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Miranda and Some Puzzles of 'Prophylactic' Rules

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MIRANDA AND SOME PUZZLES OF "PROPHYLACTIC" RULES*

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Constitutional law scholars have long observed that many doctrinal rules established by courts to protect constitutional rights seem to "overprotect" those rights, in the sense that they give greater protection to individuals than those rights, as abstractly understood, seem to require.[1] Such doctrinal rules are typically called "prophylactic" rules.[2] Perhaps the most famous, or infamous, example of such a rule is *Miranda v. Arizona*,[3] in which the Supreme Court implemented the Fifth Amendment's privilege against self-incrimination[4] with a detailed set of directions for law enforcement officers conducting custodial interrogations, colloquially called the *Miranda* warnings.[5]

Miranda kicked off an energetic debate over the legitimacy of the Court's creation of so-called prophylactic rules, as well as the scope of Congress's power to alter or displace these rules. The Court breathed new life into this debate once again last term when, in *Dickerson v. United States*,[6] it refused to let Congress dispense with the *Miranda* warnings in

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1. *E.g.*, Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988).

2. Scholars have defined "prophylactic rules" in slightly different ways. *See, e.g.*, Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1032 (2001) ("A 'constitutional prophylactic rule' is a judicially-created doctrinal rule or legal requirement determined by the Court as appropriate for deciding whether an explicit or 'true' federal constitutional rule is applicable."); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926 (1999) (using term "to refer to those risk-avoidance rules that are not directly sanctioned or required by the Constitution, but that are adopted to ensure that the government follows constitutionally sanctioned or required rules"). To the extent the phrase "prophylactic rule" has a useful denotation, but see *infra* text accompanying notes 80-93 (arguing phrase is generally more misleading than helpful), I prefer defining the term to refer to doctrinal rules self-consciously crafted by courts for the instrumental purpose of improving the detection of and/or otherwise safeguarding against the violation of constitutional norms.

3. 384 U.S. 436 (1966).

4. "[N]or shall [any person] be compelled in any criminal case to be a witness against himself...." U.S. CONST. amend. V.

5. *See* 384 U.S. at 479. A suspect "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that 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." *Id.*

6. 530 U.S. 428 (2000).

federal interrogations, even while once again refusing to say forthrightly that those warnings are constitutionally required.

In this essay, I employ *Miranda* and *Dickerson* together as a lens through which to propose a particular way of defending the legitimacy of prophylactic doctrinal rules in constitutional law and to begin exploring some fundamental questions concerning the judicial implementation of rights. In a nutshell, I argue that, because courts frequently cannot determine with much certainty whether or not a constitutional violation has occurred in a given case, and yet courts are charged with trying to protect against constitutional violations, it is sometimes entirely appropriate for the Supreme Court to develop prophylactic rules safeguarding constitutional rights. In other words, such rules respond to the inevitability of imperfect judicial detection of constitutional wrongdoing. But I also argue that the adjective "prophylactic" in this context is both unhelpful and unfortunate; there is no difference in kind, or meaningful difference in degree, between *Miranda*'s so-called prophylactic rule and the run-of-the-mill judicial doctrines routinely constructed by the Court that we unquestioningly accept as perfectly legitimate exercises of judicial power.

I. *MIRANDA* AND *DICKERSON*

Let's begin with a brief reprise of *Miranda* and *Dickerson*. Prior to *Miranda*, the Supreme Court had long held that a criminal suspect's incriminating statements could not be admitted against her at trial if those statements were rendered involuntary by police coercion.[7] The Court enforced this prohibition by examining, on a case-by-case basis, whether in the totality of circumstances a particular defendant's

7. In *Bram v. United States*, 168 U.S. 532 (1897), the Court held that the Fifth Amendment privilege against self-incrimination barred the introduction in federal prosecutions of involuntary confessions made in response to custodial interrogation. *See also, e.g.*, Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964) (affirming this interpretation of the Self-Incrimination Clause). The Court did not hold this clause applicable to the states until 1964 in *Malloy v. Hogan*, 378 U.S. 1 (1964), however, and prior to *Malloy* the Court analyzed the admissibility of confessions in state criminal prosecutions under the Fourteenth Amendment's Due Process Clause, beginning with *Brown v. Mississippi*, 297 U.S. 278 (1936). But the due process and self-incrimination analyses have been treated as essentially the same; the question is whether custodial interrogation produced a "coerced" rather than "voluntary" confession. *See* Miller v. Fenton, 474 U.S. 104, 110 (1985) ("Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations, and is binding on the States, the Court has continued to measure confessions against the requirements of due process.") (citations omitted). *But see* Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 440-46 (1987) (arguing that compulsion for self-incrimination purposes and involuntariness for due process purposes are not entirely identical concepts).

confession was secured because her "will was overborne" by the police.[8] I will hereafter refer to this pre-*Miranda* inquiry as the "case-specific-voluntariness-test."

In *Miranda*, the Court changed course and held that this doctrinal test was insufficiently stringent. The Court discussed the ways in which custodial interrogation as then practiced by law enforcement officers across the land imposed subtle yet significant psychological pressures on suspects to confess, and it concluded that statements elicited by such custodial interrogation were presumptively coerced.[9] The Court then announced a new doctrinal rule: statements obtained through custodial interrogations cannot be admitted into evidence against a defendant unless she is first read and then waives the rights to silence and counsel mentioned in the so-called *Miranda* warnings.[10] The Court expressly invited Congress and state governments, however, to create alternative safeguards that would be "fully as effective" at protecting the Fifth Amendment prohibition — in other words, equally effective at dispelling the otherwise inherently coercive environment such interrogation creates.[11]

Only two years after *Miranda* was decided, Congress purported to respond to this invitation by enacting 18 U.S.C. § 3501, which "in essence laid down a rule that the admissibility of [statements obtained by custodial interrogation for use in federal criminal prosecutions] should turn only on whether or not they were voluntarily made."[12] For

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8. *E.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973) (noting that the question is whether "the confession [is] the product of an essentially free and unconstrained choice by its maker" or whether the defendant's "will has been overborne") (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

9. *Miranda*, 384 U.S. at 445-458.

10. *Id.* at 467-76.

11. *Id.* at 490; *see also Dickerson*, 530 U.S. at 440 (referencing *Miranda*'s invitation).

12. *Dickerson*, 530 U.S. at 432. For an argument that § 3501 is more fairly described as an attack on *Miranda* (and the Warren Court's criminal procedure precedents more generally) than a good-faith response to the *Miranda* Court's invitation of legislative alternatives, see Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda?, 85 CORNELL L. REV. 883, 887-906 (2000).

The relevant portions of § 3501 are as follows:

> § 3501. Admissibility of confessions
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> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
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> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after

various reasons, the question of whether Congress could in essence "overrule" *Miranda*'s warning requirements did not reach the Supreme Court for thirty-two years. But the issue was finally posed last year in *Dickerson*.

Many constitutional pundits thought this case was too close to call. The reason is that in the three decades since *Miranda* was decided, the Supreme Court had articulated a number of so-called exceptions to *Miranda*'s exclusionary rule. More forebodingly, the Court had justified its decision to do so on the ground that the *Miranda* rule was merely "prophylactic" rather than an interpretation of the Fifth Amendment itself, and thus statements obtained absent compliance with the *Miranda* rule were not really obtained in violation of the Constitution. For example, the Court held that unwarned statements could be used to impeach a defendant's testimony[13] and to develop leads to other tangible evidence of guilt (such that the "fruit of the poisonous tree" suppression doctrine doesn't apply).[14] In each case, the Court kept reminding us that *Miranda* violations were not full-fledged constitutional violations. To be more specific: if an incriminating statement was obtained under circumstances that rendered it "involuntary" as measured under the Court's prior case-specific-voluntariness-test, then the statement could not be used for any purpose in a criminal proceeding; such so-called "involuntary" confessions were considered to reflect "real" constitutional violations and thus were subject to blanket exclusion.[15] But statements that were considered "freely given" as measured by the case-specific-voluntariness-test yet obtained in violation of *Miranda* were understood as violating *only* a prophylactic rule, and as such could be used for various purposes other than evidence in the prosecution's case-

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> arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
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> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of the voluntariness of the confession.

18 U.S.C. § 3501 (2000).

13. Harris v. New York, 401 U.S. 222 (1971).

14. Michigan v. Tucker, 417 U.S. 433 (1974). *See also, e.g.*, Oregon v. Haas, 420 U.S. 714 (1975) (holding that the *Harris* impeachment exception applies to post-invocation as well as unwarned statements); New York v. Quarles, 467 U.S. 649 (1984) (announcing a "public safety" exception warranting unwarned questioning); Oregon v. Elstad, 470 U.S. 298 (1985) (holding that the *Miranda* waiver's is not necessarily tainted by prior admission in response to unwarned questioning).

15. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 442 (1984).

in-chief. In *Michigan v. Tucker*,[16] for example, then-Justice Rehnquist observed that the "police conduct at issue here did not abridge [the] constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda*."[17]

But in *Dickerson*, it was Chief Justice Rehnquist himself who authored the 7-2 opinion affirming *Miranda* and, this time characterizing it as a "constitutionally based rule" rather than a non-constitutional, prophylactic one, held that *Miranda* precluded Congress from authorizing the use of unwarned but voluntary statements in the prosecution's case-in-chief.[18] Perhaps the Chief Justice's belated support for a constitutionalized version of *Miranda*, notwithstanding his previous ardent opposition thereto, wasn't as big a surprise as it might appear at first glance. Certainly experience has indicated that the warning requirements, at least when coupled with the numerous judicial exceptions thereto, haven't placed a significant burden on law enforcement officers and, indeed, arguably have made their jobs easier by making clear how they can virtually guarantee that custodial interrogations will lead to admissible evidence.[19] But other than noting this precise fact,[20] the Chief Justice certainly made little effort to square the decision with the Court's (and his) repeated disparagement of *Miranda* as articulating merely a prophylactic rule not required by the Fifth Amendment, or to explain clearly why Congress cannot authorize federal officers to engage in conduct that, according to much post-*Miranda* precedent, does not violate the Constitution itself.

This lack of intellectual coherence, or at least candor, did not go unnoticed. In his blistering dissent, Justice Scalia (joined by Justice Thomas) complained that the Court did not and could not, without overruling a host of cases, say with a straight face that the introduction of a voluntary but non-*Miranda*-compliant confession violates the

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16. 417 U.S. 433 (1974).

17. *Id.* at 446; *see id.* at 439 (explaining that the question whether the "police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination" was a "separate question" from "whether it instead violated only the prophylactic rules developed to protect that right"). *See also, e.g., Quarles*, 467 U.S. at 654 ("[t]he prophylactic *Miranda* warnings . . . are 'not themselves rights protected by the Constitution . . .'") (quoting *Tucker*, 417 U.S. at 444); *Elstad*, 470 U.S. at 307 ("*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm").

18. *Dickerson*, 530 U.S. at 438 ("*Miranda* is a constitutional decision"); *id.* at 440 ("*Miranda* is constitutionally based"); *id.* at 444 ("*Miranda* announced a constitutional rule").

19. *See, e.g.*, Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000 (2001); Welsh S. White, Miranda*'s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211 (2001).

20. *Dickerson*, 530 U.S. at 443-44.

Constitution, and yet the Court provided no other basis for its power to ignore the directives of § 3501.[21] The closest the Chief Justice came to justifying his new-found conclusion that *Miranda* must be constitutionally based was that otherwise the Court couldn't have made it applicable to the states,[22] a claim the dissent correctly called question-begging.[23] And the closest the Chief Justice came to reconciling *Dickerson* with *Miranda*'s undercutting progeny was to observe that "no constitutional rule is immutable,"[24] a claim the dissent correctly called "supremely unhelpful."[25]

In fairness to the Chief Justice, perhaps there was no way to respond to the dissent's charges while still purporting to speak for six other Justices, who had earlier expressed widely disparate views of *Miranda*'s meaning and doctrinal foundation.[26] In any event, my aim in this essay is to be constructive rather than critical. I wish to advance a defense for the Court's treatment of *Miranda* and invalidation of § 3501 in *Dickerson* that sheds some light on the justification for and nature of prophylactic rules in general.

II. JUDICIAL IMPLEMENTATION OF CONSTITUTIONAL RIGHTS AND THE PROBLEM OF IMPERFECT DETECTABILITY

Judicial implementation of constitutional rights requires two major steps. First, the Supreme Court must interpret the Constitution to identify the constitutional norm relevant to resolving a given dispute. Perhaps there are some constitutional dictates whose meaning is basically determinate; the Constitution's requirement that one must be

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21. *Id.* at 450-57 (Scalia, J., dissenting). In one of my favorite Scalia-isms of recent times, surely destined to become a classic, Justice Scalia accused the Court of violating the requirement that it "make sense" of its case law. This requirement "is the only thing," charged Scalia, "that prevents this Court from being some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy." *Id.* at 455. While I agree whole-heartedly with this sentiment, I can't resist noting that Scalia was apparently taken in by decades of misinformed Hollywood movie directors. In Caesar's Rome, the best historical evidence suggests, the relevant signals for life (something positive) and death (something negative) were not thumbs-up and thumbs-down. Rather, a thumbs-up signified death to a fallen gladiator, and a closed fist signified that the gladiator had fought sufficiently valiantly to justify retaining his life. *See* Anthony Corbeill, *Thumbs in Ancient Rome:* Pollex *as Index*, 42 MEMOIRS AM. ACAD. ROME 1 (1997).

22. *Dickerson*, 530 U.S. at 438-39.

23. *Id.* at 456-57 (Scalia, J., dissenting).

24. *Id.* at 441.

25. *Id.* at 455 (Scalia, J., dissenting).

26. *See* Yale Kamisar, Miranda *Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in* Dickerson, 33 ARIZ. ST. L.J. 387, 398 (2001) ("[I]t is hard to see how the Chief Justice could have held all six Justices if he had written at any length about the constitutional status of prophylactic rules in general or the *Miranda* rules in particular.").

thirty-five years old to be President comes readily to mind.[27] For the most part, however, the Court must translate a somewhat abstract constitutional norm into a more specific conception of a constitutional right or duty.[28] The Fifth Amendment prohibition against being "compelled in any criminal case to be a witness against himself" requires some such translation because the key term "compelled" is subject to various plausible interpretations. For example, this prohibition could encompass the following confessions: those coerced by force of law, those coerced by police pressure, those coerced by private actors, and/or those that the defendant perceives to be compelled by the voice of God (or perhaps the little devil she imagines sitting on her other shoulder). As we know, the Court long ago concluded that a defendant's statement is "compelled" when it is rendered "involuntary" in response to some state-sponsored legal or informal coercion including custodial interrogation rather than merely by private pressure or internal psychological compulsion.[29] The point is that the Court must first decide which conception of a given right is most faithful to the constitutional text and its animating principles, typically as among several or more plausible conceptions.

The second step is for the Supreme Court to translate further that conception of a constitutional right or duty into a more specific and workable set of doctrinal rules that can feasibly be applied to safeguard that right or enforce that duty in specific cases. In the familiar context of protecting the freedom of speech, for example, the Court has developed a complex set of doctrines governing defamation law, where the level of constitutional protection afforded speech turns on whether the allegedly defamed person is a public or private figure;[30] a complex

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27. U.S. CONST. art. II, § 1, cl. 5.

28. *See* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56 (1997). Consider just two examples. The "establishment of religion" prohibited by the First Amendment could refer to governmental coercion to perform religious practices, or governmental indoctrination of religious beliefs, or governmental endorsement of religious tenets, or all of the above. The Sixth Amendment's right to "assistance of counsel" could guarantee an accused a minimally effective defense, even one publicly subsidized if necessary, or could guarantee no more than that the government not purposefully interfere with the performance of an accused person's counsel should the accused choose and be able to obtain private representation.

29. *See* Colorado v. Connelly, 479 U.S. 157, 163-67 (1986) (holding that coercive law enforcement activity is a prerequisite to finding a confession involuntary, and rejecting defendant's claim that his confession was coerced by the "voice of God").

30. *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that the First Amendment precludes state tort liability for defamatory statements about "public figures" absent knowledge or reckless disregard for falsity); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (noting no similar First Amendment protection for defamatory statements about "private figures," unless more than compensatory damages sought); *see generally* Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915 (1978).

set of doctrines governing speech in allegedly public spaces, where the level of constitutional protection afforded speech turns on whether the space is denominated a public, limited-public, or nonpublic forum;[31] and a complex set of doctrines governing general restraints on speech, where the constitutionality of such a restraint turns on whether the restraint is either content- or viewpoint-discriminatory.[32] Such doctrinal constructs are all around us fleshing out virtually every principle of constitutional law. The judicial objective is to construct a workable doctrinal framework with which to detect and screen out governmental conduct that transgresses a constitutional right in a particular case.[33]

At first glance, it would seem logical for the Court simply to ask, in each case, whether the government conduct at issue violates its specific conception of a right. In the Fifth Amendment context, for example, the Court would consider whether, given the totality of the circumstances, a particular confession has been obtained through government compulsion. Indeed, Justice Scalia seems in his *Dickerson* dissent to view the case-specific-voluntariness-test as itself being dictated by the Constitution, such that a confession is *in actual fact* compelled if and only if the voluntariness test identifies it as being such.[34]

But this seemingly straightforward approach ignores the messy problem of uncertainty about the occurrence of a constitutional violation. To be sure, sometimes the Court can construct and implement a doctrine that will allow it to identify each occasion of a constitutional violation with a high degree of certainty. It might be easy enough to determine whether a President-elect is thirty-five years old. But in many contexts there is no doctrinal test that can *perfectly* detect each instance in which the government has transgressed a particular constitutional norm. For example, the First Amendment protects against purposeful suppression of speech because of disagreement with its content, and the Fourteenth Amendment protects against purposeful racial discrimination, but it is difficult to know with certainty whether a particular statute reflects such invidious purposes.

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31. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-50 (1983) (outlining the different doctrinal tests associated with each of these three categories of fora); *see generally* Lillian R. BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79.

32. *See, e.g.*, Police Dep't. v. Mosley, 408 U.S. 92 (1972) (invalidating ordinance banning all picketing except labor picketing near schools during school hours); *see generally* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

33. *See* Fallon, *supra* note 28, at 67-106 (discussing and illustrating eight different types of judicially constructed doctrinal tests).

34. *See Dickerson*, 530 U.S. at 464 (Scalia, J., dissenting) ("voluntariness remains the *constitutional* standard").

In such contexts, a seemingly straightforward, case-by-case inquiry into whether a constitutional norm has been transgressed will result in what might be called "adjudication errors," meaning the production of false-negatives and false-positives. A judicial test generates a false-negative when it labels government conduct as permissible even though, were we omniscient, we would know that the conduct was actually unconstitutional. Conversely, a judicial test produces a false-positive when it labels government conduct as impermissible even though, were we omniscient, we would know that the conduct was actually constitutional. The larger point here is that there is frequently a disconnect between a doctrinal rule and what it purports to measure in the real world.

Much of the time, even when it becomes aware of this imperfection in judicial detectability, the Supreme Court apparently believes that the fit between the results of a doctrinal test and what it purports to measure is, shall we say, close enough for government work. But sometimes, the Court will conclude that the likelihood of false-negatives is unacceptably high; in other words, the direct doctrinal inquiry actually proves to be insufficiently protective of the constitutional values at stake given the persistence of unconstitutional conduct. I believe this is the best, and a fully sufficient, explanation for and justification of *Miranda*'s so-called prophylactic rule governing custodial interrogations. Justice Scalia's apparent assumption that a direct judicial inquiry into voluntariness can accurately divide the universe of confessions into truly compelled ones and truly freely-given ones, such that a confession that satisfies the Court's test is *in fact* voluntary and therefore constitutionally permissible, is unrealistically optimistic.

In developing the case-specific-voluntariness-test over time, the Court came to recognize that the voluntariness of a given confession could turn on a broad range of variables, including the suspect's knowledge (for example, was she aware of her rights to silence and counsel?); her general faculties (was she mature and in good mental health?); her specific mental and physical condition (was she hungry, fatigued, drunk, medicated, stressed out, or even scared out of her wits?); and the nature of the interrogation (how long did it last, was counsel present, did she have access to family and friends, was she physically restrained, and what precise police tactics were used?).[35] Given the nature of the doctrinal test, it seems to me that there are a number of reasons to worry

35. *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 693-94 (1993) (listing numerous factors and citing cases invoking them); Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973) (same).

that the application of such a test might generate a high adjudication error rate.

First, it is quite difficult to imagine that a trial court could, through the normal factfinding process, determine the historical set of events surrounding a custodial interrogation with 100% accuracy. This is particularly so when the relevant factfinding frequently pits the word of the police interrogators against the word of the suspect,[36] and one can easily imagine that judges would routinely, if only subconsciously, tend to favor the police in their credibility assessments.[37] And any such pro-law-enforcement proclivity in credibility assessments might create a feedback loop: once officers learn that judges tend to credit their testimony, they might develop greater confidence that they can shade the truth in their testimony and get away with it. Finally, this factfinding is most commonly done by state judges, and particularly several decades ago the Supreme Court might well have worried that such judges, again perhaps only subconsciously, might in general be somewhat underprotective of a state criminal suspect's federal constitutional rights.[38]

Moreover, there's a second difficulty. Even if a trial court could perfectly reconstruct the historical events, it still remains difficult, perhaps conceptually impossible, for the court to construct a metric by which to determine whether a particular defendant's will was actually "overborne" by those events. As the Supreme Court has itself noted, "a complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, this Court terms involuntary, and the role played by each in any situation varies according to the particular circumstances of the case."[39] As a result, "[t]he line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive

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36. *See* Miller v. Fenton, 474 U.S. 104, 117 (1985) (noting that subsidiary factual questions "often require the resolution of conflicting testimony of police and defendant").

37. *See* Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397, 424 n.133 (1999) ("When suspects and police officers differ as to critical facts, moreover, judges are likely to resolve the credibility dispute in favor of the officers."); Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 808-09 (1970) (same).

38. *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977). The Court has held that, in reviewing state court determinations of voluntariness, a federal court should "make an independent evaluation of the record." Mincey v. Arizona, 437 U.S. 385, 398 (1978); *see also Miller*, 474 U.S. at 110-12 (same independence of habeas review).

39. Blackburn v. Alabama, 361 U.S. 199, 207 (1960).

pressures and inducements on the mind and will of an accused."[40] For example, suppose a particular suspect was mentally disturbed, was only vaguely aware he could ask for a lawyer but did not know one, was ravenously hungry and fatigued, and was subject to a three-hour interrogation under bright lights? Suppose instead the suspect was mentally stable, and knew he was entitled to a lawyer but was told he could not have one, was only slightly hungry but told he could not eat again until he had confessed, and was subject to a ten-hour interrogation while being shackled to a chair? How do each of these and other relevant variables interact for each suspect? How can we "know" which, if either, of the two suspects ends up confessing involuntarily? In the end, even if a judge knows perfectly all of the facts, he must still engage in some norm-laden speculation to decide whether the particular defendant's will was overborne by police tactics. Put simply: uncertainty is endemic to Fifth Amendment law.

For all of these reasons, the Supreme Court could reasonably conclude that the case-specific-voluntariness-test typically would not accurately reconstruct the historical truth behind a particular custodial interrogation, and it could not then objectively measure and balance the many relevant variables bearing on voluntariness so as to reach a result that infallibly reflects the underlying reality whether a confession was *actually* compelled within the meaning of the Fifth Amendment. And indeed, this argument tracks what the Supreme Court said about *Miranda* in *Dickerson*:

> In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something more than the totality test was necessary.[41]

In other words, the case-specific-voluntariness-test produced more false-negatives than the Court could tolerate; some more stringent doctrinal protection was therefore appropriate.

To be sure, much of the story thus far is not entirely novel. Other constitutional scholars have observed that the Court sometimes eschews a direct, case-by-case inquiry into whether a constitutional norm has been transgressed in favor of some alternative doctrinal rule that proves more judicially manageable; and sometimes the Court is driven to do so by the worry that a direct doctrinal inquiry will end up

40. Haynes v. Washington, 373 U.S. 503, 515 (1963).
41. Dickerson v. United States, 530 U.S. 428, 442 (2000).

underprotecting the constitutional norm in question. Thus others before me have argued that courts must take into account their own institutional limitations and the resulting inherent uncertainties in constitutional adjudication when crafting doctrines to enforce constitutional norms.[42]

But for the most part, scholars have failed to consider in any detail either of two critical questions about the formulation of prophylactic rules: (1) how close to 100% detection of unconstitutional conduct may or must the Court aspire in devising a prophylactic rule, and (2) what types of prophylactic rules are appropriate in particular contexts? These are important questions because one might concede the need for *some* supplemental protection for the Fifth Amendment privilege against self-incrimination, and yet argue that the *Miranda* warnings go way too far or go off in the wrong direction. These questions deserve far more attention than I can give them in this brief essay, but let me offer some tentative proposals.

A. Miranda and the Force of False-Negatives

How much of an effort should the Supreme Court make to reduce the false-negatives that would otherwise be generated by the case-specific-voluntariness-test? What is the appropriate level of additional protection?

One could propose that the Court eradicate *all* false-negatives, meaning it should strive to erect a perfect screen. Indeed, the Court apparently believes that *Miranda* comes pretty close to this level; in *Dickerson*, the Court noted that it would be quite "rare" for a *Miranda*-

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42. For such an argument defending *Miranda*, see David A. Strauss, Miranda, *the Constitution, and Congress*, 99 MICH. L. REV. 958, 962-64 (2001) (explaining that *Miranda* reflects a cost-benefit judgment concerning how best to implement the self-incrimination privilege, with the error-rate of case-specific-voluntary-test being one factor in the calculus); *see generally, e.g.*, Susan R. Klein, Miranda *Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 482-83 (1994) (suggesting Court has obligation to create remedies or procedures necessary to safeguard a constitutional provision otherwise at risk); Landsberg, *supra* note 2, at 950 (saying that prophylactic rules "are predicated on a judicial judgment that the risk of a constitutional violation is sufficiently great that simple case-by-case enforcement of the core right is insufficient to secure that right").

Professor David Strauss has developed this line of argument in the First Amendment context as well, arguing that the judicial doctrine requiring invalidation of content-based speech restrictions serves as a proxy for the "real" constitutional concern, which is whether a given statute is purposefully designed to suppress private speech. Whereas a direct inquiry into official motive would likely lead to a high rate of adjudicatory error and thus underprotect First Amendment values, application of the doctrinal requirement of content-neutrality will do a better job of screening out statutes that are motivated by impermissible purposes and are therefore actually unconstitutional. Strauss, *supra*, at 963-66; Strauss, *supra* note 1, at 198-204.

compliant interrogation to produce a coerced confession.[43] In theory, the Court could go even further and *completely* eliminate all false-negatives by precluding the government from using *any* incriminating statements produced by custodial interrogation. But this approach would essentially terminate a very important law enforcement technique, arguably going way too far in the effort to eradicate the last marginal possibility of a coerced confession.

I propose instead that the Supreme Court should employ a balancing test similar to the *Mathews v. Eldridge*[44] test applied in the procedural due process context. In basic terms, the *Mathews* test dictates that before the government acts to deprive an individual of some benefit such as a job or welfare payments, the government must provide the individual with some procedural safeguards against a substantively wrongful deprivation, such as notice and a hearing. The Court sets the appropriate level of procedural safeguards by balancing (a) the strength of the individual's interest in avoiding wrongful deprivation of the particular benefit at issue; (b) the value of additional specific safeguards in reducing false-negatives, *i.e.*, deprivations that really should not occur under the substantive law; and (c) the cost to legitimate government interests in providing such additional safeguards.[45]

One can model the matter of prophylactic rules in an analogous manner: the Fifth Amendment grants me an entitlement not to have a coerced confession introduced against me in a criminal case; if the government introduces my confession against me in a criminal prosecution, there is some risk that it is depriving me of my Fifth Amendment entitlement because there is some risk that my confession was actually coerced; therefore, the government must provide me with procedural safeguards to minimize sufficiently the possibility that I will be wrongly deprived of my Fifth Amendment entitlement. The question whether the government must do more than judicially apply the case-specific-voluntariness-test turns on whether a set of proposed additional safeguards (such as the *Miranda* warnings) would significantly reduce the level of false-negatives without unduly disrupting legitimate government interests, for example, by producing too many false-positives by excluding too many confessions that were actually freely given.

I believe that the *Miranda* framework meets this standard, and I think that Chief Justice Rehnquist thinks so as well – which I suspect is why in *Dickerson*, when push came to shove, he was willing to live with it.

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43. *Dickerson*, 530 U.S. at 444 (quoting Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984)).
44. 424 U.S. 319 (1976).
45. *See id.* at 334-35.

Part of *Miranda*'s brilliance is that it turns out not to obstruct law enforcement investigations as much as many had feared. Of course, sometimes freely-given statements elicited by non-*Miranda*-complaint interrogations are suppressed, but this loss is preventable easily enough; officers must simply follow *Miranda*'s strictures. The only unavoidable loss comes when officers issue the *Miranda* warnings and a suspect, who was about to confess freely, now decides to keep mum. But while empirical data and interpretations thereof are not entirely uniform, it appears that the *Miranda* framework has not significantly affected confession rates.[46] Thus, I believe, *Miranda* strikes a reasonable balance under the *Mathews v. Eldridge* rubric – one that certainly protects against false-negatives, but also allows interrogations to continue and, indeed, arguably assists that practice by providing clear lines for police to walk.[47]

B. Alternative Means to Protect Fifth Amendment Rights

The second but related basic question is this: once the Supreme Court perceives a need to reduce false-negatives, how should the Court go about it? Many have complained that the *Miranda* doctrine, with its

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46. *Compare, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on* Miranda*'s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998) (arguing that *Miranda* has led to a reduction in "crime clearance rates"), *and* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084 (1996) (responding to opposite claim), *with, e.g.*, John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998) (questioning Cassell & Fowles' methodology and results); Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 503 (1996) (stating empirical analysis leading to the conclusion that "*Miranda*'s detectable net impact on conviction rates shrinks virtually to zero"); *and* Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996) (saying that while *Miranda* may result in marginally lower conviction rates, in general police have successfully adapted to *Miranda* in ways that facilitate effective law enforcement). It is noteworthy that the United States argued in *Dickerson* that *Miranda* poses no significant threat to federal law enforcement capabilities. Brief for the United States at 34, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525) ("In short, federal law enforcement agencies have concluded that the *Miranda* decision itself generally does not hinder their investigations and the issuance of *Miranda* warnings at the outset of a custodial interrogation is in the best interests of law enforcement as well as the suspect.").

47. Some scholars have suggested that this type of cost-benefit analysis is properly left for the legislative arena and lies outside the boundaries of judicial competence and legitimacy. *See generally, e.g.*, Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100 (1985). It seems to me that the Supreme Court is certainly well situated to assess the frequency and types of false-negatives created under various doctrinal procedures. Of course, as explained above, neither the Court nor any legislative body can determine with 100% accuracy how many false-negatives are produced by the *Miranda* doctrine, by the case-specific-voluntariness-test, or by any other doctrinal screen. The very uncertainty with which I am concerned undermines any strong claim to "know" what the false-negative (or false-positive) rate is with any specific test. My point is more modest and comparative; the Court is not so ill-equipped or otherwise institutionally incompetent so as to make this type of determination the unique province of legislative rather than judicial actors.

almost code-like requirements for valid law enforcement interrogations, feels overly "legislative" in character, and that the Court should instead have tried some alternative measures that feel more traditional, more comfortably "judicial" in nature. Why not instead, for example, supplement the case-specific-voluntariness-test with some evidentiary rules that will help the factfinding court reconstruct and determine the historical truth behind an interrogation, thereby making a better substantive determination? Or if that won't work, why not adopt some evidentiary presumptions or tinker with burdens of persuasion to better allocate the risk of adjudication error in a more rights-protective way?

As it so happens, the Supreme Court has embraced both of these methods in various other contexts. Consider, for example, *North Carolina v. Pearce*,[48] in which the Court articulated evidentiary rules so as to improve the record from which a reviewing court could accurately assess the facts. The *Pearce* Court observed that defendants who successfully appeal an initial conviction or sentence sometimes receive a punishment after subsequently being reconvicted and resentenced that is harsher than the one originally imposed. The Court worried that, at least in some instances, sentencing judges were punishing defendants for their initial successful appeal, and such vindictiveness violates due process. The Court acknowledged, however, that "the existence of a retaliatory motivation would . . . be extremely difficult to prove in any individual case."[49] And yet the Court believed that "such untoward sentences occurred with sufficient frequency to warrant the imposition of a prophylactic rule . . . ."[50] So instead of directly inquiring into the motives of the sentencing judge, the Supreme Court announced the following rule:

> [W]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for . . . doing so must affirmatively appear . . . . Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding [e.g., commission of a new criminal offense]. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.[51]

By requiring sentencing judges affirmatively to explain their motives and cite supportive evidence for their claims, *Pearce*'s prophylactic rule in

48. 395 U.S. 711 (1969).
49. *Id.* at 725 n.20.
50. Colten v. Kentucky, 407 U.S. 104, 116 (1972).
51. *Pearce*, 395 U.S. at 726.

effect constructed a record enabling reviewing courts to make a more accurate assessment of the underlying historical facts in a realm of inherent uncertainty, thereby reducing the number of actual due process violations that would otherwise slip through the reviewing court's radar screen. In addition, arguably the requirement that sentencing judges document their thinking likely reduces the actual occurrence of sentences motivated by vindictiveness by making those judges focus on their actual thought processes.[52]

Could the Supreme Court have done something similar in the Fifth Amendment context? I believe that, in contrast to the situation in *Pearce*, it might prove quite difficult for the Court to encourage the creation and preservation of a factual record regarding custodial interrogations – at least without embracing a doctrinal rule that *Miranda*'s critics would find equally or more troubling. The primary difficulty today is that typically the only persons with knowledge of the facts surrounding a particular custodial interrogation are the participating police and the suspect, which is why a fair and accurate reconstruction of events is quite difficult. Perhaps the Court could have required the police to audiotape or even videotape all custodial interrogations, a popular legislative proposal today, but there might be some question in each case whether the tape had been turned on at all relevant times or had been doctored after the fact. (Ever since those great scenes in Forrest Gump with Tom Hanks chatting with President Kennedy, I've become more and more suspicious of so-called "live" videotaping.) Or instead, the Court might have required that all custodial interrogations be conducted in the presence of a neutral judicial magistrate who could be trusted fairly to observe and record the events. But surely certain scholars would have sharply criticized these sorts of requirements as being even more intrusive on and improperly regulatory of police behavior than the *Miranda* warnings.

What about adjusting the burden of persuasion so as to generate fewer false-negatives in this realm of uncertainty? The Supreme Court tries to manage uncertainty through this means in various other contexts. Consider, for example, *Batson v. Kentucky*.[53] The Court had previously held, in *Swain v. Alabama*,[54] that the Equal Protection Clause prohibits prosecutors from using peremptory challenges purposefully to weed out potential jurors on the basis of their race. To prove such a

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52. *Cf.* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 652 (1995) ("Perhaps the very fact of writing (or writing publicly, although the two are hardly the same) serves as a constraint. Perhaps there are things we can think but cannot write down.").

53. 476 U.S. 79 (1986).

54. 380 U.S. 202 (1965).

claim under *Swain*, the defendant had to show a pattern of such discriminatory challenges over a series of cases.[55] *Batson* held that this standard of proof was too rigorous and was essentially immunizing discriminatory behavior from constitutional scrutiny – in other words, the doctrinal test was generating too many false-negatives. The Court responded by adjusting the defendant's evidentiary burden, holding that the defendant could establish a prima facie case of an equal protection violation merely by raising an inference of discrimination in his trial alone.

In contrast, however, it isn't clear that adjusting an evidentiary burden would be as workable or desirable in the Fifth Amendment context. The Supreme Court confronted this precise question in *Lego v. Twomey*.[56] There, a criminal defendant argued that the state could not use his confession against him unless the state proved beyond a reasonable doubt that the confession was freely given. If adopted, this burden of proof likely would have drastically reduced the level of false-negatives because any uncertainty at all would be resolved in favor of suppression. But the Supreme Court rejected the defendant's proposal, holding that while the state bore the burden of proving that a confession was not coerced, the state had to show this only by a preponderance of the evidence.[57] Curiously, the Court seemed dismissive of the concern that the lower standard of proof would contribute to false-negatives; the Court claimed that "no substantial evidence has accumulated that federal rights have suffered from determining admissibility by a preponderance of the evidence."[58] Of course, *Lego* was decided six years after *Miranda*, so by that time the case-specific-voluntariness-test was no longer doing much of the work in screening coerced confessions, and therefore that specific test's rate of false-negatives no longer had much impact on the overall, *Miranda*-controlled adjudication error-rate. Perhaps the real problem was that the Court could diminish false-negatives by radically raising the government's burden of persuasion only at the cost of radically increasing the number of false-positives as well, meaning the suppression of confessions that were in fact freely given but could not be proven so by the government.[59] In other words, given the intractable difficulties in reconstructing and assessing the

55. *Batson*, 476 U.S. at 92-93 (noting that post-*Swain* lower court decisions required such proof).

56. 404 U.S. 477 (1972).

57. *See also* Colorado v. Connelly, 479 U.S. 157, 168-69 (1986) (relying on *Lego*, holding that the state must prove waiver of *Miranda* rights only by preponderance of evidence).

58. *Lego*, 404 U.S. at 488.

59. *See id.* at 489 ("it is very doubtful that escalating the prosecution's burden of proof . . . would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries").

historical events underlying each custodial interrogation, a shift in the burden of proof could flip the results in a vast array of cases and cure the false-negative problem only by creating a huge false-positive problem. Perhaps the Court should have considered some intermediate position, such as proof of non-coercion by clear-and-convincing evidence. But even if this generated a more favorable balance of reduced false-negatives and increased false-positives, one could still say the following: the totality-of-the-circumstances test would still necessarily be applied in a subjective, ad hoc manner, providing little or no advance guidance to police as to how they could encourage confessions without crossing the line. And the more fuzzy the line, the more tempting it will be for police to approach that line, and hence the more frequently they will end up crossing it. So a comparative advantage of *Miranda* is that its requirements create a positive feedback loop. Law enforcement officers might well respond to clear guidance by modifying their behavior in ways that reduce the instances of coercion, and thus the number of undetected constitutional violations.[60] This, I believe, is what makes *Miranda* look reasonable compared to the burden-shifting alternatives – *Miranda* both reduces false-negatives and arguably reduces the amount of coercion going on in the first place.

In the end, therefore, a strong case can be made that the *Miranda* requirements constitute a more appropriate response to the problem of imperfect detectability of Fifth Amendment violations than any of these proposed adjustments in evidentiary rules or burdens. More generally, I believe that *Miranda* reflects a reasonable, even if not the only reasonable, solution to the clear deficiencies of the prior case-specific-voluntariness-test. Many have argued that *Miranda* went too far, but it cannot be gainsaid that *Miranda* did not go as far as it *could* have gone, say, by excluding the fruits of all custodial interrogation conducted outside the presence of counsel. *Miranda* strikes a balance – one that certainly militates against false-negatives, to be sure – but one that also allows custodial interrogations to continue and, indeed, arguably supports that practice by providing clear guidelines for police to follow.

One final observation warrants brief mention: this approach to justifying *Miranda* can square it with many of the later-recognized

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60. *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 694 (1993) ("*Miranda*'s 'core virtue' was 'afford[ing] police and courts clear guidance on the manner in which to conduct a custodial interrogation'") (quoting Fare v. Michael C., 439 U.S. 1310, 1314 (1978) (Rehnquist, J., in chambers)); Dickerson v. United States, 530 U.S. 428, 444 (2000) ("[t]he totality-of-the-circumstances test . . . is more difficult than *Miranda* for law enforcement officers to conform to"); Strauss, *supra* note 42, at 962 ("*Miranda* will deter law enforcement officers, to some degree, from trying to compel confessions"); Schulhofer, *supra* note 7, at 451 ("The case-by-case [voluntariness] approach even failed to prevent, and in subtle ways actually encouraged, outright physical brutality.").

"exceptions" to *Miranda*. Consider, for example, the impeachment-use exception announced in *Harris v. New York*.[61] The benefits and costs of applying *Miranda*'s presumption that non-*Miranda*-compliant interrogations are "compelled" differ when incriminating statements are used for impeachment purposes rather than in the case-in-chief. The issue of impeachability will arise only in a smaller subset of all cases, because many defendants will not take the stand, and many of those who do won't perjure themselves in a manner subject to impeachment by their earlier confession, so the benefits of expanding the doctrinal test beyond voluntariness are not as great in this context. Since fewer confessions will be at issue, the absolute number of improperly admitted coerced confessions will be lower than if the Court used the voluntariness test even for admissibility of statements in the case-in-chief. And the requirement that officers provide warnings to enable introduction of elicited statements in the prosecutor's case-in-chief remains sufficient to influence police behavior so as to deter actual coercion. On the other hand, the costs of an overinclusive doctrinal test would be higher in the impeachment context – the use of non-*Miranda*-compliant confessions for impeachment purposes is important to ensure that defendants do not have "a license to use perjury by way of a defense."[62] I personally am unsure whether the Court reached the correct conclusion in *Harris*, even given the somewhat different cost-benefit analysis, particularly given the mounting evidence that police now intentionally elicit unwarned confessions to use for impeachment purposes.[63] But my point for present purposes is merely that it is not conceptually incoherent, as Justice Scalia and some others charge,[64] for the Court to conclude in *Miranda* that the institutional inability of state and federal courts to avoid false-negatives with the voluntariness test justifies a broader doctrine with respect to the prosecution's case-in-chief, and yet to conclude in *Harris* that the same institutional constraints do not justify a similarly broad doctrinal rule with respect to impeachment. One can articulate a similar defense (with somewhat different cost-benefit criteria) of other exceptions to *Miranda*, such as *New*

61. 401 U.S. 222 (1971).

62. *Id.* at 226.

63. *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 132-140 (1998) (discussing and documenting growing practice of intentional questioning "outside *Miranda*" to obtain evidence usable for impeachment and other purposes); Charles D. Weisselberg, *In the Station House After* Dickerson, 99 MICH. L. REV. 1121 (2001) (same).

64. *See Dickerson*, 530 U.S. at 455 (Scalia, J., dissenting).

York v. Quarles[65] (establishing a "public safety" exception) and *Michigan v. Tucker*[66] (establishing a "fruit of the poisonous tree" exception).[67]

Given the defense of *Miranda*'s prophylactic rule I have sketched, it becomes clear why I believe that the Court reached the right conclusion in *Dickerson* – though I, along with Justice Scalia, would have preferred the Chief Justice to provide a more comprehensive and candid explanation. Section 3501 would have essentially restored the pre-*Miranda* case-specific-voluntariness-test, which the Court had determined generated an "unacceptably great"[68] volume of false-negatives and therefore required some doctrinal supplementation.

III. GENERAL IMPLICATIONS

Let me now tentatively sketch some more general implications of my defense of *Miranda* and *Dickerson* for the construction of judicial doctrine.

A. Determining What Constitutes a "Fully Effective" Alternative

To begin with, the defense of *Miranda* I have sketched here has some implications for the Supreme Court's continuing invitation, in both *Miranda* and *Dickerson*, for Congress and the states to devise equally effective alternatives to the *Miranda* framework.[69]

First, this approach informs what it would mean for a proposed alternative to be "fully as effective." While commentators have not been entirely clear about this point, they generally appear to assume that the alternative would have to achieve the same low false-negative rate as does the *Miranda* framework.[70] But I'm not sure that's correct. The *Mathews v. Eldridge* model I borrowed above suggests that the Supreme Court should be trying to strike an optimal balance; it should establish a doctrinal framework that will reduce false-negatives to a tolerable level, while still taking into account competing government interests. At some point, the marginal reduction in undetected violations is too costly.

Suppose, hypothetically, that Congress enacts the 2001 Videotape Act, according to which federal officials must videotape all custodial

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65. 467 U.S. 649 (1984).

66. 417 U.S. 433 (1974).

67. *See also* Strauss, *supra* note 42, at 966-69 (advancing similar defense of *Oregon v. Elstad*, 470 U.S. 298 (1985)).

68. *Dickerson*, 530 U.S. at 442.

69. *See supra* note 11 and accompanying text.

70. *See, e.g.*, Landsberg, *supra* note 2, at 974 (saying that Congress and the states may replace the *Miranda* rule "with any procedure that effectively protects the core right of silence").

interrogations from beginning to end, and a confession is admissible into evidence only if the court, based on viewing the video, determines that the confession was not coerced. Such a measure would reduce false-negatives as compared to the old case-specific-voluntariness-test without any videotaped record, though in a different way than do the *Miranda* warnings. The *Miranda* warnings dispel the inherently coercive environment of custodial interrogation, making it less likely that any ensuing confession is the product of coercion. In contrast, the Videotape Act would not actually dispel the coercive force of the interrogation; rather, it would preserve an objective factual record and thereby improve a court's capacity to apply the case-specific-voluntariness-test, and it would presumably reduce false-negatives by giving the court more accurate data upon which to base a determination of coercion.

Suppose the Supreme Court evaluates the Videotape Act and decides that it will produce significantly fewer false-negatives than did the case-specific-voluntariness-test by itself, but still a few more false-negatives than does *Miranda*. Put numerically, suppose the conventional case-specific-voluntariness-test generates a false-negative rate of 20% (meaning two out of every ten confessions the test designates as freely given, and hence admissible, are truly coerced and hence admission is actually unconstitutional); suppose the *Miranda* framework generates a false-negative rate of 1%; and suppose the Videotape Act would generate a false-negative rate of 3%.[71] But on the other hand, the Videotape Act compromises competing governmental interests far less than does *Miranda*, because it doesn't screen out as many freely-given confessions. In other words, suppose the *Miranda* framework generates a false-positive rate of 20% (meaning two out of every ten confessions suppressed as non-*Miranda*-compliant are freely given), and the Videotape Act generates a false-positive rate of 3%. On the whole, compared to *Miranda* the Act is not as quite as good at reducing false-negatives (3% to 1%), but it creates fewer unfortunate false-positives (3% to 20%). How should the Supreme Court respond?

Rather than focus exclusively on the comparative false-negative bottom line, the *Mathews* approach suggests that the Court should ask whether the overall balance of competing interests struck by the Videotape Act, securing lesser constitutional protection but at less social cost, is a better overall balance than that struck by the *Miranda* framework. In other words, just as the Court might compare two procedural schemes for protecting welfare benefits from wrongful

71. These numbers, of course, are entirely made up for purposes of illustration.

termination and prefer one scheme which has a slightly higher error rate but costs substantially less to implement, the Court might prefer the Videotape Act to the *Miranda* framework despite the slightly higher rate of false-negatives the Act produces. The *Mathews*-modeled approach to determining the propriety of doctrinal protection, therefore, allows for the possibility that a congressional (or state) alternative might be considered "fully as effective" even if it doesn't protect the Fifth Amendment right to precisely the same extent as does *Miranda*. As a result, the Court's invitation to consider equivalent alternatives may be more capacious and allow for more flexibility than has been previously realized.

B. Judicial-Legislative Interaction

The analysis I employ in this essay brings to light a second point regarding the Supreme Court's invitation to create equally effective alternatives: it informs the conceptual mechanics by which a congressional or state alternative could displace *Miranda*. Contrary to some previous claims, the *Miranda* rule is not some form of judge-made federal common law, subject like all common law to being overridden by statute.[72] Rather, the rule – like all doctrinal rules developed by courts to implement constitutional rights – reflects the straightforward exercise of the judicial power to interpret and apply the Constitution in discrete cases and controversies. Congress can no more "override" doctrinal rules than it can "override" the Court's interpretation of the underlying constitutional rights being implemented.[73]

What Congress can do, however, is use its conventional legislative powers[74] to enact a statute providing equally effective protection for the Fifth Amendment, which then becomes binding on federal courts in addition to the Court's previously announced doctrinal protections.

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72. *See, e.g.*, Monaghan, *supra* note 1; Grano, *supra* note 47, at 156; *cf.* Harold J. Krent, *How to Move Beyond the Exclusionary Rule: Structuring Judicial Response to Legislative Reform Efforts*, 26 PEPP. L. REV. 855, 857-61 (1999) (applying argument to Fourth Amendment exclusionary rule).

73. *See Dickerson*, 530 U.S. at 437 ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

74. Congress could regulate federal law enforcement interrogations and the judicial admissibility thereof pursuant to the Necessary and Proper Clause. U.S. CONST. art. I, § 8, cl. 18. Congress could, to some degree at least, regulate state law enforcement interrogations and the judicial admissibility thereof pursuant to the Enforcement Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5; *see* Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 85-103 (discussing Congress's Article I and Section 5 power to provide effective *Miranda* alternatives for both federal and state actors); *see also* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127 (2001) (arguing that the Court's recent case law interpreting the scope of Congress's Section 5 power requires an overly stringent level of means-ends tailoring).

Suppose again that Congress enacts the Videotape Act, and suppose further the Court deems this to provide an equally effective way of safeguarding the Fifth Amendment right against compelled testimony. The Videotape Act by itself doesn't override or displace the *Miranda* doctrine; in fact, the two can peacefully co-exist, such that the police would have to both comply with the *Miranda* requirements *and* also videotape their interrogations in order to avoid suppression.

The assumption, however, is that once the Court assures itself that the Act qualifies as an equally effective measure, the Court would react to the Videotape Act by *changing the doctrinal requirements of the Fifth Amendment*, because now the Amendment no longer needs the same level of protection through judicial doctrine. Perhaps the Court would revert back to the old case-specific-voluntariness-test. Perhaps instead the Court would retrench only part-way – for example, holding that given the Videotape Act, the Fifth Amendment no longer requires police to inform suspects of their right to silence but still requires them to inform suspects of their right to appointed counsel. Or perhaps the Court would retrench even beyond the old case-specific-voluntariness-test and hold that the Fifth Amendment itself requires suppression only if the suspect can prove coercion beyond a reasonable doubt.

The central point is that it remains entirely within the Court's control whether, and how, it wants to recraft Fifth Amendment doctrine in light of an effective substitute. So despite some loose talk along these lines,[75] there is no sense in which Congress can itself override judicial doctrine, even with an equally effective measure of its own.

Moreover, this also means that if the Court concludes that the Videotape Act is *not* an equally effective alternative to *Miranda* because it does not sufficiently reduce the likelihood of false-negatives, the Court still would not invalidate the Act. It is not unconstitutional for Congress (or a state) to impose additional (though less effective) controls on interrogations.[76] Rather, the Act would remain valid and enforceable, but the Supreme Court would not backtrack from *Miranda* in response. As a result, custodial interrogators would both have to videotape their interrogations (to avoid suppression on statutory grounds) and continue

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75. *See, e.g.*, Landsberg, *supra* note 2, at 974 (referring to Congress's power "to change judicially adopted prophylactic rules"); Strauss, *supra* note 42, at 969 (asking whether "the *Miranda* warnings can be replaced by legislation"); Dorf & Friedman, *supra* note 74, at 85 ("[J]ust as Congress has power after *Dickerson* to pass legislation altering *Miranda*'s guidelines, so too do the states.").

76. Of course, contrary to my hypothetical Videotape Act, the Court was correct to conclude that § 3501 must "yield to *Miranda*'s more specific requirements," *Dickerson*, 530 U.S. at 437, since that provision purported to *require* federal courts to admit evidence in some circumstances notwithstanding a violation of *Miranda*'s dictates. *See* 18 U.S.C. § 3501 (2000) ("a confession . . . *shall be admissible* in evidence if it is voluntarily given") (emphasis added).

to comply with *Miranda* in its entirety.[77] In sum, the consequences of a failed effort by Congress (or a state) to displace the *Miranda* framework are commonly misunderstood.

C. Doctrinal Incorporation of State Interests

In addition to sharpening the ways in which we think about the Supreme Court's "effective alternatives" invitation, the defense of *Miranda* sketched in this essay has broader jurisprudential implications. First, the defense makes clear that the judicial enforcement of constitutional rights routinely takes into account some notion of competing state interests.

We frequently divide the universe of rights into those that are "absolute" and those that are subject to "balancing" against countervailing government interests. When a court identifies a prima facie violation of a "balancing" right, the court then asks whether the government conduct serves a sufficiently compelling interest so as to justify the infringement.[78] But when a court identifies a violation of an "absolute" right, that's the end of the inquiry: the government conduct is unconstitutional, period. At least thus far, the Supreme Court has treated the Fifth Amendment right against compelled self-incrimination as an "absolute" right; the government cannot justify its violation for any reason.[79]

But competing government interests are not entirely absent from the equation; they are just lurking beneath the surface by helping to shape the right's doctrinal protection. As I noted earlier, one could deal with the problem of identifying actual constitutional violations in this inherently uncertain world by trying to screen out 100% of coerced

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77. This suggests that if Congress (or a state) implements an alternative that is deemed insufficient by the Court, Congress might want to be ready quickly to repeal its own measure, so as not to impose even greater burdens on the police than before. If Congress simultaneously requires courts to admit non-*Miranda*-compliant confessions (as in § 3501) and embraces an alternative deemed inadequate by the Court, Congress could avoid any need for a subsequent repeal of the alternative by including a nonseverability clause in the original legislation: when the purported *Miranda* override is invalidated, the alternative will become inoperative as well.

78. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

79. Criminal procedure classrooms often debate the hypothetical involving a suspected terrorist who refuses to reveal in which elementary school a bomb is about to explode: may the police coerce her into confessing? This hypothethical doesn't really push the question whether the Self-Incrimination Clause is absolute, as the government can always coerce the confession and just refrain from using the confession against her in a subsequent criminal prosecution. Of course, if the government coercion rises to the level of a substantive due process violation, *e.g.*, constitutes torture, then the question is squarely posed whether the due process right is absolute in this context.

confessions. All this approach would require is a doctrinal rule precluding the government from ever using at trial the product of a custodial interrogation under any circumstances. While such an extreme measure would perfectly protect the Fifth Amendment right, however, it would also severely undermine competing government interests. We don't aim for a 100% screen, here or elsewhere, precisely because the costs are too high. Instead, we aim for a constitutionally tolerable level of false-negatives, taking into account the government interests on the other side. But that means, even for rights we call "absolute" and refuse to balance away at the back end, there has already been some calibration of government interests worked into the front-end definition of doctrinal protection. So one way or the other, our commitment to rights is virtually always contextual to some degree.

D. The Illusion of "Prophylactic" Rules

Perhaps most fundamentally, my defense of *Miranda* undermines the entire conceptualization of various doctrinal rules as "prophylactic" in some special sense. Through this point I have bowed to convention and employed the term "prophylactic" to refer to doctrinal rules self-consciously crafted by courts for the instrumental purpose of improving the detection of and/or otherwise safeguarding against the violation of constitutional norms. If used in this fashion,[80] I now propose 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. To the extent one purports to use the adjective "prophylactic" as a descriptive term, it confuses more than it clarifies; and to the extent one purports to use the adjective pejoratively, it inappropriately raises concerns of legitimacy where none should exist.

The terminology misleadingly suggests that so-called prophylactic rules differ in kind from so-called "ordinary" doctrinal rules. But if the argument is that prophylactic rules are different because they rest on some institutional judgments concerning the capacity of courts to enforce constitutional norms, rather than merely on some "pure" interpretation of those norms, this is just wrong – such institutional judgments are precisely the stuff of which most constitutional law is made. Almost all constitutional doctrine, from Article I and the First Amendment on down, represents a judicial judgment both about the

80. *But see supra* note 2 (discussing an alternative definition).

content of the constitutional norm worthy of protection *and also* about a court's institutional capacity to enforce that norm in various ways, taking into account both its own propensities and limitations and those of other relevant actors such as lower federal and state courts.[81]

Consider, for example, the First Amendment, where the Court navigates through cases wielding doctrines such as the public forum doctrine[82] and the content-neutrality doctrine,[83] both of which reflect efforts to make the protection of First Amendment values judicially manageable. Consider the Equal Protection Clause, where the Court navigates through cases by imposing various tiers of scrutiny as rough proxies for invidious discrimination.[84] Consider the scope of congressional power under the Commerce Clause, where the Court suggests it will now navigate through cases using the regulation of a commercial activity as a rough proxy for the regulation of interstate commerce.[85] In each of these contexts, the Court employs doctrinal rules and presumptions that help it screen out unconstitutional conduct in a manageable way. And these rules and presumptions are all based, at least in part, on a self-conscious assessment of the judicial capacity to enforce the underlying norms in various manners.[86] *Miranda* is simply not different in kind; its sin, if it be one, is the somewhat greater candor with which the Court acknowledges the role being played by its own institutional assessments.

Indeed, if *Miranda* is labeled "prophylactic," one might fairly ask: compared to what? The obvious answer is "compared to the case-specific-voluntariness-test." But that test is "no more 'directly compelled' by the Constitution, and no more a product of the 'explicit' text of the Constitution than *Miranda* itself."[87] The Fifth Amendment requires the exclusion of compelled statements. Both the case-specific-voluntariness-test and the *Miranda* framework represent different doctrinal tools by which courts might screen out actually compelled statements – in this sense, both are instrumental devices designed to

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81. For a compelling defense of this proposition, see Strauss, *supra* note 1; *see also* Strauss, *supra* note 42; Caminker, *supra* note 74, at 1170 ("[B]ased on institutional and sometimes empirical considerations, courts must translate abstract norms or rights into specific and elaborate legal doctrines useful for resolving concrete cases.").

82. *See supra* note 31 and accompanying text.

83. *See supra* note 32 and accompanying text.

84. *See* Strauss, *supra* note 1, at 204-05.

85. *See* United States v. Lopez, 514 U.S. 549, 566 (1995) (suggesting critical doctrinal distinction is "whether an intrastate activity is commercial or noncommercial"); *id.* at 574 (Kennedy, J., concurring) ("Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.").

86. *See generally* Fallon, *supra* note 28, at 61-67.

87. Kamisar, *supra* note 26, at 426.

safeguard constitutional values. And they each have a different success rate in doing so. Compared to the case-specific-voluntariness-test, *Miranda* likely screens out both more actually coerced confessions and more actually freely-given confessions; it is a more rigorous screen all around. But the Constitution certainly does not indicate a preference for the more porous screen. Indeed, I've argued – and I think *Dickerson* squarely held – that the more porous screen is constitutionally inadequate. Yet even if one disagrees with this bottom-line judgment, I do not think one can persuasively maintain that the two doctrinal rules are different in kind rather than degree. There is no analytical reason to privilege the case-specific-voluntariness-test as being the appropriate "benchmark" as against which the *Miranda* rules can be intelligibly labeled "prophylactic."[88]

Perhaps *Miranda* seems like a special case because the Court sometimes uses *both* the *Miranda* screen and the case-specific-voluntariness-test to assess the same product of custodial interrogation. A defendant has two bites at the apple when attempting to suppress a confession. First, the defendant can argue that his confession was compelled as determined by the case-specific-voluntariness-test, and thus cannot be used by the prosecution for any purpose. Second, if this fails, the defendant can argue that the confession was obtained in violation of *Miranda*, in which case at least the confession can't be used in the prosecution's case-in-chief (though it can still be used for other purposes, such as impeachment or investigatory leads). This two-layer screen might make it feel as though the case-specific-voluntariness-test is the "real" constitutional test and *Miranda* plays second fiddle. The Court has continually fed this imagery by saying (at least pre-*Dickerson*) that "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."[89]

But this argument relies solely on semantics. *Miranda* excludes some confessions even though the case-specific-voluntariness-test would not, but the case-specific-voluntariness-test and the Constitution are not the same thing at all; the former is just one proxy for the latter. One can just as easily say that the *Miranda* requirements constitute the "real" constitutional test and the voluntariness inquiry serves as the

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88. Indeed, it is worth recalling that the Court's opinion in *Miranda* itself nowhere describes the rule it announces as "prophylactic" in nature. *See* Miranda v. Arizona, 384 U.S. at 436, 536, 544 (1966) (White, J., dissenting) (describing case as establishing a "*per se*" rule). While various Justices soon used the term "prophylactic" to describe other doctrines, *see, e.g.*, United States v. Wade, 388 U.S. 218, 251 (1967) (White, J., dissenting in part and concurring in part) (describing requirement that counsel be present at pre-trial identification line-ups as a "broad prophylactic rule"), the *Miranda* rule itself was not described by the Court as "prophylactic" until *Michigan v. Tucker*, 417 U.S. at 433, 439 (1974).

89. Oregon v. Elstad, 470 U.S. 298, 307 (1985); *see supra* notes 13-17.

supplement.[90] The best way to characterize the relation between *Miranda* and the case-specific-voluntariness-test is as follows: both are mutually supportive doctrinal tools by which the Court tries to screen out actually compelled confessions so as to safeguard the Fifth Amendment; as such, both deserve equal respect as applied in their own proper spheres.[91]

To summarize: there is commonly some slippage between rights and the doctrinal rules that enforce those rights, slippage designed in part to manage the probabilistic nature of most constitutional violations. This is true both for doctrinal tests that turn on all relevant case-specific circumstances and for doctrinal tests that invoke per se presumptions, which are all over the law.[92] *Miranda* differs from run-of-the-mill and unquestionably legitimate doctrinal rules only in degree, not in kind.[93]

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90. The fact that the Court deploys the case-specific-voluntariness-test as the only screen in certain contexts, such as where the prosecutor wants to use a confession solely for impeachment purposes, doesn't somehow make that test represent some constitutional core in the abstract, such that the addition of the *Miranda* screen in the case-in-chief context demonstrates that *Miranda* goes beyond the "core" and is therefore "prophylactic." It just means the Court has established different rules for defining the proper level of constitutional protection in different contexts, such as for impeachment and for the case-in-chief – which is what the Chief Justice said (albeit inartfully) when he observed that "no constitutional rule is immutable." Dickerson v. United States, 530 U.S. 428, 441 (2000).

91. Similarly, the common characterization of *Miranda* and other so-called prophylactic rules as "overprotecting" the constitutional right in question should come to an end. This pejorative wrongly assumes some "natural" baseline of lesser protection. Indeed, *Dickerson* essentially holds that *Miranda* provides the constitutionally requisite level of protection with respect to admissibility in the prosecution's case-in-chief, which in contrast means that the case-specific-voluntariness-test unacceptably underprotects the Fifth Amendment.

92. *See, e.g.*, Schulhofer, *supra* note 7, at 448-49; Klein, *supra* note 2, at 1037-51.

93. One could, of course, define "prophylactic" in a different sense than I use the term here, such that there is a conceptual distinction between prophylactic rules thus defined and run-of-the-mill judicially-crafted doctrines. In his ardent attack on both *Miranda* and the concept of prophylactic rules, for example, Professor Grano concedes that the phrase "prophylactic" as I have defined it here "has the potential for wide employment in constitutional discourse" and its usage in this manner "raise[s] no issues of particular interest . . . ." JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 175 (1993). But Professor Grano, in contrast, ascribes to the term prophylactic "a special and narrower meaning." *Id.* He instead employs the term "prophylactic" to refer to rules that supplement the enforcement of constitutional rights but do not themselves function to help *define* a violation of those rights. *Id.* ("[A]s used by the *Tucker* plurality to describe *Miranda*, prophylactic rules are not simply protective devices for constitutional provisions but more importantly – and this is the crux of the matter for the legitimacy issue – rules that may be violated without violating the Constitution."); *id.* at 190 ("One must take care not to confuse a per se rule that does not require case-by-case factual analysis with a rule that can be violated without violating the Constitution."); *id.* at 191 ("It bears repeating that a rule is prophylactic, as that term is used in *Miranda*, [but see *supra* note 2] not because it, or its underlying constitutional provision, instrumentally serves other ends. A rule is prophylactic only when the rule may be violated without violating the Constitution."). Thus narrowly defined, prophylactic rules "are not nearly so pervasive as some commentators contend." *Id.* at 190. Indeed, Professor Grano himself identifies only *Miranda* and its progeny, *Pearce* (see *supra* notes 48-52 and accompanying text), and a rule governing eyewitness identification testimony that was proposed by Justice Marshall in dissent but *rejected* by the Court in *Manson v. Braithwaite*, 432 U.S. 98 (1977). Grano, *supra* note 47, at 111-115; *compare id.* at 115-123 (listing rules commonly but "improperly" categorized as prophylactic).

Justice Scalia also appears to have this very narrow definition in mind when he claims in his

IV. CONCLUSION

The persistent challenge to prophylactic rules basically ignores the significance of our living in an uncertain world. We can say, and perhaps must continue to say for ease of simple communication, that government conduct is unconstitutional if it fails to pass muster under a judicially established doctrinal test, and it is constitutional if it passes muster. But in reality, that privileges the test too much. Perhaps courts can determine, with relative certitude, whether a presidential candidate is thirty-five years old or whether a trial started within a certain number of days after indictment. But many constitutionally salient facts are more messy, and many questions require inherently normative judgment calls as well. We often cannot know with certainty whether a violation has occurred or not – all courts can do is construct appropriate screens, and their propriety ought to turn, in substantial part, on whether they do a good job in screening out probable violations. In such a world of uncertainty, so-called prophylactic rules like *Miranda* are surely understandable and indeed inevitable.

Dickerson dissent that only *Miranda* (and some of its progeny) and *Pearce* are properly characterized as true prophylactic rules. *Dickerson*, 530 U.S. at 457-60 (Scalia, J., dissenting). He distinguishes these examples from other cases cited by the petitioner "in which the Court quite simply exercised its traditional judicial power to define the scope of constitutional protections and, relatedly, the circumstances in which they are violated." *Id.* at 457.

Thus narrowly defined, the phrase "prophylactic rule" becomes inapplicable to the vast array of instrumentally crafted doctrinal rules referred to above, such as those implementing the First and Fourteenth Amendments, see *supra* notes 30-33 and accompanying text, since those rules do indeed help define what counts as a violation of an underlying constitutional norm. As such, I would concede that the phrase does draw an important *conceptual* distinction.

However, thus narrowly understood the phrase still has little if any *practical* usefulness. Professor Grano concedes that "[o]nly the Court, not its critics, can determine whether its decisions are merely prophylactic" as he defines the term. GRANO, *supra*, at 178. And when the Court in *Dickerson* held that *Miranda* is a constitutionally based rule, see *supra* note 18 and accompanying text, the Court essentially rejected the characterization of *Miranda* as prophylactic under Professor Grano's (and Justice Scalia's) narrow terminology. I do not mean to suggest in the text that we ought to jettison the term "prophylactic" from our constitutional lexicon *if* we carefully define it as narrowly as does Professor Grano. But so defined, the term no longer properly encompasses *Miranda* (notwithstanding the years of complaint to the contrary, see *supra* notes 35-47 and accompanying text), and has few – if any – referents elsewhere in constitutional doctrine.