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Introduction

Picture the following situation: A police officer pulls you over, or shows up at your house with an arrest warrant. You are placed in the back of a police car. During your ride to the police station, or while seated in the back of the car, the police officer asks you questions about the crime you're accused of committing. Would you answer the questions? Would you feel free to leave? Would you feel free to terminate your interactions with the police officer? Do you consider yourself a reasonable person?

Miranda v. Arizona created an important standard in the law of criminal procedure in the United States.[1] It ensures that those subject to custodial interrogations will be informed of their constitutional rights. These constitutional rights include the individual's right to remain silent, that anything they say can and will be used against them in a court of law, and that they have the right to an attorney.[2] *Miranda* warnings are not required in every police interaction.[3] Rather, the law requires that *Miranda* warnings be issued when two factors are present: that the individual was in custody, and that the police interrogated them.[4] The law since *Miranda*, however, has struggled to define exactly what conditions and circumstances define a "custodial

[1] *See* Miranda v. Arizona, 384 U.S. 436 (1966).
[2] *See Id*. at 476.
[3] *Id.*
[4] See United States v. Mendenhall, 446 U.S. 544 (1980); Terry v. Ohio, 392 U.S. 1 (1968); R.I. v. Innis, 446 U.S. 291, 380 (1980).

interrogation," and thus require *Miranda* warnings.[5] One factual circumstance that has resulted in a federal circuit split is whether an individual placed in the back of a police car should be considered "in custody" for purposes of *Miranda* warnings.[6]

Currently, when the issue is the admissibility of a statement made without *Miranda* warnings, courts use a reasonable person standard based on the totality of the circumstances to establish whether the individual was in custody.[7] Courts analyze whether the person felt free to leave the situation, or whether their movement was restrained to the degree of a formal arrest.[8] This comment proposes a restructuring of the totality of the circumstances analysis by placing a stronger emphasis on the inherently coercive nature of the environment of a police car. I propose creating a rebuttable presumption, which asserts that a person is seized when they are questioned in the back of a police car, and thus should be considered "in custody." The proposed presumption is rebuttable by the prosecution asserting certain facts that include whether the individual was told he was free to leave, was not handcuffed, or was not restrained in any manner. Ultimately, because no reasonable person would feel free to get out of the back of a police car and walk away once placed there by a police officer, this presumption renders the coercive environment the most important factor in the custody determination analysis.

Part I of this comment will address the background of relevant constitutional law, namely *Miranda v. Arizona* and the cases that followed it that defined custodial interrogations. The background section will also address the current federal circuit split that exists on this issue. Part II of this comment addresses the proposed presumption as well as the facts that can be

[5] *See* Terry v. Ohio, 392 U.S. 1 (1968); Orozco v. Texas, 394 U.S. 324 (1969); United States v. Mendenhall, 446 U.S. 544 (1980); California v. Beheler, 463 U.S. 1121 (1983); Berkemer v. McCarty, 468 U.S. 420, 440 (1984).
[6] *See* United States v. Henley, 984 F.2d 1040 (9th Cir. 1992); Figg v. Shroeder, 321 F.3d 625 (4th Cir. 2002); United States v. Richardson, 949 F.2d 851 (6th Cir. 1991); Burlew v. Hedgpeth, 448 Fed. Appx. 663 (9th Cir. 2011); United States v. Murray, 89 F.2d 459 (7th Cir. 1996); United States v. Boucher, 909 F.2d 1170 (8th Cir. 1990).
[7] United States v. Mendenhall, 446 U.S. 544, 554 (1980).
[8] *Id.*

asserted by the prosecution to successfully rebut the presumption of custody. It will also address the purposes of the presumption as well as the possible benefits and negative consequences of implementing this solution into criminal justice practice. Lastly, this comment will address any remaining questions and legal issues left open by this proposal.

Part I: Background

To fully examine the legal concepts surrounding *Miranda* law, one must first identify the relevant Constitutional law, the precedent established in *Miranda v. Arizona*, as well as the cases that followed *Miranda*. Additionally, one must look to the current federal circuit split on the issue of a custody determination in cases where the defendant is questioned in the back of a police car and the factual circumstances of these cases.

A. Relevant Constitutional Law

The Constitutional law applicable to the *Miranda* custody analysis includes case law that has served to ensure the constitutional guarantees of protection from unreasonable seizures, as well as protection against self-incrimination.[9] These constitutional rights are located in the Fourth and Fifth Amendments of the United States Constitution.

The Fourth Amendment of the United States Constitution provides that, "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."[10] The definition of seizure is important to this analysis because

[9] *See* U.S. CONST. am. IV *and* U.S. CONST. am. V.
[10] U.S. CONST. am. IV.

of its analytical similarities to the determination of custody.[11] The purpose of the Fourth Amendment is "not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'"[12] The Fourth Amendment seeks to provide a balance between personal liberties, as well as the legitimate investigative needs of law enforcement.[13] Therefore, the determination of whether a person has been seized is important to determine whether the proper protections were afforded to that individual, specifically by analyzing the reasonableness of that seizure.[14]

The Fifth Amendment of the United States Constitution states that "No person … shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law…"[15] The privilege of self-incrimination is important to this analysis because the constitutional safeguards established in *Miranda v. Arizona* were decided in order to protect this privilege.[16] The *Miranda* warnings ensure when a detained individual is questioned, he knows his rights against self-incrimination.[17] *Miranda* also extended this Fifth Amendment right against self-incrimination to pre-trial matters, finding that it is equally important to ensure this right to individuals in police custody as it is to ensure the right to individuals during criminal trials.[18]

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[11] *Compare* Terry v. Ohio, 392 U.S. 1 (1968); *with* Berkemer v. McCarty, 468 U.S. 420, 440 (1984).
[12] United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) *quoting* United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).
[13] *See* United States v. Mendenhall, 446 U.S. 544, 553-54 (1980).
[14] *See Id.*; U.S. CONST. am IV.
[15] U.S. CONST. am. V.
[16] *See* Miranda v. Arizona, 384 U.S. 436, 466 (1966).
[17] *See* Miranda v. Arizona, 384 U.S. 436 (1966).
[18] *Id.* at 467.

B. History of Miranda law

Miranda v. Arizona examined whether statements obtained from an individual who is subjected to a custodial police interrogation are admissible in court.[19] The case also examined the police procedures necessary to constitutionally safeguard the individual's privilege against self-incrimination.[20] The Court established that a defendant must be warned before questioning that he had the right to remain silent and that anything he says can be used against him in a court of law, and that he had the right to the presence of an attorney.[21] The Court recognized that the Fifth Amendment privilege against self-incrimination was jeopardized where an individual is taken into custody and subjected to questioning.[22] After the *Miranda* warnings are read, the defendant can knowingly and intelligently waive the rights and agree to answer questions or give a statement to the police.[23] The Court mandated that an individual be informed of their rights prior to questioning, due to the inherent coerciveness of a custodial interrogation.[24]

Following *Miranda*, cases sought to both expand and limit the legal principles established. A bright line rule was established that if a person is arrested, he is in custody for the purposes of *Miranda* warnings.[25] The Supreme Court also held that a person who voluntarily accompanied the police, was left unrestrained and was not formally under arrest, was not in custody.[26] In the same case, the Court also held that while "circumstances of each case would certainly influence a determination of whether a suspect is 'in custody' for purposes of receiving *Miranda* protection" that ultimately, the inquiry is "simply whether there is 'formal arrest or

[19] *Id.* at 439.
[20] *Id.*
[21] *Id.* at 467-468.
[22] *Id.* at 467 (citing U.S. CONST. am. V).
[23] Miranda v. Arizona, 384 U.S. 436, 475 (1966).
[24] *Id.* at 469.
[25] Orozco v. Texas, 394 U.S. 324 (1969).
[26] California v. Beheler, 463 U.S. 1121 (1983).

restraint on freedom of movement' of degree associated with arrest."[27] The Court emphasized that *Miranda* warnings are not required "simply because the questioning takes place in a station house, or because the questioned person is one whom the police suspect."[28]

Two years following the Supreme Court's decision in *Miranda*, the Court further defined "seizure" in *Terry v. Ohio*.[29] Though the main focus of the *Terry* decision was to define the police procedure of "stop and frisk," the Court also further defined the circumstances surrounding seizure of individuals.[30] In *Terry*, it was determined that all seizures of individuals do not occur in the traditional context of arrests, and yet such seizures are still governed by the Fourth Amendment.[31] The Court reasoned that, "[i]t must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[32] The police officer seizes an individual when they execute a "show of authority" which occurs when an officer "by means of physical force or show of authority has in some way restrained the liberty of a citizen."[33] *Terry* expanded the context of a seizure, and underlined the importance of constitutionally safeguarding a restraint on an individual's liberty.[34]

As the Supreme Court began to further define seizure law, the development of an objective test emerged.[35] In *United States v. Mendenhall*, the Court stated that "as long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy."[36] Ultimately, the Court held that a

[27] *Beheler*, 463 U.S. at 1125.
[28] *Id.*
[29] Terry v. Ohio, 392 U.S. 1 (1968).
[30] *Id.* at 16.
[31] *Id.* at 16. ("It is quite plain that the Fourth Amendment governs seizures of the person which do not eventuate in a trip to the station house and prosecution for crime – "arrests" in traditional terminology.")
[32] *Id.* at 16.
[33] *Id.* at 19.
[34] *See* Terry v. Ohio, 392 U.S. 1 (1968).
[35] *See* United States v. Mendenhall, 446 U.S. 544 (1980).
[36] *Id.* at 553.

person is seized within the meaning of the Fourth Amendment only if, in the view of all circumstances surrounding the incident, a reasonable person would have believed that she was not free to leave.[37] This standard to determine whether a seizure of an individual has occurred is a merging of a totality of the circumstances, and reasonable person standard.[38]

Ultimately, both the analysis for seizure under the Fourth Amendment and the analysis for a custody determination for *Miranda* rights look to the beliefs of a reasonable person, totality of the circumstances and the belief of freedom of movement.

C. Definition of Custody

The cases described above are just a few of the many in which the courts have defined, expanded or limited the definitions of seizure and custody.[39] As it currently stands, the legal test for determining a seizure and custody are almost identical. However, the concept of a seizure refers to the jurisprudence of the Fourth Amendment, which protects people from unreasonable searches and seizures by state actors.[40] The concept of "custody" is important in determining if a custodial interrogation exists, where the individual must be read their *Miranda* rights in order to protect the privilege against self-incrimination.[41] While different legal concepts, the test for both, as established by the Supreme Court, is a totality of the circumstances analysis that seeks to determine whether a reasonable person would have felt free to leave or terminate the police interaction.[42] Therefore, if a person has been found to be in police custody for purposes of Miranda, it follows that a seizure of that person has also occurred. However, the courts are not clear on whether a seizure of that individual would be the equivalent of that person also being

[37] *Id.* at 554.
[38] *Id.*
[39] *See supra* notes 19-38.
[40] U.S. CONST. am. IV.
[41] *See* U.S. CONST. am. V.; Miranda v. Arizona, 384 U.S. 436 (1966).
[42] United States v. Mendenhall, 446 U.S. 544, 554 (1980).

considered in police custody. One reason for this inequality between a "custody" determination and a "seizure" determination is because the legal test is a totality of the circumstances analysis, which allows a court to consider certain factors more heavily than others, depending on the facts of the case and that case's potential outcome.[43] However, while the factual analysis or outcomes may be different between the two legal concepts, the legal test remains the same.[44] Because of the similarities of the two legal tests, this comment suggests that when a person is seized under the 4th Amendment in the back of a police car, the Court should consider that person to be "in custody" for purposes of the 5th Amendment.[45]

D. Federal Circuit Split

Currently, there is a federal circuit split on the issue of whether, when questioning an individual in the back of a police car, the individual is considered to be "in custody" to require a reading of *Miranda* rights.[46] Circuit courts define this issue in different ways. Some circuits focus on the definition of seizure under the Fourth Amendment, while others focus on the legal concept of "in custody." Either way, the circuits are split on whether, when in the back of a police car, a reasonable person would feel they were free to leave the situation.

The Ninth Circuit is the most recent circuit to decide this issue.[47] *Burlew v. Hedgpeth* held that the defendant was not in custody at the time he made his incriminating statement.[48] At the time, Burlew was sitting in the back of the patrol car, but he was not handcuffed and was not

[43] *See Id.*
[44] *See Id.*
[45] See U.S. CONST. am. IV; U.S. CONST. AM V.; Miranda v. Arizona, 384 U.S. 436 (1966). (Also note, that this logic would also apply conversely, where a person is considered to be "in custody" the court could also undergo an analysis as to whether or not the seizure of that individual was unreasonable under the 4th Amendment, though this exceeds the scope of this comment.)
[46] *See supra* note 4.
[47] Burlew v. Hedgpeth, 443 Fed. Appx. 663 (9th Cir. 2011).
[48] *Id.* at 664.

told he was under arrest.[49] Based on these facts, the Ninth Circuit held that the defendant was not in custody. In its decision, the Ninth Circuit recognized the circuit split that existed on this issue. In a previous case, the Ninth Circuit held that an individual in the back of a police car was in custody.[50] In *United States v. Henley*, an FBI agent questioned the defendant while the defendant was handcuffed in the back of the police car.[51] However, the defendant was not formally placed under arrest.[52] The factual difference between the defendant in *Burlew* and the defendant in *Henley* is that the defendant in *Henley* was handcuffed while seated in the car.[53] In *Henley*, the Ninth Circuit found the defendant was in custody. Thus, it is clear that the Ninth Circuit placed a strong emphasis on the factor of whether the individual is handcuffed in making custody determinations.[54] Thus, whether or not a suspect has been handcuffed while sitting in the back of a police car may be a factual circumstance of a case that serves to rebut the proposed presumption of custody.[55]

The Fourth Circuit and the Sixth Circuit both found that a defendant was "in custody" in cases where incriminating statements were made in the back of a police car. In *Figg v. Shroeder*, the Fourth Circuit held that the defendant was seized within the meaning of the Fourth Amendment because it was an undisputed fact of that case that he was not allowed to leave, despite not being formally arrested in the back of the car.[56] The Fourth Circuit reasoned that in the absence of a formal arrest, the trial court should look to whether a seizure occurred in order

[49] *Id.*
[50] United States v. Henley, 984 F. 2d 1040 (9th Cir. 1992).
[51] *Henley*, 984 U.S. at 1042.
[52] *Henley*, 984 U.S. at 1042.
[53] *Id.*
[54] *Compare* Burlew v. Hedgpeth, 443 Fed. Appx. 663, 664 (9th Cir. 2011) *to* United States v. Henley, 984 F. 2d 1040, 1042 (9th Cir. 1992).
[55] *See Part II: Analysis; Factors that Rebut the Presumption*.
[56] Figg v. Shroeder, 321 F.3d 625 (4th Cir. 2002).

to determine if the individual was informally arrested.[57] The court found it dispositive that the individual would not have been allowed to leave the patrol car in which he was detained, thus he was subjected to a Fourth Amendment seizure.[58] The court did, however, ultimately conclude that these seizures did not violate the Constitution.[59]

The Sixth Circuit, in *United States v. Richardson*, also found that the individual, while in the back of the police car, had been seized under the meaning of the Fourth Amendment.[60] The court enumerated factors that may lead a reasonable person to conclude they were not free to leave.[61] These factors included the threatening presence of several officers, physical touching of the person of the citizen, an officer displaying a weapon, or the use of language or tone of voice indicating that compliance with the officer's request is not optional.[62] The court also cited *Terry v. Ohio*, stating that a seizure of a person will occur when the officer "by means of physical force or show of authority has in some way restrained the liberty of a citizen."[63] In this case, four officers approached the defendant and informed him that he was a subject of a drug investigation.[64] When the officers asked for consent to search, the defendant refused.[65] As a result of his refusal to consent, he was placed in the back the police car.[66] Similar to the facts of *Figg*, the defendant here was also not formally arrested, but the court found it was reasonable for him to believe he was not permitted to leave.[67] The court reasoned that if, "after refusing to consent to a search, a person was placed in the back of a police car by "agents" who had no

[57] *Id.* at 636.
[58] *Id.*
[59] *Id.*
[60] United States v. Richardson, 949 F.2d 851 (6th Cir. 1991).
[61] *Richardson*, 949 F.2d at 856.
[62] *Id. quoting* United States v. Mendenhall, 446 U.S. 544, 554 (1980).
[63] *Id. quoting* Terry v. Ohio, 392 U.S. 1, 19 (1968).
[64] *Richardson*, 949 F.2d at 856.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 856; *See* Figg v. Shroeder, 321 F.3d 625 (4th Cir. 2002).

intention of allowing him to leave, that person would have believed that he was not free to leave."[68] Thus, the Sixth Circuit found a seizure of the individual occurred.[69]

These cases uphold the *Miranda* law effectively and better protect the privilege against self-incrimination established in the Fifth Amendment.[70] However, other circuits have not been as amenable to the protection against self incrimination, thus creating the federal circuit split at issue.[71]

The Seventh and Eighth Circuits came to the same conclusion as the Ninth Circuit in its decision in *Burlew*, finding that the defendants were not in custody when they were questioned in the back of a police car.[72] The Seventh Circuit in *United States v. Murray*, held that evidence seized from the lawful traffic stop of the defendant and his self incriminating statement about possessing the gun found in the car, were properly admitted.[73] The defendant was placed in the squad car after the officers discovered crack cocaine in the car.[74] Upon further search, the officers also discovered a firearm.[75] The officer opened the door of the squad car, and while holding the gun, asked the defendant if he knew who owned it.[76] The defendant stated that he did not know who owned the gun, but that he did own the car.[77] The court reasoned that the defendant was not "in custody" for purposes of *Miranda* warnings because there was no evidence in the record to support that his freedom of movement was restrained.[78] Other factors the court considered was that only a brief period of time elapsed between the initial stop and the

[68] *Richardson,* 949 F.2d at 855.
[69] *Id.*
[70] *See* United States v. Richardson, 949 F.2d 851 (6th Cir. 1991); United States v. Henley, 984 F. 2d 1040, 1042 (9th Cir. 1992); Figg v. Shroeder, 321 F.3d 625 (4th Cir. 2002).
[71] *See* United States v. Boucher, 909 F.2d 1170 (8th Cir. 1990); United States v. Murray, 89 F.2d 459 (7th Cir. 1996).
[72] *See Id.*
[73] United States v. Murray, 89 F.2d 459 (7th Cir. 1996).
[74] *Id.* at 462.
[75] *Id.* at 461.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 462.

time of the questioning, nor was there any evidence that the officers engaged in conduct that overcame the will of the defendant.[79] Despite the court deeming the most relevant inquiry to be how a reasonable person in the suspect's position would have understood the situation, the court held that the defendant was not in custody.[80]

The Eighth Circuit, in *United States v. Boucher*, found that a reasonable person in Boucher's position would not have considered the officer's questions in the patrol car to be a "custodial interrogation."[81] In *Boucher*, the defendant claimed that his statements were illegally obtained because he was not given *Miranda* warnings and the items found in the subsequent search were fruits of an unconstitutional custodial interrogation.[82] The court did not agree with the defendant's position.[83] Rather, the court found that the questioning of the defendant could not be considered an interrogation because the defendant did not know that the officer had spotted a gun lodged between his seat, thus the defendant was unaware that he could incriminate himself.[84] On the issue of custody, the court found that the defendant was not in custody simply because the questioning is conducted in a certain place, like a police car.[85] The court reasoned that placing an emphasis on the location of the questioning was improper in making a custody determination.[86] The court held that a "reasonable person in Boucher's position would not have considered [the police officer's] questions in the patrol car a custodial interrogation.[87]

The solution proposed in this comment, which would create a presumption of custody when a defendant is questioned in the back of a police car, is contrary to the decisions of the

[79] *Murray*, 88 F.2d at 462.
[80] *Id.*
[81] United States v. Boucher, 909 F.2d 1170 (8th Cir. 1990).
[82] *Id.* at 1173.
[83] *Id.* at 1174.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] United States v. Boucher, 909 F.2d 1170, 1174 (8th Cir. 1990).

Seventh and Eighth Circuits. The solution proposed here suggests that if this issue were to ever reach the United States Supreme Court, the Supreme Court should consider the decisions of the Fourth, Sixth and Ninth Circuits as having decided these issues in accordance with the legal tests already established by the Supreme Court in previous cases.

Part II: Analysis

A. Creation of Rebuttable Presumption

As previously stated, the laws surrounding seizure and custody determinations are essentially analyzed under the same legal standard.[88] Therefore, where a seizure occurs, the courts should consider that individual to be "in custody."[89] *Miranda* rights were created in order to guard against the inherently coercive environment of a custodial interrogation.[90] This inherent coercion was originally developed in the context of a police station questioning, however, now, "custody" is no longer defined as the traditional concept of being arrested and or being held in the police station.[91] One of these contexts that should be considered inherently coercive is when the defendant is seized in the back of a police car.

Currently, the standard that exists for a custody determination is a reasonable person standard based on the totality of the circumstances that asks the question of whether that reasonable person would feel free to leave or terminate the interaction with the police.[92] This standard should be altered to create a presumption that if the defendant is interrogated while in the back of a police car, there has been a seizure of that person, and further that person was "in custody."[93] Because of the inherent coercion that exists in that location, the court should assume

[88] *See supra* notes 39-45.
[89] *See* U.S. CONST. am. IV; U.S. CONST. am V.; Miranda v. Arizona, 384 U.S. 436 (1966).
[90] *See* Miranda v. Arizona, 384 U.S. 436, 448 (1966).
[91] *See* California v. Beheler, 463 U.S. 1121, 1125 (1983).
[92] United States v. Mendenhall, 446 U.S. 544, 554 (1980).
[93] *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980); Miranda v. Arizona, 384 U.S. 436, 448 (1966).

that the reasonable individual would not feel free to leave.[94] As a result of this inherent coercion and subsequent custody determination, the presumption would dictate that that individual must be provided with *Miranda* warnings when interrogated in the back of a police car.[95] The burden would be on the prosecution to rebut this presumption. In order to rebut the presumption, the prosecution must allege facts on the record that establish that the individual did have freedom of movement, thus rendering the defendant not in custody, and *Miranda* warnings unnecessary.[96]

B. Purpose of the Presumption

Often cases with *Miranda* legal issues are in court because the defendant is asserting that a statement he or she made should be inadmissible because the defendant was not aware of his or her *Miranda* rights when he or she made the incriminating statement. On the other side, the prosecution is asserting that the person was not in custody, and thus the police were not required to read the defendant his or her *Miranda* rights. The legal standards exist for the purpose of providing judges a way to answer this question. These standards are vital to the legal system, and while they will always be imperfect and have weaknesses, it is important to try and account for as many facts and circumstances as possible.

When determining legal tests in this area of the law, it is important for courts to balance the need for effective law enforcement and the rights of American citizens.[97] "The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but to

[94] *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980).
[95] *See* Miranda v. Arizona, 384 U.S. 436, 467-468 (1966).
[96] *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980) (for reasonable person standard and totality of the circumstances analysis being adopted here).
[97] Christopher Lynch, Comment, *Here in My Car: The Crossing of Miranda and Terry at the Intersection of Custody During Stops* 25 J. Civ. Rts. & Econ. Dev. 909 (2011).

prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of all individuals."[98]

One underlying purpose of the *Miranda* law was to alert the public when their rights are being violated or are in danger of being violated.[99] The creation of this presumption will preserve the Supreme Court's underlying aim established in *Miranda.*[100] It produces a workable legal standard that will allow members of the public to know when they are actually in custody and when they are free to exercise their right against self-incrimination.[101] The current standard of a totality of the circumstances analysis does not allow for this clarity. More importantly, the proposed presumption will protect the individual even in the event that they are not made aware of their rights.[102]

C. Inherently Coercive Environment Determination

The purpose of the *Miranda* law is to provide constitutional safeguards in inherently coercive police dominated situations.[103] In order for the privilege of self-incrimination to be effective, it also has to apply before trial.[104] Otherwise, the police could circumvent the privilege it by interrogating as suspect beforehand, and then using that prior statement against the individual at trial.[105] Therefore, the Court determined that without procedural safeguards, police interrogation is inherently coercive due to "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not

[98] United States v. Mendenhall, 446 U.S. 544, 509 (1980) (*quoting* United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).
[99] *See* Miranda v. Arizona, 384 U.S. 436, 457-58 (1966).
[100] *Id.*
[101] *See Id.*
[102] *See Id.*
[103] *See* Miranda v. Arizona, 384 U.S. 436, 457 (1966).
[104] *Id.* at 467.
[105] *Id.*

otherwise due so freely."[106] Therefore, the Court does not need to inquire into the facts of the given case.[107] Because custodial interrogations are considered inherently coercive, as long as the individual was interrogated in custody, the Court will presume that statements made by the individual were influenced by that coercion.[108]

Miranda also outlines the details of the coercive police tactics that led the Court to determine the need for procedural safeguards.[109] For example, the Court in *Miranda* recognized that many police manuals detail methods for intimidating defendants into providing incriminating information.[110] For example, *Miranda* cites one police handbook that states,

> If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.[111]

The Court found it was clear that the aim of these police tactics was to isolate the individual, thus depriving him of "outside support."[112] The Court noted that, "when normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights."[113] Thus, in *Miranda* the Court chose to concern itself with

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[106] *Id.*
[107] *Id.* at 491.
[108] *Id.*
[109] *See* Miranda v. Arizona, 384 U.S. 436, 449 (1966).
[110] *Id.*
[111] *Id.* (*quoting* O'Hara, Fundamentals of Criminal Investigation (1956) at 99).
[112] Miranda v. Arizona, 384 U.S. 436, 455 (1966).
[113] *Id.* at 455.

the "evils" that police interrogation procedures could bring.[114] The likelihood of coercion is the policy reason for the creation of the procedural safeguards that are now referred to as an individual's "*Miranda* rights."[115] These constitutional rights include the right to remain silent, that anything you say can be used against you in the court of law, the right to counsel and that if one is unable to afford an attorney, that the court will appoint an attorney.[116]

Ultimately, in *Miranda*, by creating a presumption that being interrogated by the police in custody is inherently coercive, the Court places the burden on the police to show that they made the person aware of their rights.[117] Without such a showing, it would be very difficult for the police to use any subsequent statements at trial.[118] These same factors of inherent coercion the *Miranda* court found applied to police stations can also be applied to the environment of a police car.

This solution does place emphasis on a factor that has previously not been considered dispositive in the *Miranda* analysis.[119] This solution will put the emphasis on the inherently coercive nature of the environment of the back of the police car.[120] Based on the established legal test, the place where an interrogation occurs does not conclusively establish the presence or absence of custody.[121]

Previous cases have held that a non-custodial situation does not become a custodial interrogation because a court concludes that the questioning took place in a "coercive environment" in the absence of a formal arrest or restraint on the freedom of movement.[122] The

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[114] *Id.*
[115] *Id*. at 476.
[116] *Id.* at 479.
[117] *Id. at* 478-479.
[118] *See* Miranda v. Arizona, 384 U.S. 436, 478-479 (1966).
[119] *See* United States v. Knox, 839 F.3d 285 (6th Cir. 1988).
[120] *See* Miranda v. Arizona, 384 U.S. 436, 446 (1966).
[121] United States v. Knox, 839 F.3d 285, 291 (6th Cir. 1988).
[122] *See* United State v. Knox, 839 F.3d 285, 291 (6th Cir. 1988); Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

Court has also determined that questioning that took place in a prison, without more factors of coercion, was not enough to constitute custody under the meaning of *Miranda.*[123] The Court has never found that a coercive environment was dispositive to determine that the person was "in custody" for the purposes of *Miranda.*[124] This proposed solution alters these previous holdings by asserting that some environments should be considered *so* coercive as to create a presumption of custody.

Originally, the context of *Miranda* focused on interrogations that occurred in a police station.[125] This context must be expanded to adapt to the current problems facing law enforcement and the citizenry's knowledge, or lack of knowledge, of their constitutional rights. Questionings that take place in the back of a police car can be compared to the traditional scenario of a defendant being questioned in a police station.[126] Both are police dominated atmospheres that are associated with formal arrest.

Additionally, there are certain factors surrounding a questioning in a police car that also contribute to the inherent coerciveness of the environment. A reasonable person may find that questioning in the back of a police car even more inherently coercive than the environment of a police station.[127] For example, an individual would have less freedom of movement in the back of a car than in a holding room at a police station, especially if the police car is moving and transporting them to a destination.[128] The fact that the car is capable of movement contributes strongly to a reasonable person's opinion that they would not be free to leave.

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[123] Howes v. Fields, 1132 S. Ct. 1181 (2011).
[124] *See* Miranda v. Arizona, 384 U.S. 436 (1966); Dunaway v. New York, 442 U.S. 200 (1979); Howes v. Fields, 1132 S.Ct. 1181 (2011).
[125] *See* Miranda v. Arizona, 384 U.S. 436, 440, 496(1966); *supra* note 97.
[126] *See Miranda*, 384 U.S. at 479; Dunaway v. New York, 442 U.S. 200 (1979).
[127] *See Miranda*, 384 U.S. at 479 (1966); *Dunaway*, 442 U.S. at 200.
[128] *See* Dunaway v. New York, 442 U.S. 200 (1979).

Secondly, most police cars lack handles or any way in which an individual would be able to physically exit the vehicle once the door was shut. This factor, or even an individual's knowledge of that fact, renders a police car a more intimidating environment for interrogation.

There is also a power dynamic associated with the front seat and the back seat of vehicles. Those in the front seat, or the driver's seat, are in control of the vehicle. Those who are seated in the backseat are subordinate to that driver and their control of that vehicle. This power dynamic exists outside of the presence of a police officer, and enhances the perceived power of the vehicle's driver. Add a police presence to this scenario, and that power dynamic becomes even more extreme.

Additionally, general public knowledge associates being placed into the back of a police car with being under arrest. The media and other news outlets, as well as mainstream television and movies, often depict individuals under arrest being placed into the back of police cars. Often in such scenes, the individual being placed in the back of the police car is read his *Miranda* rights simultaneously. Depictions of crime and arrests on television and in the movies contribute to a reasonable person's expectations of "arrest" and the legal concept of when one is considered "in custody." There is also a strong public stigma against people who are arrests and those who are in custody.[129] Often those who are in custody can experience isolation, loss of jobs, dislocation, family distress and loss of self-respect.[130] And when the legal test for a custody determination is whether a reasonable person would feel free to leave, these outside factors toward arrests that contribute to how a reasonable person perceives a situation are relevant to that determination.

[129] *See* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION, 98-99 Wolters Kluwer 2011.
[130] *Id.*

The Supreme Court has also engaged in discussions about the inherently fearful nature of police presence, even to an innocent individual.[131] In his dissent in *Illinois v. Wardlow*, Justice Stevens posits that flight to escape police detection may have "entirely innocent motivation."[132] Justice Stevens disagrees with the majority that concluded that when the individual in question fled from the police officer, it provided the officer with reasonable suspicion that allowed the police officer to legally seize the individual.[133] A "reasonable person" may conclude that an officer's presence indicates that there is criminal activity in the vicinity nearby, and that there is a substantial element of danger associated with that criminal activity.[134] Stevens concludes that "[t]hese considerations can lead to an innocent and undesirable desire to quit the vicinity with all speed."[135] Additionally, an entirely innocent individual may seek to leave the scene in fear of being apprehended as a guilty party, or from an unwillingness to appear in court as a witness to a crime.[136] Justice Steven's dicta in *Wardlow* provides context for an important aspect of this presumption. A police presence can be fearful for individuals, whether they are innocent or guilty.[137] This presence becomes more intimidating when the police begin to question an individual.[138] Thus, police presence combined with interrogation results in a situation that is often coercive in nature.[139] This coercion is particularly present when there is a show of authority involved, such as when the individual is placed into that officer's official police vehicle. [140]

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[131] Illinois v. Wardlow, 582 U.S. 119 (2000) (Stevens, J. dissenting).
[132] *Id.* at 131 (Stevens, J. dissenting).
[133] Illinois v. Wardlow, 582 U.S. 119, 126 (2000).
[134] *Wardlow*, 582 U.S. at 131 (Stevens, J. dissenting).
[135] *Id.*
[136] *Id.* quoting Alberty v. United States, 162 U.S. 499, 511 (1896).
[137] *See* Illinois v. Wardlow, 528 U.S. 119 (2000) (Stevens, J. dissenting)
[138] *Id.*
[139] *Id.*
[140] Terry v. Ohio, 392 U.S. 1, 19 (1968).

As criminal law develops, it is clear that *Miranda* warnings should not solely be required in the context of a police station interrogation. The courts should progress and recognize that inherently coercive situations exist outside that traditional context. This presumption allows for recognition of how a reasonable person perceives a situation when they are placed in the back of a police car by establishing a presumption of custody in such situations.

E. Rebutting the Presumption

Additional factors of the detention, or the lack of the existence of certain factors, may serve to assist the prosecution in rebutting the established presumption of custody. These factors, examined by other courts in making custodial determinations, are very important to the analysis. The "totality of the circumstances" test is based solely on the facts present on the record.[141] In light of the created presumption of custody here, the facts that form the totality of the circumstances will now assist the prosecution in rebutting the presumption.[142]

The Supreme Court has identified some factors that would contribute to a reasonable person not feeling free to leave a situation or terminate a police interaction.[143] Those factors include the threatening presence of several officers, physical touching of the person of the citizen, an officer displaying a weapon, or the use of language or tone of voice indicating that compliance with the officer's request is not optional.[144] These factors, under the new presumption of custody, are factors that would result in the court upholding the determination of custody.[145] Additionally, contrary factors or the lack of these factors could be used to assist the prosecution in rebutting the presumption.[146] For example, if the officer did not display a

[141] *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980).
[142] *See supra* notes 70--75.
[143] United States v. Mendenhall, 446 U.S. 544, 554 (1980).
[144] *Id.*
[145] *See Id.*; *supra* notes 92-97.
[146] *See* Mendenhall, 446 U.S. at 554.

weapon, did not touch the individual, or if there was only one officer on the scene, under the precedent of *Mendenhall*, the prosecution could argue the individual was not "in custody" for purposes of *Miranda* rights.[147]

Another relevant factual consideration is whether the defendant was handcuffed. If the defendant was not handcuffed, that factor would support the prosecution's assertion that the individual had freedom of movement and was not seized during the police interaction.[148] In some cases where the defendant was handcuffed, the Court found that the individual was in custody.[149] For example, in *Henley*, one factor that led the court to determine that the individual was in custody was the fact that he was handcuffed while seated in the police car.[150] Similarly, in *Burlew*, when the defendant was not handcuffed, the Court rejected the argument that the defendant was in custody.[151] In some cases where there are other demonstrations of authority present, the use of handcuffs may not be a dispositive factor.[152] For example:

> Under the totality of the circumstances approach now used by courts, it is very likely that the court would find that when a person is involuntarily removed from his home, especially in the middle of the night, and taken in the police car down to the station, that he was definitely in custody for *Miranda* purposes.' This would hold true even where the police don't handcuff the suspect. Police officers who wish to question 'the usual suspects' should make it very clear to them if they are not under arrest that they do not have to accompany the police and are free to leave the station at any time.[153]

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[147] *Id.*
[148] *See* United States v. Henley, 984 F.2d 1040 (9th Cir. 1992); Burlew v. Hedgpeth, 448 Fed. Appx. 663 (9th Cir. 2011).
[149] United States v. Henley, 984 F.2d 1040 (9th Cir. 1992).
[150] *Id.* at 1042.
[151] Burlew v. Hedgpeth, 448 Fed. Appx. 663 (9th Cir. 2011).
[152] *See* Kevin Corr, *A Law Enforcement Primer on Custodial Interrogation*, 15 Whittier L. Rev. 723, 737 (1994) (citing Dunaway v. New York, 442 U.S. 200 (1979)).
[153] Kevin Corr, *A Law Enforcement Primer on Custodial Interrogation*, 15 Whittier L. Rev. 723, 737 (1994) *citing* Dunaway v. New York, 442 U.S. 200 (1979).

The second factor is whether or not the defendant was formally arrested.[154] If the defendant had not been formally arrested, it would help the prosecution in rebutting the presumption of custody.[155] In *Figg*, the defendant was not formally arrested when he was placed in the car, but he was still considered seized within the definition of the Fourth Amendment.[156] In *Richardson*, the defendant was not formally arrested, but was seized because it was made clear to him that he was not free to leave.[157] Ultimately, if an individual has been informed that he is officially under arrest, this should support a finding of custody based on the purposes and principles underlying *Miranda*.[158] Being officially under arrest would rise to the level of custody described in *Beheler*, where the Court found that an individual is "in custody" when the police encounter rises to the degree associated with a formal arrest.[159]

A third factor that the court may consider in the prosecution's attempts to rebut the presumption, is whether the defendant was directly told that he could not move.[160] If the defendant is never told that he or she could not move, it may help to rebut the presumption.[161] On the contrary, if they are specifically told they cannot move during the course of the police interaction, then clearly at this point their movement is restricted and they should be considered seized.[162] Thus, the presumption would stand if a person were told they were not free to leave the police encounter.[163]

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[154] *See* United States v. Richardson, 949 F.2d 851 (6th Cir. 1991); Figg v. Shroeder, 321 F.3d 625 (4th Cir. 2002); United States v. Henley, 984 F.2d 1040 (9th Cir. 1992); Burlew v. Hedgpeth, 448 Fed. Appx. 663 (9th Cir. 2011).
[155] *Id.*
[156] *See* Figg v. Shroeder, 321 F.3d 625 (4th Cir. 2002).
[157] *See* United States v. Richardson, 949 F.2d 851 (6th Cir. 1991).
[158] *See* Miranda v. Arizona, 384 U.S. 436 (1966); *supra Part IIB Purposes of the Presumption*.
[159] *See* California v. Beheler, 463 U.S. 1121, 1125 (1983).
[160] *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980).
[161] *See Id.*
[162] *See Id.*
[163] *Id.*

Some state cases have also focused on a defendant's proximity to a police car, even when the individual was not physically detained inside the police car.[164] For example, in *People v. Kennedy*, the defendant was asked to step to the rear of a patrol car and was patted down.[165] The court determined that the officers had demonstrated sufficient control of the defendant's physical movement to warrant a reasonable belief on his part that he was not free to leave.[166] Similarly, where a defendant was drifting in and out of consciousness, was removed from his home and propped up against the police car, the court held that the questioning throughout the interaction constituted a custodial interrogation.[167] The South Carolina Court of Appeals reasoned that where the individual was physically removed from his home and carried to the police car and handcuffed, it was clear that the police had taken that person into custody.[168] Other courts however, have taken a more strict approach.[169] An Ohio District Court found that the suspect was not in custody even when he was spread-eagled against a police car and patted down during an investigatory stop.[170] The court reasoned that requiring the suspect to place his hands on the patrol car was reasonable given the officer's belief that the individual was armed, and reasonable force would not constitute the police officer's actions rising the level of a custodial interrogation.[171]

Some courts have also differentiated between placing the defendant in the front of the police vehicle, versus in the back seat of the police vehicle.[172] This raises the question of

[164] *See* People v. Kennedy, 66 Ill. App. 3d 27 (5th Dist. 1978); State v. Gaston, 110 Ohio App. 3d 835 (11th Dist. Lake County 1996); State v. Ledford, 351 S.C. 83 (Ct. App. 2002).
[165] People v. Kennedy, 66 Ill. App. 3d 27 (5th Dist. 1978).
[166] *Id.*
[167] State v. Ledford, 351 S.C. 83 (Ct. App. 2002).
[168] *Id.*
[169] *See* State v. Gaston, 110 Ohio App. 3d 835 (11th Dist. Lake County 1996).
[170] *Id.*
[171] *Id.*
[172] *See* Taylor v. State, 659 N.E.2d 1054 (Ind. Ct. App. 1995); State v. Plager, 2004 W.L. 144122 (Iowa Ct. App. 2004).

whether the prosecution would be able to argue that the front seat of a police vehicle is a less coercive environment than the back seat of a police vehicle, which symbolizes a much more traditional aspect of arrest.

Ultimately, these factual considerations are just some examples of the types of facts a case may present that can assist a prosecutor in attempting to rebut the proposed presumption.

F. Interrogation Analysis

The proposed solution here focuses on the Fifth Amendment analysis in order to determine whether a person should have been read their *Miranda* rights. In such an analysis, first the court must determine if the person was "in custody" for purposes of *Miranda*, then the court must determine if the police engaged in an "interrogation" of the suspect.[173] The presumption proposed here focuses less on whether the police are "interrogating" the suspect, and more on whether that person has been seized to the point of being considered "in custody." However, whether the officer was intending to get an incriminating response is a factor that goes to the "interrogation" aspect of the custody determination.[174]

The Supreme Court in *R.I. v. Innis* stated, "that is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[175] This definition focuses on what is perceived by the suspect, not what the police intend in their questioning.[176]

The interrogation analysis is relevant to the proposed solution because some courts have failed to find that a defendant was subject to a custodial interrogation in or around a police car

[173] *Id.*
[174] R.I. v. Innis, 446 U.S. 291, 380 (1980).
[175] *Id.*
[176] *Id.*

not because the environment did not render the individual seized, but rather because the questions asked by the police officers did not amount to the level of an "interrogation."[177] For example, in *People v. Fulcher*, the court found that the officer did not question the subject in an effort to illicit an incriminating response, even though the defendant was temporarily detained outside the police vehicle.[178] Ultimately, even if the court determines that the individual was in custody due to the presumption suggested here or otherwise, the second prong of the *Miranda* legal standard must be met.[179] The defense must also show that an interrogation occurred, because the custody determination will not require a reading of *Miranda* rights.[180]

G. Applicable Miranda Exceptions

It should be noted that the Supreme Court found that *Terry* stops did not require *Miranda* warnings and did not rise to the level of a custodial interrogation.[181] As a result, many courts have determined that *Terry* detainees are not in *Miranda* custody.[182] Factors relevant to this decision include the brief period of time an individual is usually detained during a *Terry* stop, as well as a typically less intimidating police presence.[183] In *Berkemer v. McCarty*, the Court held that a traditional *Terry* stop of a vehicle did not render the person "in custody."[184] The Court concluded the individual was not in custody because "the respondent…failed to demonstrate that, at any time between the initial stop and arrest, he was subjected to restraints comparable to those associated with formal arrest."[185] The Court considered the fact that the interaction

[177] *See* R.I. v. Innis, 446 U.S. 291, 380 (1980); People v. Fulcher, 194 Cal. App. 3d (1st Dist. 1987).
[178] People v. Fulcher, 194 Cal. App. 3d (1st Dist. 1987).
[179] *See* Miranda v. Arizona, 384 U.S. 436 (1966); R.I. v. Innis, 446 U.S. 291 (1980).
[180] *Id.*
[181] *See* Berkemer v. McCarty, 468 U.S. 420, 440 (1984).
[182] Daniel C. Isaacs, Comment, *Miranda's Application to the Expanding Terry Stop*, 18 J.L. & Pol'y 383 (2009).
[183] Berkemer v. McCarty, 468 U.S. 420, 440 (1984).
[184] *Id.*
[185] *Id.* at 441.

occurred over a short period of time, and that the individual was not told at any time that the detention would not be temporary.[186] There was one police officer asking a few questions and he only requested that the respondent perform a balancing test.[187] The Court held that, "treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest."[188] Therefore in the event that a motor vehicle or a *Terry* stop involve the placing of an individual in the back of the police car, it is possible the Court would extend the *Berkemer* holding to that case, thus serving to rebut the presumption that the individual was placed in custody.

However, the *Terry* stop exclusion to *Miranda* created in *Berkemer* does not eliminate the presumption proposed in this comment.[189] The analysis should occur in all circumstances where a person is asked questions while sitting in the back of the police car.[190] Even *Berkemer* states that once formally arrested, the individual must be read *Miranda* rights.[191] Therefore, if the court finds that the individual, when detained in the car, was subjected to the same restraint of movement as a formal arrest, and the prosecution is unable to rebut the presumption than the presumption of custody will stand.[192] However, if the questioning occurs in the context of a *Terry* stop, the court may consider this as a factor in the prosecution rebutting the presumption, though it should not be dispositive.[193]

It should also be noted that already established exceptions to the *Miranda* rule will also serve as exceptions to this presumption of custody. For example, the public safety exception created in *New York v. Quarles*, will limit the presumption.[194] In *Quarles*, the police frisked a

[186] *Id.* at 442.
[187] *Id.*
[188] *Id.*
[189] *See supra* notes 70-75
[190] *See supra* notes 70-75.
[191] Berkemer v. McCarty, 468 U.S. 420 (1984).
[192] *See* Berkemer v. McCarty, 468 U.S. 420 (1984).
[193] *See* Berkemer, 468 U.S. 420 (1984); Terry v. Ohio, 392 U.S. 1 (1968).
[194] New York v. Quarles, 467 U.S. 649 (1984).

subject inside a grocery store after a woman reported that he had raped her. When the police realized he had an empty shoulder harness, they asked him where he hid the gun prior to reading him *Miranda* warnings.[195] The defendant was also handcuffed at the time of the questioning.[196] However, the Supreme Court held that his statements were admissible despite the lack of *Miranda* warnings by establishing a public safety exception to *Miranda v. Arizona*.[197] The Court held that, if it would be reasonable for the police officer to be concerned about public safety, the police can questions without first giving *Miranda* warnings.[198] Additionally, the answers to those questions can be admitted into evidence.[199]

Additionally, providing *Miranda* rights will likely not remedy the Fourth Amendment violation of an illegal detention.[200] In *Dunaway v. New York*, the police questioned the informant and read him his *Miranda* rights at the police station, but did not have enough information to get a warrant for the defendant's arrest.[201] The Court held that while proper *Miranda* warnings were given and the petitioner's statements were "voluntary," they were inadmissible because the petitioner's confession occurred during his illegal detention.[202] "Detention for custodial interrogation, regardless of its label, intrudes so severely on interests protected by the Fourth Amendment as necessary to trigger the traditional safeguards against illegal arrest."[203] Additionally, "*Miranda* warnings and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation."[204] Therefore, even with the proposed presumption in effect, if the police presence is illegal or the undermining stop or arrest is invalid

[195] *Id.* at 651.
[196] *Id.*
[197] *Id.* at 657.
[198] *Id.*
[199] *Id.* at 651.
[200] Dunaway v. New York, 442 U.S. 200 (1979).
[201] *Id.* at 216.
[202] *Id.*
[203] *Id.*
[204] *Id.* (*quoting* Brown v. Illinois, 422 U.S. 601, 601 (1975).

under the Fourth Amendment, then the presumption would likely not be rebuttable by the prosecution in light of defense facts asserting the illegal detention.

H. Ramifications and Limitations to the Presumption

The proposed solution of creating the rebuttable presumption has potential benefits as well as possible detriments to the mission of law enforcement. The solution is likely to be characterized as serving or protecting the rights of defendants, as it serves to counter balance the inherently coercive nature of detention in the back of a police car.[205] However, it could also be considered pro-prosecution because it will ensure that any statements made by the defendant will be admissible in court, or in the very least, ensure that the defendant's statements are not excluded because he was not read *Miranda* warnings prior to the statement being made.[206] It is also possible that establishing this presumption will result in a more efficient motion practice system, and decrease the amount of motions to suppress statements on the grounds that the defendant was not read his *Miranda* rights.[207]

On the contrary however, if this presumption were to become law, police officers may hesitate to place defendants in the back of police cars simply to control them, or the situation.[208] Another possible consequence is that the police may err on the side of caution and handcuff the defendants less frequently, especially if handcuffing a defendant is a factor that the court finds rebuts the presumption.[209] If handcuffing the defendant or placing them in the back of the police car means that they must read the individual their *Miranda* rights, they may hesitate to detain

[205] *See supra* notes 87-95.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*

that person in that manner.[210] These effects could lead to endangering the police officers or even the general public in the surrounding area.[211]

The goal of the presumption is to promote the reading of *Miranda* rights to individuals who are being detained in coercive environments.[212] The presumption aims to accomplish this goal by placing the finder of fact in the defendant's shoes prior to assessing the reasonableness of police actions. However, there are concerns associated with changing the current objective standard to one with more subjectivity. Such concerns include whether the defendant would be required to testify as to what he or she actually felt during the time of the interrogation. Currently, the objective nature of the standard allows a court to make that determination much more efficiently and without such testimony. This shift in the standard may impact judicial efficiency.

I. Public Opinion

In furtherance of the concepts explained throughout this comment, a survey was conducted of average Americans on their views of policing and the concepts of arrest and Miranda rights.[213] The survey was responded to by seventy five individuals, 51% of whom had a legal education background[214], and 12% of whom had been arrested. Of the respondents, 77% of them were between the ages of twenty three and twenty nine. The largest group of respondents that responded were age twenty four, with twenty respondents and age twenty five, with fifteen

[210] *Id.*
[211] *See supra* notes 87-95.
[212] *Id.*
[213] Survey was conducted online, and distributed via email and Facebook to friends, family, classmates, and acquaintances of the author with a large range of ages, occupations, geographical background and gender – though specifics on all these categories are not known. The title of the survey was "Police Presence Survey" and it was responded to by 75 individuals.
[214] 49% answered that they had no legal education background, where the answer choices to the question "Are you a law student?" were Option 1: Yes, Option 2: No.

respondents. 12% of respondents were between the ages of thirty and forty nine, and 11% were age fifty and over.

The survey asked the respondents three questions on their feelings about terminating a police encounters. When asked, "If you were stopped by a police officer and questioned about your name and whereabouts, would you feel free to walk away from them without answering their questions?" 88% of the respondents answered that no, they would not feel free to walk away without speaking the officer. Similarly, 78% of the respondents said they would not feel free to terminate a police encounter if the officer asked them to sit in the back of their squad car, even if they were not handcuffed. If they were handcuffed, however, 87% of the respondents would assume they were under arrest, even if they were not told they were formally under arrest. Of the 75 respondents, the vast majority (81%)[215] wrote that an individual should be read their Miranda rights when they are arrested. This would mean that the overlapping group would assume that Miranda rights should be read upon being handcuffed by the police, since the majority of the respondents associated that action with formal arrest.

The survey also inquired about coercive environments. When asked, "Where would you feel more intimidated if you were being questioned by the police in one of the following locations?" The options were police station, police car, your home and roadside. 64% of the respondents answered that the police station was the most intimidating environment for questioning, while 26% responded that a police car was the most intimidating place. One respondent who answered police car stated, "It's probably a bad situation to be in a police car. At least in a police station it's a larger building and there is a possibility of being free to walk around so long as you're not restrained. It's a much tighter situation in a police car and for some

[215] This percentage includes the number of respondents who referenced custody in their responses.

reason seems more intimidating."[216] Other respondents who chose the same answer, referencing the limited space of a police car, the fact that the doors can not be opened from the inside, and the lack of other people present. Another respondent stated that there is likely to be more supervision of the officers and cameras protecting their civil liberties at a police station than in a squad car.[217] "If I were placed in a squad car it would signal to me that I am in an intimidating situation" was the response of another survey taker.[218]

These concerns associated with the police car environment, as well as the perceived inability to terminate police encounters when the law states that an individual is hypothetically legally allowed to do so, show the public confusion over the standards that surround Fourth Amendment rights and police activity. By creating a presumption that an individual is in custody during an intimidating encounter with the police in a squad car, the court's established standard would become more synonymous with the expectations of the general public.

J. Social Science Concerns

Many issues that remain unanswered in regards to the topic of Miranda rights, arrests and custodial interrogations are concerns of social science. The entire premise of this presumption asks what is reasonable in policing and the enforcement of Fourth Amendment principles. What is considered reasonable may vary depending on the community and it's level of crime, the norms followed by police officers and courts, and the viewpoints of community members. Social scientists have begun to examine these issues in the context of stop and frisk, community policing and judgments about detaining individuals.[219]

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[216] Respondent is a 24 year old law student with no arrest record.
[217] Respondent is a 26 year old law student with no arrest record.
[218] Respondent is a 26 year old non-law student who opted not to answer as to arrest record.
[219] *See* David Kennedy, "Underwriting the Risky Investment in Community Policing: What Social Science Should be Doing to Evaluate Community Policing." Justice System Journal 17, no.3.; L. Song Richardson, *Police Inefficiency and the Fourth Amendment*, 87 INDIANA L. J. 1143 (2012); L. Song Richardson, *Arrest Efficiency and*

For example, some social scientists posit that "individuals have implicit (nonconscious) biases that can perniciously affect the perceptions, judgments and behaviors that are integral to core Fourth Amendment principles."[220] In her scholarly articles, L. Song Richardson also astutely notes that Fourth Amendment Scholars are particularly absent from the discussion of behavioral science as it relates to Fourth Amendment and policing concerns.[221] How individuals react to police activity, and how the police view the individual's behavior toward them, is extremely relevant to the perceived "reasonableness" of one's detention or seizure in a police dominated atmosphere.[222] These social science principles are particularly relevant to the creation of this presumption, as it assumes an inherently coercive environment for the purposes of a new legal standard.

In her articles, L. Song Richardson also discusses implicit biases in behavior in regards to police activity, particularly how that science of implicit social cognition can contribute to the understanding of police activities, especially as it relates to the treatment of nonwhites.[223] Ultimately, "Negative stereotypes and unfavorable attitudes toward blacks can cause individuals to treat them differently than non-stereotyped group members."[224] This concept is particularly relevant in certain communities with a high minority population. In such communities, the concept of what is "reasonable" for an individual to believe in the presence of police activity could vary from what is considered reasonable in communities that are comprised of mostly white individuals. Yet, our current legal jurisprudence does not in any way account for the make up of individual communities as it relates to police presence and action.

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the Fourth Amendment, 95 MINN. L. REV. 2035 (2011).
[220] L. Song Richardson, *Police Inefficiency and the Fourth Amendment*, 87 INDIANA L. J. 1143, 1144 (2012).
[221] L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2036 (2011).
[222] *See Id.*
[223] L. Song Richardson, *Police Inefficiency and the Fourth Amendment*, 87 INDIANA L. J. 1143, 1148 (2012); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2036 (2011).
[224] L. Song Richardson, *Police Inefficiency and the Fourth Amendment*, 87 INDIANA L. J. 1143, 1151 (2012)

Ultimately, legal scholars should work to closely consider the social behavioral aspects of Fourth Amendment enforcement and how that affects the legal standard and subsequent outcomes for individuals, specifically in minority communities. Currently, however, a reasonable person legal standard fails to consider these concerns, thus further supporting a restructuring of the *Miranda* reasonable person analysis, as proposed in this comment.

Conclusion

The solution proposed in this comment, a rebuttable presumption of custody when a suspect is interrogated in the back of a police car, seeks to counterbalance the inherently coercive nature of a police encounter that occurs in a police car. While location has not been a previous dispositive factor for a custody determination, the courts must recognize the inherently coercive nature of such a location by moving away from the traditional context of custodial interrogations in police stations. The creation of this presumption grants defendants the benefit of knowing their rights during an inherently coercive situation, a right that *Miranda v. Arizona* sought to afford all defendants that found themselves in a custodial interrogation. The totality of the circumstances analysis that the courts previously applied to the custody determination will now apply to the prosecution's ability to rebut the presumption. The elimination of the totality of the circumstances analysis, and its replacement with a pro-defendant's rights presumption allows a clear line to be drawn for police and law enforcement. The presumption is also supported by the goal of ensuring that defendants know their rights, and the expectations of the general public. The presumption will also serve to foster an environment where it is commonplace for a defendant to be informed of his rights. The principles that underlined the Supreme Court's historically significant decision in *Miranda v. Arizona* must be upheld and protected in order to preserve the Constitutional rights afforded to individuals in the Fourth and Fifth Amendments.

Protection of those rights and of the integrity of the Constitution of the United States in criminal proceedings must be of the utmost importance in our criminal justice system. This presumption allows for the protection of those rights, while still maintaining the ability of law enforcement to effectively perform their duties and protect societies.