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## The Rise, Decline, and Fall (?) of *Miranda*

Yale Kamisar

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## THE RISE, DECLINE, AND FALL (?) OF *MIRANDA*

Yale Kamisar\*

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There has been a good deal of talk lately to the effect that *Miranda*<sup>1</sup> is dead or dying—or might as well be dead.<sup>2</sup> Even liberals have indicated that the death of *Miranda* might not be a bad thing.<sup>3</sup>

This brings to mind a saying by G.K. Chesterton: "Don't ever take a fence down until you know the reason why it was put up."<sup>4</sup>

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

2. See RICHARD LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 280–83 (2008); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1 (2010); Christopher Slobogin, *Toward Taping*, 1 OHIO ST. J. CRIM. L. 309 (2003); George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1092–95 (2003); cf. Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1246 (2001) ("[A]s interpreted by the post-*Miranda* Court, the extent to which *Miranda*'s safeguards protect suspects from pernicious interrogation practices is extremely limited.").

3. See Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1523–25, 1590–1600 (2008).

4. The saying is usually attributed to G.K. Chesterton. See, e.g., ARTHUR M. SCHLESINGER, JR., A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 106 (1965) (noting that President Kennedy kept a collection of sayings in a notebook, including the one set forth in the text—which he attributed to G.K. Chesterton). Judge William C. Griesbach, *The Joy of Law*, 92 MARQ. L. REV. 889, 892 (2009), also credits Chesterton with this saying.

However, the saying seems to be a paraphrase or compressed version of what Chesterton actually said. His point was that if you find a fence in a certain place, somebody might have had a good reason for putting one there. Until you know what that reason might be, you should not consider tearing the fence down. See *The Drift from Domesticity*, in 3 THE COLLECTED WORKS OF G.K. CHESTERTON 157, 157 (1990).

## I. WHY DID THE WARREN COURT BELIEVE SOMETHING LIKE *MIRANDA* WAS NEEDED?

Why was the “*Miranda* fence” erected? Because the “fence” it replaced—the due process/“totality of circumstances”/“voluntariness” test—proved to be “an inadequate barrier when custodial interrogation was at stake.”<sup>5</sup> As the “voluntariness” test evolved, the terms typically used in administering it (e.g., “voluntariness,” “coercion,” “breaking” or “overbearing” the will) became increasingly unhelpful. They did not focus directly on either of the two grounds for excluding confessions: (a) their untrustworthiness or (b) disapproval of the methods used by the police in obtaining them.<sup>6</sup>

Nor is that all. As Stephen Schulhofer has observed, because of its sponginess and “subtle mixture of factual and legal elements,”<sup>7</sup> the pre-*Miranda* test “virtually invited” trial judges to “give weight to their subjective preferences” and “discouraged active review even by the most conscientious appellate judges.”<sup>8</sup>

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5. *J.D.B. v. North Carolina*, \_\_\_ U.S. \_\_\_, 131 S. Ct. 2394, 2408 (2011) (Sotomayor, J., for a 5-4 majority). In the course of arguing successfully in *Dickerson v. United States*, 530 U.S. 428 (2000), that a 1968 federal statute purporting to abolish *Miranda* (a statute widely known as § 3501) should be struck down as unconstitutional, the U.S. Department of Justice “recall[ed] that the *Miranda* Court arrived at its solution only after concluding that the ‘totality of circumstances’ voluntariness test, as the sole protection for the Fifth Amendment rights of a custodial suspect, had failed . . . . It was inadequate because a ‘totality’ test, without more, provided insufficient guidance to the police, left inadequate means for this Court to unify and expound the law, and resulted in an uncertain legal rule that could not secure the vital constitutional rights at stake.” Reply Brief for the United States at 20, *Dickerson*, 530 U.S. 428 (No. 99-5525).

6. This was pointed out more than a decade before *Miranda*. See Monrad Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 418–19, 429–30 (1954); see also Francis Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 235 (1959). As Louis Michael Seidman has pointed out, at the very end of his long career, in *Culombe v. Connecticut*, 367 U.S. 568 (1991) (plurality opinion), Justice Frankfurter tried to make sense of, and to defend, the “voluntariness” test—in “sixty-seven pages of elegantly written prose.” Michael Seidman, *Brown and Miranda*, 80 CALIF. L. REV. 673, 730–33 (1992). “Despite his herculean effort,” Frankfurter “succeeded in attracting only one other Justice to his opinion” (Stewart). *Id.* at 732. “[T]he Justices who concurred [with Frankfurter] on an analytical framework for resolving the problem disagreed on the result produced by that framework, while the Justices who concurred on the result disagreed on the analytic framework producing the result. In short, the *Culombe* opinion was a total disaster.” *Id.* at 733.

7. Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 869–70 (1981).

8. *Id.* Even the late Bill Stuntz, one of *Miranda*’s strongest critics, recognized that:

[T]he three decades before *Miranda* showed that a case-by-case voluntariness inquiry sorted badly, and at least part of the reason was that courts had a very hard time judging, case by case, the difference between good and bad police interrogation tactics . . . . By 1966, the voluntariness standard seemed to be failing, and so could not do the job for which it was designed: It could not separate good police tactics and good confessions from bad ones.

“Given the Court’s inability to articulate a clear and predictable definition of ‘voluntariness,’ the apparent persistence of state courts in utilizing the ambiguity of the concept to validate confessions of doubtful constitutionality, and the resultant burden on [the Court’s] own workload,”<sup>9</sup> it is hardly surprising that in 1966 what might be called the “voluntariness fence” was finally torn down in favor of a new one.

If a picture is worth a thousand words, perhaps the same can be said for a specific case and its graphic details. I am not going to return to the 1930s and 40s, when police interrogators sometimes resorted to the whip or the rope. I am only going to recall a case decided in the late 1970s—*Mincey v. Arizona*.<sup>10</sup>

As I shall discuss shortly, the first blow the post-Warren Court dealt *Miranda* was in 1971. That year the Burger Court told us that even though statements obtained in violation of *Miranda* could not be used in the prosecution’s case-in-chief, they could still be used to impeach the defendant’s credibility if he testified on his own behalf.<sup>11</sup> However, the prosecution could not use the defendant’s statements for *any* purpose if they were “coerced” or “involuntary.” The question presented in the *Mincey* case was not whether the police had violated *Miranda* (the state conceded they had), but whether they had failed to satisfy the voluntariness test.

During a narcotics raid on Mincey’s apartment, a police officer was shot and killed. Mincey himself was shot in the hip. According to the attending physician, Mincey “arrived at the hospital ‘depressed almost to the point of coma.’”<sup>12</sup> Tubes were then placed in his throat to help him breathe, a catheter was inserted into his bladder and a device was attached to his arm so that he could be fed intravenously. Mincey was

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William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 980–81 (2001).

Because suspects may not be in custody when they are interrogated by the police or because they may validly waive their rights before being questioned by the police, the due process/voluntariness test is still very much alive. But I know of no reason to believe that the test is any more manageable today than it was in pre-*Miranda* days. After reading thousands of “voluntariness” cases from 1985 to 2005, Paul Marcus, *It’s Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601 (2006), concludes that the test “offers almost no guidelines for lawyers and judges” and that the rules governing the test “are just as poorly and inconsistently applied as they were in the 1950s and 1960s. In comparison, the imprecisely bright line rules of *Miranda* look very good.” *Id.* at 643–44.

9. Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 102–03 (1977).

10. 437 U.S. 385 (1978) (per Stewart, J.).

11. See *infra* notes 75–95 and accompanying text.

12. *Mincey*, 437 U.S. at 398.

then taken to the intensive care unit.<sup>13</sup>

At eight o'clock that evening, a detective came to the intensive care unit to question Mincey about the slaying of the police officer. Unable to talk because of the tubes in his mouth, Mincey could only respond to the detective's questions by writing his answers on pieces of paper provided by the hospital.<sup>14</sup> As the Court described the situation, "while Mincey was being questioned he was lying on his back on a hospital bed, encumbered by tubes, needles, and breathing apparatus. He was . . . unable to escape or resist the thrust of [the detective's] interrogation."<sup>15</sup>

When given the warnings required by *Miranda*, Mincey invoked his *Miranda* rights. But to no avail. "Although [he] asked repeatedly that the interrogation stop until he could get a lawyer, [the detective] continued to question him until almost midnight."<sup>16</sup>

Although it is hard to believe, the Arizona courts concluded that Mincey's confession was "voluntary." The Supreme Court reversed, but the vote was not unanimous. Justice Rehnquist dissented, maintaining (as other Justices had in the pre-*Miranda* "voluntariness" cases) that "the Court today goes too far in substituting its own judgment for the judgment of a trial court and the highest court of a State, both of which decided these disputed issues differently than does this Court, and both of which were a good deal closer to the factual occurrences than is this Court."<sup>17</sup>

One might say that the *Mincey* case demonstrates that the administration of the "voluntariness" test does work. After all, the judgment of the Arizona Supreme Court was reversed in that case. But we should keep in mind that in the thirty years between *Brown v. Mississippi*<sup>18</sup> (the first state due process/"voluntariness" case the Supreme Court ever reviewed) and *Miranda*, the High Court decided an

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13. *See id.* at 396.

14. *Id.*

15. *Id.* at 399.

16. *Id.* at 396. Moreover, at the time the detective asked the questions, he made no record of them. In a report dated about a week later, the detective "transcribed Mincey's answers and *added the questions he believed he had asked.*" *Id.* (emphasis added).

17. *Id.* at 410. *Mincey* was not the only time state courts ruled that a confession obtained from a wounded and hospitalized person was "voluntary" only to have the U.S. Supreme Court reverse. In *Beecher v. Alabama*, 389 U.S. 35 (1967) (per curiam), a confession was obtained from a murder suspect while (a) he was bleeding from a bullet wound in his leg (which was amputated soon afterwards) and (b) he was under the influence of a morphine injection that had been given to him to ease his pain. *Id.* at 36-37.

18. 297 U.S. 278 (1936).

average of only one state confession case per year.<sup>19</sup> And most of them were death penalty cases.<sup>20</sup> As Justice Black said of the due process/"voluntariness" test during the *Miranda* oral arguments, "[I]f you are going to determine it [the admissibility of the confession] each time on the circumstances . . . [if] this Court will take them one by one . . . it is more than we are capable of doing."<sup>21</sup>

## II. CONFUSION OVER, AND RESISTANCE TO, *MIRANDA*

To a considerable extent, *Miranda* was going to turn on how broadly or narrowly the Court would read *Escobedo v. Illinois*.<sup>22</sup> Because the defendant in *Escobedo* had both requested and retained counsel, it was possible to read *Escobedo* quite narrowly. But the Warren Court was highly unlikely to do so. Even James Thompson, who had the distinction of making the losing argument in *Escobedo*, recognized this. Indeed, Thompson came quite close to predicting what the *Miranda* warnings would be.<sup>23</sup>

But other predictions of what the Warren Court would tell us in *Miranda* proved to be wide of the mark. A month before *Miranda* was decided, Henry Friendly, a member of the U.S. Court of Appeals for the

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19. Counting *Brown*, the Supreme Court decided thirty-five state confession cases from 1936 through 1965. See National Legal Aid and Defender Association, *Defender Newsletter*, Vol. II, no. 5, Sept. 1965.

20. See E. BARRETT PRETTYMAN, JR., DEATH AND THE SUPREME COURT 297-98, 305 (1961).

21. See 63 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 881, 894 (Philip B. Kurland & Gerhard Casper eds., 1975) (quoting oral argument of Mr. Victor Earle for petitioner in *Vignera v. New York*, companion case to *Miranda*).

22. 378 U.S. 478 (1964).

23. As assistant director of the Northwestern Law School's Criminal Law Program, Thompson told a group of prosecuting attorneys shortly after *Escobedo* was handed down that even if a suspect had neither retained nor requested counsel the police should inform him of his right to remain silent and that anything he said could be used against him. Moreover, added Thompson, even though a suspect had not asked for a lawyer or indicated that he knew he had a right to one, "absolute compliance with the *Escobedo* rule may well require a warning of the right to counsel, along with the warning of the privilege against self incrimination."

Thompson emphasized that "in no other area of the criminal law has the Supreme Court taken more pains to carefully scrutinize the application of the doctrine of waiver by uncounseled defendants than in the area of the waiver of the right to counsel itself. Verbal waivers related to police officers, contradicted by the defendant at the trial, will almost certainly not pass muster." Substantial extracts from Thompson's remarks appear in Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in YALE KAMISAR, FRED INBAU & THURMAN ARNOLD, CRIMINAL JUSTICE IN OUR TIME 66-68 (A.E. Dick Howard ed., 1965).

A young Northwestern University law professor at the time he argued *Escobedo*, Thompson later became Governor of Illinois.

Second Circuit and one of the most respected judges in the nation, balked at “conditioning” police questioning “*on the presence of counsel*.”<sup>24</sup> To do so, maintained Judge Friendly, is “really saying that there may be no effective, immediate questioning by the police” and “that is not a rule that society will long endure.”<sup>25</sup>

We shall never know how long society would endure such a rule because neither the Warren Court nor any other court ever handed down such a rule. As Justice Sandra Day O’Connor reminded us, speaking for the Court twenty years later, *Miranda* rejected the ACLU’s argument that nothing less than “the *actual presence* of a lawyer” was required to assure the admissibility of an incriminating statement (as opposed merely to a police warning that the suspect had *a right to a lawyer*).<sup>26</sup> Nonetheless, this did not prevent the author of a well-known book on the Warren Court’s “revolution” in American criminal procedure from leading us to believe that one of the reasons *Miranda* was so heavily criticized was that it “condition[ed] questioning on the presence of counsel.”<sup>27</sup>

Even those who welcomed *Miranda* recognize that the Warren Court blundered when it applied *Miranda* to all cases *tried* after the date of the decision—even though the police interrogation had occurred and the confession had been obtained *before* the *Miranda* case had been decided.<sup>28</sup> By doing so, the Court confused many people and led them to believe that “*Miranda* had affected police interrogation far more than it actually had.”<sup>29</sup>

In the weeks immediately following *Miranda*, a number of self-confessed killers did walk free. This was bound to anger many people. Lawyers may have understood that the confessions being thrown out involved “only a relatively tiny, special group,”<sup>30</sup> but a great many

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24. Remarks of Judge Henry Friendly, 43 A.L.I. PROC. 250–52 (1966) (emphasis added).

25. *Id.* at 250; see also Symposium, *Has the Court left the Attorney-General Behind?*, 54 KY. L.J. 464, 521, 520, 523 (1966) (pre-*Miranda*), where a highly regarded state judge, Walter Schaefer of the Illinois Supreme Court, maintained that effective criminal law enforcement “is not compatible with a prohibition of station house interrogation or with the presence of a lawyer during [such interrogation].”

26. *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (emphasis added).

27. FRED GRAHAM, *THE SELF-INFLICTED WOUND* 7 (1970).

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

29. See GRAHAM, *supra* note 27, at 184.

30. *Id.* at 185. The Warren Court soon realized its mistake. A year later, when it applied the right to counsel to lineups and other pretrial identifications in *United States v. Wade*, 388 U.S. 218 (1967), the Court limited the new ruling to identifications conducted in the absence of counsel *after the date* of the *Wade* decision.



people did not. They believed, rather, that self-confessed killers “would continue to go free, so long as the *Miranda* case remained on the books”—providing “tremendous emotional impact to the argument that voluntary confessions should be usable in court, as they always had been.”<sup>31</sup>

But *Miranda* ran into a more formidable (and more enduring) problem—what might be called the great tensions and violence of the times. As Fred Graham, then the Supreme Court correspondent for the *New York Times*, observed:

No one could have known [when the Court began to restrain the power of the nation’s police in the 1960s] that it would coincide with the most troubled period of violent crime and racial unrest that has occurred in the [twentieth] century. As it turned out, the cycles of legal reform and rising crime and racial tensions moved in uncanny rhythm . . . . In 1962, the Federal Bureau of Investigation’s crime index swung upward, after several stable years. By the mid-1960s, record crime increases were being registered each year and waves of Negro riots were raking the cities each summer . . . . History has played cruel jokes before, but few can compare with the coincidence in timing between the rise in crime, violence and racial tensions in the United States and the Supreme Court’s campaign to strengthen the rights of criminal suspects against the state . . . . [T]he Supreme Court’s reform campaign eventually encountered a monumental incongruity—the Court had announced the most rigid legal limitations that any society had sought to impose on its police at a time when the United States had the most serious crime problem of any so-called advanced nation in the world.<sup>32</sup>

### III. THE POLITICIANS GET INTO THE ACT

Unfortunately, too many politicians could not resist the temptation to blame the rising crime and racial tensions on cases like *Escobedo* and *Miranda*. A striking example is the performance of Senator John McClellan, who chaired the Senate subcommittee hearings on the Omnibus Crime Control and Safe Streets Act of 1968,<sup>33</sup> the Act that contained a provision (generally known as § 3501) purporting to abolish *Miranda* and to replace it with the old “voluntariness” test.

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31. See GRAHAM, *supra* note 27, at 186.

32. *Id.* at 3–4.

33. 18 U.S.C. § 3501 (1994).

When Senator McClellan urged the need to pass § 3501, he propped up a huge facsimile of the FBI's crime graph. "The titles of key Supreme Court decisions were marked at the peaks along the rising line, to show the embarrassing parallel between Supreme Court activity on behalf of defendants and the crime rise."<sup>34</sup> McClellan then said:

Look at [the crime graph] chart. Look at it and weep for your country. Crime spiraling upward and upward and upward. Apparently nobody is willing to put on the brakes. I say to my colleagues today that the Senate has the opportunity—and the hour of decisions is fast approaching<sup>35</sup> . . . . . . . . [If this bill is defeated] every gangster and overlord of the underworld; . . . every murderer, rapist, robber . . . will have cause to rejoice and celebrate.<sup>36</sup>

Senator Sam Ervin turned out to be McClellan's chief lieutenant. And, he, too, was quite forceful:

If you believe that the people of the United States should be ruled by a judicial oligarchy composed of five Supreme Court Justices rather than by the Constitution of the United States, you ought to vote against title II. If you believe that self-confessed murderers, rapists, robbers, arsonists, burglars, and thieves ought to go unpunished, you ought to vote against [this bill] . . . .<sup>37</sup> . . . [The *Miranda* majority subscribed] to the strange theory that no man should be allowed to confess his guilt, even though the Bible says [and others declare] that an honest "confession is good for the soul." Hence, [the *Miranda* majority] invented rules . . . to keep people from confessing their crimes and sins.<sup>38</sup>

Both the Senate and the House passed the bill by overwhelming margins. The vote was an astonishing 72 to 4 in the Senate and equally lopsided in the House—369 to 17.<sup>39</sup>

True, from the outset, the constitutionality of § 3501 was in serious

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34. *Id.* at 12.

35. See 114 CONG. REC. 14,146 (May 21, 1968) (statement of Sen. McClellan).

36. *Id.* at 14,155.

37. *Id.* at 14,155 (statement of Sen. Ervin).

38. *Id.* at 14,030.

39. See Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 893, 894 (2000). June 5, 1968, the day the House began consideration of the Senate bill, was also the day Senator Robert F. Kennedy was assassinated. Some Congressmen cited the assassination as a reason for prompt action on the Senate bill. This was ironic. According to Senator Kennedy's legislative assistant, Peter Edelman, the Senator was "very deeply opposed" to the bill purporting to abolish *Miranda*. See *id.* at 893–94, 894 n.63.

doubt (although the issue was not resolved until more than thirty years later).<sup>40</sup> Nevertheless, as one commentator observed shortly after § 3501 was enacted, “it expresses a mood that the Court is not likely to ignore when [cases] involving the application, and particularly the extension, of *Miranda* come before it.”<sup>41</sup>

Republican presidential candidate Richard Nixon demonstrated that when it came to blaming the Supreme Court for rising crime rates and other social ills, he yielded to no southern Democrat. In a typical campaign speech, Nixon would report that a cab driver, an old woman, and an old man were brutally murdered, but in all three cases the killer was “let off”—even though he had confessed to the crime—“because of a Supreme Court decision.”<sup>42</sup>

As Frank Allen has noted, Mr. Nixon reduced “the bewildering problems of crime in the United States” to “a war between the ‘peace forces’ and the ‘criminal forces.’”<sup>43</sup> Nixon mentioned *Miranda* and *Escobedo* specifically. These two cases, he charged, “have had the effect of seriously hamstringing the peace forces in our society and strengthening the criminal forces”—and “[t]he balance must be shifted back.”<sup>44</sup>

Mr. Nixon’s unhappiness with the Supreme Court turned out to be more significant than Congress’s. He was elected President and in his first term he made four Supreme Court appointments: Warren Burger, Harry Blackmun, Lewis Powell, Jr., and William Rehnquist.

The new President did his best to make sure none of his appointees were enamored of the Warren Court’s “revolution” in criminal procedure. And none of them were. Nor did President Nixon have any

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

41. Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 810 (1970).

42. See GRAHAM, *supra* note 27, at 15.

43. Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 539 (1975), referring to Mr. Nixon’s position paper on crime, *Toward Freedom from Fear*, dated May 8, 1968 [hereinafter Nixon, Position Paper on Crime], available at <http://legacy.library.ucsf.edu/tid/xfe16b00/pdf.jsessionid=B3108BC30B410939156F8DCF38F2F114.tobacco03>.

44. *Id.* In his position paper Mr. Nixon emphasized that at the time only “one of eight major crimes . . . results in arrest, prosecution, conviction and punishment – and a twelve percent chance of punishment is not adequate to deter a man bent on a career in crime.” *Id.* This one-in-eight statistic is highly misleading. Even if all arrests led to prosecutions and convictions, only one reported crime in six would result in a conviction because only one reported crime in six leads to criminal prosecution. Most reported crimes never lead to an arrest. See Yale Kamisar, *How to Use, Abuse—and Fight Back with—Crime Statistics*, 25 OKLA. L. REV. 239 (1972).

reason to think otherwise.<sup>45</sup> That President Nixon was successful in this respect should come as no surprise. By the time a person is old enough to be considered for the U.S. Supreme Court, he or she is more likely to have made up his or her mind about the death penalty, the search and seizure exclusionary rule, and *Miranda* than on most matters.

#### IV. PRESIDENT NIXON NOMINATES WARREN BURGER TO BE CHIEF JUSTICE

According to then-candidate Nixon, the Warren Court's pro-defendant criminal procedure cases underscored the need for future presidents to appoint Supreme Court justices "who are thoroughly experienced and versed in the criminal laws of the land."<sup>46</sup> But Warren Burger had no background in criminal law. Ironically, Earl Warren, the person Burger replaced, did. In fact, Warren had been a prosecutor for eighteen years. Moreover, he had actually interrogated murder

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45. Warren Burger and William Rehnquist are discussed in the text below. As for future Justice Powell, he was appointed by President Lyndon Johnson to the Commission on Law Enforcement and Administration of Justice in 1965. The Commission issued its report two years later. Mr. Powell was one of seven members of the Commission to sign a supplemental statement expressing great concern about the adverse impact of *Escobedo* and *Miranda* on law enforcement. He and the six other commission members maintained that "the legitimate place of voluntary confessions in law enforcement must be reestablished" by returning to the pre-*Miranda* "voluntariness" test even if, "as now appears likely, a constitutional amendment is required." See THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 303, 307-08 (1967). The supplemental statement also stressed the need to allow for comment on the failure of a defendant to take the stand in his own defense and the need for reciprocal discovery in criminal cases—again, by a constitutional amendment, if necessary. See *id.*

As for Harry Blackmun, he and Warren Burger were close friends since childhood. In 1961, when both were federal court of appeals judges, Burger had felt comfortable enough with Blackmun to write him a letter referring to "those bastards on the Supreme Court who . . . 'turn every criminal appeal into a quest for error.'" SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 244 (2010). Shortly before he was nominated to be Chief Justice, Burger (at the suggestion of President Nixon) had sent Attorney General John Mitchell some Supreme Court recommendations and Harry Blackmun's name had been on the list. As Nixon aide John Ehrlichman put it, Blackmun "could be expected to follow closely the new Chief Justice's lead." JOHN D. EHRLICHMAN, WITNESS TO POWER: THE NIXON YEARS 129 (1982).

Linda Greenhouse, in her article LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 186 (2005), notes that Chief Justice Burger "had clearly believed that [Justice] Blackmun would enlist in his causes, but his agenda was not Blackmun's. It did not take long for that fact to become clear." Greenhouse then points to a study showing that in his first five years on the Court, Blackmun voted with Burger in 87.5% of the closely divided cases, but in the next ten years Blackmun voted more often with Justice Brennan than with the Chief Justice.

46. See Nixon, Position Paper on Crime, *supra* note 43.

suspects.<sup>47</sup> On top of that, he had been California's Attorney General for four years.<sup>48</sup> He probably had a more extensive background in criminal law enforcement than anyone who has ever served on the U.S. Supreme Court.

Nixon did not want to put people on the Court who happened to be "thoroughly experienced" in criminal law. He sought people rather who were likely to be "law-and-order" justices regardless of whether they had any background in criminal law. He wanted people like Warren Burger.

In his dissenting opinions and public speeches, Judge Burger had left no doubt that he was quite unhappy with the Warren Court's criminal procedure rulings—and equally unhappy with the liberal judges on his own court.<sup>49</sup> Dissenting in a 1967 case, Burger observed:

I suggest that the kind of nit-picking appellate review exhibited by reversal of this conviction may help explain why the public is losing confidence in the administration of justice. I suggest also that if we continue on this course we may well come to be known as a society incapable of defending itself—the impotent society.<sup>50</sup>

Dissenting in a 1969 confession case, one decided only a short time before he was nominated to be Chief Justice, Burger maintained:

We are well on our way to forbidding any utterance of an accused to be used against him unless it is made in open court. Guilt or innocence becomes irrelevant in the criminal trial as we flounder in a morass of artificial rules poorly conceived and often impossible of application.<sup>51</sup>

Before ascending to the Supreme Court, Burger did not restrict his criticism of the American criminal justice system to his dissenting opinions as a federal judge. He also had his say in speeches and articles.

In a 1964 speech,<sup>52</sup> Burger trashed the search and seizure

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47. See Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work as Chief Justice*, 3 OHIO ST. L.J. 11–12 (2005).

48. See *id.*

49. By the time Judge Burger was nominated to be Chief Justice, it was plain that he had become the principal antagonist of the liberal Chief Justice of his court, David Bazelon. But the intensity of Burger's dislike of Bazelon was not as well known. According to STERN & WERMIEL, *supra* note 45, "Burger privately mocked Bazelon in letters as 'Baz' and called in Washington reporters for off-the-record conversations in which he dismissed [Bazelon] as 'misguided,' 'pathetic,' and 'a menace to society.' [Justice] Brennan heard all about the conflict from Bazelon. 'It was a blood feud, there isn't any doubt about that,' Brennan said." *Id.* at 243.

50. *Borum v. United States*, 380 F.2d 595, 602 (D.C. Cir. 1967) (Burger, J., dissenting).

51. *Frazier v. United States*, 419 F.2d 1161, 1176 (D.C. Cir. 1969) (Burger, J., dissenting).

52. Warren E. Burger, *Who Will Watch the Watchman?*, 14 AM. U. L. REV. 1 (1964).

exclusionary rule, doubting whether the rule (he liked to call it the Suppression Doctrine, perhaps because that sounded more ominous) was ever anything more than “wishful thinking.”<sup>53</sup> And he wondered “whether any community is entitled to call itself an ‘organized society’ if it can find no way to solve this problem [police engaging in unreasonable searches or seizures] except by suppression of truth in the search for truth.”<sup>54</sup>

A 1967 speech by Judge Burger, reprinted in *U.S. News & World Report*,<sup>55</sup> caught the attention and the approval of future President Nixon.<sup>56</sup> Burger’s 1967 article sounded a good deal like a Nixon campaign speech—perhaps because “Nixon referred to and quoted from the Burger article often during his 1968 campaign.”<sup>57</sup> Judge Burger’s article deplored America’s high crime rate and stressed the need to shift the balance in favor of law and order. The article began:

People murder others in this country at the rate of more than one for every hour of the day . . . .

. . . The murder rate is 10,000 human lives a year, which is higher than the death rate in our current military operations in Vietnam which inspire such emotional and violent public demonstrations.<sup>58</sup>

The judge wondered whether “a judicial system which consistently finds it necessary to try a criminal case 3, 4 or 5 times” deserves “the confidence and respect” of “decent people.”<sup>59</sup> He looked admiringly at

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53. *Id.* at 12.

54. *Id.* at 23.

55. Warren E. Burger, *What to Do about Crime in U.S.: A Federal Judge Speaks*, U.S. NEWS & WORLD REP., Aug. 7, 1967, at 70.

56. According to John Dean, future President Nixon sent Judge Burger a letter complimenting him on his *U.S. News* article. See JOHN W. DEAN, *THE REHNQUIST CHOICE* 12–13 (2001). John Ehrlichman, who served as an assistant to President Nixon, tells a somewhat different story: Shortly after his inauguration, President Nixon asked Judge Burger to come to the White House to administer the oath of office to some of the President’s new appointees. Judge Burger brought with him a copy of the speech that had been reprinted in *U.S. News*. After the President and Judge Burger had talked for a while, the President handed Ehrlichman a copy of the Burger speech and told him to disseminate it to various people (including Attorney General John Mitchell, who was in charge of Supreme Court appointments). The President also told Ehrlichman to “keep in touch with the Judge.” He did not have to do much to carry out the President’s orders, recalls Ehrlichman, “because Burger was a past master at keeping in touch.” From that point on, Ehrlichman received a number of notes from Burger about the Supreme Court, law enforcement, and other topics. See EHRlichman, *supra* note 45, at 114.

57. DEAN, *supra* note 56, at 13.

58. Burger, *supra* note 55, at 70.

59. *Id.* at 72.

“North Europe countries” such as Norway, Sweden, Denmark, and Holland, where “there is much less crime generally than in the United States.”<sup>60</sup>

These “North Europe countries,” pointed out Burger, “do not consider it necessary to use a device like our Fifth Amendment under which an accused person may not be required to testify. They go swiftly, efficiently and directly to the question of whether the accused is guilty.”<sup>61</sup> Compared to American criminal justice, noted Judge Burger, the Northern European countries’ “system of finding the facts concerning guilt or innocence is almost ruthless.”<sup>62</sup>

## V. PRESIDENT NIXON NOMINATES WILLIAM REHNQUIST TO BE ASSOCIATE JUSTICE

Warren Burger’s record as a federal Court of Appeals judge and as a speaker and writer left little doubt that as a Supreme Court justice he would read the Warren Court’s criminal procedure cases as grudgingly as possible. But when it came to “law and order” another Nixon appointee yielded to no one—William Rehnquist.

Rehnquist was only in his new post as Assistant Attorney General in charge of the Office of Legal Counsel for a few months before he wrote a memorandum to John Dean (of Watergate fame) underscoring the need to re-examine such cases as *Escobedo* and *Miranda*.<sup>63</sup> One can get a good sense of what the future Supreme Court Justice thought about the Warren Court’s criminal procedure rulings by studying this memorandum.

“[T]here is reason to believe,” maintained Rehnquist, “that the Supreme Court has failed to hold true the balance between the right of

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60. *Id.*

61. *Id.*

62. *Id.*

63. See Memorandum from William H. Rehnquist, Assistant Attorney Gen., Office of Legal Counsel, to John W. Dean III, Assoc. Deputy Attorney Gen. (Apr. 1, 1969) [hereinafter Rehnquist Memorandum] (on file with the Washington Law Review). The memorandum was marked “administratively confidential.” According to Dean, this “kept it locked up for many years.” DEAN, *supra* note 56, at 268. I am indebted to Professor Thomas Y. Davies of the University of Tennessee College of Law for calling this memorandum to my attention and providing me with a copy (which he obtained from the National Archives).

Rehnquist’s proposal to establish a commission to determine whether some of the Warren Court rulings called for a constitutional amendment never went beyond Dean’s discussion of the issue with Attorney General John Mitchell. The Attorney General thought “it might create a problem if the Nixon administration could not control such a commission which would not be easy.” DEAN, *supra* note 56, at 269.

society to convict the guilty and the obligation of society to safeguard the accused.”<sup>64</sup> Therefore, recommended Rehnquist, “the President [should] appoint a Commission to review these decisions, to determine whether the overriding public interest in law enforcement . . . requires a constitutional amendment.”<sup>65</sup>

Although the Rehnquist memorandum voiced unhappiness with other matters (such as the search and seizure exclusionary rule and the sharp increase in habeas corpus petitions),<sup>66</sup> it focused primarily on police interrogation and confessions:

Limitations both drastic and novel have been placed on the use . . . of pre-trial statements of the defendant . . . .<sup>67</sup>

. . . The Court is now committed to the proposition that relevant, competent, uncoerced statements of the defendant will not be admissible at his trial unless an elaborate set of warnings be given which is very likely to have the effect of preventing a defendant from making any statement at all.<sup>68</sup>

Up to this point, Rehnquist’s criticism of *Miranda* was certainly debatable. But then he made a mistake. He recalled Justice Robert Jackson’s observation that “any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement under any circumstances.”<sup>69</sup>

By quoting Justice Jackson in the manner he did, Rehnquist badly smudged the distinction between two different rules: (a) the rule *Miranda* actually adopted, which only calls for the police to *advise* a custodial suspect he has a right to a lawyer, and only grants him the right to a lawyer if he asks for one, and (b) a rule which the *Miranda* Court plainly rejected—one requiring the police to make sure that a custodial suspect *actually confers with* a lawyer before he can be questioned.<sup>70</sup>

The distinction between these two rules is quite significant. As Assistant Attorney General Rehnquist should have known, or a member

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64. See Rehnquist Memorandum, *supra* note 63, at 2.

65. *Id.*

66. *Id.*

67. *Id.* at 1.

68. *Id.* at 5.

69. *Id.* (quoting from Justice Jackson’s opinion in *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting)).

70. See *supra* notes 24–27. In a way, Judge Friendly made the same mistake as future Justice Rehnquist did. But Friendly was *anticipating* what the Warren Court *might do* when it handed down *Miranda*. Rehnquist, on the other hand, was writing a memorandum about confessions approximately three years *after* the *Miranda* case had been decided.



of his staff should have informed him, only a year earlier a study of police interrogation in Washington, D.C. had revealed that the great majority of custodial suspects (a) sign waivers of their rights and (b) do not ask to see a lawyer.<sup>71</sup> More recent studies are to the same effect.<sup>72</sup>

## VI. CHIEF JUSTICE BURGER AND JUSTICE REHNQUIST ADMINISTER THE FIRST BLOWS TO *MIRANDA*: THE *HARRIS* AND *TUCKER* CASES

I have dwelt on Burger and Rehnquist because (a) they were probably the two most “police-friendly” Justices in Supreme Court history and (b) each played a prominent role in the downsizing and dismantling of *Miranda*. Chief Justice Burger administered the first blow to *Miranda* in *Harris v. New York*.<sup>73</sup> Justice Rehnquist delivered the second blow in *Michigan v. Tucker*.<sup>74</sup>

### A. *Harris v. New York*

In *Harris*, the police had obtained incriminating statements from the defendant in violation of *Miranda*. The question presented was whether the prosecution could impeach Mr. Harris’s credibility with these un-Mirandized statements when he took the stand in his own defense.

Writing for a 5-4 majority consisting of two Nixon appointees (Blackmun and himself) and the three *Miranda* dissenters still on the Court (Harlan, Stewart and White), the Chief Justice ruled that the prosecution could impeach the defendant. The majority relied heavily on *Walder v. United States*,<sup>75</sup> which grew out of very different facts: Mr. Walder’s testimony had been impeached by means of illegally seized evidence relating to a different incident and one that had occurred two years before his prosecution in the case that ultimately reached the Supreme Court.

Moreover, the Chief Justice failed to make clear that the prosecution was allowed to impeach Mr. Walder’s credibility only because when the defendant testified in his own defense he “*went beyond a mere denial of*

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71. Richard J. Medalie, Leonard Zeitz & Paul Alexander, *Custodial Police Interrogation in Our Nation’s Capital*, 66 MICH. L. REV. 1347, 1351–52 (1968).

72. See LEO, *supra* note 2, at 280–81; Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781, 792–93 (2006) (and authorities collected therein).

73. 401 U.S. 222 (1971).

74. 417 U.S. 433 (1974).

75. 347 U.S. 62 (1954).

*complicity in the crimes of which he was charged* and made the sweeping claim that he had never dealt in or possessed any narcotics.”<sup>76</sup>

Nor is that all. In *Walder*, the prosecution had impeached the defendant’s testimony as to collateral matters—*not*, as in *Harris*, with incriminating statements by the defendant bearing directly on the crime charged. As Professors Alan Dershowitz and John Hart Ely have pointed out, there is a significant difference between the two situations: “[T]here is a considerable risk that illegally obtained evidence *which bears directly on the crime charged* [as it did in *Harris*] will be considered by the jury *as direct evidence of the defendant’s guilt*. This risk is significantly reduced when the illegally obtained evidence does not directly relate to the elements of crime charged [as was true in *Walder*].”<sup>77</sup>

Although the *Harris* majority relied heavily on *Walder*, it neglected to point out that *Walder* reminded us that “the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him”<sup>78</sup> and that the defendant “*must be free to deny all the elements of the case against him* without thereby giving leave to the Government to [use] rebuttal evidence illegally secured by it.”<sup>79</sup>

When Mr. Harris took the stand in his own defense he did nothing to waive his right to have the un-Mirandized statements excluded from his cross-examination just as the defendant in the 1925 case of *Agnello v. United States*<sup>80</sup> had done nothing to waive his right to have the illegally seized evidence excluded. Although one would never know this from Chief Justice Burger’s majority opinion in *Harris*, if one reads *Walder* in its entirety (as opposed to the extracts from the case that the Chief Justice carefully selected) and one reads *Agnello v. United States*—which the Chief Justice never once cited<sup>81</sup>—it becomes clear that *Agnello* represents the general principle and that “the [*Walder*] Court carved a narrow exception out of the *Agnello* principle.”<sup>82</sup>

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76. *Id.* at 65 (emphasis added).

77. Alan M. Dershowitz & John Hart Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1215–16 (1971) (emphasis added).

78. *Walder*, 347 U.S. at 65.

79. *Id.* (emphasis added).

80. 269 U.S. 20 (1925).

81. Not only did the Chief Justice neglect to cite *Agnello* even once, he “appears to have gone to some pains to excise from [his] rendition of *Walder* all reference to *Agnello*.” Dershowitz & Ely, *supra* note 77, at 1213.

82. Stone, *supra* note 9, at 108. To the same effect is Dershowitz & Ely, *supra* note 77, at 1211.

Specific language in the *Miranda* opinion seemed to anticipate—and resolve—the fact situation in *Harris*:

The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner . . . . In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial . . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.<sup>83</sup>

But the *Harris* Court brushed off this language by noting that discussion of the impeachment issue “was not at all necessary to the Court’s holding and cannot be regarded as controlling.”<sup>84</sup> As Professor Stone has observed, however:

[*M*]iranda was deliberately structured to canvass a wide range of problems, many of which were not directly raised by the cases before the Court. This approach was thought necessary in order to give “concrete guidelines for law enforcement agencies and courts to follow.” Thus, a technical reading of *Miranda*, such as that employed in *Harris*, would enable the Court to label many critical aspects of the decision mere dictum and therefore not “controlling.”<sup>85</sup>

“To what extent,” asks Geoffrey Stone, “does the result in *Harris* provide an incentive to police not to warn a suspect of his rights, in violation of *Miranda*?”<sup>86</sup> He answers:

The incentive would seem substantial . . . . [I]f the suspect [does confess to the police without warnings and then] chooses to testify at trial, the confession can be used to impeach and, because of the ineffectiveness of limiting instructions, is likely to be used as substantive evidence of guilt as well. On the other hand, if the suspect attempts to avoid this dilemma by exercising

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83. *Miranda v. Arizona*, 384 U.S. 436, 476–77 (1966). Prior to *Harris*, most state and federal courts of appeals addressing this issue had ruled that un-Mirandized statements were inadmissible for impeachment purposes. See Stone, *supra* note 9, at 107.

84. *Harris v. New York*, 401 U.S. 222, 224 (1971).

85. See Stone, *supra* note 9, at 107–08. Chief Justice Warren spent fifty pages “discuss[ing] the relationship of the Fifth Amendment privilege to police interrogation,” *Miranda*, 384 U.S. at 491, before turning to the facts of the cases before the Court. Moreover, as pointed out in Dershowitz & Ely, *supra* note 77, at 1210, the opinion “said that it was part of its ‘holding’ that an uncounseled ‘exculpatory’ statement could not be used by the prosecution” (emphasis added), referring to *Miranda*, 384 U.S. at 444.

86. Stone, *supra* note 9, at 112.

his right not to testify at trial, the jury is likely, despite cautionary instructions, to regard his silence as evidence of guilt. Thus, for the police, it is virtually a no-lose situation.<sup>87</sup>

Finally, it should be noted that the *Harris* majority maintained that Mr. Harris had never “claim[ed] that the statements [he] made to the police were coerced or involuntary.”<sup>88</sup> The best that can be said for this misstatement of the record by the Court is that it is inexplicable. One commentator put it more strongly:

This statement . . . is flatly untrue. At his trial, throughout the state appellate proceedings, and in his brief and oral argument before the Supreme Court, Harris consistently maintained that his statements to the police were involuntary.<sup>89</sup>

Cases subsequent to *Harris* make clear that the use of an “involuntary” or “coerced” statement for impeachment purposes is forbidden.<sup>90</sup> Thus, because of the Court’s misunderstanding of the record, Mr. Harris was never able to show that the statements the police obtained from him should have been excluded from his cross-examination. But this misunderstanding of the record is important for another reason. It underscores the sloppiness characterizing the majority opinion in *Harris*. How could the four Justices who joined the opinion of the Court in *Harris* have done so without noticing the Chief Justice’s mistake in discussing the record and without insisting that the record be corrected? Where were their law clerks? For that matter, how could the four Justices who joined the opinion of the Court in *Harris* have done so without noticing that the Chief Justice had mangled the state of the law

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87. *Id.* The *Harris* majority maintained that “the impeachment process here undoubtedly provided valuable aid to the jury in assessing [the defendant’s] credibility, and the benefits of this process should not be lost . . . because of the *speculative possibility* that impermissible police conduct will be encouraged thereby.” *Harris*, 401 U.S. at 225 (emphasis added). It is possible the police might not have decided *on their own* to exploit the opening that *Harris* afforded them. But in 1998 Professor Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998), reported that litigation seeking to stop the California police from questioning custodial suspects after they had asserted their *Miranda* rights had turned up a California police training videotape in which a California deputy district attorney was *instructing* police officers *to continue to question* suspects who had invoked their rights (a tactic known as questioning “outside *Miranda*”):

[I]f you get a statement “outside *Miranda*” and [the suspect] tells you that he did it and how he did it . . . we can use [that] to impeach [him] . . . . [I]f the defendant . . . gets on the stand and lies and says something different, we can use his “outside *Miranda*” statements to impeach him . . . .

*Id.* at 191.

88. *Harris*, 401 U.S. at 224.

89. Stone, *supra* note 9, at 114; *see also* Dershowitz & Ely, *supra* note 77, at 1201–08.

90. *See* New Jersey v. Portash, 440 U.S. 450 (1979); *Mincey v. Arizona*, 437 U.S. 385 (1978).

governing the impeachment use of statements inadmissible in the prosecution's case-in-chief?

*Harris v. New York* was an important decision in its own right. Moreover, it was the first of a series of blows the post-Warren Court dealt *Miranda*. But in announcing the decision, Chief Justice Burger did his best to minimize the case's significance.

The *Washington Post* reported that when he announced the decision, Burger called it "a matter 'of interest mostly to the bar'" and "not worth describing from the bench."<sup>91</sup> The *Los Angeles Times* told its readers that "[a]nouncing the ruling, Burger seemed to minimize its significance by not describing the case, only the vote breakdown."<sup>92</sup> The *Chicago Tribune* noted that that "[c]ontrary to custom, the chief justice declined to read highlights of his opinion from the bench."<sup>93</sup>

*Harris* marked the beginning of the post-Warren Court's piece-by-piece "overruling" of *Miranda*. But *Harris* did something else. It began what recently has been called the "stealth overruling" of *Miranda*.<sup>94</sup>

#### B. Michigan v. Tucker

When the Warren Court's "revolution" in American criminal procedure was at its height, Judge Henry Friendly complained about the effect of "hard cases"—"the full consequences of decision may have been clouded by understandable outrage over the facts at hand."<sup>95</sup> Judge Friendly had in mind such cases as *Mapp v. Ohio*,<sup>96</sup> *Fay v. Noia*,<sup>97</sup> and *Escobedo v. Illinois*,<sup>98</sup> cases whose extreme facts favored the defendant.<sup>99</sup> But sometimes a case is a "hard case" because its facts are tilted heavily in favor of the prosecution. *Michigan v. Tucker* is such a case.

Mr. Tucker had been advised of his right to remain silent and his right

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91. John P. MacKenzie, *Court Eases Restraint on Confessions*, WASH. POST, Feb. 25, 1971, at A1.

92. Ronald J. Ostrow, *Court Limits Effect of the Miranda Decision on Defendant's Rights*, L.A. TIMES, Feb. 25, 1971, at 21.

93. Glen Elsasser, *Ease Warren Curb on Police Quizzing*, CHI. TRIB., Feb. 25, 1971, at 1.

94. Friedman, *supra* note 2 (emphasis added).

95. HENRY J. FRIENDLY, *The Bill of Rights as a Code of Criminal Procedure*, in BENCHMARKS 235, 236 (1967). The text of this chapter was taken from Judge Friendly's speech to the State Bar of California on Sept. 23, 1965. *Id.*

96. 367 U.S. 643 (1961).

97. 372 U.S. 391 (1963).

98. 378 U.S. 478 (1964).

99. See FRIENDLY, *supra* note 95, at 264 n.135.

to counsel, but not of his right to the appointment of counsel if he were indigent. The police questioning had occurred *before* the *Miranda* case had been decided. Moreover, the defendant's only complaint was that the testimony of a witness for the prosecution should have been excluded because the police had learned of the witness's identity solely as a result of the defendant's un-Mirandized statements.

Concurring Justice Brennan would have resolved the matter in favor of the prosecution by "confi[n]g the reach of *Johnson v. New Jersey* to those cases in which the *direct statements* of an accused made during a pre-*Miranda* interrogation were introduced at his post-*Miranda* trial."<sup>100</sup> But the Court (per Justice Rehnquist) rejected this approach.

Justice Rehnquist emphasized how narrow the question presented was: The incriminating statements the defendant had "actually made" to the police had been excluded at trial.<sup>101</sup> "Whatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness . . . as well."<sup>102</sup>

Some of the comments made by Justice Rehnquist in the course of his majority opinion are puzzling.

At one point he noted that "[c]ertainly no one could contend that the interrogation faced by [the defendant] bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed."<sup>103</sup> This may be true, but why is Justice Rehnquist telling us this? Certainly no one would contend that the police interrogation experienced by Mr. *Miranda* or the defendants in *Miranda's* three companion cases resembled the historical practices at which the Self-Incrimination Clause was aimed. For that matter, no one would say that comment by the prosecution on a defendant's failure to take the stand or an instruction by the trial court that a defendant's silence is evidence of guilt—both prohibited by *Griffin v. California*<sup>104</sup>—resembled the historical circumstances underlying the privilege.

At another place in his opinion, Justice Rehnquist observed that Mr. Tucker's statements to the police "could hardly be termed involuntary as that term has been defined in the decisions of this Court."<sup>105</sup> Once again,

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100. *Michigan v. Tucker*, 417 U.S. 433, 458 (1974) (Brennan, J., concurring, joined by Marshall, J.). For a discussion of *Johnson*, see *supra* notes 28–31.

101. *Tucker*, 417 U.S. at 448.

102. *Id.*

103. *Id.* at 444.

104. 380 U.S. 609 (1965).

105. *Tucker*, 417 U.S. at 445.

this may be true, but what is its relevance? Mr. Miranda's statements and the statements of the defendants in *Miranda's* three companion cases could hardly be called "involuntary" as that term had been defined by the Supreme Court in the pre-*Miranda* era. Nevertheless, they all prevailed in the Supreme Court. Moreover, all four defendants probably would have lost if they had been required to establish that their incriminating statements were "coerced" or "involuntary."

At still another point, Justice Rehnquist seemed to equate (a) "compulsion" within the meaning of the privilege against self-incrimination and (b) "coercion" under the "voluntariness" test.<sup>106</sup> This, too, is puzzling. To be sure, "compulsion" and "coercion" have similar meanings when one turns to the dictionary. But they have distinctly different connotations when one takes into account their different constitutional bases, legal history, and legal meaning.

As Victor Earle, a lawyer for a defendant in a companion case to *Miranda*, emphasized in an exchange with Justice Harlan, much greater pressures were necessary to render a confession "coerced" or "involuntary" under the "voluntariness" test than are needed to make a statement "compelled" within the meaning of the privilege.<sup>107</sup>

When asked by Justice Harlan whether he was contending that his client's statement was "coerced," Mr. Earle replied that he did not think the confession in his case was coerced "at all."<sup>108</sup> Nevertheless, Earle expected to win his case—and he did. Perhaps Justice Harlan remembered his exchange with Mr. Earle. In any event, in his dissenting opinion in *Miranda*, Harlan recognized that "the privilege imposes more exacting restrictions than does the Fourteenth Amendment's voluntariness test."<sup>109</sup>

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106. *See id.* at 444–46. According to Justice Rehnquist, the police conduct in *Tucker* violated neither a defendant's "privilege against self-incrimination as such" (as opposed to the "procedural safeguards associated with that right") nor the protection against "involuntary" confessions. *See id.* at 444–45.

107. This part of the oral arguments in *Miranda* and its companion cases is reprinted in YALE KAMISAR, WAYNE R. LAFAYE ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS & QUESTIONS 569–70 (13th ed. 2012):

I don't think [the confession in my case] was coerced at all. . . . I think there is a substantial difference between [compelling someone to give up his Fifth Amendment privilege] and coercing a confession. . . . [I]t is quite different to say that the privilege is cut down and impaired by detention and to say a man's will has been so overborne a confession is forced from him. . . .

. . . [I]f we go back to the totality of circumstances [test], that means this Court will sit all by itself as it has [for] so many years to overturn the few confessions it can take . . . The lower courts won't do their job. We need some specific guidelines . . . to help them along the way.

108. *See id.*

109. *Miranda*, 384 U.S. at 511 (Harlan, J., dissenting, joined by Stewart and White, JJ.).

It is hard to see how reading *Miranda* to say that the privilege is not violated unless and until the pressures on the custodial suspect are strong enough to render any statement obtained from him “coerced” under the “voluntariness” test would make any sense. We *already had* a rule barring the use of “coerced” or “involuntary” confessions (or incriminating statements). If *Miranda* were to be read the way Justice Rehnquist indicated, what would it have accomplished? It is no exaggeration to say, as Geoffrey Stone has said:

Mr. Justice Rehnquist’s conclusion that there is a violation of the Self-Incrimination Clause only if a statement is involuntary under traditional standards is an outright rejection of the core premises of *Miranda*. . . . [T]he conclusion that a violation of *Miranda* is not a violation of the privilege is flatly inconsistent with the Court’s declaration in *Miranda* that “[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege.”<sup>110</sup>

In some ways the most puzzling aspect of Justice Rehnquist’s opinion was his effort to drive a wedge between the privilege against self-incrimination and the *Miranda* rights. At various places in his opinion, Rehnquist called the *Miranda* warnings “prophylactic rules,” “prophylactic standards,” “procedural safeguards,” and “procedural rules.”<sup>111</sup> Does this make the *Miranda* rights “second-class rights” (if they are constitutional rights at all)? At other places Rehnquist called these rights “protective *guidelines*” and “*recommended* ‘procedural safeguards.’”<sup>112</sup> Does this mean they are “third-class” rights?

Not only did Justice Rehnquist indicate that the *Miranda* rights were not required, but he told us that the Warren Court *itself* had “recognized” as much:

The [*Miranda*] Court recognized that these procedural safeguards [the *Miranda* rules] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. As the Court remarked: “[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.”<sup>113</sup>

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110. Stone, *supra* note 9, at 118–19 (quoting *Miranda*, 384 U.S. at 476).

111. See *Tucker*, 417 U.S. at 439, 443–46.

112. *Id.* at 443 (emphasis added).

113. *Id.* at 444 (quoting *Miranda*, 384 U.S. at 467).



Justice Rehnquist's quotation from *Miranda* is incomplete—and quite misleading. Once *Miranda* was decided, the police could no longer conduct the proceedings in the interrogation room the way they did in the so-called “good old days.” *Some new safeguards were constitutionally required.* Because “[t]he current practice of incommunicado interrogation is at odds with” the privilege against self-incrimination,<sup>114</sup> the police could not stand pat.

Requiring all custodial interrogations to occur in the presence of a neutral judicial magistrate might sufficiently reduce the “inherently compelling pressures [of in-custody interrogation] which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.”<sup>115</sup> A requirement that the police videotape all custodial interrogation might prove to be an “adequate protective device . . . to dispel the compulsion inherent in custodial surroundings.”<sup>116</sup>

However, in the absence of any other protective device—and, as dissenting Justice Douglas noted in *Tucker*, there was no contention that any other means for safeguarding the privilege was in place<sup>117</sup>—the *Miranda* warnings were required.

Justice Rehnquist did quote language from *Miranda* in *Tucker*, but he ended his quotations too soon. In the very same paragraph from *Miranda* that Rehnquist quoted, Chief Justice Warren went on to say:

However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards [the *Miranda* warnings] must be observed.<sup>118</sup>

As Geoffrey Stone has pointed out:

As even [Rehnquist] conceded, [the *Miranda* Court] thought that the privilege against self-incrimination offered “a more comprehensive and less subjective protection”<sup>119</sup> than the Due Process Clause which had been the basis of the traditional voluntariness test . . . [Justice Rehnquist's] conclusion that a violation of *Miranda* is not a violation of the privilege is flatly

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114. *Miranda*, 384 U.S. at 457.

115. *Id.* at 467.

116. *Id.* at 458.

117. *Tucker*, 417 U.S. at 463.

118. *Miranda*, 384 U.S. at 467.

119. Stone, *supra* note 9, at 118–19 (quoting *Tucker*, 417 U.S. at 442–43).

inconsistent with the Court's declaration in *Miranda* that "[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege."<sup>120</sup> . . . If [the *Miranda*] safeguards are not derived from the Constitution, whence do they spring? . . . Since the Court has no supervisory power over the states, the Rehnquist analysis, if taken seriously, would seem in practical effect to overrule *Miranda*.<sup>121</sup>

Three decades later, the Court finally directed its attention to the federal statute purporting to abolish *Miranda*. As it turned out, not even Chief Justice Rehnquist took the Rehnquist analysis in *Tucker* seriously. He wrote the opinion of the Court for a 7-2 majority invalidating the statute.<sup>122</sup>

However, as far as *Miranda* supporters were concerned, Rehnquist's analysis of *Miranda* in *Tucker*, and his failure in *Dickerson* to question the soundness of cases that built on *Tucker*, did do considerable damage: earlier cases had downsized *Miranda* on the premise that a violation of *Miranda* is not a violation of a constitutional right, but only a "prophylactic rule" designed to implement a constitutional right.<sup>123</sup> Although these earlier cases seemed to be based on the view that *Miranda* was *not* a constitutional decision, their significance has not been diminished one whit. Despite the invalidation of the federal statute, the downsizing of *Miranda* brought about by these earlier cases *remains in place today*.<sup>124</sup>

Although one would never have known this from Justice Rehnquist's discussion of (and quotations from) *Miranda* in his *Tucker* opinion, not once in his sixty-page opinion of the Court did Chief Justice Warren call the *Miranda* rights prophylactic rules or procedural safeguards. What is probably more significant, not once did any of the *Miranda* dissenters complain that the majority opinion represented an "extraconstitutional" or "illegitimate" exercise of the Supreme Court's authority to review state-court judgments.<sup>125</sup>

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120. *Id.* at 119 (quoting *Miranda*, 384 U.S. at 476).

121. *Id.* at 119–20.

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

123. See especially *Oregon v. Elstad*, 470 U.S. 298 (1985) (Justice O'Connor writing for the majority); *New York v. Quarles*, 467 U.S. 649 (1984) (Justice Rehnquist writing for the majority).

124. See *infra* notes 210–27.

125. At this point, I am borrowing language from Justice Scalia, who wrote a forceful dissent in *Dickerson v. United States*, 530 U.S. 528 (2000), the case that reaffirmed the constitutionality of *Miranda*. *Id.* at 461, 465 (Scalia, J., dissenting). At two places in his *Miranda* dissenting opinion, Justice White did refer to the majority's "per se approach" or use of "per se rule," *Miranda*, 384 U.S. at 539, 544 (White, J., dissenting, joined by Harlan and Stewart, JJ.), but he did not suggest

Although Justice Rehnquist's way of thinking about *Miranda* in his *Tucker* opinion finds little support in either the majority or dissenting opinions in *Miranda* itself, a 1969 Department of Justice (DOJ) memorandum<sup>126</sup> (written when Rehnquist headed the Office of Legal Counsel) is another matter.

In an effort to defend the constitutionality of § 3501 (the federal law purporting to abolish *Miranda*),<sup>127</sup> the 1969 DOJ memorandum drew a distinction between (a) "constitutional absolutes," such as the privilege against self-incrimination,<sup>128</sup> and (b) what the memorandum called "a means, suggested by the Court, by which the accused's Fifth Amendment privilege may be safeguarded in the custodial situation"<sup>129</sup> or "a protective safeguard system suggested by the Court."<sup>130</sup>

There does not seem to be much distance between the way Justice Rehnquist analyzed *Miranda* in *Tucker* and how the Justice Department viewed *Miranda* in its 1969 memorandum: The DOJ distinguished "constitutional absolutes" from mere "procedural safeguards."<sup>131</sup> Rehnquist distinguished the "right against compulsory self-incrimination" itself (which cannot be violated) from "prophylactic rules developed to protect that right"<sup>132</sup> (which can be violated under certain

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this was "extraconstitutional" or "illegitimate."

Justice White's characterization of the *Miranda* rights as *per se* rules is interesting. As one commentator has observed, the kind of decision-making the Warren Court utilized did lead it to turn to "broad, legislative-like directives, sometimes called 'flat' or 'per se' rules." Allen, *supra* note 43, at 532. The main advantages of such rules are that they "give relatively certain guidance to the lower courts" and "are applicable to a great mass of cases at the trial court levels without direct involvement of the Supreme Court." *Id.* As Justice White's dissenting opinion in *Miranda* illustrates, the Justices do not always distinguish between "prophylactic" rules and what are variously called "flat" or "bright-line" or "administratively based *per se* rules." But 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE §§ 2.9(g), 2.9(h) (3d ed. 2007) does distinguish between these two types of rules:

Where rules are described as "prophylactic," the Court indicates its willingness to accept equally effective safeguards adopted by the state or federal government. . . . When rules are described as setting forth a "per se" or "bright line" standard, they arguably are presented as a direct reading of the constitutional command at issue and not a standard that the state can replace with an adequate alternative . . . .

*Id.* § 2.9(h) at 806 n.214.

126. Memorandum from the Department of Justice to United States Attorneys (June 11, 1969), in 5 CRIMINAL LAW REPORTER 2350 (Bureau of Nat'l Affairs ed. 1969) [hereinafter Memorandum to U.S. Attorneys].

127. *See supra* notes 34–41.

128. Memorandum to U.S. Attorneys, *supra* note 126, at 2351–52.

129. *Id.* at 2351.

130. *Id.* at 2352.

131. *Id.* at 2351–52.

132. *Michigan v. Tucker*, 417 U.S. 433, 439 (1974).

circumstances). The DOJ talks about “a protective safeguard system suggested by the Court”<sup>133</sup> and Rehnquist speaks of “procedural safeguards” “recommended” by the *Miranda* Court.<sup>134</sup>

What role, if any, did then-Assistant Attorney General Rehnquist play in the writing of the 1969 Justice memorandum? We do not know. But it is hard to believe that Rehnquist played no role at all.

At the time the DOJ memorandum was written, Rehnquist headed the Office of Legal Counsel, and it was not unusual for that office to write (or at least contribute to the writing) of such memoranda. Nor is that all. Rehnquist was so unhappy with *Miranda* that only two months earlier he had written a memorandum to John Dean proposing a way to get rid of that famous case.<sup>135</sup> Moreover, Attorney General John Mitchell knew how strongly Rehnquist felt about *Miranda* because, as Mr. Dean has told us,<sup>136</sup> Dean and Mitchell had met to discuss whether or not to carry out Rehnquist’s proposal.

There is another reason to believe that future Justice Rehnquist contributed to the writing of the DOJ memorandum. As John Dean recently told me, because the memorandum was addressed to all U.S. Attorneys and Deputy Attorney General Richard Kleindienst was the person who supervised these attorneys at the time, “[the] memo would have been prepared with the approval of Kleindienst.”<sup>137</sup> “[G]iven the close relationship between Kleindienst and Rehnquist, it would be very surprising if Rehnquist was not behind this action. It was Kleindienst, of course, who brought Rehnquist into the DOJ, and who relied on him heavily.”<sup>138</sup>

## VII. “PROPHYLACTIC RULES” VS. CONSTITUTIONAL RULES

*Miranda* was not the only time the Court dealt with “prophylactic rules.” The Court also promulgated such rules in a line of cases beginning with *North Carolina v. Pearce*.<sup>139</sup> *Pearce* arose as follows: a number of defendants had overturned their original convictions only to receive longer sentences when they were retried and reconvicted. There

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133. Memorandum to U.S. Attorneys, *supra* note 126, at 2352 (emphasis added).

134. *Tucker*, 417 U.S. at 443 (emphasis added).

135. *See supra* notes 63–70.

136. *See supra* note 63.

137. E-mail from John Dean, former Assoc. Deputy Attorney Gen., to author (Sept. 20, 2011) (on file with author).

138. *Id.*

139. 395 U.S. 711 (1969).

was reason to believe that in some instances at least these defendants were being punished for managing to overturn their earlier convictions. But it would be “extremely difficult” to prove this in any individual case.<sup>140</sup>

What was the *Pearce* Court’s solution? Establishing what has come to be known as a “presumption of vindictiveness.”<sup>141</sup> “[W]henver a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear . . . [and] must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentence proceeding.”<sup>142</sup>

Several years later, the Court had become *so comfortable* with *Miranda*’s prophylactic rules that a 7-2 majority explained and defended “the *Pearce* prophylactic rules” by analogizing them to the *Miranda* rules:

[T]he *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*, . . . in which 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 rules in *Pearce* and *Miranda* are similar in that each was designed to preserve the integrity of a phase of the criminal process.<sup>143</sup>

As Susan Klein has persuasively argued, constitutional-criminal procedure is filled with what might be called “prophylactic rules.”<sup>144</sup> Nor are these rules limited to criminal procedure. As David Strauss has shown, the famous case of *New York Times v. Sullivan*<sup>145</sup> (and other First Amendment cases) may plausibly be read as adopting prophylactic rules as well.<sup>146</sup>

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140. *Id.* at 725 n.20.

141. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 881 (5th ed. 2008).

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

143. *Michigan v. Payne*, 412 U.S. 47, 53 (1973) (per Powell, J.). The 7-2 majority included Chief Justice Burger and future Chief Justice Rehnquist.

144. Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001).

145. 376 U.S. 254 (1964).

146. David A. Strauss, *Miranda, the Constitution, and Congress*, 99 MICH. L. REV. 958, 965–66 (2001).

As for the characterization of *Miranda* as a prophylactic rule that “goes beyond” the Constitution:

[This notion] seems to rest on the premise that a case-by-case inquiry into voluntariness is somehow natural, or is found in the Constitution, so that any deviation from that approach is judicial lawmaking of questionable legitimacy. But the Constitution does not ordain any particular institutional mechanism for ensuring that compelled statements are not admitted into evidence. The case-by-case voluntariness approach is just one such mechanism. The Supreme Court has to decide if it is the right mechanism.<sup>147</sup>

If one calls the *Miranda* rules “prophylactic,” notes Evan Caminker, “one might fairly ask: compared to what? The obvious answer is ‘compared to the case-specific-voluntariness test.’”<sup>148</sup> But that test is no more “directly compelled” by the Constitution than *Miranda* itself.<sup>149</sup>

The due process/“totality of the circumstances”/“voluntariness” test for the admissibility of confessions cannot be called a requirement of the Self-Incrimination Clause, because that Clause did not apply to the states until 1964<sup>150</sup>—long after the Supreme Court had started using the test. Moreover, the Self-Incrimination Clause did not apply to the police station until *Miranda* was handed down in 1966. Finally, one will search the Constitution in vain for any mention of any of the key words or terms used to decide “voluntariness” cases—such as “coerced,” “involuntary,” “totality of the circumstances,” and “breaking” or “overbearing” the will. So why is the prohibition against “involuntary” confessions (as opposed to the protection furnished by *Miranda*) considered a “core constitutional right?”

I believe there is a good deal to be said for Dean Caminker’s proposal that “we jettison the phrase ‘prophylactic rule’ from our vocabulary, because there really isn’t any such thing as a distinctively prophylactic rule that is in any important way distinguishable from the more run-of-the-mill doctrine that courts routinely establish and implement regarding every constitutional norm.”<sup>151</sup> Moreover, “to the extent one purports to use the adjective pejoratively, it inappropriately raises concerns of

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147. *Id.* at 963.

148. Evan H. Caminker, *Miranda and Some Puzzles of “Prophylactic” Rules*, 70 U. CIN. L. REV. 1, 26 (2001).

149. *Id.*

150. *Malloy v. Hogan*, 378 U.S. 1 (1964).

151. Caminker, *supra* note 148, at 25.

legitimacy where none should exist.”<sup>152</sup>

However, as long as “prophylactic rule” does remain part of our vocabulary, it is noteworthy that in *Edwards v. Arizona*,<sup>153</sup> a majority of the Burger Court essentially established a new “prophylactic rule” that built on *Miranda*’s “prophylactic rules.” *Edwards* held that when a custodial suspect invokes his right to a lawyer, he may not be subjected to further interrogation until counsel has been made available to him—*unless* he himself initiates further discussion with the police. *Edwards* held, in effect, that when a custodial suspect asserts his right to counsel, there is a *conclusive presumption* that any subsequent waiver of rights that comes at police instigation is *compelled*.<sup>154</sup>

Nor is that all. A decade later, in *Minnick v. Mississippi*,<sup>155</sup> a majority of the Rehnquist Court—over a strong protest by dissenting Justice Scalia that this “is the latest stage of prophylaxis built upon prophylaxis”<sup>156</sup>—expanded the *Edwards* rule still further. The Court held that “when counsel is requested, interrogation must cease and officials may not reinstate interrogation without counsel present, *whether or not* the accused has consulted with his attorney”<sup>157</sup> *in the meantime*. Speaking for a 7-2 majority, 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 protections of *Miranda* in practical and straightforward terms. . . . [The] rule provides “clear and unequivocal” guidelines to the law enforcement profession.<sup>158</sup>

This explanation and defense of *Edwards* strikes me as an explanation and defense of *Miranda* as well.

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152. *Id.*

153. 451 U.S. 477 (1981). *Edwards* is one of the few times in the last forty years that the Supreme Court gave *Miranda* a generous reading.

154. It will not do to say that *Miranda* required the *Edwards* rule. The Court had held earlier that if a suspect asserts his “right to silence” (as opposed to his right to counsel) the police *are permitted* (if they cease questioning on the spot) to try again and succeed at a subsequent interrogation. *See Michigan v. Mosley*, 423 U.S. 96 (1975). The Court could have plausibly held that invocation of the right to counsel should be treated no differently than the assertion of the right to silence.

155. 498 U.S. 146 (1990) (per Kennedy, J.).

156. *Id.* at 166 (Scalia, J., dissenting, joined by Rehnquist, C.J.).

157. *Id.* at 153 (emphasis added).

158. *Id.* at 151. Only Justice Scalia, joined by Chief Justice Rehnquist, dissented.

VIII. THE COURT WEAKENS THE *EDWARDS* RULE

The Supreme Court giveth, but the Supreme Court also taketh away. Although *Edwards* marked a significant victory for *Miranda*, and the Court went on to strengthen *Edwards* in some respects, it also weakened it in other ways. A good example is *Oregon v. Bradshaw*.<sup>159</sup>

The police believed that Mr. Bradshaw's drinking had brought about the death of a minor. After being arrested, Bradshaw invoked his right to counsel. A few moments later, while being taken to the jail, Bradshaw asked the accompanying officer: "Well, what is going to happen to me now?"

This question led to a discussion about the minor's death, during which time the officer reiterated his own theory of how Bradshaw's drinking had caused this. The officer then persuaded the suspect to agree to take a lie detector test the next day, at which time the suspect confessed.<sup>160</sup>

Writing for a four-Justice plurality,<sup>161</sup> Justice Rehnquist maintained that the suspect's question as to what was going to happen to him next evinced "a willingness and a desire for a generalized discussion about the investigation."<sup>162</sup> This conclusion appears to be quite a stretch. It seems much more likely that, as the four dissenters argued,<sup>163</sup> Bradshaw was simply manifesting anxiety and that his only desire was to find out where the police were taking him next or what was going to happen to him next.

Even though a suspect clearly invokes his or her right to counsel, the police still have some room to maneuver. When the officer responds to a suspect's specific question about what is going to happen next, by *telling the suspect* where he is being taken, or when he will be meeting with an attorney or phoning his or her spouse, this should *not count* as "police interrogation." But when the officer's response goes beyond the scope of the suspect's question—when the officer exploits the situation as seems to have occurred in *Bradshaw*—that *should count* as "police interrogation," conduct barred by *Edwards*.

Under such circumstances, the suspect *did not* change his or her mind about wanting to talk to a lawyer. *The police* did. The suspect did not

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159. 462 U.S. 1039 (1983).

160. *Id.* at 1042.

161. Concurring Justice Powell provided the fifth vote. He agreed that Bradshaw had effectively waived his right to counsel, but saw no need for the plurality's two-step analysis.

162. *See Bradshaw*, 462 U.S. at 1045–46.

163. *See id.* at 1055–56.



“initiate” or “invite” conversation about the strengths or weaknesses of his case. *The police* did. Therefore, the police conduct should be viewed as “police interrogation”—prohibited by *Edwards*.

A decade later, the Court weakened the *Edwards* rule in another respect. In *Davis v. United States*,<sup>164</sup> it tried to draw a bright line between those suspects who “clearly” assert their right to counsel (thereby gaining the protection of *Edwards*) and those who only make an ambiguous or equivocal reference to an attorney that might (or might not) be considered an invocation of the right to counsel. (E.g., “I think maybe I should ask for a lawyer at this point, don’t you?” or “Maybe the time has come for me to ask for a lawyer?” or “Do you think I need an attorney here?”)

As Janet Ainsworth pointed out, a year before the *Davis* case was decided, women and members of a number of minority racial and ethnic groups are far more likely than other groups to avoid strong, assertive means of expression and to use indirect and hedged speech patterns that give the impression of uncertainty or equivocality.<sup>165</sup> Unfortunately, however, in determining whether suspects have effectively invoked the right to counsel, a majority of the lower courts have acted on the premise that “direct and assertive speech . . . is, or should be, the norm.”<sup>166</sup> Moreover, since the custodial police interrogation environment involves an “imbalance of power” between suspects and their interrogators, such an environment increases the likelihood that a suspect will adopt an indirect or hedged—and thus ambiguous—means of expression.<sup>167</sup>

More recently, after studying state and federal cases for twelve years, Marcy Strauss reported that only one out of five suspects’ statements were found to constitute unambiguous requests for counsel.<sup>168</sup> Professor Strauss found “the use of questions, hedges and imprecise language in the custodial interrogation setting . . . very common among all suspects.”<sup>169</sup> As for police interrogators, they not only “ignore ambiguous requests,” but “frequently use them to subtly or overtly encourage suspects to waive their right to counsel.”<sup>170</sup>

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164. 512 U.S. 452 (1994).

165. Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993).

166. *Id.* at 315.

167. *See id.* at 285–88.

168. Marcy Strauss, *Understanding Davis v. United States*, 40 LOY. L.A. L. REV. 1011, 1047, 1055 (2007).

169. *Id.* at 1057.

170. *Id.* at 1060.

IX. THE COURT DISPARAGES *MIRANDA*: *QUARLES* AND *ELSTAD*

To many supporters of *Miranda*, however, how grudgingly the Court construed *Edwards* was not as disturbing as how unwilling the Court was to treat *Miranda* as a constitutional doctrine. A good example is *New York v. Quarles*.<sup>171</sup>

Writing for a 5-4 majority, Rehnquist contrasted *Miranda* with “traditional due process standards.”<sup>172</sup> Under the circumstances, he told us, the suspect could not invoke *Miranda*—but he was “certainly free on remand” to rely on the voluntariness test.<sup>173</sup>

*Quarles* grew out of the following facts: shortly after midnight, the police apprehended defendant in the rear of a supermarket. He matched the description of a man who had just committed a rape. According to the victim, the man had been carrying a gun. When the police discovered the suspected rapist was wearing an empty shoulder holster, they asked him where his gun was and he pointed to some cartons (where the weapon was found).

The questions about the gun’s location were *not* preceded by any warnings.<sup>174</sup> The Court told us, however, that that did not matter. Because “public safety” was at stake, the police were justified in failing to advise the defendant of his *Miranda* rights.<sup>175</sup>

Writing for the majority, Justice Rehnquist seemed to take considerable pains to avoid calling *Miranda* a constitutional ruling or a doctrine required by the Constitution. At one point, he referred to the *Miranda* warnings as “the procedural safeguards associated with the privilege against compulsory self-incrimination since *Miranda*;”<sup>176</sup> at another place he called *Miranda* “the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.”<sup>177</sup>

A year after the *Quarles* case came *Oregon v. Elstad*.<sup>178</sup> Mr. Elstad was suspected of burglary. When questioned at his own home, a police officer failed to advise him of his rights. Elstad then made an incriminating statement. (The prosecution subsequently conceded that

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171. 467 U.S. 649 (1984).

172. *Id.* at 655 n.5.

173. *Id.*

174. *See id.* at 652–53.

175. *See id.* at 655–60.

176. *Id.* at 655.

177. *Id.* at 657.

178. 470 U.S. 298 (1985).

this statement was inadmissible.)<sup>179</sup>

When brought to the police station, Mr. Elstad *was* advised of his rights. He waived them and signed a written confession.<sup>180</sup> Since his incriminating statement had been excluded by the trial court, the only question presented was whether the written confession itself was admissible. Mr. Elstad maintained that the written confession was fatally “tainted” by the statement the police had obtained from him before he arrived at the stationhouse. A 7-2 majority, per Justice O’Connor, disagreed.

Justice O’Connor’s opinion for the Court, which relies heavily on Justice Rehnquist’s opinions in *Tucker*<sup>181</sup> and *Quarles*, is quite remarkable—especially when one looks back at her opinion today.

Fifteen years later, in the *Dickerson* case,<sup>182</sup> Justice O’Connor would join a 7-2 majority opinion, one telling us that “*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress.”<sup>183</sup> In the 1985 *Elstad* case, however (writing for another 7-2 majority), Justice O’Connor made at least *nine* statements to the effect that the *Miranda* doctrine (unlike the Fourth Amendment exclusionary rule or exclusion stemming from a violation of the Fifth Amendment itself) is neither a “constitutional decision” nor a violation of any specific provision of the Constitution:

- (1) “[Metaphors, such as the ‘tainted fruit of the poisonous tree’] should not be used to obscure *fundamental differences* between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* . . . .”<sup>184</sup>
- (2) “The Oregon court assumed and respondent here contends that a failure to administer *Miranda* warnings *necessarily breeds the same consequences as police infringement* of a constitutional right . . . . We believe *this view misconstrues the nature of the protections afforded by Miranda warnings* and therefore misreads the consequences of police failure to supply them.”<sup>185</sup>
- (3) “*Respondent’s contention* that his confession was tainted by the earlier failure of the police to provide *Miranda* warnings and

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179. *Id.* at 300–02.

180. *Id.* at 301–02.

181. *See supra* notes 101–22.

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

183. *Id.* at 432.

184. *Elstad*, 470 U.S. at 304 (emphasis added).

185. *Id.* (emphasis added).

- must be excluded as ‘fruit of the poisonous tree’ *assumes the existence of a constitutional violation*. . . . But as we explained in [earlier cases], *a procedural Miranda violation differs in significant respects from violations of the Fourth Amendment*, which have traditionally mandated a broad application of the ‘fruits’ doctrine.”<sup>186</sup>
- (4) “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>187</sup>
- (5) “[U]nwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda’s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm*.”<sup>188</sup>
- (6) “[T]he *Miranda* presumption [of coercion] . . . does not require that the statements and their fruits be discarded as inherently tainted. . . . [T]he *Tucker* Court noted that neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the witness’ testimony. . . . We believe that this reasoning applies with equal force when the alleged ‘fruit’ of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused’s own voluntary testimony. As in *Tucker*, *the absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule*.”<sup>189</sup>
- (7) “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>190</sup>
- (8) “There is *a vast difference* between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect’s will and

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186. *Id.* at 305–06 (emphasis added).

187. *Id.* at 306 (emphasis added).

188. *Id.* at 307 (emphasis added).

189. *Id.* at 307–08 (emphasis added).

190. *Id.* at 309 (emphasis added).

the uncertain consequences of disclosure of a 'guilty secret' freely given in response to an unwarned but noncoercive question, as in this case."<sup>191</sup>

- (9) "We must conclude that, *absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion.* A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement."<sup>192</sup>

#### X. WHAT WAS THE *MIRANDA* COURT TRYING TO DO?

Friedrich Nietzsche once observed that the commonest stupidity consists of forgetting what one is trying to do.<sup>193</sup> When the Supreme Court decided *Miranda*, what was it trying to do?

It was trying to change the way the police did business. Now that the privilege against self-incrimination applied to the interrogation room as well as the courtroom, the police could no longer say or imply that they had a right to an answer or the authority to compel one. (It would be more accurate to say that the police *never* had the right to an answer or the lawful authority to compel one; they only led suspects to believe they did.)

Moreover, now that the privilege applies to the interrogation room, the police can no longer say or imply that suspects will be "better off" if they "cooperate" with the police and "worse off" if they do not. Nor is that all. Now that the right to counsel applies to police interrogation (even the right to a lawyer at state expense if a suspect cannot afford to pay for one), the police cannot lead a suspect to believe that he or she must confront the police "all alone" for an indefinite period of time.

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191. *Id.* at 312 (emphasis added).

192. *Id.* at 314 (emphasis added).

193. In L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pt. 1), 46 *YALE L.J.* 52, 53 (1936), the authors refer to "Nietzsche's observation, that the most common stupidity consists in forgetting what one is trying to do." Unfortunately, the authors do not provide a source. According to the University of Michigan Law School Faculty Services Librarian, Seth Quidachay-Swan, the Fuller-Purdue reference to Nietzsche has made their version of the quote the basis for its current form. Mr. Quidachay-Swan adds that in *FRIEDRICH NIETZSCHE, HUMAN, ALL TOO HUMAN* (R.J. Hollingdale trans., Cambridge Univ. Press 1996) (1878), Nietzsche does say: "During the journey we commonly forget its goal. . . . Forgetting our objectives is the most frequent of all acts of stupidity." *Id.* at 360.

It is never easy to get the police to change their conduct. It is much harder, however, when they have a strong incentive to continue to operate as usual. *Elstad* provides such an incentive.

How can we expect the police to take *Miranda* seriously when they are aware that even though they disregard *Miranda*, the state will be able to use the testimony of any witness or any physical evidence that their misconduct brings to light? Unfortunately, the *Elstad* majority forgot the warning in *Nardone* that “[t]o forbid the direct use of methods . . . but to put no curb on their full indirect use would only invite the very methods deemed ‘inconsistent with ethical standards and destructive of personal liberty.’”<sup>194</sup>

Shortly after *Miranda* was handed down, Judge Henry Friendly recognized that “‘what data there are’ suggest that the obtaining of leads with which to obtain real or demonstrative evidence or prosecution witnesses is more important than getting statements for use in court.”<sup>195</sup> Some will retort, however, that although lawyers and law review writers may think this way, the average police officer does not. But the police do not have to think this way on their own *so long as their instructors train them to think this way*. Evidently they do.

More than a decade ago (and it is fair to assume that since then this “training” has spread), Professor Charles Weisselberg reported that many California police officers were being encouraged to question “outside *Miranda*,” i.e., continue to question custodial suspects despite the fact that they had directly and unambiguously asserted their rights.<sup>196</sup> According to one training videotape, for example, a California deputy district attorney instructs the police as follows:

The *Miranda* exclusionary rule . . . doesn’t have a fruits of the poisonous tree attached to it the way constitutional violations do. . . . [When we question someone who has invoked his *Miranda* rights,] [a]ll we lose is the statements taken in violation of *Miranda*. We do not lose physical evidence that resulted from that. We do not lose the testimony of other witnesses that we

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194. *Nardone v. United States*, 308 U.S. 338, 340 (1939) (per Frankfurter, J.).

195. Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 712 n.176 (1968). A quarter-century later, another commentator indicated that nothing had changed. See David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, 845 (1992) (“Expert interrogators have long recognized, and continue to instruct, that a confession is a primary source for determining the existence and whereabouts of the fruits of a crime, such as documents or weapons.”).

196. See Weisselberg, *supra* note 87, at 188.

learned about only by violating his *Miranda* invocation.<sup>197</sup>

True, most custodial suspects waive their rights and agree to talk to the police. But if suspects *do* assert their rights, why would a determined police officer stop questioning? The officer is aware that the incriminating statements themselves must be excluded. But he is also aware—perhaps instructed not to forget—that any physical evidence or testimony obtained from heretofore unknown witnesses may still be admissible.

After *Quarles* and *Elstad* were decided, *Miranda* supporters still had one remaining hope: sooner or later the Supreme Court would have to decide the constitutionality of a 1968 federal statute widely known as § 3501, a statute which purported to abolish *Miranda*.<sup>198</sup> If and when the Court struck down the statute as unconstitutional, thereby reaffirming (or resuscitating) the constitutionality of *Miranda*, the premise on which such cases as *Tucker*, *Quarles*, and *Elstad* were based would shatter. And the conclusions these cases had arrived at would topple. (Although it did not turn out this way, it was a reasonable expectation that considering *Miranda* a “constitutional decision” once again would lead to the collapse of such cases as *Elstad*.)

## XI. THE STRANGE CASE OF *DICKERSON V. UNITED STATES*

Fifteen years after *Elstad* was decided, the Court handed down *Dickerson v. United States*,<sup>199</sup> the case that finally did address the constitutionality of § 3501. Surprisingly, Chief Justice Rehnquist (who up to this point had probably never had a kind word to say about *Miranda*) came to *Miranda*'s rescue. Equally surprisingly, however, the Chief Justice could find no fault with such cases as *Tucker*, *Quarles*, and *Elstad*, cases that had led many to believe that *Miranda* was not, or was no longer considered, a constitutional decision.

When the Chief Justice discussed these cases, he treated them quite gingerly. Indeed, he was careful to leave them completely unscathed.

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197. The full transcript of the videotape is reprinted in an appendix to Professor Weisselberg's article. See Weisselberg, *supra* note 87, at 189–92. At the time the training tape was made it was not perfectly clear that *physical evidence* discovered as a result of a failure to follow *Miranda*, as well as a “second confession” following a *Miranda* violation, would be admissible. But the California district attorney turned out to be right. The lower courts “almost uniformly ruled” that *Elstad* applied to physical evidence. See Wollin, *supra* note 195, at 835–36. And the Supreme Court ultimately agreed. See *infra* notes 216–26.

198. Compare Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175 (1999), with Kamisar, *supra* note 39.

199. 530 U.S. 428 (2000).

I believe Don Dripps spoke for many criminal procedure professors when he commented:

[Once the Court granted certiorari in *Dickerson*, Court-watchers] knew the hour had come. At long last the Court would have to either repudiate *Miranda*, repudiate the prophylactic-rule cases, or offer some ingenious reconciliation of the two lines of precedent. The Supreme Court of the United States, however, doesn't "have to" do anything, as the decision in *Dickerson* once again reminds us.<sup>200</sup>

Because the Department of Justice would not defend the constitutionality of § 3501, the Court appointed Professor Paul Cassell to do so. Although I usually discount the complaints of losing counsel, this time, I believe, there is a good deal to be said for losing counsel's reaction.

When he read the opinion in *Dickerson* shortly after it was sent to him from the clerk's office, Cassell's "immediate reaction" was "Where's the rest of the opinion?"<sup>201</sup> Cassell had been so taken aback by the Chief Justice's "cursory treatment" of the "deconstitutionalization" of *Miranda*, a treatment that Cassell understandably believes "leaves *Miranda* doctrine incoherent," that he couldn't help thinking that "some glitch in the transmission had eliminated the pages of discussion on the critical issues in the case."<sup>202</sup>

As discussed earlier, *Elstad* was an especially difficult case to reconcile with the *Dickerson* view that *Miranda* was a "constitutional decision." Dissenting Justice Scalia was well aware of this and hit the *Dickerson* majority hard on this point. Scalia maintained, and I believe he was quite right, that "[t]he proposition that failure to comply with *Miranda*'s rules does not establish a constitutional violation was *central* to the *holdings*" of such cases as *Elstad*<sup>203</sup>—indeed, constituted "[t]he only reasoned basis for their outcome."<sup>204</sup>

How did Chief Justice Rehnquist handle Justice Scalia's complaint? If ever there were a half-hearted response, it was Rehnquist's:

Our decision in [*Elstad*]<sup>204</sup>—refusing to apply the traditional

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200. Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 33 (2001).

201. See Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failure in Dickerson*, 99 MICH. L. REV. 898 (2001).

202. *Id.*

203. *Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting, joined by Thomas, J.) (first emphasis added).

204. *Id.* at 455.



“fruits” doctrine developed in Fourth Amendment cases—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>205</sup>

Justice Scalia called the Chief Justice’s response “true but supremely unhelpful.”<sup>206</sup> One commentator, with good reason, put it more strongly: Rehnquist’s “non-answer to the question of why the traditional fruits doctrine . . . does not apply to *Miranda* violations . . . comes dangerously close to being a non sequitur.”<sup>207</sup>

In the *Tucker* case, then-Justice Rehnquist became the first member of the Court in a case involving *Miranda* to distinguish between statements that were *actually* “coerced” or “compelled” and those obtained *merely* in violation of *Miranda*’s “prophylactic rules.”<sup>208</sup> A quarter-century later, however, when he wrote his majority opinion in *Dickerson*, the Chief Justice was careful never to refer to the *Miranda* rules as “prophylactic.”<sup>209</sup> On the other hand, Rehnquist did work hard in *Dickerson* to avoid undermining any of the earlier cases that had carved out exceptions to *Miranda* on the premise that the landmark case was *not* (or was no longer regarded as) a constitutional decision.

Only a few years after *Dickerson* was handed down, however, Chief Justice Rehnquist joined two plurality opinions by Justice Thomas that read as if *Dickerson* had never been written: *Chavez v. Martinez*<sup>210</sup> and *United States v. Patane*.<sup>211</sup> In *Martinez*, Justice Thomas contrasted “prophylactic rules” such as *Miranda* rights with “core constitutional right[s]” such as the Self-Incrimination Clause.<sup>212</sup> In *Patane*, Thomas characterized *Miranda* as a “prophylactic employed to protect against violations of the Self-Incrimination Clause.”<sup>213</sup> He also reminded us that prophylactic rules such as *Miranda* “necessarily sweep beyond the

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205. *Id.* at 441.

206. *Id.* at 455.

207. Klein, *supra* note 144, at 1073.

208. *See supra* notes 102–21.

209. *See generally* Yale Kamisar, *Dickerson v. United States: The Case that Disappointed Miranda’s Critics—and Then Its Supporters*, in *THE REHNQUIST LEGACY* 106 (Craig M. Bradley ed. 2006).

210. 538 U.S. 760 (2003). Justice Thomas’s plurality opinion was joined by Chief Justice Rehnquist in its entirety and in large part by Justices O’Connor and Scalia.

211. 542 U.S. 630 (2004). Chief Justice Rehnquist and Justice Scalia joined Justice Thomas’s plurality opinion. Justice Kennedy, joined by Justice O’Connor, concurred in the judgment.

212. *Martinez*, 538 U.S. at 770.

213. *Patane*, 542 U.S. at 636.

actual protections of the Self-Incrimination Clause.”<sup>214</sup>

It is hard not to sympathize with Judge Ebel, the Tenth Circuit judge who excluded the physical evidence in *Patane* only to be reversed by the Supreme Court. Mr. Patane had been arrested outside his home and handcuffed. A federal agent, who had been informed that Patane, a convicted felon, illegally possessed a Glock pistol, failed to give him a complete set of *Miranda* warnings. As a result, the government conceded that any *statements* Patane made about the location of the Glock had to be excluded. But it insisted that the Glock *itself* (found where the defendant said it was, on a wooden shelf in his bedroom) should be admissible. The government relied heavily on two pre-*Dickerson* cases, *Tucker* and *Elstad*. But speaking for a unanimous three-judge panel, Judge Ebel made short work of these cases:

[B]oth [*Tucker* and *Elstad*] were predicated upon the premise that the *Miranda* rule was a prophylactic rule, rather than a constitutional rule. . . . However, the premise upon which *Tucker* and *Elstad* relied was fundamentally altered in *Dickerson* [where] the Supreme Court declared that *Miranda* articulated a constitutional rule rather than merely a prophylactic one. Thus, *Dickerson* undermined the logic underlying *Tucker* and *Elstad*.<sup>215</sup>

Some judges might have stopped at this point, but evidently Judge Ebel could not do so. He continued:

Further, the rule urged upon us by the Government appears to make little sense as a matter of policy. From a practical perspective, we see little difference between the confessional statement “The Glock is in my bedroom on a shelf,” which even the Government concedes is clearly excluded under *Miranda* . . . and the Government’s introduction of the Glock found in the defendant’s bedroom on the shelf as a result of his

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214. *Id.* at 639. In a companion case to *Patane*, *Missouri v. Seibert*, 542 U.S. 600 (2004), a 5-4 majority, per Souter, J., did exclude a “second confession.” But *Seibert* grew out of egregious facts: The principal police interrogator had admittedly been trained to use a two-stage interrogation technique designed to circumvent *Miranda*. At the first questioning session with the defendant the police interrogator deliberately failed to give any warnings at all—which he had been trained to do. Moreover, the statement ultimately admitted into evidence was “largely a repeat” of the statement the police had obtained during the first questioning session.

Justice Kennedy cast the deciding vote in *Seibert*. He left little doubt that he (1) approved *Elstad*’s reasoning; (2) believed that *Elstad* had been unaffected by *Dickerson*; and (3) would admit the incriminating statement obtained during the second questioning session in a less egregious “second confession” case.

215. *United States v. Patane*, 304 F.3d 1013, 1019 (10th Cir. 2002), *rev’d*, 542 U.S. 630 (2004).

unconstitutionally obtained confession. If anything, to adopt the Government's rule would allow it to make *greater* use of the confession than merely introducing the words themselves.<sup>216</sup>

In reversing the Tenth Circuit opinion in *Patane*, Justice Thomas took account of Judge Ebel's observation that the position advocated by the government "appears to make little sense as a matter of policy."<sup>217</sup> "[P]utting policy aside," retorted Thomas, "we have held that '[t]he word "witness" in the constitutional text limits the' scope of the Self-Incrimination Clause to testimonial evidence."<sup>218</sup>

In the context of the *Patane* case, Justice Thomas's statement is misleading. Mr. Patane had not been ordered to put on a hat to see whether it fit properly.<sup>219</sup> Nor had he been required to provide a blood sample to test for its alcoholic content.<sup>220</sup> What Mr. Patane was complaining about was the use of evidence *derived from* an incriminating statement. Ever since the 120-year-old case of *Counselman v. Hitchcock*<sup>221</sup> was decided (a case Justice Thomas never mentions), it has been clear that the Self-Incrimination Clause protects against the *derivative use* of compelled testimony as well as the compelled testimony itself.

Evidently, Justice Thomas refuses to believe that a statement violates the privilege simply because the police officer who obtained it from a custodial suspect failed to comply with *Miranda*. But that was what *Dickerson* was supposed to be all about—and Justices Scalia and Thomas lost, 7-2. The *Dickerson* majority informed us that once the Self-Incrimination Clause was held to apply to the interrogation room "something more than the [pre-*Miranda*] totality [of circumstances] test was necessary"<sup>222</sup>—that because "§ 3501 reinstates the totality test as sufficient" it "cannot be sustained if *Miranda* is to remain the law."<sup>223</sup>

What Justice Thomas had to say about *Miranda* in the post-*Dickerson* era should not have come as a great surprise. After all, Justice Thomas did join Justice Scalia's forceful dissent in *Dickerson*. But *how could* Chief Justice Rehnquist—the author of the majority opinion in

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216. *Id.* at 1027 (emphasis in original).

217. *Patane*, 542 U.S. at 643.

218. *Id.* at 643–44.

219. *Cf.* *Holt v. United States*, 218 U.S. 245 (1910) (requiring a person to put on a blouse is not a violation of the privilege).

220. *See Schmerber v. California*, 384 U.S. 757 (1966) (not a violation of the privilege).

221. 142 U.S. 547 (1892).

222. *Dickerson v. United States*, 530 U.S. 428, 442 (2000) (emphasis added).

223. *Id.* at 442–43.

*Dickerson*—join Justice Thomas’s opinions in *Martinez* and *Patane*? How could Rehnquist agree that *Miranda* was *not* a constitutional decision after all?

It was almost as if Chief Justice Rehnquist had (a) written his opinions in *Tucker* and *Quarles* when he was quite healthy; (b) written the majority opinion in *Dickerson* when he was suffering from amnesia; and (c) recovered fully from his amnesia when he joined Justice Thomas’s opinions in *Martinez* and *Patane*.

As might be expected, many theories have been advanced to explain Rehnquist’s surprising vote in *Dickerson*.<sup>224</sup> One of the most interesting theories is that the Chief Justice decided to vote with the majority so that he could assign the opinion to himself rather than let it go to someone like Justice Stevens.<sup>225</sup> Some people may find this theory disturbing. But when one (a) takes into account the Chief Justice’s performance in the post-*Dickerson* cases of *Martinez* and *Patane* and (b) keeps in mind that the person offering this theory is a great admirer of Rehnquist’s (and also a former law clerk to him), this theory takes on a certain plausibility:

If there had been four votes to overrule *Miranda*, it is difficult to imagine that, given his decades of principled opposition, the Chief would not have readily provided the fifth. But the votes were not there.

In their place was genuine peril. . . . [I]f [§ 3501] were unconstitutional, that would presumably be because *Miranda* was not mere prophylaxis, but itself required by the Constitution.

Had the Chief voted with the dissenters, the majority opinion would have been assigned by the senior Justice in the majority, in this case Justice Stevens. And Justice Stevens, of course, had a very different view of *Miranda* than did the Chief. . . .

[A holding that *Miranda* is required by the Constitution] would have undermined the foundation for most if not all of the

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224. Most of the participants in Symposium: *Miranda After Dickerson: The Future of Confession Law*, 99 MICH. L. REV. 879, 879–1247 (2001) suggested various reasons why Chief Justice Rehnquist voted the way he did. (The participants were: Paul Cassell, Yale Kamisar, Susan R. Klein, Richard A. Leo, Laurie Magid, Stephen J. Schulhofer, David A. Strauss, William J. Stuntz, George C. Thomas III, Charles D. Weisselberg and Welsh S. White.) See also Craig Bradley, *Behind the Dickerson Decision*, 36 TRIAL 80 (Oct. 2000); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2001 SUP. CT. REV. 61; Daniel M. Katz, *Institutional Rules, Strategic Behavior, and the Legacy of Chief Justice Rehnquist: Setting the Record Straight in Dickerson v. United States*, 22 J. L. & POL 303 (2006).

225. R. Ted Cruz, *In Memoriam: William H. Rehnquist*, 119 HARV. L. REV. 10 (2005).

previous decisions limiting *Miranda*, quietly threatening three decades of the Chief's careful efforts to cabin in that decision appropriately. Therefore, in my judgment, the Chief acted decisively to avoid that consequence. He voted with the majority and assigned the opinion to himself.

With that backdrop, the majority opinion in *Dickerson* is, in many respects, amusing to read. Its holding can be characterized as threefold: First, *Miranda* is NOT required by the Constitution; it is merely prophylactic and its exceptions remain good law. Second, [§ 3501] is not good law. Third, do not ask why, and please, never, ever, ever cite this opinion for any reason.<sup>226</sup>

Although, as Mr. Cruz suggests, Chief Justice Rehnquist may have wished that his *Dickerson* opinion would “never, ever” be cited “for any reason,” it has been. In *Patane*, Justice Thomas told us that “[t]he [*Dickerson*] Court’s reliance on our *Miranda* precedents [including *Elstad*] further demonstrates the continuing validity of those decisions.”<sup>227</sup> To reaffirm the constitutionality of *Miranda* without repudiating cases such as *Elstad* is not easy. But to read *Dickerson* as somehow “relying” on cases such as *Elstad* and demonstrating their “continuing validity” is truly extraordinary. Yet Chief Justice Rehnquist joined Justice Thomas’s opinion.

## XII. *BERGHUIS V. THOMPkins*: THE COURT INFLICTS A HEAVY BLOW ON *MIRANDA*

As a general matter, law professors like to be quoted by the U.S. Supreme Court. But there are exceptional cases. For Professor Fred Inbau, senior co-author of the Inbau-Reid police interrogation manual<sup>228</sup>—considered “the undisputed bible of police interrogation since its initial publication in 1962”<sup>229</sup>—the *Miranda* opinion’s

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226. *Id.* at 14–15. Mr. Cruz takes comfort in the fact that Chief Justice Rehnquist never said in *Dickerson* that the *Miranda* warnings are required by the Constitution. *See id.* at 15 n.26. But to say that would be incorrect. As the *Miranda* Court told us, and as Rehnquist reminded us in *Dickerson* that *Miranda* told us, “the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were ‘at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.’” *Dickerson*, 530 U.S. at 440.

227. *United States v. Patane*, 542 U.S. 630, 640 (2010) (emphasis added).

228. FRED E. INBAU & JOHN E. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* (1962).

229. Robert M. Thomas Jr., *Fred Inbau*, 89, *Criminologist Who Perfected Interrogation*, N.Y. TIMES, May 28, 1998, at B9.

references to and quotations from his work marked such an exception.

In the course of setting forth what he thought was occurring in most “interrogation rooms” throughout the land (the police prefer to call them “interview rooms”), Chief Justice Warren turned to various interrogation manuals. Warren believed (and I agree with him) that these manuals “professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering [them], it is possible to describe procedures observed and noted around the country.”<sup>230</sup> Warren referred to or quoted from the Inbau-Reid manual nine times—but never with approval.<sup>231</sup>

*Miranda* not only had an impact on police interrogation and the law school curriculum.<sup>232</sup> It also affected book publishing. The landmark *Miranda* case necessitated a new edition of the Inbau-Reid manual as soon as possible. And a new edition was published only a year after *Miranda* was decided. As Charles Weisselberg has noted,<sup>233</sup> in their first post-*Miranda* edition, Inbau and Reid assured their readers that “all but a very few of the interrogation tactics and techniques presented in our earlier publication are still valid if used *after* the recently prescribed warnings have been given to the suspect . . . [and] *after he has waived* his self-incrimination privilege and his right to counsel.”<sup>234</sup> It seemed obvious to Professor Inbau that *Miranda* required the police to obtain a waiver of the right to remain silent and the right to counsel *before* subjecting the custodial suspect to the interrogation process.

In the 1960s, few, if any, believed that a day would come when the U.S. Supreme Court would read *Miranda* more narrowly and more

230. *Miranda v. Arizona*, 384 U.S. 436, 449 (1966).

231. *Id.* at 449–55. Although one commentator undoubtedly exaggerated, there *is* something to what he said about Chief Justice Warren’s use of the Inbau-Reid manual, Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 971 (1997): It “was exhibited in the *Miranda* opinion like a relic from a medieval torture chamber.”

Chief Justice Warren may have been unhappy with some of the psychological tactics recommended by Inbau, but the latter was a strong opponent of anything resembling the “third degree.” See generally Ronald J. Allen, *Tribute to Fred Inbau*, 89 J. CRIM. L. & CRIMINOLOGY 1271 (1999); Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogation and Modern Confessions Law*, 84 MICH. L. REV. 662 (1986); Yale Kamisar, *Fred E. Inbau: “The Importance of Being Guilty,”* 68 J. CRIM. L. & CRIMINOLOGY 182 (1977); Yale Kamisar, *What is an “Involuntary” Confession: Some Comments on Inbau and Reid’s Criminal Interrogation and Confessions*, 17 RUTGERS L. REV. 728 (1963).

232. Until *Miranda* was handed down, very few law schools, if any, offered criminal procedure as a separate course. That changed very quickly.

233. Weisselberg, *supra* note 3, at 1528.

234. *Id.* (quoting FRED E. INBAU & JOHN E. REID, *CRIMINAL INTERROGATION AND CONFESSIONS* 1 (2d ed. 1967) (emphasis added by Professor Weisselberg)).

grudgingly than did Inbau, a proponent of deceit and deception in obtaining confessions.<sup>235</sup> But that day did come—in 2010, when the Court handed down *Berghuis v. Thompkins*.<sup>236</sup>

I once said that *Elstad*, or at least an expansive reading of this case, would administer a crippling blow to *Miranda*.<sup>237</sup> I considered *Elstad* the worst that could happen to *Miranda* short of overruling it.<sup>238</sup> But that was before *Thompkins* was decided. Justice Kennedy's opinion for the Court discusses the facts of *Thompkins* at considerable length. A summary of these facts follows:

Detective Helgert and another police officer questioned defendant Thompkins about a shooting in which one person died. The interrogation was conducted in the early afternoon in a small room. Thompkins sat in a straight-backed chair. At no time during his meeting with the police did Thompkins express a desire to see a lawyer or say he wanted to remain silent. Moreover, he never said that he did not want to talk to the police. But he declined to sign a written acknowledgement that he had been advised of his rights and understood them. During the interrogation, which lasted about three hours, Thompkins was largely silent, but he did give a few "limited verbal responses," such as "yeah," "no," or "I don't know."

At the outset of the interrogation, Detective Helgert presented Thompkins with a form containing the four standard *Miranda* warnings and a fifth warning that read: "You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned." At Helgert's request, Thompkins read the fifth warning out loud. Helgert himself then read the four standard *Miranda* warnings out loud.

About two hours and forty-five minutes into the interrogation, the detective asked Thompkins a series of questions, beginning with whether he believed in God. Thompkins' reply to the first question was that he did believe in God, his eyes "well[ing] up in tears." Helgert's next question was: "Do you pray to God?" Again, Thompkins answered that he did. Finally, the detective asked: "Do you pray to God to forgive you for shooting that boy down?" Thompkins answered that he did, looking away. About fifteen minutes later, after Thompkins had refused to make

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235. See Thomas, *supra* note 229.

236. 560 U.S. \_\_\_, 130 S. Ct. 2250 (2010).

237. See Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 478–80 (1999).

238. See *id.* at 480.

a written confession, the interrogation ended.<sup>239</sup>

The Michigan trial court refused to exclude Thompkins' statements. He was convicted of murder and sentenced to life imprisonment without parole. The Michigan Court of Appeals affirmed. On habeas corpus, the federal district court denied relief. But a unanimous three-judge panel of the U.S. Court of Appeals for the Sixth Circuit reversed, concluding that the state courts had unreasonably applied clearly established law and had based their decisions on an unreasonable determination of the facts. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court cannot grant habeas corpus relief unless the state court's adjudication of the merits was "contrary to, or involved an unreasonable application of clearly established Federal law."<sup>240</sup>

According to the Sixth Circuit, the state court unreasonably determined the facts because "the evidence demonstrates that Thompkins was silent for two hours and forty-five minutes."<sup>241</sup> Moreover, the defendant's "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights."<sup>242</sup>

A. *Must the Police Obtain a Waiver of Rights Before Interrogation Commences?*

A 5-4 majority of the Supreme Court reversed. Justice Kennedy wrote the opinion of the Court. Although *Miranda* prevents the police from interrogating suspects without first providing them with the now-familiar *Miranda* warnings, wrote Kennedy, "it does not impose a formalistic waiver procedure that a suspect must follow to relinquish those rights."<sup>243</sup> Where "the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent."<sup>244</sup> The majority emphasized that the primary protection afforded custodial suspects who are, or are going to be, interrogated, "is the *Miranda* warnings themselves."<sup>245</sup>

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239. *Thompkins*, 130 S. Ct. at 2256–57.

240. *See id.* at 2258 (quoting 28 U.S.C. § 2254(d)(1) (2006)).

241. *See id.*

242. *See id.* at 2258–59.

243. *Id.* at 2262.

244. *Id.*

245. *Id.* at 2263 (quoting *Davis v. United States*, 512 U.S. 452, 460 (1994)).



Thompkins argued that the police could not interrogate him until they first obtained a waiver of his rights. “The *Miranda* rule and its requirements are met,” responded the Court, “if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions.”<sup>246</sup> Since Thompkins received and understood the *Miranda* warnings, and never invoked his *Miranda* rights, he “waive[d] the right to remain silent by making an uncoerced statement to the police.”<sup>247</sup> The police did not obtain an explicit or specific waiver of Thompkins’ right *before* interrogating him.<sup>248</sup> According to the *Thompkins* majority, however, the police did not have to do so.

During the oral arguments, Justice Breyer expressed surprise at the government’s contention that the waiver of *Miranda* rights could take place *after* the police had begun interrogating the suspect.<sup>249</sup> I had the same reaction and reread the *Miranda* opinion, expecting to find strong, explicit language prohibiting such a course of action. Instead I discovered that the language in *Miranda* was not nearly as explicit as I thought it was. At one point, *Miranda* does come very close to saying what I was looking for: “After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement.”<sup>250</sup> But the Court does not unequivocally say that *the only time the police must obtain a waiver of Miranda rights is immediately after* the warnings have been given and *before* any interrogation has commenced. And the sentence immediately before the sentence quoted above reads: “Opportunity to exercise these rights must be afforded to [the suspect] throughout the interrogation.”<sup>251</sup>

At another point, *Miranda* also comes close to saying what I hoped to find: “The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.”<sup>252</sup> But the very next sentence veers off: “The warnings required and the waiver necessary in accordance with our opinion today are . . . prerequisites to

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246. *Id.*

247. *Id.* at 2264.

248. *See id.*

249. *See* KAMISAR, LAFAVE ET AL., *supra* note 107, at 650.

250. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

251. *Id.*

252. *Id.* at 476.

*the admissibility of any statement made by a defendant.*<sup>253</sup> Of course a waiver of rights must take place before any statement is *ultimately admissible*, but must the waiver occur before any interrogation has begun or may it take place later?

At still another point, *Miranda* tells us: “The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody . . . .”<sup>254</sup> But what did the Court mean by “the principles announced today?” Did it mean *all* the principles—including *when* and *how* waivers have to take place? Or did the Court mean only the principles pertaining to how and when the warnings must be given and how and when custodial suspects may assert their rights?

When *Miranda* was decided, the member of the Court who most clearly recognized that the landmark decision required a suspect to waive his or her rights *before* interrogation commenced (although he was not happy about it) seems to have been *dissenting* Justice White. The very first sentence of White’s twenty-page dissenting opinion reads: “The proposition that the privilege against self-incrimination *forbids in-custody interrogation* without the warnings specified in the majority opinion and *without a clear waiver of counsel* has no significant support in the history of the privilege or in the language of the Fifth Amendment.”<sup>255</sup> Moreover, ten pages later, Justice White observes that “apparently, it is only if the accused is also warned of his right to counsel and *waives both that right and the right against self-incrimination* that the inherent compulsiveness of interrogation disappears.”<sup>256</sup>

Although I believe Justice White’s understanding of what *Miranda* requires the police to do is noteworthy, I realize, too, that sometimes a dissenting or concurring Justice may distort or exaggerate the majority’s ruling. Therefore, even taking into account Justice White’s dissent, one may plausibly conclude that the explicit language of the Court is not conclusive on the point in time when the waiver of rights must occur.

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253. *Id.* (emphasis added).

254. *Id.* at 477.

255. *Id.* at 526 (White, J., dissenting, joined by Harlan and Stewart, JJ.) (emphasis added).

256. *Id.* at 536 (emphasis added); *see also id.* at 537 (“[T]he Court declares that the accused may not be interrogated without counsel present, *absent a waiver of the right to counsel . . . .*”) (emphasis added).

B. *The Implications of Miranda's Concern About the "Compelling Atmosphere" of Police Interrogation*

However, there is another way to establish that the *Thompkins* Court went astray when it ruled that the police could begin interrogating custodial suspects *before* they waived their rights and *then* utilize the interrogation process itself in order to obtain the necessary waiver. This other route is based on the implications of the *Miranda* opinion's pervasive concern and anxiety about what is variously called "the compelling atmosphere of the in-custody interrogation,"<sup>257</sup> "the secret interrogation process,"<sup>258</sup> "the compulsion to speak in the isolated setting of the police station,"<sup>259</sup> and the "incommunicado interrogation of individuals in a police-dominated atmosphere."<sup>260</sup>

*Miranda* also tells us that in each of the four cases before the Court the "interrogation environment" was "created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation."<sup>261</sup> At another point, *Miranda* observes: "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described [in the police manuals] cannot be otherwise than under compulsion to speak."<sup>262</sup> At still another point, the *Miranda* Court recalls that in *Escobedo v. Illinois*,<sup>263</sup> "[t]he entire thrust of police interrogation there, as in all [four of the cases before the Court] today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment."<sup>264</sup>

One of the basic premises of *Miranda* was that "the process of custodial interrogation contains inherent pressures that compel suspects to speak."<sup>265</sup> Charles Weisselberg, who has studied the issue extensively, tells us that the principal ingredients of custodial interrogation have changed very little since *Miranda*: "the basic psychological approach to interrogation described in the *Miranda* decision remains prevalent in the

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257. *Id.* at 465.

258. *Id.* at 470.

259. *Id.* at 461.

260. *Id.* at 445.

261. *Id.* at 457.

262. *Id.* at 461.

263. 378 U.S. 478 (1964).

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

265. Weisselberg, *supra* note 3, at 1522.

United States”<sup>266</sup> and “many of the same tactics discussed by the justices in 1966” are “widely used” today.<sup>267</sup>

It is hard to believe that the *Miranda* Court, a Court which was so troubled by in-custodial police interrogation, would (a) *require the police* to warn custodial suspects of their rights, yet (b) *permit the police* to intimidate, mislead, deceive, bluff, coax, or trick these same suspects into “waiving” their rights by subjecting them to interrogation. This is why I agree with Professor Weisselberg (he actually made this point two years before *Thompkins* was decided), who explained why the *Miranda* Court must have meant that a waiver of rights had to take place *before* interrogation commences: “Given the [*Miranda*] Court’s extensive and critical discussion of the interrogation manuals, this could only mean that waivers could not be obtained while interrogators were applying the tactics advocated in the manuals.”<sup>268</sup>

Quoting with approval from *Davis v. United States*, the *Thompkins* Court does say that “the primary protection afforded suspects subject[ed] to custodial interrogation is the *Miranda* warnings themselves.”<sup>269</sup> But *why* is this so? As the late Welsh White pointed out a decade ago, “[t]ranscripts of modern interrogations indicate that police interrogators are often so overwhelmingly in control of the interrogation—dictating the pace of the questioning and the topics under discussion—that the suspect has no practical opportunity to invoke his rights during the most critical parts of the interrogation.”<sup>270</sup>

### C. *What Likely Takes Place in the Interrogation Room?*

In the course of rejecting Mr. *Thompkins*’ argument that the police could not question him “until they obtained a waiver first,” the *Thompkins* Court had some nice things to say about interrogation:

Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the

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266. *Id.* at 1529.

267. *Id.* at 1537.

268. *Id.* at 1528.

269. *Berghuis v. Thompkins*, 560 U.S. \_\_\_, 130 S. Ct. 2250, 2263 (2010) (quoting *Davis v. United States*, 512 U.S. 452, 460 (1994)).

270. White, *supra* note 2, at 1215. Professor White further cites “examples of questioning that is so rapid that the suspect has no practical opportunity to halt the questioning in order to invoke his rights.” *Id.* at 1215 n.24 (citing Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 *STUD. L. POL. & SOC’Y* 189, 227–30 (1997)).

suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that *Miranda* rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and longterm interests. Cooperation with the police may result in more favorable treatment for the suspect; the apprehension of accomplices; the prevention of continuing injury and fear; beginning steps towards relief or solace for the victims; and the beginning of the suspect's own return to the law and the social order it seeks to protect.<sup>271</sup>

This, I submit, is a highly sanitized description of the interrogation process. One almost gets the feeling that the suspect is having a straightforward talk with his own lawyer about the strengths and weaknesses of his case. But the people who are providing the suspect with what the Court calls “the opportunity to consider the choices he or she faces and to make a more informed decision” are not the suspect's friends or advisors (although they often pretend to be), but his antagonists. Their job is not to help the suspect “make a more informed decision” (although they often pretend it is), but to figure out how best to bury him—or, to put it more precisely, how best to get him to “dig his own grave.”

David Simon knows something about interrogation. He took a leave of absence from his newspaper to study how police interrogation was conducted by the Baltimore Police Department. He had unlimited access to the city's homicide detectives for one year. His book, *Homicide: A Year on the Killing Streets*, was the result.<sup>272</sup> According to Mr. Simon:

With rare exception, a confession is compelled, provoked and manipulated from a suspect by a detective who has been trained in a generally deceitful art. That is the essence of interrogation, and those who believe that a straightforward conversation between a cop and a criminal—devoid of any treachery—is going to solve a crime are somewhat beyond naive.<sup>273</sup>

Mr. Simon is convinced that police interrogation is necessary. “Without a chance for a detective to manipulate a suspect's mind,” he

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271. *Thompkins*, 130 S. Ct. at 2264.

272. DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* (1991). In an author's note, Mr. Simon tells us that his book is a “work of journalism” and that the events he has written about “occurred in the manner described.” *Id.* at 627.

273. *Id.* at 211.

notes, “a lot of bad people would simply go free.”<sup>274</sup> But he is uncomfortable about it, because, as he sees it, the interrogation process is basically fraudulent:

[A homicide detective] becomes a salesman, a huckster as thieving and silver-tongued as any man who ever moved used cars or aluminum siding—more so, in fact, when you consider that he’s selling long prison terms to customers who have no genuine need for the product.

. . . The fraud that claims it is somehow in a suspect’s interest to talk with police will forever be the catalyst in any criminal interrogation.<sup>275</sup>

Richard Leo has a very different background than David Simon. Leo is both a lawyer and a criminologist. He has witnessed 120 live interrogations and studied over 1500 electronically recorded ones. He has also interviewed more than 100 police interrogators.<sup>276</sup> When discussing the interrogation process, Professor Leo also uses the “fraud” word:

Police interrogation in the American adversary system is firmly rooted in fraud. Modern interrogation is fraudulent not simply because police are legally permitted to—and frequently do—lie to suspects about such things as the seriousness of the crime or case evidence (e.g., fingerprints, eyewitnesses or DNA results) that they do not possess. It is also based on fraud because detectives seek to create the illusion that they share a common interest with the suspect and that he can escape or mitigate punishment only by cooperating with them and providing a full confession. Although the suspect’s self-interest would usually best be served by remaining completely silent, interrogators seek at every step to convince him that what is in their professional self-interest is somehow in his personal self-interest. The entire interrogation process is carefully staged to hide the fact that police interrogators are the suspect’s adversary.<sup>277</sup>

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274. *Id.* at 212.

275. *Id.* at 213.

276. E-mail from Richard A. Leo, Assoc. Professor of Law, Univ. of S.F., to author (Feb. 4, 2012) (on file with author).

277. LEO, *supra* note 2, at 25; *see also id.* at 34, 325–26.

Consider, too, Saul M. Kassin et al., *Police Interviewing and Interrogation: A Self-Report Survey of Police Practices and Beliefs*, 31 *LAW & HUM. BEHAV.* 381, 383–84 (2007) (“The stated objective of interrogation is to move a presumed guilty suspect from denial to admission. The techniques used are thus designed to overcome a suspect’s resistance and to induce him or her to confess. . . . [Professors] Ofshe and Leo (1997) have suggested that interrogation can best be

D. “Waiver by Confession”

*Thompkins* disregarded *Miranda* in other respects. At one point, *Miranda* warned that “a heavy burden rests on the government to demonstrate that [custodial suspects] knowingly and intelligently waived” their rights<sup>278</sup>—a “burden rightly on its shoulders” because “the State is responsible for establishing the isolated circumstances under which the interrogation takes place.”<sup>279</sup> But now that *Thompkins* is on the books, the state’s burden has lightened greatly.

To be sure, in order to establish a valid waiver of rights, the prosecution must not only show that the *Miranda* warnings were followed by an uncoerced incriminating statement. It must also establish that the suspect *understood* his or her *Miranda* rights.<sup>280</sup> As the *Thompkins* case itself illustrates, however, this will rarely cause the prosecution any difficulty.

If the suspect was afforded the opportunity to read a written copy of the *Miranda* warnings, the prosecution need only show that the suspect could read and understand English.<sup>281</sup> If the police read the warnings aloud, the prosecution need only show that the suspect heard them and understood English.<sup>282</sup>

*Miranda* also told us that “a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.”<sup>283</sup> But this caution no longer appears to be operative.

The *Thompkins* majority tells us so about as clearly as one can: “In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police.”<sup>284</sup>

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understood as a two-step psychological process in which the interrogator first seeks to convince the suspect that he or she is trapped and then attempts to induce the suspect to perceive that the benefits of confessing outweigh the costs.”)

278. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

279. *Id.*

280. *See Berghuis v. Thompkins*, 560 U.S. \_\_\_, 130 S. Ct. 2250, 2263 (2010).

281. *See id.* at 2262.

282. *See id.* at 2261–62.

283. *Miranda*, 384 U.S. at 475.

284. *Thompkins*, 130 S. Ct. at 2264. Earlier in its opinion, the majority had said virtually the same thing. *See id.* at 2262, 2263. The majority also observed more generally:

As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise and has made a deliberate choice to relinquish the protection those rights afford. . . .

. . . Thompkins’ answer to Helgert’s question about praying to God for forgiveness . . . was

An amicus brief filed on behalf of Mr. Thompkins anticipated how the Court might decide the case and called it “waiver by confession.”<sup>285</sup> Such a description of the *Thompkins* ruling will undoubtedly strike some as quite harsh, but isn’t it basically right? As the amicus brief observes: “If a suspect’s eventual inculpatory statement suffices to show waiver, then there will *always* be a waiver; no *Miranda* case would ever be litigated in the absence of an inculpatory statement.”<sup>286</sup>

Some may view *Thompkins* as simply another instance of chipping away at *Miranda*. I would put it more strongly. I would go so far as to say that *Thompkins* is a case where the Court fired point-blank at *Miranda*. *Thompkins* requires a suspect to prove that he invoked his right to remain silent *instead of requiring the prosecution to prove* that the suspect waived that right. As two of the nation’s leading commentators on the subject recently observed: “[In] removing the last residue of the ‘heavy burden’ waiver language from *Miranda* doctrine, *Thompkins* is perhaps the most significant *Miranda* case yet decided.”<sup>287</sup>

At one point, the *Thompkins* majority relied on *North Carolina v. Butler*.<sup>288</sup> “*Butler* made clear that a waiver of *Miranda* rights may be implied through ‘the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver.’”<sup>289</sup> But *Butler* was a case about the specificity of an effective waiver, *not when* the waiver must take place. The most plausible reading of the *Butler* record is that the event which might have constituted an effective waiver—the suspect’s statement “I will talk to you but I am not signing any form”<sup>290</sup>—took place immediately after he had been advised of his rights.

Although *Butler* is often called an “implied waiver” case, there is nothing *implicit* about the statement “I will talk to you but . . .”<sup>291</sup> It

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sufficient to show a course of conduct indicating waiver.

*Id.* at 2262–63.

285. Brief for the National Association of Criminal Defense Lawyers (NACDL) and the ACLU as Amici Curiae Supporting Respondent at 6, *Thompkins*, 130 S. Ct. 2250 (No. 08-1470).

286. *Id.* at 3 (emphasis in original). This is a slight exaggeration. In a few instances the inculpatory statement might be deemed coerced. But then we would no longer be dealing with a simple *Miranda* violation.

287. GEORGE C. THOMAS III & RICHARD A. LEO, *CONFESSIONS OF GUILT: FROM TORTURE TO MIRANDA AND BEYOND* 192 (2012).

288. 441 U.S. 369 (1979) (per Stewart, J.).

289. *Thompkins*, 130 S. Ct. at 2261.

290. *See Butler*, 441 U.S. at 370, 371.

291. *Thompkins*, 130 S. Ct. at 2266, 2271 (Sotomayor, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.).



might be more accurate to call *Butler* a dispute about whether a valid waiver could be “qualified” or “conditional” or must be “formal” or “formalistic.”<sup>292</sup>

The *Thompkins* majority also relied on Justice Brennan’s concurring opinion in *Connecticut v. Barrett*.<sup>293</sup> According to the *Thompkins* majority, Justice Brennan recognized in his *Barrett* concurrence that earlier (in *Butler*) the Court had “‘retreated’ from the ‘language and tenor of the *Miranda* opinion,’ which ‘suggested that the Court would require that a waiver . . . be ‘specifically made.’”<sup>294</sup> As the quotation itself indicates, however, Brennan never suggested that the Court had retreated on *another* front—the issue presented in *Thompkins*—the point in time when a waiver of rights has to take place.

The *Thompkins* Court also relied on *Davis v. United States*.<sup>295</sup> *Davis* had ruled that a suspect invoking the *Miranda* right to counsel must do so “unambiguously.”<sup>296</sup> The *Thompkins* Court could see “no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel.”<sup>297</sup>

First of all, *Davis* involved a suspect who had already waived his right to remain silent, but changed his mind some ninety minutes later—when the interrogation was well underway.<sup>298</sup> The *Davis* majority seemed to consider this factor quite important: “We . . . hold that, *after a knowing and voluntary waiver* of the *Miranda* rights, law enforcement officers may *continue questioning* until and unless the suspect clearly requests an attorney.”<sup>299</sup>

Moreover, Justice Souter, who wrote a concurring opinion in *Davis*,

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292. One of *Butler*’s arguments was that in order for a waiver of rights to be effective, a custodial suspect had to say specifically that he was waiving his right to the presence of counsel or the right to remain silent. See *Butler*, 441 U.S. at 370–71. After all, *Miranda* does say that “[an] express statement that the individual is willing to make a statement *and does not want an attorney* followed closely by a statement could constitute a waiver.” *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (emphasis added).

293. 479 U.S. 523 (1987) (Brennan, J., concurring).

294. *Thompkins*, 130 S. Ct. at 2261 (referring to *Barrett*, 479 U.S. at 531–32).

295. 512 U.S. 452 (1994).

296. See *Thompkins*, 130 S. Ct. at 2253–60 (discussing *Davis*, 512 U.S. at 455).

297. *Id.* at 2253–54.

298. *Davis*, 512 U.S. at 455.

299. *Id.* at 461 (emphasis added). As Justice Sotomayor noted in her *Thompkins* dissent, “*Davis*’ holding is explicitly predicated on [the] fact” that the suspect’s equivocal references to a lawyer “occurred only *after* he had given express oral and written waivers of his rights.” *Thompkins*, 130 S. Ct. at 2275 (Sotomayor, J., dissenting) (emphasis in original).

expressed concern that the majority might have assigned too much weight to the fact that the suspect had initially waived his right to counsel:

Nor may the standard governing waivers as expressed in these statements be deflected away by drawing a distinction between initial waivers of *Miranda* rights and subsequent decisions to reinvoke them, on the theory that so long as the burden to demonstrate waiver rests on the government, it is only fair to make the suspect shoulder a burden of showing a clear subsequent assertion. *Miranda* itself discredited the legitimacy of any such distinction.<sup>300</sup>

In the second place, there *does* seem to be a “principled reason” for using different standards for determining whether a suspect has asserted his right to remain silent or his right to counsel. As Justice Sotomayor expressed it in her *Thompkins* dissent:

Advising a suspect that he has a “right to remain silent” is unlikely to convey that he must speak (and must do in some particular fashion) to ensure the right will be protected. . . . By contrast, telling a suspect “he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires” . . . implies the need for speech to exercise that right . . . .

. . . [The] *Miranda* warnings give no hint that a suspect should use [certain] magic words [to invoke his right to remain silent], and there is little reason to believe police—who have ample incentives to avoid invocation—will provide such guidance.<sup>301</sup>

### XIII. ALTERNATIVES TO *MIRANDA*

As the *Thompkins* case illustrates, *Miranda* has been downsized and weakened in various ways. Oral statements obtained from custodial suspects who were never advised of their rights may be used to impeach them if they have the audacity to take the stand in their own defense. In addition, physical evidence derived from un-Mirandized statements may be used against defendants. So may prosecution witnesses whose identities or whereabouts would not have been known except for the defendants’ un-Mirandized statements. The fact that these exceptions to *Miranda* furnish law enforcement officials a strong incentive to

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300. *Davis*, 512 U.S. at 470–71 (Souter, J., concurring, joined by Blackmun, Stevens and Ginsburg, JJ.).

301. *Thompkins*, 130 S. Ct. at 2276 (Sotomayor, J., dissenting).

disregard *Miranda* does not matter.

Moreover, although the *Miranda* Court was quite upset by the tactics recommended in the interrogation manuals, the present Court permits the police to interrogate custodial suspects *before* they waive their rights. As a result, the police may overwhelm, confuse, or trick custodial suspects into “waiving” their rights by interrogating them *before* they waive their rights.

Has the time come to give up on *Miranda* and start over? Has the time come to accept the fact that *Miranda* does not—and never did—go far enough? Has the time come to recognize that *Miranda*—even the “original,” undiminished version—was fundamentally flawed?

A. *Should We Provide Custodial Suspects More Protection than Miranda Does (or Ever Did)?*

Based on his experience as a public defender before entering academia, and discussions with many of his indigent clients, Charles Ogletree has underscored the need for a non-waivable right to the advice of counsel: “I would propose the adoption, either judicially or legislative, of a per se rule prohibiting law enforcement authorities from interrogating a suspect in custody who has not consulted with an attorney.”<sup>302</sup>

The husband-wife team of Irene and Yale Rosenberg has made a proposal that goes still further. They maintain that statements made by custodial suspects to law enforcement officials should be inadmissible: (a) whether or not made in response to police questioning, (b) whether or not the suspects had earlier been advised of their rights by the police; and (c) evidently, whether or not they had earlier obtained the advice of counsel.<sup>303</sup>

The Rosenbergs maintain that “suspects who are in custody cannot make truly voluntary or noncompelled confessions.”<sup>304</sup> Although they recognize that “*Miranda* focused on the inherent coerciveness of custodial *interrogation*,”<sup>305</sup> the Rosenbergs believe that “it is custody in and of itself that is coercive.”<sup>306</sup>

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302. Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1830 (1987).

303. Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 75 (1989).

304. *Id.* at 109.

305. *Id.* at 110 (emphasis in original).

306. *Id.*

Otis Stephens, Jr., has suggested still another possible solution to the police interrogation problem: “Probably nothing short of a blanket requirement that no suspect be questioned except in the presence of his attorney could be expected to remove the elements of psychological coercion to which the Court has so long objected.”<sup>307</sup>

Although some of these proposals or suggestions go further than others, I believe they have one thing in common: No Supreme Court or Congress or state legislature would seriously consider any of them.

The Warren Court was undoubtedly more concerned about protecting the rights of custodial suspects than any other Supreme Court in American history. As one commentator aptly put it, “[t]he history of the Warren Court may be taken as a case study of a court that for a season determined to employ its judicial resources in an effort to alter significantly the nature of American criminal justice in the interest of a larger realization of the constitutional ideal of liberty under the law.”<sup>308</sup>

Nevertheless, this Court appears to have been so closely divided over the rights of custodial suspects that it was barely able to go as far as it did. According to one Justice who attended the March 1966 meeting on *Miranda*, if FBI agents had not been informing suspects of their rights for a number of years (although not as extensively as *Miranda* required), Chief Justice Warren’s views might not have been supported by a majority of the Court.<sup>309</sup>

It is worth recalling that, twenty years after *Miranda* was handed down, Justice O’Connor, speaking for a majority of the Court, reminded us that *Miranda* “[d]ecline[d] to adopt the more extreme position [one advocated at the time by the ACLU] that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation.”<sup>310</sup> The *Miranda* Court decided instead that “the suspect’s Fifth Amendment rights could be adequately protected by less intrusive means.”<sup>311</sup>

Looking back at *Miranda*, Justice O’Connor emphasized that the opinion was *not* based on the premise that “the rights and needs of the

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307. OTIS H. STEPHENS, JR., *THE SUPREME COURT AND CONFESSIONS OF GUILT* 205 (1973).

308. Allen, *supra* note 43, at 525.

309. See BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT* 589 (1983). Professor Schwartz does not identify the Justice. However, he does quote Justice Fortas, a member of the 5-4 majority in *Miranda*, to the effect that the *Miranda* decision was “entirely” Warren’s. See *id.*

310. Moran v. Burbine, 475 U.S. 412, 426 (1986); see also *supra* note 25.

311. *Id.*

defendant are paramount to all others.”<sup>312</sup> Rather, it “embodies a carefully crafted balance designed to fully protect *both* the defendant’s and society’s interests.”<sup>313</sup> As I noted at the time, this is the way “*Miranda*’s defenders—not its critics—have talked about the case for the past twenty years.”<sup>314</sup>

B. *Should We Give Up on Miranda and Reinvigorate the Old Due Process/“Totality of the Circumstances”/“Voluntariness” Test?*

As he points out, Charles Weisselberg has “long been an advocate of the *Miranda* decision and its theoretically bright-line rules.”<sup>315</sup> But he no longer is. In an important article, Professor Weisselberg has spelled out the various ways the Supreme Courts that have succeeded the Warren Court have “effectively encouraged police practices that have gutted *Miranda*’s safeguards, to the extent those safeguards ever truly existed.”<sup>316</sup> He concludes that the time has come to give *Miranda* a respectful burial “and move on.”<sup>317</sup>

I agree with much of what Professor Weisselberg has to say about *Miranda*. For example, I share his concern (as any reader of this Article who has come this far with me would know) that we no longer have “a clean separation between administration of *Miranda* warnings and the use of interrogation tactics, at least not in the way the *Miranda* Court envisioned.”<sup>318</sup> (Weisselberg wrote this two years *before* the *Thompkins* case was decided!)<sup>319</sup>

I also agree with Professor Weisselberg when he points out:

Observational studies and my review of training materials provide significant evidence that the warnings and waiver regime has moved at least partway into the interrogation process, contrary to the “time out” from the pressures of interrogation the Court imagined. Officers may use pre-*Miranda* conversation to build rapport, which is important to obtaining a *Miranda* waiver and—eventually—a statement. Officers may

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312. *Id.* at 433 n.4.

313. *See id.* (emphasis in original).

314. Yale Kamisar, *The “Police Practice” Phases of the Criminal Process and the Three Phases of the Burger Court*, in *THE BURGER YEARS* 143, 150 (Herman Schwartz ed., 1987).

315. Weisselberg, *supra* note 3, at 1524.

316. *Id.* at 1521.

317. *Id.*

318. *Id.* at 1562.

319. See the discussion of *Berghuis v. Thompkins* in *supra* notes 236–301.

also downplay the significance of the warning or portray it as a bureaucratic step to be satisfied before a conversation may occur. There is also evidence that police often describe some of the evidence against suspects before seeking waivers . . . .

. . . If more police seek “agreements [from suspects] to listen” or give warnings only after making a confrontation statement, then we may truly say that *Miranda*’s safeguards have been relocated to the heart of the psychological process of interrogation.<sup>320</sup>

Professor Weisselberg also tells us that “the best evidence is now that a significant percentage of suspects cannot comprehend the warnings or the rights they are intended to convey.”<sup>321</sup> To make matters worse, the Supreme Court has permitted the police officers who are required to give the *Miranda* warnings a good deal of leeway in doing so.<sup>322</sup>

It would be hard to deny that the current state of the law governing the admissibility of confessions leaves much to be desired. But is Weisselberg’s response the correct one? He would give up on *Miranda* and “move on.”<sup>323</sup> Move on to what? To the old due process/“totality of the circumstances”/“voluntariness” test—a standard that he hopes will be reinvigorated and provide a more formidable protection for custodial suspects than *Miranda* does.<sup>324</sup>

First of all, before we return to full-fledged reliance on the “voluntariness” test, what institution will abolish *Miranda*? I am painfully aware that some Supreme Court Justices do not take *Dickerson v. United States* seriously.<sup>325</sup> Nevertheless, in *Dickerson*, a 7-2 majority *did* inform us that “*Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress.”<sup>326</sup> Under these circumstances, I think it fair to say that there would be little or no support for *another* federal statute “overruling” *Miranda*. If *Miranda* is to be given a decent burial, the Supreme Court itself will have to conduct the ceremony.

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320. Weisselberg, *supra* note 3, at 1562–63.

321. *Id.* at 1563. According to the most significant study of *Miranda* warnings and mental disability, Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 540–41 (2002), mentally disabled subjects “understood only about 20% of the critical words comprising the *Miranda* vocabulary.” Weisselberg, *supra* note 3, at 1570.

322. See Weisselberg, *supra* note 3, at 1564 (discussing *Duckworth v. Eagan*, 492 U.S. 195 (1989)).

323. See *supra* note 317.

324. See Weisselberg, *supra* note 3, at 1597–99.

325. See *supra* notes 210–14 and accompanying text.

326. *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

So far as I can tell, the Court might overrule *Miranda* for any one or combination of three reasons: (1) a majority might believe that even a seriously weakened *Miranda* was still making life too difficult for law enforcement officials; (2) a majority might be sufficiently unconcerned about the rights of custodial suspects to pay even lip service to the privilege against self-incrimination or the right to counsel when a person is in the stationhouse; or (3) a majority of the Court might be willing, perhaps even eager, to give the trial courts a larger role in administering the law of confessions. As for reason (3), this is probably why the 1968 statute that purported to abolish *Miranda* would have applied only one standard—the “voluntariness” test. As Steve Schulhofer has observed, this test “virtually invited [trial judges] to give weight to their subjective preferences” and “discouraged active review even by the most conscientious appellate judges.”<sup>327</sup>

It is hard to see why a Court that was sufficiently disenchanted with *Miranda* to overrule it would want to reshape the old “voluntariness” test so that it furnished custodial suspects more protection than did the *Miranda* regime. Why, for example, would the Court that overruled *Miranda* want to use the “voluntariness” test to establish a cleaner separation between the giving of the warnings and the employment of interrogation tactics?

Would there be any “warnings of rights” requirement at all under the new voluntariness regime? Would a Court that overruled *Miranda* be likely to require the police to advise custodial suspects of their rights all over again? If so, what reason do we have to expect that the percentage of suspects who comprehend the warnings would *increase*?

As long as law enforcement officials administer the warnings, how can we expect them to advise suspects of their rights more clearly and more emphatically than they do now? If, in a world without *Miranda*, law enforcement officials are no longer required to give the warnings, suspects may still remember their rights from old TV shows. But eventually wouldn’t the percentage of suspects who know their rights *decrease sharply*?

I did say recently that even if neither the Fifth Amendment privilege nor the Sixth Amendment right to counsel were deemed applicable to the states, the Supreme Court could still have provided custodial suspects more protection by turning to the old “voluntariness” test and reinforcing it.<sup>328</sup> But I was discussing a very different Supreme Court than the one

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327. Schulhofer, *supra* note 7, at 869–70.

328. See Yale Kamisar, *How Much Does It Really Matter Whether Courts Work Within the*

we have today. I was talking about the Warren Court, a Court “greatly concerned about the many inadequacies of the prevailing test for the admissibility of confessions . . . and determined to do something about it.”<sup>329</sup> But why would the current Court, one that has permitted *Miranda* to be weakened in various ways, want to fortify the voluntariness test so custodial suspects would receive greater protection?

Apparently, Professor Weisselberg believes that state legislatures might do what the Supreme Court, and courts generally, have failed to do in recent years—provide custodial suspects with greater protection. “[M]ost importantly,” he tells us, state legislatures “might require videotaping, a movement that is gaining strength among the states.”<sup>330</sup>

After a slow start, post-*Miranda* electronic recording of police interrogations has indeed gained strength among the states.<sup>331</sup> But this movement is occurring while *Miranda* is still on the books. Noteworthy, too, is the fact that the first two states to require their law enforcement officers to tape custodial police interrogations, Alaska (1985) and Minnesota (1994), both did so by *state court decision*, not state legislation.<sup>332</sup>

Moreover, a specific state may choose to record custodial interrogation for a reason peculiar to that state. For example, it appears that “the push” for tape recording in Illinois “arose from a spate of false confession cases and questionable interrogations that have plagued Illinois law enforcement and undermined the general public’s faith in the criminal justice system.”<sup>333</sup>

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“Clearly Marked” Provisions of the Bill of Rights or With the “Generalities” of the Fourteenth Amendment?, 18 J. CONTEMP. LEGAL ISSUES 513, 522–27 (2009). After all, the Warren Court told us that the fact that “a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation . . . is a significant factor in considering the voluntariness of statements later made.” *Davis v. North Carolina*, 384 U.S. 737, 740–41 (1966) (emphasis added) (applying the “voluntariness” test on habeas corpus).

329. Kamisar, *supra* note 328, at 525 n.59.

330. Weisselberg, *supra* note 3, at 1597.

331. BRANDON L. GARRETT, *CONVICTING THE INNOCENT* 248 (2011) (finding that “[at] least 500 police departments now videotape interrogations. Police in these departments have reported positive experiences with videotaping and say that recording does not discourage a suspect’s cooperation”).

332. Alaska required tape recording as a matter of due process under its state constitution. *See Stephan v. State*, 711 P.2d 1156 (Alaska 1985). Minnesota followed when the state supreme court exercised its supervisory powers over state criminal justice. *See State v. Scales*, 518 N.W.2d 587 (Minn. 1994). Today, however, most of the nineteen jurisdictions that “require or encourage electronic recording of at least some interrogations” do so by statute. *See GARRETT, supra* note 331, at 248.

333. Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations is the Solution to Illinois’ Problem of False Confessions*, 32 LOYOLA U. CHI. L.J. 337, 339 (2001).



The need for video and audiotaping would undoubtedly be great if the admissibility of confessions turned on the spongy, unruly “voluntariness” test.<sup>334</sup> But electronic recording is also quite important under a *Miranda* regime. After all, “absent a recording, there is simply no way to adequately determine whether the police complied with the *Miranda* requirements [for example, gave the fourfold warnings at the appropriate time] or whether the suspect provided a knowing and voluntary waiver.”<sup>335</sup>

It is not at all clear whether the demise of *Miranda* would lead to an acceleration of electronic recording of police interrogation. “[M]ost police departments still do not record interrogations, and many of those

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334. Paul Cassell has forcefully argued that custodial suspects should be deprived of certain *Miranda* rights in return for a requirement that all police interrogators be videotaped. See Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 486–96 (1996). Under Cassell's proposal, a suspect would be warned of his right to a lawyer, but *only when brought before a judge*. Moreover, police questioning could proceed whether or not the police obtained an affirmative waiver of the right to remain silent. Finally, the police would no longer be required to stop questioning suspects who tried to end the interrogation or sought a lawyer's help. Professor Cassell asks: “[I]f you were facing a police officer with a rubber hose, would you prefer a world in which he was required to mumble the *Miranda* warnings and have you waive your rights, all as reported by him in later testimony? Or a world in which the interrogation is videorecorded and the burden is on law enforcement to explain if it is not . . . ?” *Id.* at 487. There is much to be said for videotaping police interrogations. Nevertheless, I am not happy with Cassell's proposal. One reason is that I was quite disappointed by *Miller v. Fenton*, 796 F.2d 598 (3d Cir. 1986), one of the relatively few reported cases where the police interrogation was recorded.

In *Miller*, a 2-1 majority concluded that the confession made by the defendant (the prime suspect in a brutal murder case) was “voluntarily given.” *Id.* at 600. (Because the suspect had waived his *Miranda* rights, the court fell back on the “voluntariness” test.) However, the police interrogator repeatedly assured the suspect that he was not a criminal who should be punished, but only a mentally ill person who was not responsible for the murder or for anything else he might have done. *Id.* at 602. Moreover, although the 2-1 majority purported to consider the “totality of the circumstances,” it did not seem to take into account that at the end of the interrogation (an admittedly brief one), the defendant collapsed into a catatonic state and was rushed to a hospital. *Id.* at 604.

When it comes to the permissible use of police trickery and deception (which is frequently the issue when suspects waive their *Miranda* rights, as they often do), judges are likely to be far apart—as they were in *Miller v. Fenton*. Therefore, I am inclined to agree with Steve Schulhofer. He recognizes (as I do) that videotaping is an extremely valuable tool (for *both* the police interrogator *and* the custodial suspect), but maintains that “without clear substantive requirements against which to test the police behavior that the videotape will reveal, the objective record will lack any specific legal implications.” Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 556 (1996).

Moreover, it is unclear whether Professor Cassell's proposal satisfies the need for a procedure that is as “effective” as the *Miranda* system “in securing Fifth Amendment rights.” See Dickerson v. United States, 530 U.S. 428, 440 n.6 (2000).

335. LEO, *supra* note 2, at 300. For the view that there are three constitutional grounds for requiring police interrogations to be taped, see Slobogin, *supra* note 2.

who do tape selectively or only tape the admission.”<sup>336</sup> Moreover, the FBI, “regarded by some as an exemplar of police professionalism, still refuses to record interrogations as a matter of policy.”<sup>337</sup> Proponents of audio and videotaping are unlikely to best the FBI in state legislatures.

Professor Weisselberg’s optimism about what might happen in a world without *Miranda* is not limited to visualizing a sharp increase in the electronic recording of police interrogation. He also tells us:

One possible outcome [of the overruling of *Miranda*] might be legislation that directly regulates the police and affords greater protection to suspects than *Miranda* currently provides. A legislature might, for example, require warnings in very simple language and instruct police to give them prior to any suspect interviews or interrogations. It might prohibit some forms of deception by officers during interrogation.<sup>338</sup>

What is the basis for such optimism? In the last 100 years, how often has Congress or the state legislatures demonstrated concern about the rights of custodial suspects facing police interrogation?

Justice Robert Jackson once observed: “In Great Britain, to observe civil liberties is good politics and to transgress the rights of the individual or the minority is bad politics. In the United States I cannot say this is so.”<sup>339</sup> Although Jackson made this comment more than fifty years ago, I still think it rings true.

The Wickersham Commission Report—detailing the widespread use of the “third degree” by law enforcement officers—was published in 1931.<sup>340</sup> The “third degree” was “an affront to human dignity and a source of unreliable confessions.”<sup>341</sup> Nevertheless, so far as I can tell, for the next thirty years neither Congress nor any state legislature even came close to passing any laws pertaining to police lawlessness in obtaining

336. LEO, *supra* note 2, at 296; see also Andrew E. Taslitz, *High Expectations and Some Wounded Hopes: The Policy and Politics of a Uniform Statute on Videotaping Custodial Interrogations*, 7 NW. J. L. & SOC. POL’Y 400, 401 (2012).

337. LEO, *supra* note 2, at 296.

338. Weisselberg, *supra* note 3, at 1597.

339. ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 82 (1955). Justice Jackson added: “[Any] court which undertakes [to] enforce civil liberties needs the support of an enlightened and vigorous public opinion which will be intelligent and discriminating as to what cases really are civil liberties cases and what questions really are involved in these cases. I do not think the American public is enlightened on this subject.” *Id.*

340. NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, *REPORT ON LAWLESSNESS IN LAW ENFORCEMENT* (1931) [hereinafter *Wickersham Report*]; see generally LEO, *supra* note 2, at 41–77.

341. Friendly, *supra* note 195, at 710.

confessions. (By the 1960s, of course, the Warren Court's so-called revolution in American criminal procedure was underway.)

At the time of the Wickersham Report (and for many years thereafter), federal law enforcement officers and most of their state counterparts were required to bring suspects promptly or "without unnecessary delay" to magistrates or commissioners so that they could be advised of their rights. Moreover, the judicial officers could decide whether there was good cause to hold the suspects for trial. Unfortunately, the prompt commitment requirements were not enforced; they continued to be "empty of force or consequence."<sup>342</sup>

However, Professor Zechariah Chafee, who had worked for the Wickersham Commission, made a relatively modest proposal: exclude any confession obtained by the police at a time when they were holding the suspect in violation of the prompt commitment requirement.<sup>343</sup> Once again, as far as I can tell, neither Congress nor any state legislature seemed interested.

But the Supreme Court was. A decade after Chafee had made his proposal, the Court in effect adopted it—in the famous case of *McNabb v. United States*.<sup>344</sup> The *McNabb* case was heavily criticized by members of Congress.<sup>345</sup> "Congress just reacted with a proposal—the Hobbs Bill—which was designed to overturn *McNabb* and which passed the House three times, but repeatedly died in committee in the Senate."<sup>346</sup>

Although *McNabb* was reaffirmed in *Upshaw v. United States* (1948)<sup>347</sup> and again in *Mallory v. United States* (1957),<sup>348</sup> criticism of the rule, which came to be known as the *McNabb-Mallory* rule, did not let up. As the authors of the most comprehensive discussion of the rule describe the reaction to *Mallory*:

The *Mallory* decision was greeted by law enforcement officials

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342. James E. Hogan & Joseph M. Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1, 3 (1958).

343. Zechariah Chafee, *Remedies for the Third Degree*, ATLANTIC MONTHLY, Nov. 1931, at 621, 630.

344. 318 U.S. 332 (1943). The *McNabb* case did not rest on any specific provision of the Constitution. Instead, it was an exercise of the Court's supervisory power over the administration of federal criminal justice. Justice Frankfurter and Chafee had once been colleagues on the Harvard Law faculty. Although Chafee's article was not cited in *McNabb*, it is hard to believe that Justice Frankfurter did not read Chafee's article before ascending to the Supreme Court.

345. See generally Hogan & Snee, *supra* note 342.

346. Note, *Prearrest Interrogation and the McNabb-Mallory Miasma: A Proposed Amendment to the Federal Rules of Civil Procedure*, 68 YALE L.J. 1003, 1008 (1959).

347. 335 U.S. 410 (1948).

348. 354 U.S. 449 (1957).

of the District of Columbia (where its impact was greatest) with something bordering on panic. The Chief of the Metropolitan Police Department declared (hyperbolically, it is hoped) that the decision renders the Police Department “almost totally ineffective.” There were loud demands for a legislative re-examination of the law of arrest, and in the Congress bills were introduced either to expand the period of allowable detention or to abolish the *McNabb* rule itself.<sup>349</sup>

When one studies Congress’s reaction to the *McNabb-Mallory* line of cases, there is little reason to expect that body to fill the gap caused by the continued weakening (or overruling) of *Miranda*. Nor does the reaction of the states to the *McNabb-Mallory* rule provide much reason for hope either.

Although *McNabb* was decided in 1943, not a single state followed the Supreme Court’s lead until the 1960s. Then, in the next twenty years, seven states did adopt some version of the *McNabb-Mallory* rule.<sup>350</sup> But what I consider more significant than the number of states (and there were not many) is that all but one (Connecticut) did so by *state court decision*.<sup>351</sup>

No survey of the politics of crime in America, however brief, would be adequate without mentioning Congress’s lopsided votes in support of the 1968 bill to “overrule” *Miranda* and reinstate the “voluntariness” test. As a strong critic of the Warren Court’s criminal procedure cases has recognized:

[T]he situation with which the Court was confronted was sufficiently disturbing that those of us who fear that the Court’s answer will unduly hamper police interrogation ought to search hard for alternatives rather than take the easy course of returning simply to the rule that statements to the police are admissible unless ‘involuntary.’<sup>352</sup>

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349. Hogan & Snee, *supra* note 342, at 17. A provision of 18 U.S.C. § 3501, the 1968 law that purported to “overrule” *Miranda*, Part (c), was aimed at the *McNabb-Mallory* rule. It states, in part that a confession by a person under arrest or detention “shall not be inadmissible solely because of delay in bringing such person before a magistrate judge . . . if such confession was made [within] six hours immediately following [the person’s] arrest or other detention.” 18 U.S.C. § 3501(c) (2006). Moreover, the six-hour time limitation does not apply where the delay is found to be “reasonable” considering the means of transportation and the distance to be traveled. *Id.* See generally *Corley v. United States*, 556 U.S. 303 (2009).

350. See generally Jerald P. Keene, *The Ill-Advised State Court Revival of the McNabb-Mallory Rule*, 72 J. CRIM. L. & CRIMINOLOGY 204 (1981).

351. The Connecticut statute is discussed in *State v. Vollhardt*, 244 A.2d 601, 607 (Conn. 1968).

352. Friendly, *supra* note 195, at 711–12.

Unfortunately, that is essentially what the Congress did.

The “anti-*Miranda*” bill passed the Senate 72 to 4.<sup>353</sup> The House vote was equally overwhelming. The House voted 317 to 60 against a conference and then 369 to 17 in favor of accepting the Senate version.<sup>354</sup>

I trust I have said enough to explain why I share Don Dripps’s view that, as a general proposition, “so long as the vast bulk of police and prosecutorial power targets the relatively powerless (and when will that ever be otherwise?), criminal procedure rules that limit public power will come from the courts or they will come from nowhere.”<sup>355</sup>

C. *Is the Best Solution Interrogation by, or in the Presence of, a Magistrate or Other Judicial Officer?*

In 1932—a long time ago considering the developments in criminal procedure that have occurred since then<sup>356</sup>—Professor Paul Kauper proposed that traditional police interrogation be replaced by judicial or judicially-supervised questioning.<sup>357</sup> In the wake of *Miranda*, two eminent judges, first Illinois Supreme Court Justice Walter Schaefer and then Judge Henry Friendly, returned to the Kauper proposal and built upon it.<sup>358</sup> Thus, Kauper’s proposal became known as the “Kauper-Schaefer-Friendly” model.<sup>359</sup>

Although Schaefer and Friendly revised some aspects of the 1932

353. See Kamisar, *supra* note 39, at 893.

354. See *id.* at 894. One reason the House may have moved so quickly is that the very day it began consideration of the bill, Senator Robert F. Kennedy was assassinated. See *id.* at 893. A number of House members cited this event as a reason for prompt action. *Id.* at 893–94. However, the day after Robert Kennedy died, his legislative assistant, Peter Edelman, “angrily criticized” the attempt of some proponents of the crime bill “to cash in on the tragedy, pointing out that the bill ‘contains measures that [Senator] Kennedy very deeply opposed.’” RICHARD HARRIS, *THE FEAR OF CRIME* 108 (1969).

355. Dripps, *supra* note 200, at 45–46.

356. For example, Kauper’s article was written four months before *Powell v. Alabama*, 287 U.S. 45 (1932), the famous right-to-counsel case, and four years before *Brown v. Mississippi*, 297 U.S. 278 (1936), the Court’s first Fourteenth Amendment Due Process “coerced confession” case.

357. Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932). Although, as Kauper himself made clear, he was not the first to make the proposal, he was the first to evaluate with any degree of thoroughness the policy and constitutional issues raised by such a plan. See Yale Kamisar, *Kauper’s “Judicial Examination of the Accused” Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 15 n.3 (1974).

358. See Friendly, *supra* note 195, at 708–16; see also WALTER V. SCHAEFER, *THE SUSPECT AND SOCIETY* 78–81 (1967).

359. This model is discussed at considerable length in Kamisar, *supra* note 357.

Kauper proposal, one feature remained the same—"[t]he only sanction," in the event the suspect refused to answer any questions when brought before a judicial officer, would be disclosure of this refusal at the trial.<sup>360</sup>

In one respect, at least, the Kauper-Schaefer-Friendly plan and the *McNabb-Mallory* rule are related. Each is based on the premise that suspects should be taken out of the hands of the police (the danger period) as quickly as possible and brought before a presumably more neutral magistrate or other judicial officer.

Professor Kauper balked at allowing a suspect's lawyer to be present at the pretrial hearing before a judicial officer.<sup>361</sup> One reason was that he thought it would take too long to arrange to have a lawyer at the suspect's side. (It certainly would have in the 1930s, when there were few, if any, public defenders.) By the time counsel arrived, maintained

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360. Friendly, *supra* note 195, at 713; SCHAEFER, *supra* note 358, at 80.

Three decades after Judges Friendly and Schaefer revised the Kauper proposal, Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995), offered another plan, one which seemed to start out like the Kauper proposal, but then moved in a different direction. Under the Amar-Lettow proposal (criticized in Yale Kamisar, *On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929 (1995)), a suspect who refused to answer any questions at a judicially supervised pretrial hearing could be held in contempt. Moreover, even if the suspect were compelled to answer, whether at the pretrial hearing or in the police station, significant evidence might still be admissible.

Although the suspect's compelled *words* could not be used against him, the evidence *derived from* such words—for example, the whereabouts of damaging evidence or the existence and identity of prosecution witnesses—would still be admissible. *See id.* at 858–59, 898–99. Why so? "Physical evidence . . . can be introduced at trial whatever its source—even if that source is a compelled pretrial utterance" because "[a] witness testifies but physical evidence does not." *Id.* at 900.

Some 120 years ago, the Court struck down a federal immunity statute because it merely prohibited *the use* of the testimony given—not the use of information *derived from* the compelled testimony. *See Counselman v. Hitchcock*, 142 U.S. 547 (1892); *see also Ullmann v. United States*, 350 U.S. 422, 437 (1956). The Court has made plain that the use *and derivative use* of the compelled testimony is coextensive with the scope of the privilege against self-incrimination. *See Kastigar v. United States*, 406 U.S. 441 (1972); *see also* Kamisar, *supra* at 930–36.

The Court has forbidden comment on the refusal of a defendant to testify at his own trial because such comment amounts to "a penalty imposed by courts for exercising a constitutional privilege." *Griffin v. California*, 380 U.S. 609, 614 (1965). Why would the Court allow a magistrate or other judicial officer presiding over a pretrial hearing to hold a suspect in contempt for refusing to answer? Whatever one's views about the significance of *Miranda*, we are talking about something else—the contempt sanction—the power to *compel* a person to speak within the meaning of the Fifth Amendment.

Amar and Lettow contemplate a day when police interrogation no longer occurs in the stationhouse, only at a pretrial hearing presided over by a judicial officer. However, if the courts follow the lead of Amar and Lettow, I doubt that day will ever arise. If the courts allow the police to use the often-valuable evidence *derived from* an inadmissible confession, why would the police ever cease questioning suspects in the stationhouse?

361. Kauper, *supra* note 357, at 1247.

Kauper, the interrogation before the magistrate would “lose its effectiveness” for “[i]ts value depends upon interrogation immediately upon arrest.”<sup>362</sup>

It is understandable if a right to counsel at a judicially-supervised interrogation seemed neither “fair” nor “feasible” in 1932.<sup>363</sup> But it seems both fair and feasible today. Therefore, although Judge Schaefer does not specifically consider this issue, Judge Friendly assumed Schaefer would require defense counsel to be present at the judicially-supervised interrogation (as Friendly himself would).<sup>364</sup>

Professor Kauper proposed that “a complete record should be kept of the interrogation”<sup>365</sup> and that the suspect should be told that the entire record of the interrogation would go to the trial court.<sup>366</sup> I am confident that if today’s technology were available when Kauper made his proposal eighty years ago, he would have required that the interrogation be electronically recorded.

So far as I can tell, there has been sparse support for the Kauper-Schaefer-Friendly proposal since Judges Friendly and Schaefer revived it more than forty years ago. One reason is obvious: If anything can doom a reform proposal, it is the need for a constitutional amendment to effectuate it. Because the Supreme Court had recently held that comment on the defendant’s failure to take the witness stand in his own defense constituted a violation of the Self-Incrimination Clause,<sup>367</sup> both Friendly and Schaefer assumed that the plan they supported would require a constitutional amendment.<sup>368</sup>

Whether an amendment to the Constitution is necessary to clear the way for the Kauper-Schaefer-Friendly plan is not perfectly clear. At least two commentators (Albert Alschuler and former federal judge Marvin Frankel) maintain that an amendment is not needed.<sup>369</sup> On the other hand, several commentators believe Judges Friendly and Schaefer

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362. *Id.*

363. Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 6 (1956) (“Due process . . . at any given time includes those procedures that are fair and feasible in the light of then existing values and capabilities.”).

364. See Friendly, *supra* note 195, at 713.

365. Kauper, *supra* note 357, at 1248.

366. See *id.* at 1240.

367. See *Griffin v. California*, 380 U.S. 609 (1965).

368. See Friendly, *supra* note 195, at 721–22; see also SCHAEFER, *supra* note 358, at 78.

369. See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2670–72 (1996); Marvin Frankel, *From Private Rights to Public Justice*, 51 N.Y.U. L. REV. 516, 531 (1976).

were right the first time.<sup>370</sup> But whether the constitutional problems raised by the Kauper-Schaefer-Friendly plan are insurmountable short of an amendment, they seem formidable enough to discourage even reform-minded state legislatures.

Putting aside constitutional questions, I think there is another reason why few state legislatures, if any, would be attracted to the Kauper-Schaefer-Friendly proposal. There are too many unanswered questions about (a) the role of the police officer who first meets the suspect at the police station, (b) the role of the police officer who takes the suspect to the site of the judicially-supervised interrogation, (c) the role of defense counsel who attends the judicially-supervised interrogation, and (d) the role of the magistrate or judicial officer who presides over the judicially-supervised interrogation.

It is not at all clear how much room the police officer has to maneuver when he first confronts the suspect or arrestee in the police station. Suppose the suspect blurts out an incriminating statement? May the police officer ask a follow-up question? Suppose, without any prodding on the part of the officer, the suspect informs the officer that he wants to tell him his “side of the story.” May the police officer listen?

What, if anything, may the police officer say to the suspect when he drives him to the site of the judicially-supervised interrogation? May the officer engage in conversation with the suspect, so long as he or she does not touch upon the case? Or would even a conversation about the previous night’s baseball game or the news of the day be prohibited on the ground that the officer was trying to build a rapport with the suspect?

Once the hearing before a judicial officer gets underway, what is the role of the defense lawyer?<sup>371</sup> Will the lawyer be able to object to some questions (or *any* question) and warn her client not to answer? When a police officer tells a suspect that his accomplice has already confessed and is “putting all the blame” on the suspect, may the defense lawyer warn the suspect that this is an “old police trick”? Will the defense

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370. See Donald A. Dripps, *Forward: Against Police Interrogation—and the Privilege Against Self-Incrimination*, 76 J. CRIM. L. & CRIMINOLOGY 699, 730 (1988); Phillip E. Johnson, *A Statutory Replacement for the Miranda Doctrine*, 24 AM. CRIM. L. REV. 303, 309 (1987); Stephen A. Saltzburg, *Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1, 25 (1986).

371. Because Professor Kauper operated on the premise that a defense lawyer would *not* be present at the judicially-supervised proceeding, he had no occasion to discuss the defense lawyer’s role. But he left no doubt that if a defense lawyer were present she would be able to act just as she does at the criminal trial itself. She would “urge [the client] to be guarded in his replies, encourage him to fabricate a denial or alibi, and make vexatious objections to questions put by the magistrate.” Kauper, *supra* note 357, at 1247.



lawyer be able to demand proof that her client's accomplice *has* confessed?

Finally, what about the role of the judicial officer who presides over the pretrial hearing? Even though a police officer or prosecutor will be doing the bulk of the questioning, may the judicial officer intervene at *some* point? Suppose the police interrogator tells the suspect or arrestee: "I'm your brother, you and I are brothers?"<sup>372</sup> Or suppose the interrogator assures the suspect: "You are not a criminal; you are only someone who needs help, but I can't help you unless you trust me?"<sup>373</sup> At *some* point, may the judicial officer interrupt the police officer *even though* the defense lawyer has made no objection?

Whether defense counsel is allowed to attend the judicially-supervised interrogation and act with the same freedom a defense lawyer has at the criminal trial itself may prove to be a decisive issue. Defense lawyers, public defenders, and civil libertarians are likely to be quite unhappy if the answer is in the negative. On the other hand, law enforcement officers are likely to be equally unhappy if defense lawyers are going to be allowed to block their efforts to obtain incriminating statements. Law enforcement officials are likely to emphasize a point Kauper made a long time ago—in order for police interrogation to be effective it must take place "immediately upon arrest."<sup>374</sup>

If it turns out that under the Kauper-Schaefer-Friendly plan, the defense lawyer will have as much freedom to defend her client at the pretrial hearing as she does at the criminal trial itself, then, in some respects, the situation will be similar to "the more extreme position" advocated by the ACLU, but rejected by the *Miranda* Court—requiring the defense lawyer to be actually present in order to dispel the coercion inherent in custodial interrogation.<sup>375</sup> To be sure, the defendant who declines to speak at the pretrial proceeding will pay a price if the case goes to trial: the jury will be told that the defendant refused to speak at the earlier hearing. But how steep a price is this?

Recently, the Supreme Court reminded us that "ours 'is for the most part a system of pleas, not a system of trials'"—"ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."<sup>376</sup> Nor is that all. Even if a defendant chooses

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372. See *Miller v. Fenton*, 796 F.2d 598, 602 (3d Cir. 1986).

373. See *id.* at 602, 609, 636.

374. See *supra* note 361.

375. See *supra* notes 310–14.

376. *Missouri v. Frye*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1399, 1407 (2012).

to remain silent at the judicially-supervised interrogation, he could still testify at his trial. Moreover, I assume he could still tell the jury that he declined to speak earlier only because at that particular point in time his lawyer told him he lacked a complete grasp of the factual situation.

Shortly after Professor Kauper and some others proposed a judicially-supervised interrogation as a substitute for traditional police interrogation, “legislation was urged in several states.”<sup>377</sup> What happened?

According to Justice Schaefer: “Perhaps because constitutional doctrines did not then, as now, threaten the extinction of police questioning, the proposals met with public indifference or hostility. The police were especially hostile . . . .”<sup>378</sup>

Justice Schaefer’s observations that constitutional doctrines “threaten[ed] the extinction of police questioning” in the 1960s needs some clarification. Although Schaefer’s lectures were delivered two months *before* the *Miranda* case was decided, they were published a year after *Miranda* was handed down. Nevertheless his book is based on the lectures *as delivered*. The lectures discuss neither the impact of *Miranda* on police interrogation nor how *Miranda* changed existing precedent. At the time Schaefer gave his lectures, the leading case was not *Miranda*, but *Escobedo v. Illinois*.<sup>379</sup> And *Escobedo* did contain some broad, sweeping language—language that Schaefer and others believed did threaten police interrogation as we have come to know it.<sup>380</sup>

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377. SCHAEFER, *supra* note 358, at 77.

378. *Id.*

379. 378 U.S. 478 (1964).

380. To quote Justice Schaefer in his 1966 lectures, “the doctrines converging upon the institution of police interrogation are threatening to push on to their logical conclusion—to the point where no questioning of suspects will be permitted.” SCHAEFER, *supra* note 358, at 9; *see also* Arnold N. Enker & Sheldon H. Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47, 91 (1964) (voicing fears that the Court might be in the process of shaping “a novel right not to confess except knowingly and with the tactical assistance of counsel”).

I should add that Justice Schaefer and I had numerous conversations about police interrogation and confessions both before and after *Miranda*. We were both members of the Advisory Committee to the American Law Institute’s *Model Code of Pre-Arrest Procedure* project. In addition, we were fellow panelists at a number of gatherings and conferences about police interrogation and confessions both before and after *Miranda*. He was greatly concerned that the Court might ultimately abolish the institution of police interrogation.

Even after *Miranda* was decided (a case which seemed to retreat from the most sweeping language in *Escobedo*), Herbert Packer, one of the leading criminal procedure commentators of his time, observed:

[I]t seems safe to predict that if the *Miranda* rule does not produce the intended effect of reducing the incidence of confessions, particularly by suspects who do not have the financial means to obtain counsel, the Court is likely to take the next step in the direction of the Due

If police interrogation “as we know it” ever faced extinction, it is safe to say it no longer does. In fact, police interrogation seems to be faring quite well. There may have been a time in the 1960s when some police officials or prosecutors were willing to “settle for” judicially-supervised interrogation, but that time has come and gone. Law enforcement will no longer settle for judicially-supervised interrogation. Neither, I submit, will the public.

#### A FINAL REFLECTION

Most of the Warren Court’s criminal procedure cases were strongly criticized when they were handed down. *Mallory*, *Mapp v. Ohio*,<sup>381</sup> *Escobedo* and *Miranda* quickly come to mind. *Gideon v. Wainwright*,<sup>382</sup> the famous right-to-counsel case, is a conspicuous exception. Why is that?

Frank Allen once suggested that it was because *Gideon* was “supported by a broad ethical consensus.”<sup>383</sup> I hesitate to disagree with Professor Allen because when I started writing about criminal procedure I found him more helpful than anyone else. But I doubt that the warm reception *Gideon* received had much to do with the “broad ethical consensus” supporting it.

It is true that twenty-two states urged the Supreme Court to overturn precedent and to assure that all indigent persons being prosecuted for a felony be furnished counsel “as a matter of due process of law and of equal protection of the laws.”<sup>384</sup> It is also true that when Clarence Gideon’s court-appointed lawyer, Abe Fortas, learned about the states’ amicus brief, he said he was “proud of this document as an American.”<sup>385</sup> However, when Mr. Fortas read the states’ brief, he must have soon realized that it spoke only of the need for a defense lawyer *in the courtroom*:

*Any trial, but particularly a criminal trial, is a highly complex,*

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Process Model, which would be flatly to prohibit the use in evidence of statements given by suspects to the police.

HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 194 (1968).

381. 367 U.S. 643 (1961).

382. 372 U.S. 335 (1963).

383. Allen, *supra* note 43, at 540.

384. ANTHONY LEWIS, *GIDEON’S TRUMPET* 150 (1964). The twenty-two states were led by Walter F. Mondale, Attorney General of Minnesota, and Edward J. McCormack, Jr., Attorney General of Massachusetts.

385. *Id.* at 173.

technical proceeding requiring representation by a trained legal adviser . . . *The layman cannot, for instance, be expected to know procedure, whether to testify, how to cross-examine.* The trial judge . . . can never be sure when, *during the trial*, the need for counsel will arise.<sup>386</sup>

There are many problems in criminal procedure that are beyond the control of the courts. Anthony Amsterdam once observed: “[I]f the Court strikes down a police practice, announces a ‘right’ of a criminal suspect in his dealings with the police, God only knows what the result will be.”<sup>387</sup>

But it is much easier for a judge to make sure that counsel is appointed than to see to it that *Mapp* or *Miranda* is honored. Moreover, a judge who sees to it that counsel is appointed does not have to face criticism that he “second-guessed” a police officer who had to make a quick decision.

In a case like *Gideon*, another factor is at work—visibility. “One of the most powerful features of the Due Process Model,” Herbert Packer once observed, “is that it thrives on visibility. People are willing to be complacent about what goes on in the criminal process as long as they are not too often or too explicitly reminded of the gory details.”<sup>388</sup>

Neither judges, nor other lawyers, nor spectators, like to see an untrained, uneducated criminal defendant floundering in the courtroom, trying to cross-examine a prosecution witness or trying to keep out certain evidence. But who sees the suspect in the so-called “interview room” in the early morning hours? Who sees the suspect being searched on a dark street or in an alley?

*Gideon* did not start a new trend. Several years after *Gideon* was argued, *Miranda* came before the Supreme Court. This case, too, involved the right to counsel, but at an earlier stage of the criminal process—at the police station. This time, however, not a single state sided with Mr. Miranda. Instead, twenty-seven states signed an amicus brief against him.

Justice Black once suggested that a person is in greater need of a lawyer when arrested than at any other time.<sup>389</sup> If so, were the people

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386. Brief for the State Government Amici Curiae at 4, *Gideon*, 372 U.S. 335 (No. 155) (emphasis added) (summary of argument).

387. Amsterdam, *supra* note 41, at 791. Professor Amsterdam went on to say: “Out there in the formless void, some adjustment will undoubtedly be made to accommodate the new ‘right,’ but what the product of this whole exercise will be remains unfathomable.” *Id.*

388. PACKER, *supra* note 380, at 242.

389. See KAMISAR, LAFAVE ET AL., *supra* note 107, at 567 (oral arguments in *Miranda*).

who supported Mr. Gideon when his case was before the Court, and who applauded the Court's opinion when it was handed down, really in favor of the right to counsel? Or were they only in favor of that right when it didn't hurt too much?