freedom of movement is restrained significantly during traffic stops—regardless of whether arrest-like restraints are present—but given the inherent coerciveness associated with arrest-like restraints, the degree of intimidation is substantially higher when they are present.

It is not to say that the use of arrest-like restraints during a lawful *Terry* stop would be unreasonable; nor would a bright-line rule establishing custody where arrest-like restraints are employed make such actions impermissible in the *Miranda* context.[49] To the contrary, the courts have time and again affirmed the use of reasonable force during an investigatory stop.[50] It is the potential for coercion when such actions are taken during interrogation that raises serious concerns.[51]

II. VARIOUS INTERPRETATIONS OF CUSTODY AND ITS APPLICATION TO ARREST-LIKE RESTRAINTS

This Part considers the various interpretations of *Miranda* custody as applied to arrest-like restraints across both federal and state jurisdictions. The vast majority of jurisdictions apply a "totality of the circumstances" test when considering whether a suspect is in custody. While many of those jurisdictions consider arrest-like restraints to be only one of several factors in determining whether a suspect is in custody, it is one that often weighs heavily in favor of finding custody.

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47. *See Howes*, 132 S. Ct. at 1189.

48. *See id.* at 1190.

49. Courts require a considerable amount of coercion before finding that a lawful *Terry* stop has elevated into a "de facto" arrest. Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 416-17 (2001). Courts grant a significant amount of deference under *Terry*'s framework, often finding that handcuffing, drawing weapons, or placing suspects in the back of a cop car, even for extended periods, do not individually or collectively amount to a Fourth Amendment violation. *See id.* at 417.

50. *See, e.g.*, United States v. Merkley, 988 F.2d 1062 (10th Cir. 1993); United States v. Clipper, 973 F.2d 944 (D.C. Cir. 1992); United States v. Miller, 974 F.2d 953 (8th Cir. 1992); United States v. Lechuga, 925 F.2d 1035 (7th Cir. 1991); United States v. Hastamorir, 881 F.2d 1551 (11th Cir. 1989).

51. See Brooke Shapiro, *The Invisible Prison: Reconciling the Constitutional Doctrines of Coercive* Terry *Stops and* Miranda *Custody*, 26 J. CIV. RTS. & ECON. DEV. 479 (2012), for a more detailed analysis on how the constitutional doctrines of *Terry* and *Miranda* interact and present issues for courts on clearly articulating a definition of custody in both the Fourth and Fifth Amendment contexts.

A. Federal Courts

The federal courts have varied in their interpretations of custody as applied to cases involving arrest-like restraints since the Supreme Court's decision in *Beheler* and, even more recently, since its decision in *Howes*. The Fourth Circuit Court of Appeals briefly addressed whether subjecting a suspect to arrest-like restraints rises to the level of custody for purposes of *Miranda*.[52] *Leshuk* involved two men who were discovered to have been growing marijuana in a rural area in West Virginia.[53] Although arrest-like restraints were not employed, the court discussed in dicta that "drawing weapons, handcuffing a suspect, placing a suspect in a patrol car for questioning, or using or threatening to use force does not necessarily elevate a lawful stop into a custodial arrest for *Miranda* purposes."[54]

In *United States v. Kim*, the Ninth Circuit Court of Appeals affirmed a lower court's finding that custody was present where a suspect had been surrounded by police and questioned for an hour, despite the location of the questioning being her own business.[55] In *Kim*, Drug Enforcement Agency (DEA) investigators obtained evidence that the suspect, Insook Kim, was selling large quantities of pseudoephedrine, a primary chemical ingredient in the production of methamphetamine, from her store.[56] An investigator went to Kim's store and informed her of the consequences of her sales of large quantities of pseudoephedrine.[57] Eight months later, investigators set up a controlled purchase.[58] After Kim's employee sold to the undercover cop, police entered the premises with a search warrant and handcuffed Kim's son, who was managing the store.[59] Kim, who was at home at the time, drove to the store when she was unable to reach her son by phone.[60]

When Kim arrived, the police allowed her to enter the store but immediately sat her down and started questioning her.[61] Kim was never handcuffed but at least two officers sat or stood around her throughout the interview, which she claimed made her feel surrounded.[62] At no time during the interview was Kim read her *Miran-*

52. *See* United States v. Leshuk, 65 F.3d 1105 (4th Cir. 1995).

53. *Id.* at 1106.

54. *Id.* at 1109-10 (citing United States v. Moore, 817 F.2d 1105, 1108 (4th Cir. 1987); United States v. Manbeck, 744 F.2d 360, 377-80 (4th Cir. 1984)).

55. 292 F.3d 969, 971 (9th Cir. 2002).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 971-72.

62. *Id.* at 972.

da rights or told that she was free to leave.[63] Kim made several incriminating statements during the interview, which lasted close to an hour.[64] Kim was arrested and charged with possession and distribution of pseudoephedrine with knowledge and reasonable cause to believe that it would be used to manufacture methamphetamine.[65] The district court granted Kim's motion to suppress the statements made during the interview.[66]

On appeal, the Ninth Circuit analyzed custody under the modified *Beheler* test of whether Kim was subjected to "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest"[67] considering the objective circumstances of the interrogation and whether "a reasonable person would believe that he or she was not free to leave."[68] The court noted several factors that would likely be relevant in the analysis, such as " '(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual.' "[69] The court suggested that this list is not exclusive.[70]

The decision in *Kim* is unique to this Note because it is the only discussed decision in which the custody inquiry did not involve a traditional arrest-like restraint (e.g., handcuffs, being placed in the back of police car, weapons drawn). If the courts were to adopt this Note's proposed bright-line rule of presuming custody in cases involving arrest-like restraints, it might still be uncertain on which side of that bright-line rule *Kim* would fall. There are, perhaps, several other potentially coercive restraints that could be considered arrest-like. If an officer tells a suspect that he is under arrest and proceeds to interview him without applying any physical restraints or providing *Miranda* warnings, would the act of saying "you're under arrest" be considered an arrest-like restraint? It is likely that the result will be the same whether we determine that the suspect was subjected to arrest-like restraints and apply the proposed bright-line rule, or whether we analyze it under any of the totality of the circumstances tests. Hypothetically, even if the Ninth Circuit had determined that being sur-

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 973 (quoting Stansbury v. California, 511 U.S. 318, 322 (1994)) (internal quotation marks omitted).

68. *Id.* at 973-74 (quoting United States v. Beraun-Panez, 812 F.2d 578, 580 (9th Cir. 1987)).

69. *Id.* at 974 (quoting United States v. Hayden, 260 F.3d 1062, 1066 (9th Cir. 2001)).

70. *See id.*

rounded by police during the interrogation was not an arrest-like restraint, the circumstances surrounding Kim's interrogation were such that a reasonable person would not have felt at liberty to terminate the interview and leave, thus constituting custody under *Howes*.[71]

In *United States v. Newton*, the Second Circuit Court of Appeals directly examined whether a suspect who was placed in handcuffs was in custody for purposes of *Miranda*.[72] Sewn Newton, a three-time convicted felon, had agreed as part of his parole to allow his parole officer to visit his home and to search both his person and his residence.[73] Police received a call from a social worker who informed them that, according to Newton's mother with whom he resided, Newton had threatened to kill her and her husband and that he kept a gun in a shoe box by the door of the home.[74] Newton's parole officer was contacted and instructed to conduct a "safety search" of the apartment.[75] Six officers, including Newton's parole officer; went to the apartment; placed Newton, who was dressed in only his underwear, in handcuffs without advising him of his *Miranda* rights; and proceeded to search the premises.[76] Police brought Newton back into the apartment, sat him down, and questioned him about any contraband he may have, to which Newton responded he only had a .22 caliber automatic firearm in a box in the corner of that room.[77] After police found the weapon, Newton was placed under arrest.[78]

In analyzing whether Newton was in custody for purposes of *Miranda*, the Second Circuit turned to the free-to-leave inquiry from *Beheler*.[79] It noted that where a person is subjected to arrest-like restraints, specific, coercive pressures do not need to be proven to establish *Miranda* custody—coercive pressures are assumed.[80] The court further elaborated that the objective standard for custody does not require police to administer warnings on the basis of a self-assessment that their own actions are coercive, but rather, it is understood that that formal arrest or arrest-like restraints will trigger

71. This hypothetical considers how the Ninth Circuit would analyze this exact case today under the prevailing view of *Howes* and, of course, after reading this Note and adopting its argument. As it may become apparent from reading this Note, none of this is currently the case.

72. 369 F.3d 659, 669-77 (2d Cir. 2004).

73. *Id.* at 663.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 663-64.

78. *Id.* at 664.

79. *Id.* at 670.

80. *Id.*

that requirement.[81] The court acknowledged that "[h]andcuffs are generally recognized as a hallmark of a formal arrest."[82] Although the police advised Newton that he was not under arrest and that the restraints were being used to ensure officer safety, these statements did not negate the coerciveness.[83] The court ultimately found that while placing Newton in handcuffs to conduct the search was reasonable under the Fourth Amendment, he was in custody for purposes of *Miranda*.[84]

The application of *Miranda* custody to arrest-like restraints continues to vary throughout the federal courts. In *Burlew v. Hedgpeth*, the Ninth Circuit found that a suspect who was placed into the back of a patrol car and then questioned was not in custody.[85] In *Hedgpeth*, Deputy Sheriff James Beaupre was surveying a suspected drug-manufacturing house when the suspect in the case, Robert Burlew, drove by in an "erratic" manner.[86] Beaupre pulled Burlew over, searched him, and placed him into the patrol vehicle for further investigation.[87] Although Burlew was informed that he was not under arrest and was not placed in handcuffs, he was still in the back of Beaupre's patrol car when he made incriminating statements in response to a direct question.[88] Despite this custodial-like atmosphere and direct questioning, the court held that the lower court had not unreasonably applied federal law in weighing the factors and in finding that Burlew was not in custody at the time he made the incriminating statements.[89] Such a decision appears to be at odds with the underlying purpose of *Miranda*'s safeguards. Although Burlew was not in handcuffs, being placed into the back of a patrol car increases the potential for coercion.

In reaching custody determinations, courts typically apply a totality of the circumstances test. The factors that a court may consider vary from circuit to circuit. In *United States v. Cowan*, the Eighth Circuit Court of Appeals applied a non-exhaustive list of six factors when it considered whether a suspect was in custody.[90] *Cowan* involved police officers in Davenport, Iowa, who executed a warrant to search an apartment in which they suspected crack cocaine was be-

81. *Id.* at 672.

82. *Id.* at 676 (citing New York v. Quarles, 467 U.S. 649, 665 (1984)).

83. *Id.*

84. *Id.* at 677.

85. 448 F. App'x 663, 664 (9th Cir. 2011).

86. Burlew v. Hedgpeth, No. CIV S-08-2009 LKK CHS P., 2009 WL 2045455, at *1 (E.D. Cal. July 9, 2009) (unpublished opinion).

87. *Id.* at *1-2.

88. *Burlew*, 448 F. App'x at 664.

89. *Id.* at 665.

90. 674 F.3d 947, 957 (8th Cir. 2012).

ing sold.[91] During the search, the officers discovered, and subsequently handcuffed, eight adults, including Mauriosantana Cowan.[92] One of the officers frisked Cowan and asked him whether he had identification and what brought him to the apartment.[93] Cowan claimed that he had traveled by bus from Chicago; however, a further frisk of Cowan by the police officer revealed car keys.[94] When the police officer confronted Cowan about why he had car keys, Cowan responded that he was keeping them from his girlfriend.[95] After the police searched the apartment and discovered crack cocaine in several locations, they removed the handcuffs from Cowan and informed him that he could leave, so long as his keys did not match any of the vehicles parked outside of the apartment.[96] One of the officers pressed Cowan's key fob while outside of the apartment, which set off a car alarm.[97] The police handcuffed Cowan and brought out a drug-sniffing canine, which alerted the police to the presence of drugs in Cowan's car.[98] The police searched the vehicle, discovered crack cocaine, and brought Cowan back inside the apartment, at which point Cowan was read *Miranda* warnings and subsequently confessed.[99]

The Eighth Circuit interpreted custody as whether a reasonable person would have felt free to terminate the interrogation and leave.[100] The court considered a non-exhaustive list of six factors in its analysis of whether Cowan was in custody, which included the following: (1) whether police told the suspect "that the questioning was voluntary," the suspect could leave or ask the officers to do so, "or that the suspect was not considered under arrest"; (2) whether the suspect's movement was restrained during the questioning; (3) "whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions"; (4) whether police used "strong arm tactics or deceptive stratagems" during questioning; (5) "whether the atmosphere of the questioning was police dominated"; and (6) whether the suspect was arrested at the end of the questioning.[101]

The court emphasized that the ultimate inquiry depended on whether the suspect's freedom to leave was restricted in any way, as

91. *Id.* at 951.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 951.
97. *Id.*
98. *Id.*
99. *Id.* at 951-52.
100. *Id.* at 957.
101. *Id.* (quoting United States v. Griffin, 922 F.2d 1343, 1349 (8th Cir. 1990)).

opposed to whether questioning occurred in a coercive or police-dominated environment.[102] That rationale seems inapposite when considering the Supreme Court has clearly expressed that restriction on freedom of movement is a necessary but insufficient condition for establishing custody and that the focus should be on the circumstances surrounding the interrogation.[103] Despite this, the court applied the factors to find that Cowan was in custody, noting that "a reasonable person in Cowan's position would not have felt free to end the questioning and leave."[104]

In a more recent decision, *United States v. Richardson*, the U.S. District Court for the District of Columbia discussed but failed to address whether handcuffs created a custodial effect for purposes of *Miranda*.[105] Fourteen law enforcement agents of the Federal Bureau of Investigation and the District of Columbia Metropolitan Police Department executed a search warrant at an apartment in southeast D.C. in search of drugs.[106] After announcing themselves and receiving no response, the police forcibly entered the apartment.[107] Once inside, they again identified themselves and ordered all inhabitants to reveal themselves, and the suspects, Marsha Richardson and William Hill, complied.[108] The two were searched and placed in handcuffs while the police proceeded to search the apartment for weapons.[109] The two suspects, still in handcuffs, were placed in the living room.[110] Hill, being the suspected target of a larger drug conspiracy, was approached by one of the detectives soon thereafter.[111] The detective informed Hill of the authorized search warrant, his knowledge of Hill's connection to another suspect that was being investigated, and Hill's transactions with that suspect.[112] A different detective ap-

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102. *Id.* (quoting United States v. Martinez, 462 F.3d 903, 909 (8th Cir. 2006)).

103. *See* Howes v. Fields, 132 S. Ct. 1181, 1189-90 (2012) ("We have 'decline[d] to accord talismanic power' to the freedom-of-movement inquiry . . . and have instead asked the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." (quoting Berkemer v. McCarty, 468 U.S. 420, 437 (1984))); *see also* Maryland v. Shatzer, 559 U.S. 98, 112 (2010) ("Our cases make clear, however, that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody.").

104. *Cowan*, 674 F.3d at 957.

105. Criminal No. 14-CR-0018 (KBJ), 2014 WL 1410890, at *1 (D.D.C. Apr. 14, 2014).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at *2.

112. *Id.*

proached Richardson minutes later to retrieve information for identification, which Richardson calmly provided.[113]

Twenty minutes after the initial interaction with Richardson, the police located a .38 caliber pistol in a black purse covered by a pink towel.[114] The police first questioned Hill, who denied ownership of the gun.[115] The search continued and Richardson, who requested to go to the bathroom, was released from her handcuffs and escorted by one of the few female officers on the team.[116] The bathroom had not been thoroughly searched, so the officer followed Richardson in and closed the door behind them.[117] Without the officer asking any questions, Richardson confessed that the gun was hers.[118] The officer brought another detective into the bathroom where Richardson again admitted that the gun was hers.[119] When the detective asked her to describe the weapon, she accurately told them that it was wrapped in a pink towel inside of a black purse, but she claimed that the weapon was for protection in her dangerous neighborhood.[120] The search of the apartment continued; however, no other evidence was found.[121] The police decided to arrest Richardson for the illegal possession of a firearm, which Richardson confessed to owning for a third time prior to being taken away.[122]

The district court noted that the essential inquiry for determining custody is whether, given the circumstances surrounding the interrogation, a reasonable person would not have felt as if he or she was "at liberty to terminate the interrogation and leave."[123] This interpretation is at odds with the Court's rationale in *Howes*. It was unlikely that, with fourteen armed law enforcement officers, either Richardson or Hill would have felt at liberty to terminate the interrogation and leave. In its analysis, the court determined that no single factor was dispositive; it stated, rather, that consideration should be given to the location and duration of the interrogation, the number of officers and citizens present, whether the suspects were handcuffed, and the tone and demeanor during the actual interrogation.[124]

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at *3.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at *4.

123. *Id.* (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)) (internal quotation marks omitted).

124. *See id.*

B. State Courts

The federal courts are not alone in their vague and often conflicting application of custody. The state courts, too, have wrestled with the doctrine.[125] The vast majority of the states still rely on the formalistic application of custody expressed in the *Beheler* decision. It is unclear whether the courts will adopt the broader interpretation of custody offered in *Howes*. It is clear, however, that a bright-line rule for arrest-like restraints will reach the same result, perhaps more clearly and consistently, in the cases being decided, while mitigating the potential for the coercive pressures of concern in *Miranda*. Given the abundant and rather repetitious case law available throughout state courts, this Note will only briefly discuss some common illustrations and the issues they potentially raise.

In *State v. Hieu Tran*, the Vermont Supreme Court addressed whether a suspect was in custody when questioned in a police cruiser.[126] Vermont police received information from a victim and witnesses about an alleged assault and robbery that occurred during a drug transaction before questioning the suspect, Hieu Tran.[127] Tran was not at his residence when the police arrived, so they followed his mother when she went to pick him up; once they returned, the police requested to speak with him inside of the police cruiser.[128] One detective sat in the back seat, another sat in the driver's seat, and Tran sat in the front passenger's seat.[129] Tran was never informed whether he was free to leave.[130] The detectives questioned Tran for an hour; in that time, he made several incriminating statements, but at no point during the questioning was he informed of his *Miranda* rights.[131] Tran was arrested after the questioning.[132] The trial court subsequently granted Tran's motion to suppress.[133]

On an interlocutory appeal, the Vermont Supreme Court affirmed the trial court's decision to grant the motion to suppress, finding that the police conduct amounted to a custodial interrogation of the suspect without the necessary *Miranda* warnings.[134] The court identified several factors for consideration of custody determinations, including

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125. The Fifth Amendment's privilege against compulsory self-incrimination is protected from abridgement by the states by virtue of the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

126. 2012 VT 104, ¶ 1, 193 Vt. 148, 71 A.3d 1201.

127. *Id.* ¶ 4.

128. *Id.* ¶ 5.

129. *Id.*

130. *Id.*

131. *Id.* ¶¶ 6, 8.

132. *Id.* ¶ 7.

133. *Id.* ¶ 9.

134. *Id.* ¶ 13.

(1) the location of the interview; (2) the interviewer's communication to the suspect of his belief in the suspect's guilt; (3) whether the suspect arrives at the interview voluntarily; and (4) "whether the police told the suspect that he was free to terminate the interview at any point and leave."[135]

The court applied these factors specifically to the case and determined that a coercive atmosphere was present during interrogation.[136] The court included in these factors an arrest-like restraint, namely the police cruiser.[137] The closed, confined space of the police cruiser presented a potential for coercion.[138] The court admitted that a suspect that is questioned in a car will not always be considered in custody; however, in this case, where the police chose to interview the suspect in the police cruiser rather than in his home and the suspect was not informed he was free to leave, custody was present and the suspect was entitled to *Miranda* warnings.[139]

The same year that the Vermont Supreme Court decided *Hieu Tran*, the Wisconsin Supreme Court also examined the question of arrest-like restraints in *State v. Martin*.[140] In *Martin*, a Milwaukee police sergeant approached an intersection when he observed the suspect, Randy Martin, exit the driver's side door of a vehicle, walk toward another vehicle, and shout to the driver of the other vehicle, to which the other driver responded.[141] The other driver exited the vehicle, presumably to confront Martin, but noticed the sergeant and chose to remain near the vehicle.[142] The sergeant witnessed Martin approach the other driver and pull out an item from his pocket.[143] The other driver motioned toward the sergeant and Martin placed the item back into his pocket.[144] The sergeant immediately summoned Martin and placed him in handcuffs.[145] The sergeant searched him and discovered an expandable baton.[146] Two more police officers arrived on the scene to assist the sergeant; they ordered Martin's friend out of Martin's vehicle, searched the vehicle, and discovered a

135. *Id.* ¶ 12 (quoting State v. Muntean, 2010 VT 88, ¶ 19, 189 Vt. 50, 12 A.3d 518).

136. The suspect was never informed that he was free to leave, he was confronted with evidence of guilt, and he "did not voluntarily initiate contact with police." *Id.* ¶¶ 15-17.

137. *See id.* ¶ 17.

138. *See id.*

139. *Id.* ¶ 19.

140. 2012 WI App 96, ¶ 2, 343 Wis. 2d 278, 816 N.W.2d 270.

141. *Id.* ¶ 4.

142. *Id.* ¶¶ 4-5.

143. *Id.* ¶ 5.

144. *Id.*

145. *Id.*

146. *Id.* ¶ 6.

.22 caliber revolver.[147] When the two men, neither of whom had received *Miranda* warnings, were questioned about the gun, they both denied ownership.[148] The sergeant placed Martin's friend under arrest for possession of a concealed weapon due to the fact it was discovered underneath his seat, and after a brief exchange, Martin admitted that the gun was his.[149] Despite this admission, one of the officers requested that Martin describe the gun; Martin did so accurately and was arrested as a result.[150]

In its analysis, the Wisconsin Supreme Court first acknowledged that custody is present for purposes of *Miranda* where "a reasonable person would not feel free to terminate the interview and leave the scene."[151] The court further stated that handcuffs would not render a suspect in custody in all cases, such as cases involving " 'temporary roadside detention' "; however in this case, the sergeant had placed Martin in handcuffs for the purpose of arresting him for disorderly conduct.[152] The court noted that under the totality of the circumstances test for custody determinations, courts consider whether the suspect was free to leave; the purpose, location, and duration of interrogation; and the degree of restraint placed on the suspect.[153] This illustrates a common confusion between the doctrines behind *Terry* and *Miranda*.[154] This Note's proposed bright-line rule would not make the use of handcuffs during a lawful *Terry* stop unreasonable, but in those circumstances, the suspect should be considered in custody for purposes of *Miranda*.

In *State v. Ortiz*, the Court of Criminal Appeals of Texas explicitly rejected the bright-line rule offered in this Note and yet affirmed both lower courts' findings of custody where handcuffs were employed.[155] In *Ortiz*, a police officer for the Lubbock County Sheriff's Department was patrolling a highway when he pulled over Octavio Ortiz, the suspect in this case, for speeding.[156] After brief questioning, the officer ordered Ortiz out of the car.[157] Once outside of the vehicle, Ortiz was further questioned, and he revealed that he was traveling with his wife and that he was on probation for a previous drug pos-

147. *Id.* ¶¶ 7-8.
148. *Id.* ¶ 10.
149. *Id.* ¶¶ 10-11.
150. *Id.* ¶ 12.
151. *Id.* ¶ 33 (citing Thompson v. Keohane, 516 U.S. 99, 112 (1995)).
152. *Id.* ¶ 34.
153. *Id.* ¶ 35.
154. *See supra* Part I.B.
155. 382 S.W.3d 367, 374, 377 (Tex. Crim. App. 2012).
156. *Id.* at 369.
157. *Id.*

session charge.[158] The officer then questioned the wife, and after her story conflicted with Ortiz's, the officer called for backup and asked to search the vehicle, to which Ortiz consented.[159] While the officer searched the vehicle, the backup officer who had just arrived began to frisk Ortiz's wife.[160] When she tried to avoid the search, the backup officer handcuffed her.[161] After discovering something on Ortiz's wife, one of the officers handcuffed Ortiz and asked him if he knew what it was; he admitted it was cocaine.[162] The trial court suppressed Ortiz's statements after finding that he was in custody when he admitted to the drugs and that the officers failed to read him his *Miranda* rights.[163] On an interlocutory appeal, the court of appeals affirmed.[164]

On appeal, the Court of Criminal Appeals analyzed custody objectively, considering whether a reasonable person would have viewed the detention as being a restraint on movement comparable to a formal arrest.[165] The court used a totality of the circumstances test to determine whether a reasonable person under the same circumstances would have believed his freedom of movement was restricted to a degree similar to formal arrest.[166] It noted that the subjective belief of the officers was only relevant to the custody analysis if the officers manifested a belief to the individual being detained that he was in fact a suspect.[167] In considering the factors in the case, the court went on to dispel any concern that the court of appeals had adopted a categorical rule for handcuffs that would automatically amount to custody.[168] It expressly stated that "the court of appeals properly relied on handcuffing as only one of a range of relevant factors in its determination."[169] The court relied on the *Howes* test for custody—one of the few state opinions that has done so—in affirming the decision of the court of appeals.[170] Ortiz was handcuffed immediately after viewing his wife get handcuffed and frisked.[171] Based on the officers' actions, Ortiz could have reasonably inferred that he was being associated

158. *Id.* at 369-70.
159. *Id.* at 370.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 371.
164. *Id.*
165. *Id.* at 372.
166. *Id.*
167. *Id.* at 373.
168. *Id.* at 374.
169. *Id.*
170. *Id.* at 374 n.35.
171. *Id.* at 374.

with the criminal behavior of his wife.[172] The traffic stop had elevated into a custodial arrest in which Ortiz was entitled to *Miranda* rights.[173]

In all three cases, the same result arguably would have occurred if the courts had applied a bright-line rule for arrest-like restraints. The interpretation and analysis of custody varies only marginally in other opinions from other jurisdictions. However, the presence of arrest-like restraints often has the same effect in those cases—the scales are tipped heavily in favor of finding custody.

III. ABANDONING A "TOTALITY OF THE CIRCUMSTANCES" TEST FOR A CLEAR, BRIGHT-LINE RULE

Miranda was intended to be a bright-line, prophylactic rule.[174] One of the principle rationales behind the *Miranda* opinion was to provide law enforcement and courts with clarity in the application of its rule.[175] However, the various interpretations of custody across jurisdictions clearly demonstrate a growing need for further clarification. The current totality of the circumstances test, even under *Howes*, only exacerbates the potential for contradictions and circuit splits. A bright-line rule with regards to finding custody when there are arrest-like restraints meets both aims of the original doctrine by being clear and simple while ensuring that police do not coerce suspects into confessing.[176] Additionally, a bright-line rule would relieve the courts of the task of analyzing each individual case.[177]

While it is difficult to establish a bright-line rule for custody that would not be over- or under-inclusive, it is possible for the courts to carve out a rule applicable to the circumstances described in the cases in Part II. This is the area where the former test for custody under *Beheler* and the recent test for custody under *Howes* meet: arrest-like restraints. Under *Howes*, the Court distinguished arrest from custody, which under *Beheler* had been treated as functionally interchangeable. It has become readily apparent over the years that the concerns of *Miranda* over the potential for a coercive, police-

172. *Id.* at 374-75.

173. *Id.* at 375.

174. *See* Arizona v. Roberson, 486 U.S. 675, 681 (1988) ("We have repeatedly emphasized the virtues of a bright-line rule in cases following . . . *Miranda*." (citing several authorities)).

175. *Id.* at 680 ("A major purpose of the Court's opinion in *Miranda v. Arizona* . . . was 'to give concrete constitutional guidelines for law enforcement agencies and courts to follow.' 'As we have stressed on numerous occasions, "[o]ne of the principal advantages" of *Miranda* is the ease and clarity of its application.' " (citing Moran v. Burbine, 475 U.S. 412, 425 (1986))).

176. *See* Berkemer v. McCarty, 468 U.S. 420, 421 (1984).

177. *See id.*

dominated atmosphere during custodial interrogations can be present whether or not the individual has been formally arrested.

The proposed bright-line rule to be applied is one that is relatively simple: any individual subjected to arrest-like restraints—such as being placed in handcuffs or into the back of a police car, or having weapons drawn on him—is in custody for purposes of *Miranda*. A court should then inquire whether the suspect was subjected to interrogation for purposes of *Miranda* while in custody. It will not always be the case that a *Miranda* violation has occurred under the scope of this rule when a suspect has been subjected to arrest-like restraints. If a *Miranda* violation has occurred, then the burden will shift to the government, who is in a better position to prove that an exception to *Miranda* applies or that the statements should be excluded.

Even if a court were to find that a suspect is in custody, failing to apprise the suspect of his *Miranda* rights will not automatically bar the admissibility of evidence obtained through interrogation. It cannot be overstated that the Court has reaffirmed the core holding of *Miranda* as a constitutional decision that is subject to several exceptions.[178] These exceptions allow for the establishment of a bright-line rule in Fifth Amendment jurisprudence.

It was not long after *Miranda* established safeguards against the inherent coerciveness of custodial interrogation that the Court began establishing exceptions to its general rule. In analyzing the rationale behind *Miranda*, the Court has found that certain circumstances are not covered by the general rule because the coercive pressures are not likely to be present. The *Miranda* opinion specifically acknowledged that the Fifth Amendment does not bar statements freely volunteered, allowing for their admissibility whether or not warnings were given.[179] The bright-line rule proposed in this Note would only be sufficient to establish custody and would not detract from the inquiry of whether there was interrogation. If a suspect were to be placed in handcuffs and immediately confess before any questioning has occurred, it would be unlikely that the confession would be excluded under any analysis. Similarly, the Fifth Amendment does not extend its protections to the examination of real, physical evidence, because there is no communicative act by the suspect.[180]

If the concerns over adopting a bright-line rule in favor of presumptive custody for cases involving arrest-like restraints are that it would exclude more evidence and serve as a straightjacket in police

178. *See* Dickerson v. United States, 530 U.S. 428, 441 (2000).

179. *See* Miranda v. Arizona, 384 U.S. 436, 478 (1966).

180. *See* Schmerber v. California, 384 U.S. 757, 765 (1966) (holding that petitioner's blood sample was not a communicative act of the petitioner and therefore presented no concern of "testimonial compulsion").

work, the actual application of the exclusionary rule[181] should ease those concerns. The exclusionary rule serves as a deterrent against negligent and bad police conduct.[182] However, this assumes that the police acted in bad faith and as a result an individual was deprived of his or her constitutional rights.[183] A suspect's constitutional right against self-incrimination is violated by the introduction of unwarned statements against him or her at trial, not by the failure to inform the suspect of his rights.[184] When the police negligently, or even deliberately, fail to provide *Miranda* warnings to a suspect, any statements made in violation of *Miranda* may be excluded, but the "physical fruit" obtained by the statements will not.[185] This denotes an important limitation within Fifth Amendment privilege: it is only applicable to *self*-incrimination.[186] Additionally, the mere failure to inform a suspect of his *Miranda* rights does not exclude the physical evidence obtained from those statements, because the Fifth Amendment's focus on protecting against self-incrimination is limited to testimonial evidence.[187]

The proposed bright-line rule works well with the exceptions to provide law enforcement with clarity in decision-making and remedies for potential *Miranda* violations. The police may potentially remove a suspect from custody by removing the arrest-like restraint or, more logically, by providing the suspect with *Miranda* warnings. Even in a situation where a suspect is subjected to arrest-like restraints, not read *Miranda* warnings, and subsequently makes incriminating statements during interrogation, all is not lost for obtaining evidence from that suspect specifically. So long as the police acted in good faith, they could administer *Miranda* warnings and any statements made thereafter would likely be admissible, assuming that they were made voluntarily.[188]

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181. The exclusionary rule is a judicially created remedy that operates to deter constitutional violations. Jack A. Levy, *The Exclusionary Rule*, 85 GEO. L.J. 969, 970 (1997). When applied, it bars the government from introducing evidence obtained in violation of the defendant's constitutional rights into the prosecution's case-in-chief. *Id.* at 969-70.

182. Michigan v. Tucker, 417 U.S. 433, 447 (1974).

183. *See id.*

184. *See* United States v. Patane, 542 U.S. 630, 643-44 (2004) (holding that a police officer's failure to warn a suspect of his *Miranda* rights during an arrest did not warrant suppression at trial of a weapon discovered through the suspect's statements).

185. *Id.* at 644.

186. The "fruit of the poisonous tree" doctrine is applicable only where a constitutional violation has occurred. Michael A. Cantrell, *Constitutional Penumbras and Prophylactic Rights: The Right to Counsel and the "Fruit of the Poisonous Tree"*, 40 AM. J. CRIM. L. 111, 115-16 (2013). A *Miranda* violation is not necessarily a constitutional violation because the rule provided by *Miranda* is not in the text of the Fifth Amendment. *Id.*

187. *See Patane*, 542 U.S. at 643-44.

188. *See* Oregon v. Elstad, 470 U.S. 298, 318 (1985) ("[A] suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his

Even in cases where there has been a *Miranda* violation, the exclusionary rule has not been applied with strict force. The statements are still admissible for the purpose of impeachment on the rationale that *Miranda* does not grant a criminal defendant the right to commit perjury.[189] Certainly nothing in a bright-line rule would affect the exception for impeachment.

Out of the several exceptions to *Miranda*, arguably none play as large of a role in Fifth Amendment custody determinations as the public safety exception. For that reason, it may remedy the potential issues of over- and under-inclusiveness present in the proposed bright-line rule in this Note. The Court held in *New York v. Quarles* that law enforcement officers could forego *Miranda* warnings in exigent circumstances where the "threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[190] The rationale behind the public safety exception is that police should not be placed in a position where they will have to make judgment calls, often under pressure and time constraints, of whether to issue the suspect warnings or take the chance that some probative evidence may then be rendered inadmissible.[191] In such situations, an arrest-like restraint offers police the best option to neutralize any threat the suspect may impose, but it seldom would neutralize all threats imposed in that situation. This would not detract from the fact that the suspect is in custody for purposes of *Miranda*, but the government would not be penalized as a result of the exception.

The public safety exception should have some limitations such that it will not to render this Note's proposed rule or *Miranda*, for that matter, ineffectual. The public safety exception is generally concerned with the welfare of the public; therefore, where the premises have been secured and the suspect(s) no longer pose any direct threats to officer safety, any pre-*Miranda* questioning should fall outside of the scope of *Quarles*.[192] Under this application, the exception and the rule complement one another, balancing policy concerns of effective and efficient policing with the protection of individual constitutional rights.

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rights and confessing after he has been given the requisite *Miranda* warnings."). *But see* Missouri v. Seibert, 542 U.S. 600, 622 (2004) (Kennedy, J., concurring) ("If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made.").

189. Harris v. New York, 401 U.S. 222, 225-26 (1971).

190. 467 U.S. 649, 657 (1984).

191. *Id.* at 657-58.

192. Rorie A. Norton, *Matters of Public Safety and the Current Quarrel Over the Scope of the* Quarles *Exception to* Miranda, 78 FORDHAM L. REV. 1931, 1961-62 (2010).

CONCLUSION

This Note's proposed bright-line rule in favor of presuming custody in cases involving arrest-like restraints would provide for consistency in custody determinations across jurisdictions and would further the aim of *Miranda*: protecting Fifth Amendment privilege against self-incrimination during inherently coercive custodial interrogations.[193] Moreover, law enforcement and courts would benefit from clarity in the application of the rule, while avoiding the over- and under-inclusiveness that traditionally plague bright-line rules as a result of the established exceptions to *Miranda*. Even under the current *Howes* test for custody, it is likely that a court would find custody where arrest-like restraints are employed. It is therefore reasonable for the United States Supreme Court to adopt this Note's proposed bright-line rule.

193. *See* Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) ("Procedural safeguards must be employed to protect the [Fifth Amendment] privilege.").