

## MIRANDA THIRTY-FIVE YEARS LATER: A Close Look at the Majority and Dissenting Opinions in *Dickerson*\*

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Over the years, *Miranda v. Arizona*<sup>1</sup> has been criticized both for going too far<sup>2</sup> and for *not going far enough*.<sup>3</sup> Nevertheless, on the basis of talks with many criminal procedure professors in the sixteen months between the time a panel of the Fourth Circuit upheld a statute (18 U.S.C. § 3501) purporting to “overrule” *Miranda* and a 7-2 majority of the Supreme Court overturned that ruling in the case of *Dickerson v. United States*,<sup>4</sup> I am convinced that most criminal procedure professors wanted the Supreme Court to do what it did—“reaffirm” *Miranda*. This is not surprising. As Professor Grano once observed, “a person need only attend academic conferences on criminal procedure to discover how discrete and insular ‘conservatives’ are in academia.”<sup>5</sup>

However, I think all the many professors teaching criminal procedure realized that we would be in much greater demand if the Fourth Circuit’s ruling were to be upheld by the Supreme Court—if the centerpiece of the Warren Court’s revolution in American criminal procedure were to be eradicated by the Rehnquist Court. For in such an event the resulting confusion would have been enormous—and we would have been popping up on radio and television in much the way all those “election law specialists” did during the protracted 2000 presidential election.

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

2. See, e.g., JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 199-222 (1993); Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1419 (1985); Fred E. Inbau, “*Playing God*”: 5 to 4 (*The Supreme Court and the Police*), 57 J. CRIM. L. CRIMINOLOGY & POL. SCI. 377, 377 (1966).

3. See, e.g., Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. F. 518, 537-38; Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1842-45 (1987); Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 110 (1989).

4. 120 S. Ct. 2326 (2000), *rev’g* 166 F.3d 667 (4th Cir. 1999).

5. Joseph D. Grano, *Introduction—The Changed and Changing World of Constitutional Criminal Procedure*, 22 U. MICH. J.L. REFORM 395, 398 n.12 (1989).

## I. WHAT MIGHT HAVE BEEN

Suppose, in a *Miranda*-less stationhouse,<sup>6</sup> a suspect were to ask the police whether she *had* to answer their questions or whether the police had *a right* to an answer.<sup>7</sup> How should the police respond?

Or suppose a custodial suspect were to ask an officer whether she could first meet with her own lawyer (or *a* lawyer) before answering any questions or whether the police could (or would) *prevent her* from seeing or communicating with a lawyer until she answered their questions. Once again, how should a police officer respond?

As Chief Justice Warren pointed out a week after *Miranda*, the fourteenth amendment due process-“voluntariness”-“totality of the circumstances” standard for the admissibility of confessions had become “increasingly meticulous through the years.”<sup>8</sup> On the eve of *Miranda*, the test demanded a

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6. Professor Paul Cassell, who was appointed by the Court in *Dickerson* to defend the constitutionality of § 3501 (because the Department of Justice would not do so), sought to assure the Court that, even if § 3501 were upheld and *Miranda* displaced by a statutory voluntariness- totality of circumstances test, the police would continue to give the *Miranda* warnings. Perhaps some police departments would do so *in the months immediately after* the overturning of *Miranda*—but I doubt that they would in what they considered “exceptional” or “compelling” cases. And it would hardly be surprising if some of the departments who assured us that they were going to continue to warn suspects of their rights after the fall of *Miranda* (at least for a while) chose an abbreviated or diluted version of the warnings, such as “anything you say can be used *for or* against you.” Moreover, in a world without *Miranda*, if the prosecution chose to utilize a statement obtained in violation of internal police regulations requiring *Miranda* warnings to continue to be given, the defense would not be able to suppress the statement simply because it was obtained in violation of police regulations. See *United States v. Caceres*, 440 U.S. 741, 757 (1979).

In any event, I share the view of Professor George Thomas that even if, in the wake of the demise of *Miranda*, the police continued to give the *Miranda* warnings, “over time, the number of cases in which warnings [would be] given would fall, and if courts routinely admit[ted] these confessions under Section 3501, the police [would] learn that *Miranda* is truly no longer crucial.” George C. Thomas, III, *The End of the Road for Miranda v. Arizona?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 31 (2000).

Finally, after the demise of *Miranda*, some police departments might continue to require their officers to give the now-familiar warnings, but eliminate *other* “harmful features” of *Miranda*. Cf. Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 496 (1996) (in return for the additional safeguard of taping police interrogations, we might “dispense with the requirement that police obtain an affirmative waiver of rights from suspects, [a] particularly harmful feature of *Miranda*” and “the requirement that police immediately terminate an interview whenever the suspect requests an end to the interview or an opportunity to meet with counsel”).

7. Such questions would hardly be surprising. After all, over the years tens of millions of Americans have watched many detective shows on TV.

8. *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966); see also *Miranda*, 384 U.S. at 508 (Harlan, J., dissenting) (“[S]ynopses of the cases [applying the pre-*Miranda* voluntariness test] would serve little use because the overall gauge has been steadily changing, usually in the direction of restricting admissibility.”).

good deal more of the police than it had in 1936, the year the Court decided its first fourteenth amendment due process confession case.<sup>9</sup>

A persuasive argument may be made that, as it had evolved by the time of *Miranda*, the due process-voluntariness test would have (1) barred the use of any statement made by a suspect who had been told that she must answer police questions or told that the police had a right to an answer; (2) prohibited, at the least, the use of statements that were the product of any stationhouse questioning in the face of *repeated* expressions by the suspect of unwillingness to talk to the police until first consulting with a lawyer.

As to (1), perhaps the strongest contemporary critic of the Warren Court's approach to police interrogation and confessions, Justice White, dissenting in *Escobedo v. Illinois*<sup>10</sup> (as he was to dissent in *Miranda*), recognized that under the due process-voluntariness test if a suspect "is told he must answer and does not know better, it would be very doubtful that the resulting admissions could be used against him."<sup>11</sup> More recently, Professor Joseph Grano, a long-time critic of *Miranda* (and the Warren Court's criminal procedure cases generally), observed that because the police "may not deceive defendants about the nature or scope of their legal rights," "it would violate due process to tell suspects that they are obligated to answer questions."<sup>12</sup>

As to (2), I am aware that two 1958 cases, *Crooker v. California*,<sup>13</sup> and the companion case of *Cicenia v. LaGay*,<sup>14</sup> seem to refute my claim that by the mid-1960's the due process-voluntariness test had progressed to the point that police questioning of a suspect after denying his requests to contact a lawyer would have been considered unacceptably "coercive." Indeed, *Crooker* and *Cicenia* seem to say just the opposite. But I doubt that these cases were still viable after 1963, when the Court handed down *Haynes v. Washington*,<sup>15</sup> the last of the pre-*Miranda* cases to apply the voluntariness test.

Mr. Haynes had asked the police several times to allow him to call his wife, only to be told each time that he would not be permitted to do so unless and until he admitted his involvement in the case.<sup>16</sup> In striking down the resulting confession in light of "the unfair and inherently coercive context in which

9. *Brown v. Mississippi*, 297 U.S. 278 (1936). Professor Thomas recently described this case as, "[o]ne suspect was hanged, let down, hanged again, let down, tied to a tree and whipped." Thomas, *supra* note 6, at 5.

10. 378 U.S. 478 (1964).

11. *Id.* at 499 (White, J., joined by Clark, J., and Stewart, J., dissenting).

12. GRANO, *supra* note 2, at 114; see also Donald Dripps, *Is the Miranda Caselaw Really Inconsistent?: A Proposed Fifth Amendment Synthesis*, 17 CONST. COMMENT 19, 24 (2000) ("A citizen . . . always had the right to refuse to answer questions put by the police. . . . The Court's cases . . . forbid state-imposed penalties for exercising the right to remain silent." (emphasis added)).

13. 357 U.S. 433 (1958).

14. 357 U.S. 504 (1958).

15. 373 U.S. 503 (1963).

16. *Id.* at 504.

made,”<sup>17</sup> a 5-4 majority highlighted the police’s refusal to allow the defendant communication with and access to his family unless and until he “cooperated” with them.<sup>18</sup>

If anything, repeated denials of a suspect’s request to call a lawyer strike me as more likely to underscore the intimidating nature of incommunicado detention than repeated denial of a suspect’s request to contact his spouse. After all, as the Court has noted, “the lawyer occupies a critical position in our legal system because of his unique ability to protect [a] client undergoing custodial interrogation.”<sup>19</sup> Thus, I do not see how one can reconcile the Court’s position in *Haynes* with its approach five years earlier in *Crooker* and *Cicenia*. Neither could Justice Clark—who wrote the opinion of the Court in *Crooker*, but filed an angry dissent in *Haynes*.<sup>20</sup>

Of course, whether, in a *Miranda*-less world, (1) the police could tell a suspect that she had to answer their questions or (2) could reject a suspect’s requests to communicate with a lawyer and still use the resulting confession, are questions whose answers are not perfectly clear. But that very fact may be one of the reasons the *Dickerson* Court reaffirmed *Miranda*.

To be sure, this is speculation. But the majority opinion Chief Justice Rehnquist wrote in *Dickerson*—“reaffirming” the constitutionality of *Miranda*<sup>21</sup> is so spare and so cryptic that it is difficult, if not impossible, to discuss it without engaging in a good deal of speculation.

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17. *Id.* at 514.

18. *Id.*

19. *Fare v. Michael C.*, 442 U.S. 707, 719 (1979).

20. *See Haynes*, 373 U.S. at 525 (Clark, J., dissenting).

21. According to *Miranda*, a person taken into police custody must be advised of her rights (the now-familiar warnings) and waive those rights before statements obtained from her may be admitted into evidence. *Miranda*, 384 U.S. at 467-70. A provision of the Omnibus Crime Control and Safe Streets Act of 1968, a provision commonly known as § 3501 because of its designation under Title 18 of the United States Code, made the pre-*Miranda* “due process”-“totality of circumstances”-“voluntariness” doctrine the sole test for the admissibility of confessions in federal prosecutions, thereby purporting to overrule the Warren Court’s most famous confession case. 18 U.S.C. § 3501 (1994). *Dickerson* held that *Miranda*, “being a constitutional decision of [the] Court,” *Dickerson*, 120 S. Ct. at 2329, could “not be in effect overruled by an Act of Congress,” *id.* The Court then added: “and we decline to overrule [it] ourselves.” *Id.* For a discussion of the evolution of § 3501, the testimony at the Senate subcommittee hearings and the tone and quality of the Senate debate over the proposal that became § 3501, see Yale Kamisar, *Can (Did) Congress “Overrule” Miranda?*, 85 CORNELL L. REV. 883, 884-906 (2000).

Although it has often been said that *Miranda* supplanted or scrapped the pre-*Miranda* voluntariness test, this is not entirely accurate. The *Miranda* Court did find the voluntariness test unsatisfactory, but it did not replace it in all settings. *Miranda* added another test; the voluntariness test is still there. Just as the police may satisfy the voluntariness test but violate *Miranda*’s requirements, so may they comply with *Miranda* but fail the voluntariness test. For example, if a suspect effectively waives his *Miranda* rights and agrees to talk to the police, but insists he is completely innocent, the police may not subject him to coercive or offensive interrogation techniques that transgress due process-voluntariness standards.

II. SPECULATION ON WHY SEVEN JUSTICES VOTED TO “REAFFIRM” *MIRANDA*  
AND HOW AND WHY CHIEF JUSTICE REHNQUIST WROTE AN  
UNSATISFACTORY OPINION

Because the Supreme Court Justices of the 1970s and 1980s “themselves undermined the [*Miranda*] rule, in part by their eagerness to slice pieces off whenever possible, but worse by saying peculiar things like, ‘these procedural safeguards were not themselves rights protected by the Constitution,’”<sup>22</sup> the *Dickerson* case has been called “a devil of the Court’s own doing.”<sup>23</sup> One might go a step further and call it a devil of then-Justice Rehnquist’s own doing.

The key case is *Michigan v. Tucker*,<sup>24</sup> now more than a quarter-century old. *Tucker* did not deal with the admissibility of the defendant’s own statements—they had been excluded—but only with the testimony of a witness whose identity had been discovered by questioning the defendant in violation of *Miranda*. In admitting the testimony of the witness, the Court, per Justice Rehnquist, seemed to equate the “compulsion” barred by the privilege against self-incrimination with “coercion” or “involuntariness” under the pre-*Miranda* “totality of circumstances”-case-by-case-“voluntariness” test.<sup>25</sup>

This is quite misleading. Much harsher police methods were needed to render a confession “coerced” or “involuntary” under the pre-*Miranda* test than the *Miranda* Court deemed necessary to make a confession “compelled” within the meaning of the self-incrimination clause.<sup>26</sup> That is one of the basic premises of *Miranda*. That is why, although his questioning had been quite mild compared to the oppressive and offensive police interrogation methods that had barred the use of statements in the older confession cases, Ernesto Miranda’s statements were held inadmissible.

The *Tucker* Court dealt *Miranda* another blow. In the course of holding the witness’s testimony admissible, Justice Rehnquist told us that the *Miranda* Court itself had “recognized” that the four warnings “were not themselves rights protected by the Constitution,” but only prophylactic standards designed

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22. Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 1, 10 (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (Rehnquist, J.)).

23. *Id.*

24. 417 U.S. 433 (1974).

25. *See id.* at 444-46.

26. Stephen J. Schulhofer, *Miranda, Dickerson and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. (forthcoming 2001) (manuscript at 13, on file with author) [hereinafter Schulhofer, *Puzzling Persistence*]; Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 440-46 (1987) [hereinafter Schulhofer, *Reconsidering*]; *see also* Yale Kamisar, *The “Police Practice” Phases of the Criminal Process and the Three Phases of the Burger Court*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986*, at 143, 152-53 (Herman Schwartz ed., 1987).

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to “safeguard” or to “provide practical reinforcement” for the privilege against self-incrimination.<sup>27</sup>

Commentators protested that *Tucker* and the cases that built on it “cut the doctrinal heart out of *Miranda*”<sup>28</sup> and warned that “*Tucker* seems certainly to have laid the groundwork to overrule *Miranda*” (even without regard to § 3501).<sup>29</sup> But the Court never administered the *coup de grâce*.

However, the Court continued to quote *Tucker*’s mischievous language approvingly and continued to look at, and speak about, *Miranda* the way it had in *Tucker*. In both *New York v. Quarles*<sup>30</sup> and *Oregon v. Elstad*<sup>31</sup> the Court underscored the distinction between *actual* coercion by physical violence or threats of violence and *inherently* or *irrebuttably presumed* coercion (the basis for the *Miranda* rules) and between statements that are actually “coerced” or “compelled” and those obtained *merely* in violation of *Miranda*’s “procedural safeguards” or “prophylactic rules.”<sup>32</sup>

In *Elstad*, speaking for a 6-3 majority, Justice O’Connor emphasized that “the *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself”<sup>33</sup> and “may be triggered even in the absence of a Fifth Amendment violation.”<sup>34</sup> The *Elstad* Court seemed to say—it certainly may plausibly be read as saying—that because a violation of *Miranda* is not a *real*

27. *Tucker*, 417 U.S. at 444. This, too, is quite misleading. The *Miranda* Court did say that the Constitution does not “require . . . adherence to *any particular solution* for the inherent compulsions of the interrogation process as it is presently conducted.” *Miranda*, 384 U.S. at 467 (emphasis added). But it quickly added: “However, unless we are shown other procedures which are *at least* as effective in apprising accused person of their [rights] and in assuring a continuous opportunity to exercise [them], the following safeguards [the *Miranda* warnings] must be observed.” *Id.* (emphasis added). Moreover, later in the opinion, the *Miranda* Court reiterated: “The warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statements made by a defendant.” *Id.* at 476 (emphasis added).

28. Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 740 (1987).

29. Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 123.

30. 467 U.S. 649 (1984) (establishing a “public safety” exception to *Miranda*).

31. 470 U.S. 298 (1985); *see also infra* text accompanying notes 66-67.

32. *Elstad*, 470 U.S. at 307; *Quarles*, 467 U.S. at 654-55. The Burger Court had drawn the same distinction in another line of cases that began even before *Tucker* was decided. *See Oregon v. Hass*, 420 U.S. 714 (1975) (stating that one who takes the stand in his own defense can be impeached by statements taken from him in violation of *Miranda*, even when statements obtained after suspect asserted right to counsel); *Harris v. New York*, 401 U.S. 222 (1971) (stating that one who takes the stand in his own defense can be impeached by statements taken from him in violation of *Miranda*). Some years later, the Court held that neither testimony given in response to a grant of immunity, *New Jersey v. Portash*, 440 U.S. 450 (1979), nor statements that were “coerced” in the pre-*Miranda* sense, *Mincey v. Arizona*, 437 U.S. 385 (1978), could be used for impeachment purposes. Thus, here, too, a distinct line was drawn between statements that are only *presumptively* compelled (*Miranda* violations) and those that are *actually* compelled.

33. *Elstad*, 470 U.S. at 306.

34. *Id.*

constitutional violation, it is not entitled to, or worthy of, the “fruit of the poisonous tree” doctrine. Thus, unlike evidence obtained as the result of a Fourth Amendment violation (which *is* a *real* violation), evidence uncovered following a *Miranda* violation need not, and should not, be suppressed as the tainted fruit.<sup>35</sup>

In the meantime, the Court continued to overturn state convictions because of *Miranda* violations.<sup>36</sup> Yet, as Justice Stevens emphasized in his *Elstad* dissent, “[t]his Court’s power to require state courts to exclude probative self-incriminatory statements rests entirely on the premise that the use of such evidence violates the Federal Constitution.”<sup>37</sup>

As we awaited the decision in *Dickerson*, almost all of us assumed that, as Donald Dripps put it, “the Court would have to either repudiate *Miranda*, repudiate the prophylactic-rule cases, or offer some ingenious reconciliation of the two lines of precedent.”<sup>38</sup> But as Professor Dripps points out immediately thereafter, the *Dickerson* Court did none of these things. Instead, charges Susan Klein (and I am inclined to agree), Chief Justice Rehnquist wrote an

35. *Id.* at 305, 308-09. For a discussion of “real” and “just pretend” constitutional rights, see Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436 (1987).

36. *See, e.g.*, *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Edwards v. Arizona*, 451 U.S. 477 (1981). In *Dickerson*, Chief Justice Rehnquist noted that since *Miranda* was decided, “we have consistently applied *Miranda*’s rule to prosecutions arising in state courts.” 120 S. Ct. at 2329, 2333.

Although in the main, the post-Warren Court applied *Miranda* begrudgingly. *Edwards v. Arizona*, 451 U.S. 478 (1981), is a notable exception. *Edwards* invigorated *Miranda* in an important respect. It held that when a suspect effectively asserts his right to a lawyer (as opposed to his right to remain silent), he may not be subjected to further police interrogation “until counsel has been made available to him, unless [he] himself initiates further communication . . . with the police.” *Id.* at 484-85 (emphasis added). In short, once a suspect invokes his right to counsel, the police cannot try to change his mind; they must wait to see whether the suspect changes his mind on his own initiative. Subsequent cases informed us that the *Edwards* rule applies even when the police want to question a suspect about a crime *unrelated* to the subject of their initial interrogation, *Roberson*, 486 U.S. 675, and even if the suspect has been allowed to consult with an attorney in the interim, *Minnick*, 498 U.S. 146.

Another post-Warren Court case that gladdened the hearts of *Miranda* supporters was *Withrow v. Williams*, 507 U.S. 680 (1993). The *Withrow* Court surprised many Court-watchers when it held that, unlike the situation when a state prisoner alleges that his conviction rests on evidence obtained in violation of the Fourth Amendment, *see Stone v. Powell*, 428 U.S. 465 (1976), state prisoners may bring alleged *Miranda* violations before the federal courts in habeas corpus proceedings. *See infra* text accompanying notes 73-77 for extracts from the opinions in *Withrow*.

37. *Elstad*, 470 U.S. at 371. Eleven years earlier, dissenting in *Tucker*, Justice Douglas had made a similar point. *Michigan v. Tucker*, 417 U.S. 433, 462-63 (1974).

38. Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Miranda, Dickerson and the Continuing Quest for Broad-But-Shallow* 43 WM. & MARY L. REV. (forthcoming 2001) (manuscript at 33, on file with author). For a similar, but somewhat different analysis of the *Dickerson* Court’s options, none of which it chose, see Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. (forthcoming 2001) (manuscript at 38-45, on file with author).

opinion “that cannot be characterized as plausible. In an apparent compromise between the right and left wings of the Court, Rehnquist holds that the law is to stay exactly as it was pre-*Dickerson*, by judicial fiat.”<sup>39</sup>

Why did a majority of the Court brush aside language in cases like *Tucker* that seemed to view *Miranda* as a unconstitutional rule?<sup>40</sup> Why, instead, did the Court emphasize that “both *Miranda* and two of its companion cases applied the rule to proceedings in state courts,”<sup>41</sup> “[s]ince that time, we have consistently applied *Miranda*’s rule to prosecutions arising in state courts,” and “[i]t is beyond dispute that we do not hold a supervisory power over the courts of the several States”?<sup>42</sup> (The Court could have said the same things the day it decided *Tucker*. In fact, dissenting Justice Douglas *did*.<sup>43</sup>)

I shall try to explain why, or at least suggest various reasons why, a large majority voted to “reaffirm” *Miranda* and why Chief Justice Rehnquist, long regarded as a relentless critic of *Miranda*, not only was part of that majority but wrote the opinion of the Court.<sup>44</sup> (Explaining why the Supreme Court decides a case the way it does is no great feat, so long as one does so *after the event*).<sup>45</sup> Consider the following, for example:

- Section 3501 was not really a response to the Court’s invitation to Congress to produce alternative safeguards to the *Miranda* warnings, but rather an “angry, disrespectful and disingenuous attempt” “to overrule a decision [Congress] loathed.”<sup>46</sup> Section 3501 “was a slap at the Court and if any Court was likely to slap back, it was this one.”<sup>47</sup>

39. Klein, *supra* note 38, at 38.

40. See *Dickerson*, 120 S. Ct. at 2333 (“We disagree with the Court of Appeals’ conclusion [that the *Miranda* protections are not constitutionally required], although we concede that there is language in some of our opinions that supports the view taken by that court.”).

41. *Id.*

42. *Id.*

43. See *Michigan v. Tucker*, 417 U.S. 433, 462-63 (1974) (Douglas, J., dissenting). The *Dickerson* Court also noted that Chief Justice Warren’s opinion in *Miranda* “is replete with statements indicating that the majority thought it was announcing a constitutional rule.” *Dickerson*, 120 S. Ct. at 2334. Of course, this, too, could have been pointed out the day that *Tucker* was decided.

44. I have speculated at some length elsewhere about why, in *Dickerson*, the Chief Justice himself did a turnabout. Yale Kamisar, *Foreword: From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. (forthcoming 2001) (manuscript at 20-24, on file with author).

45. I gave a talk on the *Dickerson* case at Cornell Law School three months *before* the case was decided. When asked by a student to predict the outcome of the case, I said what I thought at the time—it was “too close to call.” To my dismay, I received a copy of the Cornell Law Forum quoting me to this effect a week after a 7-2 lopsided majority had “reaffirmed” *Miranda*. See CORNELL L.F., July 2000 at 15.

46. Klein, *supra* note 38, at 27-28; see also Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 127 (“[Section 3501] was, to an important degree, a gesture of defiance at a Court which protected criminals and Communists. . .”).

47. Dorf & Friedman, *supra* note 22, at 12. Professors Dorf and Friedman add: “For the Court that in recent years has given us *Seminole Tribe of Florida v. Florida* [517 U.S. 44 (1996)], *Plaut v. Spendthrift Farm, Inc.* [514 U.S. 211 (1995)], *City of Boerne v. Flores* [521 U.S. 507 (1997)] and

- The Court had been aware for some time that *Miranda* was much more of a “compromise”—much more of a serious effort to protect *both* the defendant’s and society’s interests—than was generally realized at the time the decision was handed down. As Justice O’Connor, speaking for a 6-3 majority in *Moran v. Burbine*,<sup>48</sup> reminded us fifteen years ago, *Miranda* rejected “the more extreme position” advocated by the ACLU that nothing less than “the *actual presence* of a lawyer” (as opposed merely to the issuance of warnings about one’s rights) was needed to dispel the compelling pressure inherent in custodial interrogation.<sup>49</sup> Instead, the *Miranda* Court concluded, to quote Justice O’Connor again, that “the suspect’s Fifth Amendment rights could be adequately protected by less intrusive means.”<sup>50</sup>
- Over three decades, *Miranda* had acquired a number of exceptions that significantly weakened it (or, as critics of *Miranda* might put it, made the doctrine more workable).<sup>51</sup> It seems clear that Chief Justice Rehnquist was talking about how the cases carving out exceptions to *Miranda* had reduced its *adverse* impact on police activity when he noted that “our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement.”<sup>52</sup>
- At least some members of the *Dickerson* majority must have known that the police obtain waivers of rights in the “overwhelming majority” of cases<sup>53</sup> and that once they do “*Miranda* offers very little, if any, meaningful protection.”<sup>54</sup> To be sure, suspects who agree to talk to the

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other decisions favoring its own power at the expense of Congress, Section 3501 was a gnat that ran into the windshield of whatever it was that *Miranda* held.” *Id.*; see also Craig Bradley, *Behind the Dickerson Decision*, TRIAL, Oct. 2000, at 80 (“In *Dickerson*, the majority sent a strong message to Congress: Stay off our turf.”).

48. 475 U.S. 412 (1986).

49. *Id.* at 426 (emphasis added).

50. *Id.*

51. See, e.g., *Oregon v. Elstad*, 470 U.S. 298 (1985) (declining to apply the “fruit of the poisonous tree” doctrine to a second statement elicited from a suspect whose first statement had been obtained in violation of *Miranda*); *New York v. Quarles*, 467 U.S. 649 (1984) (recognizing a “public safety” exception to the *Miranda* warnings); *Harris v. New York*, 401 U.S. 222 (1971) (permitting the prosecution to impeach a defendant who takes the stand in his own defense by using statements obtained from him in violation of *Miranda*).

52. *Dickerson*, 120 S. Ct. at 2336.

53. Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. (forthcoming 2001) (manuscript at 21, on file with author).

54. *Id.* at 24.

police may still cut off questioning or invoke their right to have counsel—but they “almost never” do.<sup>55</sup>

- The *Dickerson* majority must have been aware that when the police have complied with *Miranda* and a suspect has waived his rights, it is extremely difficult to establish that any resulting confession was “involuntary” in the pre-*Miranda* due process-voluntariness sense.<sup>56</sup> After all, in *Dickerson* Chief Justice Rehnquist pretty much recognized that an effective waiver of a suspect’s rights often has the effect of minimizing the scrutiny courts give police interrogation practices following the waiver.<sup>57</sup>
- The “overruling” of *Miranda* by legislation would have wiped out more than three decades of *Miranda* jurisprudence—nearly 60 cases.<sup>58</sup> Why pay this price when, whatever their initial experience with *Miranda*, the police now seem to be living comfortably with it?<sup>59</sup>
- As an associate justice, Rehnquist might not have voted to “reaffirm” *Miranda*. In *Dickerson*, however, he “show[ed] the kind of leadership that he has long admired in previous chief justices,” such as Charles Evans Hughes, who was “willing to modify his own opinions to hold or increase his majority.”<sup>60</sup>

I share the view of Donald Dripps that “[t]he fact that Chief Justice Rehnquist, for decades an implacable critic of *Miranda*, wrote the majority opinion [in *Dickerson* is] a sure sign of a compromise opinion, intentionally written to say less rather than more, for the sake of achieving a strong majority

55. William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. (forthcoming 2001) (manuscript at 3, on file with author); see also Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859-60 (1996); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 653 (1996).

56. Welsh S. White, *Miranda’s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. (forthcoming 2001) (manuscript at 10, on file with author); see also Leo, *supra* note 53, at 35-37; Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 744-46 (1992).

57. “The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry. But . . . [c]ases in which a defendant can make a colorable argument that a self-incriminating statement was “compelled” despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.” *Dickerson*, 120 S. Ct. at 2336 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984)).

58. As dissenting Justice Scalia noted in *Dickerson*, in the 34 years since *Miranda* had been announced, “this Court has been called upon to decide nearly 60 cases involving a host of *Miranda* issues.” 120 S. Ct. at 2347 (Scalia, J., joined by Thomas, J., dissenting).

59. See, e.g., Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with the Obstacles Posed by Miranda*, 44 MINN. L. REV. 397 (1999).

60. Bradley, *supra* note 47, at 80.

on the narrow question of *Miranda*'s continued vitality."<sup>61</sup> I agree, too, although I am quite unhappy about it, that "[t]he apparent gist of that compromise is that the *status quo* will be maintained,"<sup>62</sup> i.e., in the years ahead we are likely to learn that the *Dickerson* Court reaffirmed *Miranda* with all its qualifications and exceptions "frozen in time." The trouble is that, not infrequently, the clarity and general quality of a "compromise opinion" leaves a good deal to be desired. *Dickerson* marks one of those times.

In *Dickerson*, the court of appeals, which had upheld § 3501, had relied in part on various Supreme Court cases carving out exceptions to *Miranda*.<sup>63</sup> Chief Justice Rehnquist's response was that these cases simply "illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable."<sup>64</sup> Is this supposed to be illuminating?<sup>65</sup>

As for *Elstad*,<sup>66</sup> refusing to apply the "fruit of the poisonous tree" doctrine, a staple of Fourth Amendment law, to *Miranda* violations, all the Chief Justice had to say was that this case "does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."<sup>67</sup> (Showing remarkable restraint, dissenting Justice Scalia retorted that the Court's statement "is true but supremely unhelpful."<sup>68</sup>)

In *Dickerson*, the court of appeals also relied on the fact that the Supreme Court had "repeatedly referred to the *Miranda* warnings as 'prophylactic' and 'not themselves rights protected by the Constitution.'"<sup>69</sup> Both quotations came from opinions of the Court written by then-Justice Rehnquist.<sup>70</sup> How did the Chief Justice respond? He voiced disagreement with the court of appeals' conclusion that *Miranda* protections are not constitutionally required, but "concede[d] that there is language in some of our opinions that supports the

61. Dripps, *supra* note 38, at 3.

62. *Id.* at 36.

63. See *Dickerson*, 120 S. Ct. at 2335.

64. *Id.*

65. The Chief Justice added that "the sort of modifications represented by [decisions making exceptions to *Miranda*] are as much a normal part of constitutional law as the original decision." *Id.* Still not very illuminating. One who had not read these cases would not know from the discussion in *Dickerson* that many appeared to be based on the premise that *Miranda* was not a constitutional decision.

66. See *supra* text accompanying notes 33-35; see also *supra* note 50.

67. *Dickerson*, 120 S. Ct. at 2335.

68. *Id.* at 2343. But see David A. Strauss, *Miranda, The Constitution, and Congress*, 99 MICH. L. REV. (forthcoming 2001) (manuscript at 19-20, on file with author), quoted *infra* note 203.

69. See *Dickerson*, 120 S. Ct. at 2333.

70. *New York v. Quarles*, 467 U.S. 649, 653 (1984); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

view taken by that court.”<sup>71</sup> That’s all. This must be the most peremptory dismissal ever of majority opinions by the Justice who wrote them.

In fairness to Chief Justice Rehnquist, it was quite an accomplishment to get six members of the Court with differing views on the subject to join his opinion. And it is hard to see how the Chief Justice could have held all six Justices if he had written at any length about the constitutional status of prophylactic rules in general or the *Miranda* rules in particular.

Chief Justice Rehnquist’s majority included Justices O’Connor, Stevens and Souter. Could *anybody* have written a short essay on “prophylactic rules” and “core constitutional rights” that pleased *all three* of these Justices?

In *Withrow v. Williams*,<sup>72</sup> the Court, per Justice Souter, rejected the government’s argument that since “*Miranda*’s safeguards are not constitutional in character, but merely ‘prophylactic,’” federal habeas review should not extend to claims based on violations of those procedures.<sup>73</sup> The *Withrow* Court accepted the government’s characterization of the *Miranda* safeguards, for purposes of the case, but not its conclusion. Along the way, Justice Souter had some very nice things to say about *Miranda* and its prophylactic rules:

“Prophylactic” though it may be, in protecting a defendant’s Fifth Amendment privilege against self-incrimination, *Miranda* safeguards “a fundamental *trial* right.” The privilege . . . reflects “many of our fundamental values and most noble aspirations . . . .”

Nor does the Fifth Amendment “trial right” protected by *Miranda* serve some value necessarily divorced from the correct ascertainment of guilt. . . . By bracing against “the possibility of unreliable statements in every instance of in-custody interrogation,” *Miranda* serves to guard against “the use of unreliable statements at trial.”<sup>74</sup>

On the other hand, the *Withrow* case saw Justice O’Connor (joined, incidentally, by Chief Justice Rehnquist) launch a strong attack on *Miranda*:

Excluding *Miranda* claims from habeas . . . denies collateral relief only in those cases in which the prisoner’s statement was neither compelled nor involuntary but merely obtained without the benefit of *Miranda*’s prophylactic warnings. The availability of a suppression remedy in such cases cannot be labeled a “fundamental

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71. *Dickerson*, 120 S. Ct. at 2333.

72. 507 U.S. 680 (1993); *see also supra* note 36.

73. *Withrow*, 507 U.S. at 690.

74. *Id.* at 691-92.

trial right,” for there is no constitutional right to the suppression of *voluntary* statements. . . .<sup>75</sup>

. . . Whatever the Fifth Amendment’s relationship to reliability, *Miranda*’s prophylactic rule is not merely “divorced” from the quest for truth but at war with it as well. The absence of *Miranda* warnings does not by some mysterious alchemy convert a voluntary and trustworthy statement into an involuntary and unreliable one. . . .<sup>76</sup>

. . . A *Miranda* claim . . . requires no evidence of police overreaching whatsoever; it is enough that law enforcement officers commit a technical error. Even the forgetful failure to issue warnings to the most wary, knowledgeable, and seasoned of criminals will do.<sup>77</sup>

In *Elstad*,<sup>78</sup> this time writing for the majority, Justice O’Connor (again joined by then-Justice Rehnquist) also had some unflattering things to say about *Miranda*:

The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.<sup>79</sup>

. . . .

. . . If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. . . .<sup>80</sup>

There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means . . . and the uncertain consequences of disclosure of a “guilty secret” freely given in response to an unwarned but noncoercive question, as in this case.<sup>81</sup>

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75. *Id.* at 706.

76. *Id.* at 707.

77. *Id.* at 708-09.

78. *See supra* text accompanying notes 33-35.

79. 470 U.S. at 306.

80. *Id.* at 309.

81. *Id.* at 312.

This time it was Justice Stevens' turn to dissent. Finding the majority's "somewhat opaque characterization of the police conduct in this case" the "most disturbing aspect of the Court's opinion,"<sup>82</sup> Justice Stevens protested:

The Court appears ambivalent on the question whether there was any constitutional violation. This ambivalence is either disingenuous or completely lawless. This Court's power to require state courts to exclude probative self-incriminatory statements rests entirely on the premise that the use of such evidence violates the Federal Constitution. The same constitutional analysis applies whether the custodial interrogation is actually coercive or irrebuttably presumed to be coercive. If the Court does not accept that premise, it must regard the holding in the *Miranda* case itself, as well as all of the federal jurisprudence that has evolved from that decision, as nothing more than an illegitimate exercise of raw judicial power.<sup>83</sup>

With Justices O'Connor, Souter and Stevens all in his camp (along with three others whose enthusiasm for *Miranda* probably varies quite a bit), it is unsurprising that the Chief Justice's majority opinion was "intentionally written to say less rather than more, for the sake of achieving a strong majority on the narrow question of *Miranda's* continued vitality."<sup>84</sup> However, this made the majority opinion an attractive target for dissenting Justice Scalia. But the fact that the Chief Justice all but ignored Justice Scalia's fusillade does not mean that no plausible responses exist.

### III. A DISSENT FROM THE *DICKERSON* DISSENT<sup>85</sup>

Dissenting in *Dickerson*, Justice Scalia (joined by Thomas, J.) severely criticized both *Miranda* itself and Chief Justice Rehnquist's opinion of the Court in *Dickerson*. According to Justice Scalia, although the Constitution only prevents one from being "compelled" to confess (compelled within the meaning of the traditional "voluntariness" test), *Miranda* prevents a suspect from "foolishly" confessing of his own accord.<sup>86</sup> Indeed, the "most remarkable" thing about *Miranda* is its "palpable hostility" toward the act of

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82. *Id.* at 370.

83. *Id.* at 370-71.

84. See *supra* text accompanying note 61; cf. Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 901 (1949) ("[A] judge who is trying to establish a doctrine which the Supreme Court will promulgate as law cannot write like a solitary philosopher. He has to convince at least four [others] in a specific group and convince them very soon.").

85. Cf. Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 Mich. L. Rev. 59 (1966).

86. See *infra* note 91 and accompanying text.

confessing.<sup>87</sup> Moreover, the promulgation of “prophylactic rules,” such as the *Miranda* warnings, is a “lawless practice,” and an “illegitimate exercise” of the Court’s authority to overturn state criminal convictions.<sup>88</sup>

As for the opinion of the Court in *Dickerson*, the majority cannot even bring itself to say flatly that the use of an un-*Mirandized* confession, but one that would have passed muster under the traditional voluntariness test, violates the Constitution.<sup>89</sup> What is more, adds Justice Scalia, in light of the *Tucker*-line of cases and other confession opinions written since *Miranda* was decided, “a majority of the Court does not believe” that a violation of the *Miranda* rules is a violation of the Constitution.<sup>90</sup>

I shall try to respond to these charges.

- A. **“There is a world of difference, which the Court recognized under the traditional voluntariness test but ignored in *Miranda*, between compelling a suspect to incriminate himself and preventing him from foolishly doing so of his own accord. . . . Preventing foolish (rather than compelled) confessions is likewise the only conceivable basis for [other] rules [suggested in *Miranda*].”<sup>91</sup>**

*Miranda* can be criticized on various grounds, but surely not this one.

*Miranda* does not prevent anyone from *foolishly* “volunteering” an incriminating statement. *Miranda* leaves the police free to hear and act upon “volunteered” statements even though the “volunteer” neither knows nor has been informed of his rights.<sup>92</sup> (This is so, even if a person has been taken into custody, so long as the police have not yet begun interrogating him.)<sup>93</sup>

*Miranda* does not prevent anyone from *foolishly* making an incriminating statement in response to “[g]eneral on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens”<sup>94</sup>—the kind of questioning, *Miranda* tells us, that the police may conduct without advising

87. See *infra* note 114 and accompanying text.

88. See *infra* notes 145-46 and accompanying text.

89. See *infra* note 128 and accompanying text.

90. See *infra* note 126 and accompanying text.

91. *Dickerson*, 120 S. Ct. at 2339 (Scalia, J., joined by Thomas, J., dissenting).

92. *Miranda*, 384 U.S. at 478 (“Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.”).

93. The *Miranda* warnings “must be given . . . when the individual is first subjected to police interrogation while in custody.” *Id.* at 477. It is police custody *plus* police interrogation that requires the *Miranda* warnings. Thus, as Justice White observed, dissenting in *Miranda*, an arrestee “may blurt out a confessions which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission.” *Id.* at 533.

94. *Id.* at 477.

anyone of his rights.<sup>95</sup> Nor does *Miranda* prevent anyone from *foolishly* making an incriminating statement, even though he is unaware and uninformed of his rights, when he is being questioned by the police in his own home or place of business.<sup>96</sup>

Even when a suspect is incarcerated, *Miranda* does not prevent him from *foolishly* confiding in and confessing to a police officer posing as a fellow-prisoner. Since “the essential ingredients of a ‘police-dominated atmosphere’ and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate,”<sup>97</sup> *Miranda* warnings are not required in these circumstances.

Finally, and most importantly, even when a suspect is in the interrogation room and confronting three or four police officers, *Miranda* does not prevent him from *foolishly* waiving his rights and *foolishly* trying to convince the police that they may have arrested the wrong person. Indeed, *Miranda* has been criticized from the outset for failing to recognize “the improbability, if not the impossibility, of an intelligent waiver” of one’s *Miranda* rights<sup>98</sup> and for “leaving an opening which predictably meant that the defendant who is naive, confused, unintelligent or careless would confess to the police while others would not.”<sup>99</sup>

Justice Scalia’s criticism of *Miranda* is reminiscent of Justice White’s assertion, dissenting in *Miranda* that “the Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel”—thus unjustifiably “installing counsel as

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95. “In such situations,” *Miranda* tells us, “the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.” *Id.* at 478.

96. *Id.* at 478 & n.46.

97. *Illinois v. Perkins*, 496 U.S. 292, 296 (1990). The Court went on to say, quite correctly I believe, that “[c]oercion is determined from the perspective of the suspect” and when “a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking.” *Id.*

98. Richard H. Kuh, *Some Views on Miranda v. Arizona*, 35 *FORDHAM L. REV.* 233, 234-35 (1966). But the prevailing view is, as Chief Judge Weintraub pointed out more than thirty years ago, that “if a defendant has been given the *Miranda* warnings, if the coercion of custodial interrogation was thus dissipated, his ‘waiver’ was no less ‘voluntary’ and ‘knowing’ and ‘intelligent’ because he misconceived the inculpatory thrust of the facts he admitted, or because he thought that what he said could not be used because it was only oral . . . or because he could well have used a lawyer. A man need not have the understanding of a lawyer to waive one.” *State v. McKnight*, 243 A.2d 240 (N.J. 1968). Consider, too, James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contents*, 71 *IOWA L. REV.* 975, 1049 (1986).

99. Marvin Frankel, *From Private Fights to Public Justice*, 51 *N.Y.U. L. REV.* 516, 529 (1976). Judge Frankel notes that “multitudes of waivers are found to have occurred each year, despite the fact that any person who knows what he is doing ought to volunteer nothing.” *Id.* at 528. More recently, Chief Judge Posner has observed that those who confess to the police “are not adept at weighing benefits and costs. . . . [T]hey may think that by explaining their crime from their own perspective they may convince the police that there were extenuating circumstances . . . .” Richard A. Posner, *Let Them Talk*, *NEW REPUBLIC*, Aug. 21, 2000, at 42.

the arbiter of the [Fifth Amendment] privilege.”<sup>100</sup> But more than three decades have elapsed since Justice White made his dire prediction about *Miranda*’s impact and “[e]xperience has shown that *Miranda* does far less harm to law enforcement than the *Miranda* dissenters feared.”<sup>101</sup>

Even Paul Cassell, *Miranda*’s harshest critic, who insists that “law enforcement never recovered from the blow inflicted by *Miranda*,”<sup>102</sup> reports that slightly less than one out of eight felony suspects who were given the *Miranda* warnings invoked their rights before the police were successful in their interrogation.<sup>103</sup> Didn’t many of the large number of suspects who declined to assert their *Miranda* rights act *foolishly*?

I concur in George Thomas’s view that “if the *Miranda* dissenters and the police in 1966 had been told that the effect of *Miranda* would be limited to 12.1 percent of felony suspects, they would have cheered in relief.”<sup>104</sup>

Justice Scalia also maintains that “[p]reventing foolish (rather than compelled) confessions is likewise the only *conceivable* basis for the [*Miranda* rules] that courts must exclude any confession elicited by questioning conducted, without interruption, after the suspect has indicated a desire to stand on his right to remain silent or initiated by police after the suspect has expressed a desire to have counsel present.”<sup>105</sup>

Being unhappy with *Miranda*’s requirements is one thing. Maintaining that you cannot *conceive* of any basis for these requirements other than “[p]reventing foolish (rather than compelled) confessions” is something else again.

One need only look at the *Miranda* opinion itself. It tells us that the denial of a custodial suspect’s request for counsel aggravates “the anxieties which [the police have] created in the interrogation rooms,”<sup>106</sup> “heighten[s] [the suspect’s] dilemma, [making] his later statements the product of this compulsion,”<sup>107</sup> and “undermine[s] his ability to exercise the privilege—to remain silent if he [chooses] or to speak without any intimidation, blatant or subtle.”<sup>108</sup>

100. *Miranda*, 384 U.S. at 536-37 (White, J., joined by Harlan, J., and Stewart, J., dissenting).

101. Dripps, *supra* note 38, at 54 n.190.

102. Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda’s Defenders*, 90 NW. U. L. REV. 1084, 1091-92 (1996).

103. Cassell & Hayman, *supra* note 55, at 860.

104. George C. Thomas III, *Plain Talk About the Miranda Empirical Debate: A “Steady-State” Theory of Confessions*, 43 UCLA L. REV. 933, 956 (1996). Moreover, it is fair to assume that even in pre-*Miranda* days some suspects refused to “cooperate” with the police.

105. *Dickerson*, 120 S. Ct. at 2339 (emphasis added).

106. *Miranda*, 384 U.S. at 465.

107. *Id.* at 465-66.

108. *Id.* at 466.

One may also look at *Arizona v. Roberson*<sup>109</sup> where Justice Stevens, speaking for six Justices (including Justice Scalia),<sup>110</sup> observed:

[T]he prophylactic protections that the *Miranda* warnings provide to counteract the “inherently compelling pressure” of custodial interrogation and to “permit a full opportunity to exercise the privilege against self-incrimination” . . . are implemented by the application of the *Edwards [v. Arizona]*<sup>111</sup> corollary that if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the “inherently compelling pressures” and not the purely voluntary choice of the suspect. As Justice White has explained, “the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities’ insistence to make a statement without counsel’s presence may properly be viewed with skepticism.”<sup>112</sup>

- B. “[W]hat is most remarkable about the *Miranda* decision—and what made it unacceptable as a matter of straightforward constitutional interpretation in the *Marbury [v. Madison]*<sup>113</sup> tradition—is its palpable hostility toward the act of confession *per se*, rather than toward what the Constitution abhors, *compelled confession*.”<sup>114</sup>

As we have already seen, *Miranda* left the police much more leeway than many people including Justice Scalia, seem to realize. Justice Scalia’s talk about *Miranda*’s “palpable hostility toward the act of confession *per se*” makes me wonder whether he has confused *Miranda* with *Escobedo v. Illinois*,<sup>115</sup> the case which preceded it by two years. *Miranda* was argued against, and can best be understood against, the background of *Escobedo*. A comparison of the two cases reveals that *Escobedo* posed a much greater threat

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109. 486 U.S. 675 (1988); see also *supra* note 36.

110. Justice O’Connor took no part in this case. Newly appointed Justice Kennedy, joined by Chief Justice Rehnquist, dissented. Two years later, however, Justice Kennedy wrote the opinion of the Court in *Minnick v. Mississippi*, 498 U.S. 146 (1990). This time Justice Scalia, joined by Chief Justice Rehnquist, dissented. For a brief discussion of *Minnick*, see *supra* note 36.

111. 451 U.S. 477 (1981).

112. *Roberson*, 486 U.S. at 681 (referring to *Edwards v. Arizona*, 457 U.S. 477 (1981), discussed *supra* note 36).

113. 5 U.S. (1 Cranch) 137 (1803).

114. *Dickerson*, 120 S. Ct. at 2339 (Scalia, J., joined by Thomas, J., dissenting) (first emphasis added).

115. 378 U.S. 478 (1964).

to police interrogation, as it had been conducted up to that point, than did *Miranda*.

In *Escobedo*, the Court extended the right to counsel to the pre-indictment stage, but it was unclear whether this right came into play “when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession”<sup>116</sup>—or when the process so shifts and one or more of the limiting facts in *Escobedo* are also present.<sup>117</sup>

Although *Escobedo* grew out of an atypical fact situation and arguably could be limited to these special facts,<sup>118</sup> the opinion had broad implications and at some places contained sweeping language—language which troubled most law enforcement officials and many members of the bench and bar.<sup>119</sup> Thus, on the eve of *Miranda*, a case that was to reexamine *Escobedo* and to clarify its meaning and scope, a number of prominent judges spoke publicly in anticipation of the Court’s ruling, urging it to reconsider where it seemed to be going.

For example, two of the nation’s most highly regarded state judges, Walter Schaefer and Roger Traynor, voiced concern that the reasoning in *Escobedo*, if pushed to its logical conclusion, could lead to the end of police interrogation.<sup>120</sup> And Judge Henry Friendly warned that “condition[ing] questioning on the presence of counsel is . . . really saying that there may be no effective, immediate questioning by the police”—“a rule that society will not long endure.”<sup>121</sup>

116. *Id.* at 492.

117. For a summary of the wide disagreement over the meaning of *Escobedo*—and over what it ought to mean—see YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 161-62 (1980).

118. Mr. Escobedo had hired a lawyer and met with him some days earlier. On the night Escobedo confessed, his lawyer had arrived in the stationhouse and had tried unsuccessfully to meet with him. Moreover, although not advised of his right to counsel, Mr. Escobedo had requested an opportunity to meet with his lawyer, a request that was denied.

119. For example, at one point, Justice Goldberg, speaking for a 5-4 majority, observed: “We have learned the lesson of history . . . that a system of criminal law enforcement which comes to depend on the ‘confession’ will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.” *Escobedo*, 378 U.S. at 488-49.

As a close student of the Warren Court recently noted, “Goldberg’s opinion for the liberals made explicit their total disdain for confessions and perhaps for modern law enforcement as well. *Escobedo* was a slap in the face of American police by a sharply divided 5-4 Court.” LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 389 (2000).

120. WALTER V. SCHAEFER, THE SUSPECT AND SOCIETY 9 (1967) (based on lectures delivered before *Miranda*); Roger Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial* 657, 669 33 U. CHI. L. REV. 657, 669 (1966) (based on pre-*Miranda* lecture). Similar fears were expressed by another well-respected state judge. Charles D. Breitell, *Criminal Law and Equal Justice*, 1966 UTAH L. REV. 1 (based on pre-*Miranda* lecture).

121. *Forty-Third Annual Meeting of the American Law Institute*, 1966 A.L.I. PROC. 250 (remarks made a month before *Miranda*) (emphasis added); see also Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

*Miranda* did not hand down the opinion that these judges, and many other Court-watchers, had anticipated and feared. The Court did not flatly prohibit police questioning of suspects. Nor did it condition such questioning *on the presence of counsel*. Neither did it require that a suspect be advised of his rights by a defense lawyer or by a disinterested magistrate before agreeing to talk to the police.

The Warren Court “could have developed *Escobedo* into a doctrine . . . mandating that no waiver of rights would be accepted unless the accused had first consulted with counsel.”<sup>122</sup> But *Miranda* cut off that possibility. It did so by continuing to move in the same general direction but “switching tracks”—moving from a right to counsel rationale to a self-incrimination rationale, one which allowed the police more room to maneuver. A right to counsel rationale had almost no stopping point, but a self-incrimination rationale did—it required governmental compulsion.

As Justice O’Connor, speaking for six Justices (including Chief Justice Burger and soon-to-be Chief Justice Rehnquist), pointed out twenty years after *Miranda*, the case “attempted to reconcile” two “opposing concerns”—the need for police questioning as an effective law enforcement tool and the need to protect custodial suspects from impermissible coercion.<sup>123</sup> As Justice O’Connor also reminded us that day, rejecting “the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation,”<sup>124</sup> the *Miranda* Court permitted police interrogation to “continue in its traditional form . . . but only if the suspect clearly understood that at any time, he could bring the proceedings to a halt or, short of that, call in an attorney.”<sup>125</sup>

One may not share the *Burbine* majority’s view that *Miranda* “embodies a carefully crafted balance designed to fully protect *both* the defendant’s and society’s interests.”<sup>126</sup> One may prefer Judge Frankel’s less generous assessment—*Miranda* only achieved “a tense, temporary, ragged truce between combatants.”<sup>127</sup> But the *Miranda* Court would not have struggled to reach a “compromise” or (if one prefers) a “ragged truce” if, as Justice Scalia claims, it had a palpable hostility toward the act of confession *per se*.”

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122. Laurence A. Benner, *Requiem for Miranda: The Rehnquist Court’s Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 160 (1989).

Shortly after *Escobedo*, two commentators worried whether the Court might be in the process of shaping “a novel right not to confess except knowingly and with the tactical assistance of counsel.” Arnold Enker & Sheldon Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 60-61, 69, 83 (1964).

123. *Moran v. Burbine*, 475 U.S. 412, 426 (1986).

124. *Id.* at 426; *see also supra* text accompanying notes 48-49.

125. *Moran*, 475 U.S. at 426-27.

126. *Id.* at 433 n.4.

127. Frankel, *supra* note 99, at 526.

- C. **“One will search today’s opinion in vain, however, for a statement (surely simple enough to make) that what 18 U.S.C. § 3501 prescribes—the use at trial of a voluntary confession, even when a *Miranda* warning or its equivalent has failed to be given—violates the Constitution. . . .”**

**“It takes only a small step to bring today’s opinion out of the realm of power-judging and into the mainstream of legal reasoning: The Court need only . . . come out and say quite clearly: ‘We reaffirm today that custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States.’ It cannot say that because a majority of the Court does not believe it.”<sup>128</sup>**

I think the Court *did* say it. To be sure, Chief Justice Rehnquist did not use the exact words that Justice Scalia would have liked (not any more than dissenting Justice Scalia used the exact words the Chief Justice would have liked), but he said it. He did not say it Justice Scalia’s way. He said it in his own way (just as Justice Scalia wrote a dissenting opinion in *his* own way), but he said it.

I do not believe that anyone who studies the *Dickerson* majority opinion can come away with any doubt that what the Court told us is, to quote Justice Scalia, that “what 18 U.S.C. § 3501 prescribes—the use at trial of a voluntary confession, even when a *Miranda* warning or its equivalent has failed to be given—violates the Constitution.”<sup>129</sup>

In light of the way the Court seems to have “deconstitutionalized” *Miranda* in several previous decisions, *why* the Court invalidated § 3501 may be somewhat baffling.<sup>130</sup> And *how* it could bring itself to do so may be too. But there is nothing enigmatic about *what* the Court said with respect to § 3501.

After voicing its agreement with the court below that when it enacted § 3501 Congress intended or purported to overrule *Miranda*, the Court reminds

128. *Dickerson*, 120 U.S. at 2337 (Scalia, J., joined by Thomas, J., dissenting). As Professor David Strauss points out, technically this formulation “is incorrect because even under *Miranda*, what the Constitution prohibits is the admission into evidence of statements obtained by custodial interrogation without warnings. It seems doubtful that questioning a suspect in custody without warnings would violate the Constitution if the statements were never used as evidence, unless the interrogation were in some other way abusive.” Strauss, *supra* note 68, at 2 n.4.

129. See *supra* text accompanying note 128.

130. Because of the way he or she may have characterized *Miranda* in previous cases, one or more members of the *Dickerson* majority, or perhaps the Chief Justice himself, may have been uncomfortable with the precise wording Justice Scalia challenged the majority to use. Another possibility is that having written and been satisfied with a draft opinion, the Chief Justice simply resisted adopting the words and phrases Justice Scalia challenged him to use. Who tells Justice Scalia what words or phrases he should use in *his* opinions?

us that “Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”<sup>131</sup> Thus, the case “turns on whether the *Miranda* Court announced a constitutional rule.”<sup>132</sup> Four pages later, the Court “conclude[s]” that it did—that “*Miranda* announced a constitutional rule that Congress may not supersede legislatively.”<sup>133</sup> Along the way the Court furnishes various reasons why “*Miranda* is a constitutional decision”—“first and foremost” because “both *Miranda* and two of its companion cases applied the rule to proceedings in state courts”<sup>134</sup> and “[it] is beyond dispute that we do not hold a supervisory power over the courts of the several States.”<sup>135</sup>

In the course of rejecting an argument that § 3501, together with other remedies now available for abusive police misconduct,<sup>136</sup> provides a suitable alternative to the *Miranda* warnings,<sup>137</sup> the Court tells us once again that § 3501 violates the Constitution: “a legislative alternative to *Miranda*” must be “equally as effective in preventing coerced confessions”<sup>138</sup> and § 3501 is not.<sup>139</sup> Even when taken together with the remedies for police misconduct cited by defenders of § 3501, the statute falls short of “the constitutional minimum.”<sup>140</sup>

Justice Scalia also maintains that the Court never says, and “cannot say” because it does not believe it, that “custodial interrogation . . . not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States.”<sup>141</sup> I think the language quoted above proves the contrary, although once again the Court does not use the precise wording Justice Scalia would prefer.

If more language from the opinion of the Court is needed, consider the following: The *Dickerson* Court tells us that the *Miranda* Court “concluded that something more than the totality test [totality-of-circumstances or voluntariness test] was necessary” to satisfy the Fifth Amendment privilege against compulsory self-incrimination.<sup>142</sup> However, § 3501 does not provide anything more. It neither requires the *Miranda* warnings (not any of them) nor any suitable substitute; it simply reinstates the totality test. “Section 3501

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131. *Dickerson*, 120 S. Ct. at 2332.

132. *Id.* at 2333.

133. *Id.* at 2336.

134. *Id.* at 2333.

135. *Id.*

136. For example, a suspect may now bring a federal cause of action under the Due Process Clause for police misconduct during custodial interrogation.

137. *Dickerson*, 120 S. Ct. at 2333.

138. *Id.*

139. *See id.* at 2335.

140. *Id.*

141. *See supra* text accompanying note 128.

142. *Dickerson*, 120 S. Ct. at 2335.

therefore cannot be sustained if *Miranda* is to remain the law”<sup>143</sup>—and *Miranda* is to so remain.

- D. “[*Dickerson* means] that this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful ‘prophylactic’ restrictions upon Congress and the States. This is an immense and frightening antidemocratic power, and it does not exist.”<sup>144</sup>

....

“... [A]dopting prophylactic rules to buttress constitutional rights, and enforcing them against Congress and the States. . . . is in my view a lawless practice. . . .”<sup>145</sup>

....

“... [W]hat today’s decision will stand for, whether the Justices can bring themselves to say it or not, is the power of the Supreme Court to write a prophylactic, extraconstitutional Constitution, binding on Congress and the States.”

“Thus, while I agree with the Court that § 3501 cannot be upheld without also concluding that *Miranda* represents an illegitimate exercise of our authority to review state-court judgments, I do not share the Court’s hesitation in reaching that conclusion.”<sup>146</sup>

A “prophylactic rule” has been defined as a rule that “does not announce a requirement mandated by the underlying constitutional provision, but a requirement adopted in the Court’s exercise of its authority to draft remedies and procedures that facilitate its adjudicatory responsibility.”<sup>147</sup> Justice

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143. *Id.* at 2336.

144. *Dickerson*, 120 S. Ct. at 2337 (Scalia, J., joined by Thomas, J., dissenting).

145. *Id.* at 2343-44 (Scalia, J., joined by Thomas, J., dissenting).

146. *Id.* at 2346 (Scalia, J., joined by Thomas, J., dissenting).

147. WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* § 2.9(e), at 673-74 (2d ed. 1999). Professor Klein offers a somewhat different definition: “A ‘constitutional prophylactic rule’ is a judicially-created doctrinal rule or legal requirement” which the Court deems “appropriate for determining whether an explicit or ‘true’ federal constitutional rule is applicable. It may be triggered by less than a showing that the explicit rule was violated, but provides the same result as a showing that the explicit rule was violated.” Klein, *supra* note 38, at 5. Such a

Scalia's criticism of *Miranda's* "prophylactic rules," and the Court's promulgation of such rules generally, as "illegitimate" and "lawless" was not unexpected.<sup>148</sup> But it is hard to reconcile what he said in *Dickerson* with the Court's treatment of "prophylactic rules" only six months earlier in *Smith v. Robbins*.<sup>149</sup> (Justice Scalia joined Justice Thomas's opinion of the Court in that case.)

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rule is appropriate, adds Professor Klein "only upon two determinations. First, that simply providing relief upon a showing that the explicit right was violated is ineffective. Second, that use of this rule will be more effective and involve only acceptable costs." *Id.* Another commentator, Brian K. Landsberg, uses the term "to refer to those risk-avoidance rules that are not directly sanctioned or required by the Constitution, but that are adopted to ensure that the government follows constitutionally sanctioned or required rules. They are directed against the risk of noncompliance with a constitutional norm." Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926 (1999). To avoid lumping all kinds of risk-avoidance rules together, Professor Landsberg would put only "rights-protective-risk-avoidance rules" in the "prophylactic rules" category. *Id.* at 928.

Joseph Grano, who called a good deal of attention to this subject a decade and a half ago when he launched a major assault on the legitimacy of prophylactic rules generally and the *Miranda* doctrine specifically, see generally Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985), defines a prophylactic rule as one that "functions as a preventive safeguard to insure that constitutional violations will not occur." *Id.* at 105 (emphasis added). Similarly, Professors LaFave, Israel and King tell us that a prophylactic rule is "designed to operate as a preventative measure; its purpose is to safeguard against a potential constitutional violation, rather than to identify what constitutes a constitutional violation." LAFAVE, ISRAEL AND KING, *supra*, § 2.9(e), at 672-73. However, the *Miranda* rules seem designed to perform both functions. See *infra* note 217 (discussing *per se* and prophylactic rules). Thus, I prefer Susan Klein's definition: "A prophylactic rule is a standard for government behavior designed to reduce violations or make alleged violations easier to adjudicate." Klein, *supra* note 38, at 6 (emphasis added).

Finally, what about the exclusionary sanction for a violation of the Fourth Amendment? LaFave, Israel & King put it in the "prophylactic rule" category. LAFAVE, ISRAEL & KING, *supra*, § 2.9(e), at 673-75. However, I think that, although it is a first cousin to rules like *Miranda*, the search and seizure exclusionary rule is sufficiently different to warrant a separate category. Professor Klein does, so, calling the exclusionary rule a "constitutional incidental right." Klein, *supra* note 38, at 6. Such a right is "a judicially -created procedure determined by the Court as the appropriate relief for the violation of an explicit or 'true' constitutional rule." *Id.* The distinction between prophylactic rights and incidental rights is that the latter are "what the court provides after the violation has already occurred. . . . If the prophylactic rule works, there will be no violation and no incidental right offered." *Id.*; see also Landsberg, *supra*, at 971.

148. Dissenting in *Minnick v. Mississippi*, 498 U.S. 146, 156 (1990), Justice Scalia had called for the sharp containment of the *Edwards* "prophylactic rule," see *supra* note 36 (discussing *Edwards*), and only assumed for purposes of discussing the Court's authority to adopt prophylactic rules, see *Minnick*, 498 U.S. at 161. Concurring in *Davis v. United States*, 512 U.S. 452, 464 (1994), Justice Scalia had chided the Justice Department for repeatedly refusing to invoke § 3501.

149. 120 S. Ct. 746 (2000).

### 1. The Significance of *Smith v. Robbins*

How may counsel appointed to represent an indigent defendant on appeal withdraw from the case? Some thirty years ago, in *Anders v. California*,<sup>150</sup> the Court found constitutionally defective a state procedure which permitted appointed appellate counsel to withdraw simply by filing a conclusory letter stating the appeal had “no merit,” a procedure which allowed the appellate court, without further briefing, to examine the record and to affirm the judgment. The *Anders* Court then established what was later called “a prophylactic framework’ [designed to] vindicate [an indigent defendant’s] constitutional right to appellate counsel.”<sup>151</sup> Under the *Anders* procedure, a lawyer’s request to withdraw from the appeal had to be “accompanied by a brief referring to anything in the record that might arguably support the appeal.”<sup>152</sup>

Last year, in *Robbins*, the Court had to consider the constitutionality of a new California procedure for dealing with potentially frivolous appeals. Under this procedure, court-appointed counsel did not have to file a brief referring to any arguable point, but, *inter alia*, did have to file a brief “summariz[ing] the procedural and factual history of the case, with citations of the record.”<sup>153</sup> The Court upheld the new California system, pointing out that the states are free to adopt procedures other than the one set forth in the *Anders* case *so long as* the procedure “reasonably ensures [as did the challenged new California procedure] that an indigent’s appeal will be resolved in a way that is related to the merit of that appeal.”<sup>154</sup>

*Anders* does impose some constraints on Congress and the states. Although they are free to devise suitable substitutes for *Anders* (just as the *Miranda* Court repeatedly told Congress and the states they are free to do the same for the *Miranda* warnings), neither Congress nor the states are free to turn the clock back to the early 1960s. They cannot scrap the *Anders* procedure and replace it with the same old California procedure that was condemned in *Anders*. In other words, court rules or state legislation that treated *Anders* the same way that § 3501 treated *Miranda* would not survive Supreme Court review.

In his *Dickerson* dissent, Justice Scalia seems to think that *Robbins* has no bearing on the controversy over the legality of prophylactic rules. He points out that the case “upheld a procedure *different* from the one *Anders* suggested.”<sup>155</sup> But the Court would not have upheld *any* and *every* procedure

150. 386 U.S. 738 (1967).

151. *Robbins*, 120 S. Ct. at 757 (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)).

152. *Anders*, 386 U.S. at 744.

153. *Robbins*, 120 S. Ct. at 753.

154. *Id.* at 760.

155. *Dickerson*, 120 S. Ct. at 2344 (Scalia, J., dissenting).

that replaced *Anders*. The only reason the Court upheld a *different* method for satisfying constitutional requirements for indigent criminal appeals than the prophylactic rules adopted in *Anders* was that it considered the different method an adequate alternative to *Anders*. If the different method had turned out to be nothing more, or no better than, the very procedure disapproved in *Anders*, then, just as *Dickerson* invalidated § 3501 (which offered nothing more than the test for admitting confessions found inadequate in *Miranda*), *Robbins* would have struck down the new procedure for handling indigent criminal appeals.

At one point, Justice Scalia suggests he believes that *Robbins* cuts *his* way: “[A]s we made clear . . . in [*Robbins*], . . . the benchmark of constitutionality is the constitutional requirement of adequate representation, and not some excrescence upon the requirement decreed, for safety’s sake, by this Court.”<sup>156</sup>

But the “benchmark of constitutionality” in *Miranda* is *not* the *Miranda* warnings, not any more than the “benchmark” in *Anders* is the set of specific procedures sketched in that case. The “benchmark of constitutionality” in *Miranda* can be stated in various ways, some short, some a bit long-winded: Now that the privilege against self-incrimination has been held applicable to custodial interrogation, the traditional case-by-case voluntariness test falls short of the constitutional minimum and—

(a) *some* system of procedural safeguards (the *Miranda* warnings or some equally effective alternative) is necessary to protect the privilege; or

(b) *some* “adequate protective devices” must be “employed to dispel the compulsion inherent in custodial surroundings”,<sup>157</sup> or

(c) *some* safeguards must be utilized that assure “real understanding and intelligent exercise of the privilege”<sup>158</sup> and assure that “the individual’s right to choose between silence and speech remains unfettered throughout the interrogation process”,<sup>159</sup> or

(d) “suspects have a constitutional right to some procedures that are adequate to inform them of the right to remain silent in the face of custodial interrogation, and a constitutional right to procedures that

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156. *Id.* (Scalia, J., dissenting).

157. *Miranda*, 384 U.S. at 458; *see also* Schulhofer, *Reconsidering*, *supra* note 26, at 436.

158. *Miranda*, 384 U.S. at 469.

159. *Id.*

provide a continuous opportunity to exercise the right to remain silent.”<sup>160</sup>

Section 3501 was *not* invalidated because it failed to comply with *Miranda*'s prophylactic rules. It was struck down rather because it failed to satisfy the “benchmark of constitutionality” established in *Miranda*—it failed to provide *anything* more than the “totality of circumstances”—“voluntariness” test when the Court made plain that “*something* more than the totality test was necessary”<sup>161</sup>—it failed to provide *any* safeguard against the inherently compelling circumstances of custodial interrogation other than the test that had been found wanting in *Miranda*.

*Robbins* supports and helps explain *Dickerson*. Nowhere in its majority opinion does the *Robbins* Court suggest that the prophylactic rules prescribed in *Anders* were “illegitimate” or “lawless.” Nor does *Robbins* suggest that the Congress or the States could disregard the *Anders* rules with impunity simply because they were “prophylactic.” The new California procedure was upheld *only because* it was a suitable substitute for *Anders*—it “reasonably ensures that an indigent’s appeal will be resolved in a way that is related to the merit of that appeal.”<sup>162</sup> But § 3501 does not reasonably ensure that the exercise of a custodial suspect’s right to remain silent will be honored.<sup>163</sup>

The *Robbins* Court pointed out that, although the California procedure it was upholding was different than the one prescribed in *Anders*, it is “undoubtedly far better than those procedures we have found inadequate.”<sup>164</sup> Once again, this cannot be said of § 3501. In fact, § 3501 is a statutory codification of the same test the Court found wanting in *Miranda*—and nowhere in his long dissenting opinion in *Dickerson* does Justice Scalia argue, or even suggest, otherwise.

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160. According to Dorf & Friedman, *Miranda* and *Dickerson* stand for this proposition. Dorf & Friedman, *supra* note 22, at 3-4; see also David Huitema, *Miranda: Legitimate Response to Contingent Requirements of the Fifth Amendment*, 18 YALE L. & POL’Y REV. 261, 263, 290 (2000).

161. *Dickerson*, 120 S. Ct. at 2335 (emphasis added).

162. See *Smith v. Robbins*, 120 S. Ct. 746, 760 (2000).

163. As pointed out in *Dickerson*, 120 S. Ct. at 2335:

*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure that the exercise of that right will be honored. [But] § 3501 explicitly eschews a requirement of pre-interrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect’s confession.

164. *Robbins*, 120 S. Ct. at 761.

## 2. *Edwards* and its Progeny

*Edwards v. Arizona*<sup>165</sup> marked the rare occasion when the Burger Court read *Miranda* rather broadly. In an opinion by Justice White (who had written a stinging dissent in *Miranda*) the Court held that when a suspect effectively asserts his right to a lawyer (as opposed to his right to remain silent),<sup>166</sup> the suspect may not be subjected to further police questioning *until* counsel has been made available to him *unless* he himself initiates further conversation with the police. *Edwards* in effect established a new “prophylactic rule” that built on and reinforced *Miranda*’s “prophylactic rules.”<sup>167</sup>

What the Burger Court promulgated, the Rehnquist Court reaffirmed and expanded. In *Minnick v. Mississippi*<sup>168</sup> (a case that applied the *Edwards* rule even when the suspect had been allowed to meet with a lawyer after first asserting his right to counsel) a 6-2 majority,<sup>169</sup> per Justice Kennedy, observed:

The [*Edwards*] rule ensures that any statement made [by a suspect who has previously asserted his right to counsel] is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness and implements the protection of *Miranda* in practical and straightforward terms.<sup>170</sup>

Is this not an explanation and defense of *Miranda* itself as well as *Edwards*?

A “prophylactic rule” in the confessions area promulgated by the Burger Court and twice reaffirmed and expanded by the Rehnquist Court should give anyone heaping scorn on the Warren Court’s use of prophylactic rules reason to pause. But Justice Scalia barely mentions the *Edwards* rule. He dismisses *Edwards* and cases based on it in a footnote as marking “less a separate instance of claimed judicial power to impose constitutional prophylaxis than a direct, logic-driven consequence of *Miranda* itself.”<sup>171</sup>

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165. 451 U.S. 477 (1981); *see also supra* note 36. There were no dissents in *Edwards*. Justice Powell, joined by then-Justice Rehnquist, who concurred in the result did balk at the prospect of “creat[ing] a new *per se* rule” in the confessions area, *Edwards*, 451 U.S. at 489-90, but did so on policy grounds. Chief Justice Burger also concurred in the judgment. No member of the Court even hinted that the *Edwards* rule was an “illegitimate” exercise of the Court’s power.

166. *See Michigan v. Mosley*, 433 U.S. 96 (1975).

167. The *Edwards* opinion itself did not describe its rule as a “prophylactic” one. (Neither, it should be noted, did the *Miranda* opinion itself describe the *Miranda* warnings as prophylactic rules.) However, in *Arizona v. Roberson*, 486 U.S. 675 (1988), which reaffirmed and expanded *Edwards*, the Court referred to “the bright-line, prophylactic *Edwards* rule,” *id.* at 682, and the “prophylactic rule” laid down in *Edwards*, *id.* at 685.

168. 498 U.S. 146 (1990).

169. Justice Scalia, joined by Chief Justice Rehnquist, dissented. Justice Souter took no part in the case.

170. *Minnick*, 498 U.S. at 151.

171. *Dickerson*, 120 S. Ct. at 2345 n.1.

I think not. I think it is hard to say that the *Edwards* rule was *required* by the *Miranda* decision. After all, six years prior to *Edwards*, the Court had held that if a suspect asserts his “right to silence” (as opposed to his right to counsel) the police *could*, if they ceased questioning on the spot, “try again”—and succeed at a subsequent interrogation session.<sup>172</sup> The Court could have plausibly held that assertion of the right to counsel should be treated no differently than invocation of the right to silence.<sup>173</sup> Indeed, as I have mentioned elsewhere, I do not think it makes much sense to draw a distinction based on which right a suspect happens to invoke.<sup>174</sup>

It seems clear to me, and, more important, it seemed clear to Justice White (speaking about *Edwards* three years after he wrote the majority opinion in that case) that “*Edwards* was not a necessary consequence of *Miranda*.”<sup>175</sup> And the cases expanding the *Edwards* rule are certainly not, as Justice Scalia put it in *Dickerson*, “logic-driven consequences of *Miranda*.”

*Miranda* did not require a 6-2 majority in *Arizona v. Roberson*<sup>176</sup> to hold that once a suspect effectively asserts his right to counsel, the police cannot even initiate interrogation about crimes *unrelated* to the one for which the suspect has invoked his right to counsel. Nor did *Miranda* require a 6-2 majority in *Minnick*<sup>177</sup> to hold that once a suspect invokes his right to counsel the police may not reinitiate questioning in the absence of counsel *even if the suspect has been allowed to consult with an attorney in the interim*.<sup>178</sup> In short, as Justice Scalia himself observed a decade ago, “the rule of *Edwards* is

172. See *Michigan v. Mosley*, 433 U.S. 96 (1975).

173. In *Solem v. Stumes*, 465 U.S. 638 (1984), holding that *Edwards* does not apply retroactively to state-court convictions affirmed by the state supreme court before *Edwards* was decided, the Court, per Justice White (author of the *Edwards* opinion), pointed out that “much of the logic and language” of *Mosley*, which had refused to adopt a *per se* rule governing the waiver of the right to silence, “could be applied to the invocation of the [right to counsel].” *Id.* at 648. Thus, “*Edwards* was not a necessary consequence of *Miranda*.” *Id.*

174. JESSE H. CHOPER, YALE KAMISAR & LAURENCE H. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1982-83*, at 153-58 (1984) (remarks of Kamisar).

175. See *supra* note 173. Moreover, at the time *Edwards* was decided, concurring Justice Powell stated that the Court had “created a new *per se* rule in the confessions area,” *Edwards v. Arizona*, 451 U.S. 477, 489-90 (1981).

176. 486 U.S. 675 (1988); see also *supra* note 36. No Justice (including Justice Scalia, who joined the opinion of the Court) questioned the legitimacy of the Court’s exercise of power in *Roberson*. Yet Justice Stevens, who wrote the opinion of the Court, spoke freely of the “prophylactic protections” provided by *Miranda* and the “prophylactic *Edwards* rule.” *Roberson*, 486 U.S. at 681-82.

177. When *Minnick* was decided, not a single member of the original *Miranda* majority remained on the Court.

178. As I have observed elsewhere, I believe even some members of the *Miranda* majority “would have balked at the application of the *Edwards* rule to the *Minnick* fact situation.” Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 *TULSA L.J.* 1, 19 (1995).

our rule, not a constitutional command; and it is our obligation to justify its expansion.”<sup>179</sup>

It is understandable why Justice Scalia is reluctant to consider *Edwards*, *Roberson* and *Minnick* “separate instance[s] of claimed judicial power to impose constitutional prophylaxis.” Are we supposed to believe that Justice White (and the five other Justices who joined his opinion in *Edwards*), Justice Stevens (and the five other Justices who joined his opinion in *Roberson*) and Justice Kennedy (and the five other Justices who joined his opinion in *Minnick*) all exercised “an immense and frightening antidemocratic power [that] does not exist”?<sup>180</sup>

### 3. *Pearce* and its Progeny

One line of cases that Justice Scalia takes head-on is *North Carolina v. Pearce*<sup>181</sup> and its progeny. Agreeing that defenders of *Miranda* are “right on target”<sup>182</sup> when they characterize *Pearce* as a “prophylactic rules” case, Justice Scalia directs heavy fire at it, maintaining that it “exhibits the same fundamental flaw as does *Miranda*.”<sup>183</sup> I believe, however, that the *Pearce* line of cases demonstrates (a) that most Justices are fairly comfortable with prophylactic rules and (b) there are circumstances when such rules are both necessary and proper.

*Pearce* arose against the following background: A number of defendants had successfully overturned their original convictions only to receive a heavier sentence for the same crime when they were retried and reconvicted. There was reason to believe that in some of these cases, at least, sentencing judges were “punishing” defendants for having succeeded in getting their first convictions set aside. As the *Pearce* Court noted, however “[t]he existence of a retaliatory motivation would . . . be extremely difficult to prove in any individual case.”<sup>184</sup>

The *Pearce* Court dealt with the problem by establishing what has “since come to be called a ‘presumption of vindictiveness’”:<sup>185</sup> “In order to assure the absence of [a retaliatory] motivation” it held that “whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons [for] doing so must affirmatively appear [and] must be based upon objective

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179. *Minnick v. Mississippi*, 498 U.S. 146, 156 (1990) (Scalia, J., joined by Rehnquist, C.J., dissenting) (quoting with approval Justice Kennedy’s dissent in *Roberson*).

180. See *supra* text accompanying note 144.

181. 395 U.S. 711 (1969).

182. *Dickerson*, 120 S. Ct. at 2345.

183. *Id.*

184. *Pearce*, 395 U.S. at 725 n.20 (1969).

185. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 814 (4th ed. 2000).

information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.”<sup>186</sup>

According to Justice Scalia, “Justice Black surely had the right idea when he derided the Court’s requirement as ‘pure legislation if there ever was legislation.’”<sup>187</sup> But Justice Black was the *only* member of the Court to question the legitimacy of a “presumption of vindictiveness.” And when Justice Black left the Court *nobody else* raised doubts about the legitimacy of the *Pearce* prophylactic rules.

The Court subsequently made plain that *Pearce* had established a “prophylactic rule” and that such rules are nothing to be uneasy about. Speaking for a 7-2 majority (one that included Chief Justice Burger and then-Justice Rehnquist), Justice White explained *Pearce* as a case where, “[p]ositing that a more severe penalty after reconviction would violate due process [if] imposed as purposeful punishment for having successfully appealed,” the Court concluded that “such untoward sentences occurred *with sufficient frequency* to warrant the imposition of a prophylactic rule.”<sup>188</sup>

A year later, speaking for a 7-2 majority that again included Burger and Rehnquist, Justice Powell (who, so far as I know, has never been called an admirer of the Warren Court’s revolution in criminal procedure), *felt so*

186. *Pearce*, 395 U.S. at 726.

187. *Dickerson*, 120 S. Ct. at 2345 (Scalia, J., dissenting) (quoting *Pearce*, 395 U.S. at 741 (Black, J., dissenting)). Justice Black will long be remembered for his stirring opinions in the First Amendment area, but he was quick to state or to imply that his colleagues were exceeding their constitutional authority. *See, e.g.*, *Jackson v. Denno*, 378 U.S. 368, 407 (1964) (Black, J., joined by Clark, J., dissenting) (“My wide difference with the Court is in its apparent authority to change state trial procedure because of its belief that they are unfair”; “[t]here is no constitutional provision, which gives this Court any such lawmaking power”); *Linkletter v. Warden*, 381 U.S. 618 (1965) (Black, J., joined by Douglas, J., dissenting) (stating that if, as the Court maintains, a principal reason for deciding to give *Mapp v. Ohio* retroactive effect is that the Fourth Amendment exclusionary rule is primarily designed to deter future police misconduct, “the Court’s action in adopting the [exclusionary rule] sounds much more like law-making than construing the Constitution”); *Berger v. New York*, 388 U.S. 41, 77, 88 (1967) (Black, J., dissenting) (“[T]he use of the keyword ‘privacy’” enables the Court “both to usurp the policy-making power of the Congress and to hold more [laws] unconstitutional when the Court entertains a sufficient hostility to them”; the permissibility of electronic eavesdropping “is plainly the type of question that can and should be decided by legislative bodies”); *Katz v. United States*, 389 U.S. 347, 364-66, 373 (1967) (Black, J., dissenting) (stating that the Fourth Amendment “simply does not apply to eavesdropping,” but the Court has gone ahead and applied it by “arbitrarily substituting” its own language “for the Constitutional language,” forgetting that it is not the Court’s role “to rewrite the Amendment ‘in order to bring it into harmony with the times’”); *In re Winship*, 397 U.S. 358, 377, 2381-82 (1970) (Black J., dissenting) (Although “nowhere in [the Constitution] is there any statement that convictions of crime requires proof of guilt beyond a reasonable doubt,” the Court so finds; its “natural law due process” approach to constitutional interpretation leads to “an arrogation of unlimited authority by the judiciary [that] cannot be supported by the language or the history of any provision of the Constitution.”). However, Justice Black’s criticism of other Justices for going beyond the text of the Constitution and usurping the power of the legislature is hard to square with his concurring opinion in *New York Times v. Sullivan*, 376 U.S. 254 (1964). *See infra* text accompanying notes 204-10.

188. *Colten v. Kentucky*, 407 U.S. 104, 116 (1972) (emphasis added).

comfortable with *Miranda*'s prophylactic rules that he explained and defended "the *Pearce* prophylactic rules" by analogizing them to the *Miranda* rules:

By eliminating the possibility that [improper considerations] might occasion enhanced sentences, the *Pearce* prophylactic rules assist in guaranteeing the propriety of the sentencing phase of the criminal process. In this protective role, *Pearce* is analogous to *Miranda*, . . . where the Court established rules to govern police practices during custodial interrogations in order to safeguard the rights of the accused and to assure the reliability of statements made during these interrogations. Thus, the prophylactic rule in *Pearce* and *Miranda* are similar in that each was designed to preserve the integrity of a phase of the criminal process.<sup>189</sup>

Justice Powell and the six Justices who joined him seemed untroubled by the fact that in many instances application of the *Pearce* rule would benefit defendants whose rights had not *actually* been violated—who had not actually been the victims of vindictiveness.<sup>190</sup> This was a good reason for not applying *Pearce* retroactively to resentencing proceedings that took place prior to the *Pearce* decision<sup>191</sup> (just as *Miranda* had not been applied retroactively),<sup>192</sup> but it was not a valid reason for failing to adopt the rule. It is "an inherent attribute of prophylactic constitutional rules" that their application will benefit "some defendants who have suffered no constitutional deprivation."<sup>193</sup>

In still another case applying *Pearce*, even Chief Justice Burger seemed unperturbed by its "prophylactic" nature. Speaking for a majority of the Court that included Justice Rehnquist, the Chief Justice matter of factly recalled that in order "[t]o prevent actual vindictiveness from entering into a decision and allay any fear on the part of a defendant that an increased sentence is in fact the product of vindictiveness, the [*Pearce*] Court fashioned what in essence is a 'prophylactic rule.'"<sup>194</sup> *But the Court did not say this disapprovingly.*

Neither the Chief Justice nor any other member of the Court complained that the *Pearce* rule had enabled federal courts to exercise their "supervisory power over state courts." Nobody seemed troubled that a defendant who had received an increased sentence on retrial could establish a due process violation without showing *actual* vindictiveness. Nor did anybody suggest that *Pearce* was an "illegitimate" decision.

Would Justice Scalia have us believe that all these years all these Justices engaged in "lawless practices"?

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189. *Michigan v. Payne*, 412 U.S. 47, 53 (1973).

190. *See id.* at 53-54.

191. The Court held that *Pearce* would not apply retroactively in *Payne*. *Id.* at 57.

192. *See Johnson v. New Jersey*, 384 U.S. 719 (1966).

193. *Payne*, 412 U.S. at 53.

194. *Wasman v. United States*, 468 U.S. 559, 564 (1984).

Dissenting in *Dickerson*, Justice Scalia maintains that “although the Due Process Clause may well prohibit punishment based on judicial vindictiveness, the Constitution by no means vests in the courts ‘any general power to prescribe particular devices ‘in order to assure the absence of such a motivation.’”<sup>195</sup> But what good does it do to say that judicial vindictiveness is unconstitutional if there is no way to prove it? No way to make that prohibition meaningful?

Establishing that a sentencing judge was motivated by bad faith or bias is a Herculean feat. Judges who are so motivated are not likely to admit it. Suppose *Pearce* had taken Justice Scalia’s position and declared that although vindictive sentencing is unconstitutional the Court lacks any power to prescribe particular devices in order to assure that such sentencing did not occur. Then what? When a judge imposed a heavier sentence on a defendant reconvicted for the same crime, the defendant would claim that the judge “punished” him for getting his first conviction overturned and the judge would deny it. Then what?

At one point in his *Dickerson* dissent Justice Scalia maintains that there is “simply no basis in reason” for concluding that a response by a suspect “who *already knows* all of the rights described in the *Miranda* warning” is anything but a “volitional act.” But how can we tell whether a suspect *already knows* all the rights described in the *Miranda* warnings if the police are not required to inform him, and do not inform him, of his “*Miranda* rights”? To be sure, the custodial suspect might be a judge or a lawyer or a police officer. But that still leaves about ninety-eight percent of the cases. And in those cases the suspect will say he did not know all of his rights (or that he forgot some or all of them under stress or in the excitement) and the prosecution will insist that he was fully aware of his rights at all times. Then what?

#### 4. The Instructiveness of *New York Times v. Sullivan*

As Susan Klein has recently spelled out, constitutional-criminal procedure is filled with prophylactic rules.<sup>196</sup> As David Strauss has shown, however, criminal procedure has no monopoly on such rules.<sup>197</sup> *New York Times v. Sullivan*<sup>198</sup> is a noteworthy example.

I realize that in *Dickerson* Justice Scalia dismissed *Sullivan* and other First Amendment decisions cited by defenders of *Miranda* as cases that engaged in

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195. *Dickerson*, 120 S. Ct. at 2345 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 741 (1969) (Black, J., dissenting)).

196. Klein, *supra* note 38, at 7-16.

197. Strauss, *supra* note 68, at 13-15; David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

198. 376 U.S. 254 (1964).

straightforward constitutional interpretation.<sup>199</sup> But it is no easy task to decide whether Supreme Court rulings are prophylactic, especially when the opinions do not tell us (as *Miranda*, *Edwards*, *Pearce* and *Anders* did not) that they are promulgating “prophylactic rules.”<sup>200</sup> As Justice Scalia himself noted, three years after *Miranda*, the Court announced it was throwing out a confession because obtaining it “in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*.”<sup>201</sup>

I share David Strauss’s view that *Sullivan* may plausibly be read as adopting a prophylactic rule. I also agree that an analysis of *Sullivan* suggests how rules that at first glance appear to be the product of ordinary constitutional interpretation may turn out to be, like the *Miranda* rules, “‘prophylactic’ rules that ‘go beyond the Constitution itself’ in the sense that [they] reflect not just the values protected by [various clauses of the Constitution] but institutional concerns about the most effective way to secure those values.”<sup>202</sup>

Professor Strauss asks:

Why are some false statements protected by the First Amendment, even though they have “no constitutional value”? The Court gave the common sense answer in *New York Times v. Sullivan* itself: false speech must be protected to some degree in order to avoid discouraging valuable speech . . . . [G]iven the inevitable imprecision of judicial factfinding, a regime that protects only speech that has “constitutional value” will end up deterring too

199. *Dickerson*, 120 S. Ct. at 2344.

200. The difficulties involved in determining whether a ruling is “prophylactic” is illustrated by the disagreement over the status of *United States v. Wade*, 388 U.S. 218 (1967), holding that the right to counsel applies to pretrial lineups. The *Wade* Court used language that *sounded* like it was applying a prophylactic rule. For example, it told us that since “there is grave potential . . . for prejudice” in the pretrial lineup which, absent defense counsel’s presence is essential to “avert prejudice and assure a meaningful confrontation at trial.” *Id.* at 236. Moreover, the Court pointed out that legislation or regulations which eliminate “the risks of abuse and unintentional suggestion” may also eliminate the need to regard the pretrial lineup “stage as ‘critical.’” *Id.* at 239.

Nevertheless, Joseph Grano, a leading critic of *Miranda*, and prophylactic rules generally, argues forcefully and persuasively that *Wade*’s right to counsel requirement is not a prophylactic rule after all. “The sixth amendment critical stage doctrine,” maintains Professor Grano, “depends upon fair trial considerations, and the fairness concern itself follows from the sixth amendment’s instrumental purpose of guaranteeing a fair trial. . . . The right to counsel requirement in *Wade* is rooted squarely in the sixth amendment’s right to counsel provision. . . .” Grano, *supra* note 147, at 120-21.

201. *Dickerson*, 120 S. Ct. at 2338-39 (quoting *Orozco v. Texas*, 394 U.S. 324, 326 (1969)).

202. Strauss, *supra* note 68, at 3. Perhaps one may resolve the dispute about the “prophylactic” status of *Sullivan* peaceably by describing it, as three commentators have described *Jackson v. Denno*, 378 U.S. 368 (1964) (requiring an initial determination of the voluntariness of a challenged confession to be determined by the trial judge in order to assure that involuntary confessions will be excluded even if that issue goes to the jury), as a rule “not characterized [by the court that decided it] as prophylactic, but nonetheless imposing a procedural prerequisite with a prophylactic objective.” LAFAYE, ISRAEL & KING, *supra* note 147, § 2.9(e), at 673.

much valuable speech. Some speech that has (in the Court's own words) "no constitutional value" must also be protected, because the disadvantages of protecting it are outweighed by the gains. . . . [T]his justification parallels the justification for *Miranda*. The Supreme Court even characterized [the *Sullivan*] line of cases as "extend[ing] a measure of strategic protection to defamatory falsehood." . . . [I]f the notion of "go[ing] beyond what the First Amendment demand[s] in order to provide some prophylaxis" has any meaning, then *New York Times v. Sullivan* did it. The better characterization is, to use the *Dickerson* dissent's terms, that *Sullivan* held that what "the First Amendment demanded" is precisely "some prophylaxis." *Miranda* held the same thing about the Fifth Amendment.<sup>203</sup>

Another word about the *Sullivan* case. It is noteworthy that Justice Black, who has sometimes accused his colleagues of engaging in judicial lawmaking,<sup>204</sup> favored a *more prophylactic* "prophylactic rule" in *Sullivan* than did the majority. For Justice Black did not believe the rule the majority had adopted—a rule that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official misconduct unless he proves that the statement was made with 'actual malice'"<sup>205</sup>—furnished the press adequate protection. Although he did not label it a "prophylactic rule"—and he might have been shocked if someone had told him that was what he was

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203. Strauss, *supra* note 68, at 13-15; see also Huitema, *supra* note 160, at 272-74; Landsberg, *supra* note 147, at 932, 934-35. The analogy to *Sullivan* also helps explain how the *Elstad* exception (the refusal to apply the "fruit of the poisonous tree doctrine to some *Miranda* violation) can be reconciled with the view that *Miranda* is required by the Self-Incrimination Clause. See Strauss, *supra* at 19-20:

To make the comparison to the First Amendment once again, the constitutional rules governing defamation of public officials are different from the rules governing defamation of private individuals, which are in turn different from the rules governing defamation that addresses no subject of public interest. These differences do not mean that the rule of *New York Times v. Sullivan* is not a constitutional rule. They just mean that the constitutional rule that applies in one set of circumstances might have to be altered when different circumstances arise—a wholly unremarkable proposition. The Court in *Dickerson*, in trying to explain why *Elstad* and similar cases did not impugn the constitutional basis of *Miranda*, said that those cases only illustrate that "no constitutional rule is immutable." Perhaps a better way to put it is that constitutional rules are often not simple but require a degree of complexity and refinement—a point that is obvious in many areas of constitutional law. It may be that the Court struck the wrong balance in *Elstad*, or in one of the other cases creating an exception to *Miranda* (or, for that matter, in *Miranda* itself). But the fact that the Court refined the balance it struck in *Miranda* has no bearing on the constitutional status or legitimacy of that decision.

204. See *supra* note 187 and accompanying text.

205. *Sullivan*, 376 U.S. at 279-80.

proposing—I think it fair to say that Justice Black advocated a more drastic “prophylactic rule” than the one most of his colleagues found sufficient:

“Malice,” even as defined by the Court, is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment. Unlike the Court, therefore, I vote to reverse exclusively on the ground that the Times and the individual defendants had *an absolute, unconditional constitutional right* to publish in the Times advertisement their criticisms of the Montgomery agencies and officials. . . .<sup>206</sup> The half-million dollar verdict [against the New York Times] give[s] dramatic proof . . . that state libel laws threaten the very existence of an American press virile enough to publish unpopular views on public affairs and bold enough to criticize the conduct of public officials. . . . There is no reason to believe that there are not more such verdicts lurking just around the corner for the Times or any other newspaper or broadcaster which might dare to criticize public officials. In fact, . . . there are now pending eleven libel suits by local and state officials against the Times seeking \$5,600,000, and five such suits against the Columbia Broadcasting System seeking \$1,700,000. . . .<sup>207</sup>

. . . Stopgap measures like those the Court adopts are in my judgment not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about “malice,” “truth,” “good motives,” “justifiable ends,” or any other legal formulas which in theory would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount.<sup>208</sup>

Does anybody really believe that the standard Justice Black urged the Court to adopt in *Sullivan*—a rule that would have given the press an “absolute, unconditional” right to criticize public officials<sup>209</sup>—stemmed from *the explicit language* of the First Amendment or was *directly sanctioned* by the First Amendment? If so, who needs prophylactic rules?

But we do need them. Recognizing the legitimacy and utility of prophylactic rules and working out principles for establishing such rules seem

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206. *Id.* at 293 (Black, J., joined by Douglas, J., concurring) (emphasis added).

207. *Id.* at 294-95.

208. *Id.* at 295.

209. See *supra* note 206 and accompanying text.

far preferable to engaging in the kind of strained “pure” constitutional interpretation Justice Black did in his *Sullivan* concurring opinion.<sup>210</sup>

#### IV. SOME FINAL REFLECTIONS

*Miranda* left the door open for Congress to replace the warnings with other safeguards that perform the same function. Unfortunately, Congress did not walk in the door. But the door remains open.

The alternative often mentioned is a system of audiotaping or videotaping police questioning *and* a modified set of warnings.<sup>211</sup> I think such a system would and should pass constitutional muster. (It seems clear, however, that, no matter how fool-proof, a tape recording system that dispensed with all warnings would not be upheld.<sup>212</sup>)

If such a system replaced the four-fold *Miranda* warnings it would make clear that “a decision may be *both* an interpretation of the Constitution *and* a principle that Congress may modify.”<sup>213</sup> However, I doubt that any legislature will enact any audiotaping or videotaping system that contains some warnings of rights or any other *effective* alternative to the *Miranda* regime. For any alternative that *is* equally effective is likely to be “politically unacceptable for precisely the reason that saves it from being constitutionally unacceptable—it would be at least as protective of the suspect (and therefore at least as burdensome to investigators) as *Miranda* itself.”<sup>214</sup>

I believe Stephen Schulhofer is quite right—“politically attractive alternatives to *Miranda* can’t pass constitutional muster, and constitutional alternatives can’t attract political support.”<sup>215</sup> That is why the *Miranda* warnings will probably be with us for a long time.

But there is nothing inappropriate or illegitimate about prophylactic rules generally or the *Miranda* warnings in particular. I venture to say that the rule

210. See Landsberg, *supra* note 147, at 963.

211. Compare Cassell, *supra* note 6, at 486-97, with Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishing Small Social Costs*, 90 NW. U. L. REV. 556, 556-60 (1996).

212. As the *Dickerson* Court told us, referring to very similar language in the *Miranda* opinion, “*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored.” *Dickerson*, 120 S. Ct. at 2335.

213. Strauss, *supra* note 68, at 4. As Professor Strauss observes many have recommended an alternative to *Sullivan*—“a regime in which courts will determine, in any defamation action, whether the statement was true or false, but rather than imposing damages liability will require the speaker to publish a retraction (and perhaps pay the plaintiff’s attorney’s fees).” *Id.* at 22. Strauss continues: “If such a scheme (or some other alternative) did indeed strike as good or better a balance than *Sullivan*, there would be no good reason for the Court to reject a statute that adopted it. But no one questions the constitutional status of *Sullivan*.” *Id.*

214. Schulhofer, *Puzzling Persistence*, *supra* note 26, at 22.

215. *Id.*

that governed the admissibility of state confessions for thirty years prior to *Miranda*—the “totality of circumstances”-“voluntariness” test—was no more a rule of the pure *Marbury* variety, no more “directly compelled” by the Constitution, and no more a product of the “explicit” text of the Constitution than *Miranda* itself. Indeed, if anything, there is a stronger relationship between the *Miranda* doctrine and the explicit text of the Constitution than there is between the voluntariness rule and the constitutional text. After all, the *Miranda* doctrine is based on the Self-Incrimination Clause. The voluntariness is not; it simply grew out of general due process.<sup>216</sup>

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216. Prophylactic rules are often contrasted with “core” or “true” or “explicit” constitutional rules or rules that are “directly sanctioned or required” by the Constitution. *See supra* note 147. But how can it be said that the confessions rule that preceded *Miranda*, the “totality of circumstances”-“voluntariness” test, falls into the latter category? How can it be said that the “voluntariness” test was explicitly or necessarily required by the Constitution?

The “voluntariness” rule cannot be called a requirement of the Self-Incrimination Clause, because until the decision in *Malloy v. Hogan*, 378 U.S. 1 (1964), the privilege against self-incrimination did not apply to the states and, in any event, until *Miranda v. Arizona*, 384 U.S. 436 (1966), it did not apply to the police station. So where did the confession rule the Court applied to the states, starting with *Brown v. Mississippi*, 297 U.S. 278 (1936), come from? The Constitution does not specifically mention “confessions” or “admissions.” Nor do the terms “totality of circumstances,” “voluntary,” “involuntary,” “overbearing the will,” “police questioning” or “police interrogation” appear anywhere in the text. So why is the protection against the use of “involuntary” confessions (as opposed to the protection afforded by *Miranda*) a “core constitutional right”? Consider Anthony Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 805-06 (1970):

In 1936 [when the Court decided *Brown*,] it was far from evident why the due process clause required anything more of state criminal proceedings than a regular and fair trial, giving the defendant a regular and fair opportunity to contest his guilt under state evidentiary rules, including the rule which the Supreme Court of Mississippi held allowed admission of the *Brown* confession.

Prophylactic rules are simply a species of “bright-line” or *per se* rules.<sup>217</sup> Almost everything that can be said in favor of *per se* rules applies to prophylactic rules as well.<sup>218</sup> So far as I know, no one has even questioned the constitutional legitimacy of “*per se*” or “bright-line” rules, certainly not the ones that work *in favor* of law-enforcement.<sup>219</sup> It is hard to avoid the conclusion that “[t]he charge that prophylactic rules . . . are constitutionally

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217. Professors LaFave, Israel and King have made a valiant effort to distinguish “*per se*” rules from “prophylactic” ones, LAFAVE, ISRAEL & KING, *supra* note 147, at § 2.9(d)–(e), but I do not believe that many Justices have received the word. Over the years they have frequently used the terms “bright-line” rules, “*per se*” rules and “prophylactic” rules interchangeably. The opinion of the Court in *Miranda* never called the new doctrine prophylactic, but dissenting Justice White twice called it a *per se* rule. *Miranda*, 384 U.S. at 536, 544; *see also* *Solem v. Stumes*, 465 U.S. 638 (1984); *supra* note 173. In declining to give *Edwards* retroactive effect, the Court, per Justice White (author of the *Edwards* opinion), called it a “prophylactic rule” at one point, but referred to “its *per se* approach at another point, *id.* at 647, and also described the case as having “established a bright-line rule,” *id.* at 646. Concurring in *Solem v. Stumes*, Justice Powell called *Edwards* a “prophylactic rule” at one point, but a “*per se* rule” at two other places. *Id.* at 652, 654. In *Arizona v. Roberson*, which reaffirmed *Edwards*, the Court, per Stevens, J., referred to “the bright-line, prophylactic *Edwards* rule,” 486 U.S. 675, 682 (1988), and reminded us that “[w]e have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*.” *Id.* at 681.

In *Dickerson* the Court, per Rehnquist, C.J., looked back on *Miranda* as a case that “concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements and thus heightens the risk that an individual will not be ‘accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.’” 120 S. Ct. at 2331. The *Dickerson* Court also observed that the *Miranda* Court had “noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession.” *Id.* at 2335. Under the LaFave-Israel-King analysis, therefore, the *Dickerson* Court seemed to view the *Miranda* warnings as *per se* rules rather than prophylactic ones. *See also* Archibald Cox, *The Role of Congress in Constitutional Determination*, 40 U. CIN. L. REV. 199, 250-52 (1971).

It is noteworthy that Francis Allen, whose pioneering articles in the early 1950s paved the way for much of the constitutional-criminal procedure scholarship that followed, did not call the *Miranda* doctrine “prophylactic.” He cited *Miranda* rather as an example of the Warren Court’s “tendency . . . to turn to broad legislative-like directives, sometimes called ‘flat’ or ‘per se’ rules.” Allen, *supra* note 3, at 532 & n.66. What Professor Allen said of “*per se*” rules applies to “prophylactic” ones as well: “They give relatively certain guidance to the lower courts” and are “applicable to a great mass of cases at the trial court level without direct involvement of the Supreme Court.” *Id.*

218. Almost everything Professors LaFave, Israel and King say about “*per se*” (or “bright-line”) rules strikes me as applicable to “prophylactic” rules as well: They utilize “a standard that looks to a single characteristic or event and does not adjust to the uniqueness of each case,” LAFAVE, ISRAEL & KING, *supra* note 147, § 2.9(d), at 659; have “produced high visibility benchmarks that captured the attention of both administrators and the public,” *id.* § 2.9(d), at 669; provide guidance to police officers “‘who have only limited time and expertise to reflect on and balance the social and individual interests in the specific circumstances they confront,’” *id.* § 2.9(d), at 666; have “provided less room for manipulation by judges disposed to evasion, in part because they often become applicable without extensive factfinding,” *id.* § 2.9(d), at 670; they are “either overinclusive or underinclusive as compared to the application of that function to all relevant circumstances on a case-by-case basis,” *id.* § 2.9(d), at 660; are based on the notion that “the applicable constitutional guarantee should be interpreted in light of administrative realities, as well as the logic of its function,” *id.* § 2.9(d), at 660 n.155; and are “imposed in the exercise of the Court’s inherent authority to determine the appropriate scope of an interpretive rule,” *id.*

219. *See, e.g.*, *California v. Acevedo*, 500 U.S. 565 (1991); *New York v. Belton*, 453 U.S. 454 (1981); *United States v. Robinson*, 414 U.S. 218 (1973).

illegitimate seems . . . merely a policy preference in favor of under-enforcement rather than over-enforcement of individual liberties.”<sup>220</sup>

“The characterization of *Miranda* as a prophylactic rule that ‘goes beyond’ the Constitution seems to be a way of saying that *Miranda* represents [a] kind of deliberate choice to exclude some voluntary confessions, in exchange for the benefits of identifying or deterring some compelled confessions that would otherwise escape detection.”<sup>221</sup> The *Miranda* rules do “go beyond” the Constitution “in the sense that [they] reflect not just the values protected by the Fifth Amendment but institutional concerns about the most effective way to secure those values.”<sup>222</sup> However, “[v]irtually all of constitutional law” does.<sup>223</sup>

At times prophylactic rules are “necessary to combat a substantial potential for constitutional violations.”<sup>224</sup> Such rules “are based on the Constitution because they are predicated on a judicial judgment that the risk of a constitutional violation is sufficiently great that simple case-by-case enforcement of the core right is insufficient to secure that right.”<sup>225</sup>

At times, as demonstrated by cases like *Miranda* and *Pearce*, the two rulings that have “come to be viewed as paradigmatic of prophylactic decisionmaking,”<sup>226</sup> the power to fashion prophylactic rules is the power to make constitutional guarantees more meaningful and more effective. This power is inherent in the art of constitutional interpretation—indeed, in the art of judging.

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220. Klein, *supra* note 38, at 20-21; *see also* Landsberg, *supra* note 147, at 951.

221. Strauss, *supra* note 68, at 8.

222. *Id.* at 3.

223. *Id.* However, in different circumstances, institutional concerns may lead to different results:

*Miranda* excludes some statements that are not “compelled” within meaning of the Fifth Amendment . . . because, on balance, the benefits of the *Miranda* rules, when compared with a case-by-case inquiry into compulsion, outweigh that undesirable side-effect. In certain circumstances, though, the comparison between *Miranda* and the case-by-case approach might come out differently; the balance of costs and benefits might tip in favor of proceeding case by case. The Court reasoned, rightly or wrongly, that cases like *Tucker*, *Quarles*, and *Elstad* presented such circumstances. This called for refinements of the *Miranda* rule, but it did not change the basic character of the *Miranda* rules (with or without refinements)—that they are both prophylactic and “found in the Constitution” in the same way as other principles of constitutional law.

*See id.* at 16-17.

224. LAFAVE, ISRAEL & KING, *supra* note 147, § 2.9(e), at 676.

225. Landsberg, *supra* note 147, at 950.

226. LAFAVE, ISRAEL & KING, *supra* note 147, § 2.9(e), at 676.