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Securing Liberty with Chains: Locking up the Fifth Amendment within the Confines of Miranda Dickerson v. United States

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SECURING LIBERTY WITH CHAINS: LOCKING UP THE FIFTH AMENDMENT WITHIN THE CONFINES OF MIRANDA DICKERSON V. UNITED STATES, 530 U.S. 428(2000)

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I. INTRODUCTION

The admissibility of a suspect's confessions in criminal proceedings has a long and colorful history. Prior to the *Miranda* decision, the admissibility of a suspect's confession was evaluated under a voluntariness test.[1] This test was developed by the common law after the courts in England recognized that coerced confessions were inherently untrustworthy.[2] Subsequently in the United States, case law recognized two constitutional bases for the requirement that a confession be voluntary before it can be admitted into evidence.[3] These bases were the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment.[4]

For the middle third of the 20th century, the Supreme Court based the rule against admitting involuntary confessions almost exclusively on notions of due process.[5] The Court applied the due process test in 30 cases between 1936 and 1964, refining the test into an inquiry examining whether the suspect's will was overborne by the circumstances surrounding his giving of the confession.[6] According to the Supreme Court, the due process test considers "the totality of all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation."[7] The Court continued to apply the due process "totality of the circumstances" test and to exclude confessions that were obtained under coercion until 1964 when *Malloy v. Hogan*[8] and subsequently in 1966, *Miranda v. Arizona*,[9] refocused the inquiry.[10] In *Malloy*, the Fifth Amendment privilege, previously only applicable in federal proceedings, was applied to the States.[11] Miranda focused the inquiry into how to protect the Fifth Amendment right against compelled self-incrimination. After twenty-five years of interpretation of *Miranda*, some of which declared that it was not constitutionally required, the Court was forced to decide whether *Miranda* was in fact constitutionally required. If *Miranda* is constitutionally required, can there be any

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1. Dickerson v. United States, 530 U.S. 428, 432-33 (2000).
2. *Id.* at 433.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 433-34.
7. *Id.* at 434 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 223 (1973)).
8. 378 U.S. 1 (1964).
9. 384 U.S. 436 (1966).
10. *Dickerson*, 580 U.S. at 434..
11. *Id.*

exceptions to it? If it is not, then can the Supreme Court enforce *Miranda's* decision upon the States? These are the questions that *Dickerson v. United States*[12] attempted to deal with and somehow fell short of answering. *Dickerson* added what seemed to be the final dimension to the *Miranda* decision—officially making *Miranda* warnings a constitutional requirement.

II. BACKGROUND AND HISTORY OF THE LAW

A. Pre-Miranda Holdings

In 1936, the United States Supreme Court decided in *Brown v. Mississippi*[13] that coerced confessions violate the due process requirements of the Fourteenth Amendment of the Constitution of the United States.[14] In *Brown*, the petitioners were indicted for the murder of Raymond Stewart, pleaded not guilty, were found guilty at trial, and then sentenced to death.[15] Aside from the defendants' confessions, there was no evidence sufficient to submit the case to the jury.[16]

The case involved three black males, who were suspects in the murder of Raymond Stewart.[17] The deputy sheriff and several others repeatedly hanged and whipped one of the suspects in an attempt to get him to confess to the murder.[18] A couple of days later, the deputy returned to the suspect's home and arrested him and left to take the suspect to a jail in an adjoining county.[19] The route which the deputy took led them through Alabama where the deputy stopped the car and once again beat the suspect declaring that he would continue the beatings until the suspect confessed.[20] The suspect then agreed to confess to whatever statement that the deputy would dictate, and he did so, after which the deputy transported the suspect to jail.[21] The police also arrested the other two suspects and took them to the same jail.[22] On Sunday night, April 1, 1934, a deputy and several other white men came to the jail and made these defendants strip down and lie over chairs where their backs were cut to pieces with a leather strap with buckles on it.[23] The deputy made the demand that the defendants confess in every matter of detail as demanded by those present or the whippings would continue.[24] The defendants confessed to the crime, and as the whippings continued, the defendants adjusted their confession in all details so as to conform to the demands of their torturers.[25]

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12. 580 U.S. 428. (2000).
13. 297 U.S. 278 (1936).
14. *Id.* at 279.
15. *Id.*
16. *Id.*
17. *Id.* at 281-82.
18. *Id.* at 281.
19. *Id.*
20. *Id.* at 281-82.
21. *Id.* at 282.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

Once the confessions had been obtained in exactly the form required by the mob, the defendants were warned that if they changed their story at any time, then the same punishment would be inflicted on them again.[26] On the next day, two sheriffs accompanied by eight other persons came to the jail where all three defendants were housed to "hear the free and voluntary confession of these miserable and abject defendants."[27] Those present went through the farce of hearing the "free and voluntary" confessions of the defendants. The two sheriffs and one other person present were the three witnesses used in court to establish the so-called confessions, which were received in court as evidence over the objections of the defense counsel.[28]

The sole evidence upon which the convictions were obtained was these so-called confessions.[29] According to the Court, "[w]ithout this evidence, a peremptory instruction to find for the defendants would have been inescapable."[30] The defendants were put on the stand, and they fully developed the facts and details of the manner by which the police had obtained the confessions.[31] There was no dispute with regard to the facts of the manner in which the confessions were obtained from the defendants.[32]

The defendants appealed to the state supreme court, claiming that it was error to admit their confessions because they were obtained by coercion and brutality known to the court and to the district attorney.[33] The state supreme court affirmed the admission of the confessions, however.[34] The defendants then moved for a new trial on the ground that the police had obtained all the evidence against them by coercion and brutality known to the court and to the district attorney, and that the defendants had been denied the benefit of counsel.[35] The defendants asserted that allowing the coerced confessions into evidence against them violated the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.[36] The state court considered the federal question and entertained the suggestion of error, and then decided it against the defendants.[37] On appeal, the United States Supreme Court reversed, holding that by admitting the coerced confessions, the state court "denied a federal right fully established and specially set up and claimed."[38]

In 1936 when *Brown* was decided, the Fifth Amendment privilege against self-incrimination did not apply to the states. In reaching its decision, the Court examined the State's contention based on *Twining v. New Jersey*[39] that "exemp-

26. *Id.*
27. *Id.* at 282-83.
28. *Id.* at 283.
29. *Id.* at 284.
30. *Id.*
31. *Id.*
32. *Id.* at 285.
33. *Id.* at 279-80.
34. *Id.* at 280.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 287.
39. 211 U.S. 78 (1908).

tion from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution."[40] Because the Fifth Amendment did not apply to the states at the time, the only question to consider was whether the police conduct amounted to a due process violation under the Fourteenth Amendment, which did apply to the states. According to the Court, "[t]he state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[41] The Fourteenth Amendment provides that "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[42]

The Court stated that "the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law."[43] In essence, states can regulate their own processes, but there are certain fundamental rights-among these the Fourteenth Amendment right to due process-that cannot be infringed upon. Citing *Moore v. Dempsey*,[44] the Court stated that "[t]he rack and torture chamber may not be substituted for the witness stand."[45] The state may not permit an accused to be sent to a rapid conviction under "mob domination" without supplying corrective process.[46] The Court also noted that a state may "not contrive a conviction through the pretense of a trial which in truth is 'but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.'"[47]

The Court went on to describe a trial as a pretense. According to the Court,

> [T]he trial...is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.[48]

The Court considered the methods used to procure the confessions in Brown as "revolting,"[49] and that the use of the confessions as the basis for conviction and sentence was "a clear denial of due process."[50]

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40. *Brown*, 297 U.S. at 285 (quoting *Twining*, 211 U.S. at 114); *See also* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (stating that "the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state").
41. *Id.* (quoting *Snyder*, 291 U.S. at 105).
42. *U.S. Const.* amend. XIV, § 1.
43. *Brown*, 297 U.S. at 285.
44. 261 U.S. 86, 91 (1923).
45. *Brown*, 297 U.S. at 285-86.
46. *Id.* at 286 (citing *Moore*, 261 U.S. at 91).
47. *Id.* (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935)).
48. *Id.* (citing Herbert v. Louisiana, 272 U.S. 312, 316 (1926)).
49. *Id.*
50. *Id.*

For the thirty years following *Brown*, the Court applied the due process "totality of the circumstances test" examining the characteristics of the accused and the details surrounding the interrogation.[51] The cases applying the voluntariness test focused on whether a defendant's will was overborne by the circumstances surrounding the giving of the confession.[52] It was not until the 1960s that the Supreme Court began to look at the due process clause and determine its elements.

In the 1964 case of *Malloy v. Hogan*[53] the United States Supreme Court was asked to reconsider earlier decisions such as the decisions in *Brown* and in *Twining*, which held that the privilege against self-incrimination is not safeguarded against state action by the Fourteenth Amendment.[54] *Brown* was the first case where the Court held that the Fourteenth Amendment Due Process Clause prohibited the States from using an accused's compelled confession against him.[55] In the light of *Twining*, the *Brown* Court felt impelled to hold that its decision did not involve the Fifth Amendment privilege against self-incrimination.[56] "Compulsion by torture to extort a confession is a different matter."[57] However, by the time of *Malloy*, this distinction had long been abandoned.[58]

In *Malloy* the petitioner was arrested during a gambling raid by the Hartford, Connecticut, police.[59] He pleaded guilty to the misdemeanor of pool selling and was sentenced to one year in jail and a fine of $500.[60] The court ordered the sentence suspended after 90 days at which time the petitioner was to be placed on a two-year probation.[61] Sixteen months after his guilty plea, the petitioner was ordered to testify before a referee appointed by the Superior Court of Hartford County to inquire into alleged gambling and other criminal activities.[62] The referee asked the petitioner several questions all of which the petitioner refused to answer on the grounds that answering them may lead to self-incrimination.[63] The Superior Court held the petitioner in contempt and placed him in prison until he was willing to answer the questions.[64]

Affirming a denial of a writ of habeas corpus, the Connecticut Supreme Court of Errors held that a witness in a state proceeding was not entitled to the Fifth Amendment privilege against self-incrimination, that he was not covered by any privilege of the Fourteenth Amendment, and that the petitioner "had not properly invoked the privilege available under the Connecticut Constitution."[65] The United States Supreme Court reversed, holding that the Fourteenth Amendment

51. Dickerson v. United States, 580 U.S. 428, 434 (2000).
52. *Id.*
53. 378 U.S. 1 (1964).
54. *Id.* at 2.
55. *Id.* at 6.
56. *Id.*
57. *Id.* (citation omitted).
58. *Id.* at 6-7.
59. *Id.* at 3.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

does guarantee the petitioner the Fifth Amendment protection against self-incrimination.[66]

The Court noted that at the time of *Malloy* the admissibility of a confession in a state criminal prosecution was tested by the same standard applied in federal prosecutions since 1897.[67] The test was set forth in *Bram v. United States*[68] which held that

> [i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States commanding that no person "shall be compelled in any criminal case to be a witness against himself."[69]

According to the Court, under this test, the constitutional inquiry was "not whether the conduct of state officers in obtaining the confession was shocking, but whether the confession was 'free and voluntary.'"[70] To be free and voluntary, the confession must not have been obtained by any sort of violence or threats, nor obtained by any direct or implied promises, nor by the exertion of improper influence.[71] The Court in *Malloy* noted that it had held inadmissible confessions "secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed."[72]

The standard of admissibility began to shift to the federal standard in state cases with *Lisenba v. California*[73] where the Court spoke of the choice of the accused to deny, admit, or refuse to answer.[74] The Court in *Malloy* stated that the Fifth Amendment privilege is the essential mainstay of the accusatorial nature of the American system of criminal prosecution.[75] As a result, federal *and* state governments are constitutionally compelled to establish guilt by evidence that has been independently and freely secured.[76] Likewise, the government cannot by coercion prove a charge against the accused out of his own mouth.[77]

Applying this reasoning to *Malloy*, the Court held that since the Fourteenth Amendment prohibits the States from inducing a person to confess by means "far short of 'compulsion by torture,' it follows a fortiori that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions that

66. *Id.*
67. *Id.* at 7.
68. 168 U.S. 532 (1897).
69. *Malloy*, 378 U.S. at 7 (citing *Bram*, 168 U.S. at 542).
70. *Id.*
71. *Id.* (citations omitted).
72. *Id.* (citing Haynes v. Washington, 373 U.S. 503 (1963)).
73. 314 U.S. 219 (1941).
74. *Malloy*, 378 U.S. at 7 (citing *Lisenba*, 314 U.S. at 241).
75. *Id.* (citing Rogers v. Richmond, 365 U.S. 534, 541 (1961)).
76. *Id.* at 8.
77. *Id.*

might incriminate him."[78] According to the Court, in response to the claim that "the availability of the federal privilege to a witness in a state inquiry is to be determined according to a less stringent standard than is applicable in a federal proceeding,"[79] what is accorded is a privilege of refusing to incriminate oneself, and the feared prosecution may be by either state or federal authorities.[80] The Court reasoned that, "[i]t would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court."[81] The same standards, therefore, must determine the justification of an accused's silence in either a state or federal proceeding.[82]

Thus, with *Malloy*, the Supreme Court began to apply the Fifth Amendment privilege against self-incrimination to the states bolstering the Fourteenth Amendment due process requirement. The Court's reasoning in *Malloy* "made clear what had already become apparent-that the substantive and procedural safeguards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the privilege."[83] *Malloy* indicates that the voluntariness doctrine in state cases reaches to all interrogation practices which may exert a disabling pressure upon an individual, causing him to make a confession apart from free and rational choice.[84]

B. The Fifth Amendment and Miranda v. Arizona.

Following *Malloy*, the Court still had to deal with safeguarding the constitutional privilege against self-incrimination in cases where the interrogation practices were so inherently coercive as to subject the suspect to possible involuntary confession. In *Miranda v. Arizona*[85] the Court dealt with "the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."[86] According to *Miranda*, rather than being physically oriented, the modern practice of in-custody interrogation is psychologically oriented.[87] "Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in interrogation rooms."[88] The *Miranda* Court recognized that this private interrogation can, in and of itself, exact "a heavy toll on individual liberty and [trade] on the weakness of individuals."[89] Coercion can be mental. *Miranda*

78. *Id. (citation omitted).*
79. *Id.* at 10.
80. *Id.* at 11. (citation omitted).
81. *Id.*
82. *Id.*
83. Miranda v. Arizona, 384 U.S. 436, 463-64 (1966).
84. *Id.* at 464-65.
85. 384 U.S. 436 (1966).
86. *Id.* at 439.
87. *Id.* at 448.
88. *Id.*
89. *Id.* at 455.

relied on police procedure manuals which recommend various interrogation tactics such as the aforementioned privacy, demonstrations of hostility, and even trickery.[90] Often the sheer weight of the investigator's personality will be the deciding factor in eliciting a confession.[91] "Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence."[92]

In *Miranda*, the police arrested the defendant and took him to an interrogation room where he confessed to the kidnapping and forcible rape of an 18-year-old girl.[93] At the time of his confession, Miranda was a 23-year-old uneducated indigent suffering from an emotional illness "of the schizophrenic type."[94] He was "'alert and oriented as to time, place, and person,' . . . and sane within the legal definition."[95] Questioning was brief, conducted during the day, and "unmarked by any of the traditional indicia of coercion."[96] There was, in sum, "a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation."[97] Yet, the Court held the confession inadmissible because although the defendants' confessions were not involuntary in traditional terms, the Court was concerned with safeguarding the Fifth Amendment rights.[98] In none of the cases consolidated in the *Miranda* decisions[99] did the police officers try to offer appropriate safeguards at the outset of the interrogation to insure that the statements were indeed the products of free choice.[100] According to the Court,

> [i]t is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles-that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.[101]

Miranda took the Fifth Amendment privilege made applicable to the States in Malloy, and broadened its scope to situations outside of criminal court proceedings to protect "persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."[102]

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90. *Id.* at 448-55.
91. *Id.* at 451.
92. *Id.* (citation omitted).
93. *Id.* at 518 (Harlan, J., dissenting).
94. *Id.*
95. *Id.*
96. *Id.* at 518-19.
97. *Id.* at 519.
98. *Id.* at 518-19, 457.
99. The *Miranda* opinion consolidated the cases of Miranda v. Arizona, Vignera v. New York, Westover v. United States, and California v. Stewart.
100. *Id.* at 457.
101. *Id.* at 457-58 (footnote omitted).
102. *Id.* at 467.

According to the Court, the giving of an adequate warning as to the availability of the Fifth Amendment privilege is so simple, and "a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time."[103]

The warnings required by *Miranda* indicate that

> [p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently.[104]

Thus, in the face of *Miranda*, until such warnings have been given in a custodial interrogation situation, and unless the defendant waives his rights, then any statements the defendant may make will not be admissible in court against him. According to the Court,

> [t]he Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.[105]

C. Post-Miranda Decisions

Just two years after the Supreme Court's decision in *Miranda*, Congress enacted 18 U.S.C. § 3501[106] as an apparent attempt to overrule *Miranda*.[107] The statute provided that in criminal prosecutions, confessions would be admissible in evidence if voluntarily given.[108] Prior to the statement's admission, the judge would determine, out of the presence of the jury, the voluntariness of the statement, and then if he deemed the statement to be voluntarily given, the statement would be admitted into evidence.[109] The jury would then be permitted to hear the relevant evidence on the issue of voluntariness, and the judge would instruct the jury to give the appropriate weight to the confession.[110]

Title 18 U.S.C. § 3501(b) provided the circumstances that the trial judge must take into consideration in determining the statement's voluntariness.[111] That subsection provided that the circumstances should include

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103. *Id.* at 468-69.
104. *Id.* at 444.
105. *Id.* at 490.
106. 18 U.S.C. § 3501 (1968).
107. Dickerson v. United States, 580 U.S. 428, 436 (2000).
108. *Id.* at 435 (citing 18 U.S.C. § 3501).
109. *Id.* at 435-36.
110. *Id.* at 436.
111. *Id.*

> (1) the time elapsing between arrest and arraignment of the defendant making the confession . . . (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. 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 voluntariness of the confession.[112]

Subsection (e) of the statute provided a definition of the term "confession" as meaning "any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."[113]

This legislation was part of the Crime Bill introduced in 1967 by President Lyndon B. Johnson initially proposed to authorize large federal grants to state and local governments for the training of new and existing police personnel and improvement of law-enforcement facilities.[114] According to Kamisar, section 3501 "purported to overturn the Warren Court's two most famous confession cases, *Escobedo v. Illinois*[115] and *Miranda*, by providing that in all federal prosecutions any confessions 'shall be admissible in evidence if [they are] voluntarily given.'"[116] The statute appeared to reinforce the totality of the circumstances test, but facially negated the Supreme Court's requirement in *Miranda* that admissibility of a confession depended on whether or not appropriate warnings were given to a defendant to ensure a safeguarding of the defendant's Fifth Amendment rights.

After *Miranda*, the United States Supreme Court began to decide exactly how Miranda fit into the law. In *Michigan v. Tucker*[117] the Court dealt with the issue of whether a witness's testimony in the defendant's trial in state court for rape must be excluded because the police had learned of the identity of the witness through a *Miranda*-violating confession.[118] The questioning of the defendant took place before the decision in *Miranda*, but the trial at which the defendant was convicted took place after the *Miranda* decision.[119] On the defendant's petition for habeas corpus, the United States District Court for the Eastern District of Michigan held that the witness's testimony was inadmissible and

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112. 18 U.S.C. § 3501(b).
113. 18 U.S.C. § 3501(e).
114. Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 887 (2000).
115. 378 U.S. 478 (1964).
116. Kamisar, *supra* note 110, at 888.
117. 417 U.S. 433 (1974).
118. *Id.* at 435.
119. *Id.* Incidentally, just one week after the *Miranda* decision, Johnson v. New Jersey, 384 U.S. 719 (1966) held that *Miranda* was not to apply to cases in which the *trials* were commenced prior to the date of the *Miranda* decision. See *James B. Haddad et al., Criminal Procedure: Cases and Comments* 82, n. 4 (5th ed. 1998).

must be excluded.[120] The Court of Appeals affirmed, and the United States Supreme Court reversed.[121]

The facts in *Tucker* were as follows: On April 19, 1966, Luther White found a woman in her home tied, gagged, partially disrobed, and who had been raped and severely beaten.[122] The police arrested Tucker and brought him to the police station for questioning, but before the actual interrogation, the police asked Tucker if he knew for what crime he had been arrested, if he wanted an attorney, and whether he understood his constitutional rights.[123] Tucker replied that he understood what he was arrested for and that he knew his rights, but did not want an attorney.[124] The police further advised Tucker that any statements he made might be used against him in court, but they failed to advise him that if he could not afford an attorney the court would provide him with one free of charge.[125]

Through the interrogation, the police learned that Tucker had been with Robert Henderson and, later, at home asleep on the night of the rape.[126] The police contacted Henderson to confirm the story, but Henderson's story discredited parts of Tucker's statements.[127] Over the objections of petitioner's counsel, Henderson's testimony was admitted at the trial. Tucker was convicted of rape and sentenced to 20 to 40 years in prison.[128]

Tucker's sole complaint on appeal to the United States Supreme Court was that the police did not advise him that he would be given free counsel if unable to afford counsel himself.[129] His argument relied on the Fifth Amendment right against compulsory self-incrimination and the safeguards set forth in *Miranda* to secure that right.[130] He argued that "proper regard for the privilege against compulsory self-incrimination requires . . . that all evidence derived solely from statements made without full *Miranda* warnings be excluded at a subsequent criminal trial."[131] In reaching its decision, the Court examined whether the police conduct directly infringed on the respondent's rights or whether it violated only the "prophylactic" rules developed in *Miranda* to protect that right.[132]

With regard to the Fifth Amendment right against compulsory self-incrimination, the Court noted that "[t]he importance of a right does not, by itself, determine its scope, and therefore we must continue to hark [sic] back to the historical origins of the privilege . . . "[133] The Court noted that in more recent years, the concern that compelled disclosures might be used against a person in a subse-

120. *Id.*
121. *Id.* at 435, 438.
122. *Id.* at 435.
123. *Id.* at 436.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 437.
129. *Id.* at 438.
130. *Id.*
131. *Id.* at 438-39.
132. *Id.* at 439.
133. *Id.* at 439-40.

quent trial had been expanded to cases involving police interrogation.[134] Prior to Miranda, the issue in the cases was not whether the defendant had waived his Fifth Amendment privilege but whether the statement was voluntary.[135] It was not until the decision in *Miranda* that the Fifth Amendment privilege was seen as the primary protection for a person facing police interrogation.[136]

In *Tucker* the court did not hold that *Miranda* was constitutionally required.[137] it reiterated that *Miranda* presented measures that were not in themselves rights protected by the Constitution but "were . . . measures to insure that the right against compulsory self-incrimination was protected."[138] According to the Court, "[t]he suggested safeguards were not intended to 'create a constitutional straightjacket,' but rather to provide practical reinforcement for the right against compulsory self-incrimination."[139] The *Tucker* Court held that its determination that Tucker's interrogation did not involve sufficient compulsion to breach the right against self-incrimination did not necessarily mean that there was no disregard of the procedural rules later set out in *Miranda*.[140] The police conduct at issue in *Tucker* did not abridge Tucker's constitutional privilege.[141] Instead, it "departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege."[142] According to the Court in *Tucker*, "the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*."[143] This was a substantive violation of the procedural rules set forth in *Miranda*. What the Court had to examine here was the deterrent purpose of the exclusionary rule and the penalizing of police error.[144] According to the Court, the law does not require that a defendant receive a perfect trial, only a fair one.[145] Therefore, it stands to reason that the law cannot require that police officers investigating serious crimes make no mistakes whatsoever.[146] According to the Court, the primary purpose of the exclusionary rule is to deter future unlawful police conduct and "effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."[147] "The rule is calculated to prevent, not to repair. Its purpose is to deter-to compel respect for the constitutional guaranty in the only effectively available way-by removing the incentive to disregard it."[148] This rationale, according to the Court, should also apply to the Fifth Amendment privilege as well.[149]

134. *Id.* at 441.
135. *Id.*
136. *Id.* at 442.
137. *Id.* at 444.
138. *Id.*
139. *Id.* (citation omitted).
140. *Id.* at 445.
141. *Id. at 445-46.*
142. *Id. at* 446.
143. *Id.* at 444.
144. *Id.* at 446-47.
145. *Id.* at 446.
146. *Id.*
147. *Id.* (citing United States v. Calandra, 414 U.S. 338, 347 (1974)).
148. *Id.* (citing Elkins v. United States, 364 U.S. 206, 217 (1960)).
149. *Id.* at 447.

According to the Court, "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right."[150] In refusing to admit evidence gained as a result of this willful or negligent conduct, the courts hope to instill a greater degree of care in the police officers toward their handling of the accused's rights.[151]

Important to the holding in *Tucker* is the fact that Tucker did not accuse himself.[152] The evidence that the prosecution sought to introduce was not Tucker's confession of guilt or even an exculpatory statement made by him.[153] Rather, the testimony was of a third party who was not subjected to custodial pressures.[154] According to the Court, it is unreasonable to believe that Henderson's testimony is not trustworthy just because Tucker was not accorded the full measure of his rights according to *Miranda*.[155] Here, the Court was only dealing with the testimony of a witness whom the police discovered as a result of Tucker's voluntary statements.[156] According to the Court, "[t]his recourse to respondent's voluntary statements does no violence to . . . the adversary system as may be embodied in the Fifth, Sixth, and Fourteenth Amendments."[157]

The Court concluded its opinion by summarizing the holding in *Harris v. New York*[158] that "a failure to give interrogated suspects full *Miranda* warnings does not entitle the suspect to insist that statements made by him be excluded in every conceivable context."[159]

In *New York v. Quarles*[160] the United States Supreme Court examined a situation in which public safety considerations trumped an officer's failure to provide *Miranda* warnings.[161] The case involved a rape suspect who was subdued by police officers while in a grocery store.[162] The officers frisked the suspect and discovered that he was wearing an empty shoulder holster.[163] After handcuffing him, an officer asked the suspect where the gun was. The suspect nodded in the direction of some empty cartons and responded that "the gun is over there."[164] The officer found a loaded .38-caliber revolver, and then read the suspect, Quarles, his *Miranda* rights.[165] Quarles indicated that he would be willing to answer questions without an attorney present.[166] The officer asked Quarles if he owned the gun and where he purchased it, and Quarles answered that he did own it and indicated where he had purchased it.[167]

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150. *Id.*
151. *Id.*
152. *Id.* at 449.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 450.
157. *Id.*
158. 401 U.S. 222 (1971).
159. *Tucker*, 417 U.S. at 451.
160. 467 U.S. 649 (1984).
161. *Id.* at 651.
162. *Id.* at 651-52.
163. *Id.* at 652.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*

At trial, the court excluded both the statement, "the gun is over there," and excluded the gun itself because Quarles had not been read his *Miranda* rights.[168] The other statements about the gun ownership and place of purchase were also excluded as evidence tainted by the prior *Miranda* violation.[169] Despite the State's argument that the exigencies of the situation justified the officer's failure to read the suspect his *Miranda* rights, the Court of Appeals concluded that the respondent was in custody within the meaning of *Miranda* during all questioning and rejected the State's argument.[170] The court declined to recognize an exigency exception to the requirements of *Miranda* because it found no indication from the officer's testimony at the suppression hearing "that his subjective motivation in asking the question was to protect his own safety or the safety of the public."[171]

On appeal, the United States Supreme Court concluded that "this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[172] The Court began its opinion by examining the Fifth Amendment right against self-incrimination in its relationship to the *Miranda* decision.[173] It noted that the *Miranda* Court presumed that interrogation in certain custodial circumstances was inherently coercive and held that "statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights."[174] The Court conceded that the New York Court of Appeals was correct in its decision that the facts of this case fell within the scope of the *Miranda* decision.[175] There was no dispute that the respondent was in police custody because the ultimate inquiry is whether there is a "restraint on freedom of movement" to the degree associated with a formal arrest.[176] In this case, the respondent was surrounded by at least four police officers and was handcuffed when the questioning about the whereabouts of the gun took place.[177]

The Court held that on the facts presented, that there was a "public safety" exception to the requirement that the *Miranda* rights be read before the suspect's answers to any questions would be admitted into evidence.[178] According to the Court,

> [i]n a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer.[179]

168. *Id.*
169. *Id.* at 653.
170. *Id.*
171. *Id.* (citations omitted).
172. *Id.*
173. *Id.* at 654.
174. *Id.*
175. *Id.* at 655.
176. *Id.* (citations omitted).
177. *Id.*
178. *Id.*
179. *Id.* at 656.

The Court went on to say that most officers if placed in the position of the arresting officer in *Quarles*, would act from various motives including their safety and the safety of others.[180] Regardless of the motivation of the individual officers in such a situation, the Court did not believe that the "doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety."[181]

In *Oregon v. Elstad*[182] the United States Supreme Court was faced with the issue of whether or not the Fifth Amendment's Self-Incrimination Clause requires a confession made after proper *Miranda* warnings and a valid waiver of rights to be suppressed solely because the police had obtained an earlier voluntary admission from the defendant made prior to the warnings.[183]

In December 1981, the home of Mr. and Mrs. Gilbert Gross was burglarized and items were stolen valued at $150,000.[184] A witness to the burglary contacted the local sheriff's office and implicated the respondent, 18-year-old Michael Elstad, a neighbor and friend of the Gross's teenage son.[185] Upon this implication, Officer Burke and Officer McAllister went to Elstad's home with a warrant for his arrest.[186] Officer Burke asked Elstad if he knew why the officers were there to talk to him, and Elstad stated that he did not.[187] When asked if Elstad knew a person by the name of Gross, Elstad replied that he did and that he was aware that the Gross's house had been robbed.[188] Officer Burke told Elstad that he felt that he had been involved in the burglary, and Elstad looked at the officer and stated, "Yes, I was there."[189] The officers put Elstad in the police car and transported him back to the Sheriff's headquarters where Officer McAllister advised Elstad for the first time of his *Miranda* rights.[190] Elstad indicated that he understood the rights yet still wished to speak with the officers.[191] Elstad provided a full statement to the officers indicating that he had known that the Gross family was out of town and that he had been paid to lead several people to the Gross residence and show them how to get into the house through the defective sliding glass door.[192]

At trial, Elstad moved to suppress his oral statement and his signed confession claiming that the statement he made in response to the questions at his house "let the cat out of the bag,"[193] and tainted the later confession as "fruit of the poiso-

180. *Id.*
181. *Id.*
182. 470 U.S. 298 (1985).
183. *Id.* at 303.
184. *Id.* at 300.
185. *Id.*
186. *Id.*
187. *Id.* at 301.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 302 (citing United States v. Bayer, 331 U.S. 532 (1947)).

nous tree."[194] The Circuit Judge ruled that the statement "I was there," was inadmissible because Elstad had not been advised of his *Miranda* rights at the time he made the statement.[195] However, the court chose to allow the written confession to be admitted into evidence finding that "[h]is written statement was given freely, voluntarily and knowingly by the defendant after he had waived his right to remain silent and have counsel present which waiver was evidenced by the card which the defendant had signed."[196] Elstad was found guilty of first-degree burglary and received a five-year sentence and was ordered to pay $18,000 in restitution.[197]

On appeal, the State conceded that the statement "I was there," was inadmissible as having been given without proper *Miranda* warnings, but the State argued that any "taint" on the subsequent confession had been dissipated by "McAllister's careful administration of the requisite warnings."[198] The Court of Appeals reversed the conviction concluding,

> [r]egardless of the absence of actual compulsion, the coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. It is this impact that must be dissipated in order to make a subsequent confession admissible. In determining whether it has been dissipated, lapse of time, and change of place from the original surroundings are the most important considerations.[199]

The State of Oregon petitioned the Oregon Supreme Court for review, but the court declined.[200] The United States Supreme Court granted certiorari to consider the constitutional issue.[201]

According to the Court, the Oregon court assumed that a failure to administer the *Miranda* warnings "breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as 'fruit of a poisonous tree.'"[202] The Supreme Court concluded, however, that this view is a misconstruction of the nature and protections afforded by the *Miranda* warnings and, as such, misreads the consequences of police failure to supply the warnings.[203] Thus, the Court did not believe that *Miranda* was a constitutional requirement. "Requiring *Miranda* warnings before custodial interrogation provides practical reinforcement for the Fifth Amendment right."[204]

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194. *Id.* (citing Wong Sun v. United States, 371 U.S. 471 (1963)).
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 302-03 (citations omitted).
200. *Id.* at 303.
201. *Id.*
202. *Id.* at 304.
203. *Id.*
204. *Id.* at 305 (emphasis added).

According to the Court, Elstad's argument that his written confession was tainted by the earlier police failure to provide *Miranda* warnings and should be excluded as "fruit of the poisonous tree" assumed the existence of a constitutional violation.[205] The law is settled that " a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'"[206] However, a violation of the procedural rules in *Miranda* differs significantly from violations of the Fourth Amendment to which the "fruits of the poisonous tree" doctrine applies.[207] The exclusionary rule of *Miranda* serves the Fifth Amendment but sweeps more broadly.[208] The rule may be triggered even in the absence of a Fifth Amendment violation.[209] The Fifth Amendment itself prohibits the prosecution's use of compelled testimony in its case in chief.[210] The failure to administer proper *Miranda* warnings creates a presumption of compulsion; therefore, voluntary statements within the meaning of the Fifth Amendment, if unwarned, must necessarily be excluded from evidence under *Miranda*.[211] The Court noted, however, that even though this presumption is not rebuttable for the purposes of the prosecution's case in chief, it does not require that the statements and their "fruits" be discarded as tainted.[212] According to the Court,

> [i]It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.[213]

Even though *Miranda* requires that the unwarned confession must be suppressed, any subsequent statement may or may not be admitted depending on whether it was knowingly and voluntarily made.[214]

The Court held that the reading of Elstad's rights was undeniably complete.[215] It was also without question that Elstad knowingly and voluntarily waived his right to remain silent before he gave his statement as to his participation in the burglary.[216] Because the earlier remark was also voluntary within the meaning of the Fifth Amendment, neither the environment nor the manner of either "interrogation" was coercive.[217]

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205. *Id.*
206. *Id.* at 306 (citations omitted).
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.* at 306-07.
211. *Id.* at 307.
212. *Id.*
213. *Id.* at 309.
214. *Id.*
215. *Id.* at 314.
216. *Id.* at 315.
217. *Id.*

III. THE INSTANT CASE

A. Facts

Dickerson v. United States[218] involved a suspect indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence.[219] Upon police investigation of the robbery in Old Town, Alexandria, Virginia, at Dickerson's home, Dickerson agreed to accompany police officers to the FBI Field Office in Washington, D.C.[220] The police never placed Dickerson in handcuffs nor formally arrested him.[221]

When Dickerson and the agents arrived at the FBI Field Office, Special Agent Christopher Lawlor and Detective Thomas Durkin of the Alexandria Police Department questioned Dickerson.[222] Dickerson admitted that he had driven to Old Town on the morning of the robbery to look at a restaurant, but he denied any involvement in the robbery.[223] Dickerson claimed that while he was in the vicinity of the First Virginia Bank, he met an old friend who asked Dickerson to give him a ride to Suitland, Maryland.[224] Dickerson drove the friend to Suitland where he dropped him off near a liquor store.[225]

Upon obtaining a special search warrant for Dickerson's apartment, Special Agent Lawlor informed Dickerson that officers were about to search his apartment.[226] Dickerson then told Lawlor and Detective Durkin that he wanted to make a statement.[227] Dickerson admitted that he had been the getaway driver in a series of bank robberies and then identified Jimmy Rochester as the actual robber of the bank.[228] Dickerson told the agents that on the date of the First Virginia Bank robbery he and a friend named Rochester drove to Old Town, Alexandria, and stopped the car near the bank.[229] Rochester got out of the car and returned a short time later and placed something in the trunk.[230] Rochester then got back in the car and the two drove away.[231] Dickerson also admitted that Rochester gave him some dye-stained money and a silver handgun that Rochester feared the police might find in his apartment.[232] After these statements, Dickerson was placed under arrest.[233]

After Dickerson's confession, Rochester was apprehended by the police and arrested.[234] Rochester admitted to robbing the First Virginia Bank in Old Town,

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218. 530 U.S. 428 (2000).
219. *Id.* at 432.
220. United States v. Dickerson, 166 F.3d 667, 673 (4th Cir. 1999).
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* at 674.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*

Alexandria, three other banks in Virginia, eleven banks in Georgia, four banks in Maryland, and an armored car in Maryland.[235] Rochester said that Dickerson had driven the getaway car in each of the Maryland and Virginia bank robberies.[236] When searching Dickerson's apartment, the agents found the dye-stained money, a bait bill from another bank robbery, a silver .45 caliber handgun, masks, ammunition, and latex gloves.[237]

Dickerson was indicted, and prior to trial, made a motion to suppress the statements he had made at the FBI Field Office on the grounds that he made the confessions while being interrogated but prior to receiving his *Miranda* warnings.[238] The District Court granted Dickerson's motion to suppress, and the Government took an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit.[239] The Court of Appeals reversed the suppression order on a divided vote.[240] The Court of Appeals agreed with the conclusion of the District Court that according to *Miranda*, Dickerson's statements were inadmissible. However, the court went on to hold that the police in questioning Dickerson had upheld 18 U.S.C. § 3501,[241] which reinstated the totality-of-the-circumstances test and, effectually, overruled *Miranda*.[242] The Court of Appeals concluded that the United States Supreme Court's decision in *Miranda v. Arizona*[243] was not a constitutional decision and that Congress could by statute definitively legislate the question of admissibility of voluntary statements made in the absence of Miranda warnings.[244] The United States Supreme Court reversed.[245]

B. Opinion of the Court

The main issue before the Court in this case was whether Congress had constitutional authority to supersede *Miranda* by enacting 18 U.S.C. § 3501, the law relied on by the Court of Appeals for the Fourth Circuit.[246] If Congress had such authority, then § 3501 must prevail over *Miranda's* requirement that warnings be given to suspects.[247] If Congress did not have such authority, then the applicable section of the Code must "yield to *Miranda's* more specific requirements."[248]

In deciding this issue, the Court examined 18 U.S.C. § 3501, enacted two years after the *Miranda* decision.[249] The Court agreed with the Court of Appeals that Congress intended to overrule *Miranda* by its enactment of § 3501, "[g]iven §

235. *Id.*
236. *Id.*
237. *Id.*
238. Dickerson v. United States, 530 U.S. 428, 432 (2000).
239. *Id.*
240. *Id.*
241. 18 U.S.C. §3501 (1968).
242. *Dickerson*, 530 U.S. at 432..
243. 384 U.S. 436 (1966)
244. *Dickerson*, 530 U.S. at 432 (citing United States v. Dickerson, 166 F.3d 667 (4th Cir., 1999)).
245. *Id.*
246. *Id.* at 437.
247. *Id.*
248. *Id.*
249. *Id.* at 435.

3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and the instruction for trial courts to consider a nonexclusive list of factors relevant to the circumstances of a confession . . ." [250] The Court cited several cases dealing with the authority of the Supreme Court and the authority of Congress with relation to its legislative function. According to the Court, the law in this area is clear.[251] The United States Supreme Court "has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals."[252] The Court went on to reason, however, that "the power to judicially create and enforce nonconstitutional 'rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress.'"[253] The Court conceded that Congress has the ultimate authority to change, modify, or set aside any judicially created rules of evidence or procedure that are not constitutionally required; however, Congress may not legislatively supersede the Supreme Court's decisions interpreting and applying the Constitution.[254] Thus, according to the Court, the focus of the instant case was whether the *Miranda* decision announced a constitutional rule or "merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."[255]

The Court of Appeals held that because the Supreme Court had created several exceptions to the *Miranda* requirement and has often referred to the *Miranda* warnings as "prophylactic,"[256] and that the warnings were "not themselves rights protected by the Constitution,"[257] that the protections announced in *Miranda* are not constitutionally required.[258] The Supreme Court agreed with the Court of Appeals' holding that there is language in some opinions that supports this view, but disagreed with its conclusion.[259]

The Supreme Court examined the *Miranda* decision itself and stated that when *Miranda* went before the Court on appeal, the Court intended to "explore some facets of the problems . . . of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[260] The Court noted, in fact, that the majority opinion in *Miranda* is filled with statements indicating that the majority intended to announce a constitutional rule.[261] According to the Court, "the Court's ultimate conclusion was that the unwarned confessions obtained in

250. *Id.* at 436.
251. *Id.* at 437.
252. *Id.* (citing Carlisle v. United States, 517 U.S. 416, 426 (1996)).
253. *Id.* (citations omitted).
254. *Id.* (citations omitted).
255. *Id.*
256. *Id.* (citing *Quarles*, 467 U.S. at 653).
257. *Id.* at 438 (quoting *Tucker*, 417 U.S. at 444). *See also* Davis v. United States, 512 U.S. 452 (1994); Withrow v. Williams, 507 U.S. 680 (1993); Connecticut v. Barrett, 479 U.S. 523 (1987).
258. *Id.* at 2333.
259. *Id.*
260. *Id.* at 439.
261. *Id.*

the four cases before the Court in *Miranda* 'were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.'"[262] It was also noted that the *Miranda* Court's invitation for legislative action to protect the constitutional right against coerced self-incrimination further supported the conclusion that *Miranda* was constitutionally based.[263] The Court emphasized that "the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were 'at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.'"[264]

According to the Court, "*Miranda* is a constitutional decision."[265] A major factor that the Court held as support for this contention is that in both *Miranda* and two of its companion cases, the Court applied the rule in state courts and has since that time "consistently applied *Miranda's* rule to prosecutions arising in state courts."[266] The Court noted that the only time that it may intervene in state court proceedings is to enforce the commands of the United States Constitution.[267] The Court also noted that *Miranda* stated that "reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial interrogation."[268] Something more than the totality test was necessary, and therefore, § 3501's restatement of the totality test as sufficient cannot be sustained if *Miranda* is to remain the law.[269] According to the Court,

> [section] 3501 explicitly eschews a requirement of pre-interrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a suspect's confession. The additional remedies . . . do not . . . render them, together with § 3501 an adequate substitute for the warnings required by Miranda.[270]

The Court of Appeals had noted that following the *Miranda* decision, the Supreme Court made certain exceptions to its rule in cases such as *Quarles* and *Harris v. New York*.[271] However, the Supreme Court pointed out that it had also broadened the application of the Miranda doctrine in cases such as *Doyle v. Ohio*[272] and *Arizona v. Roberson*.[273] According to the Court, these decisions do not intend to purport that *Miranda* is not a constitutional rule, but that "no constitutional rule is immutable."[274]

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262. *Id.* at 439-40.(citations omitted).
263. *Id.* at 440.
264. *Id.*
265. *Id.* at 438.
266. *Id.* (citing Stansbury v. California, 511 U.S. 318 (1994); Minnick v. Mississippi, 498 U.S. 146 (1990); Arizona v. Roberson, 486 U.S. 675 (1988); and Edwards v. Arizona, 451 U.S. 477 (1981)).
267. *Id.*
268. *Id.* at 442.
269. *Id.* at 442-43.
270. *Id.* at 442.
271. 401 U.S. 222 (1971).
272. 426 U.S. 610 (1976) (holding that the use of a defendant's post-arrest silence to impeach the defendant's exculpatory story violates due process).
273. 486 U.S. 675 (1988) (holding that the rule that a suspect who has invoked his right to counsel is not subject to further interrogation until counsel has been made available to him also applies when a police-initiated interrogation occurs in the context of a separate investigation following the suspect's request for counsel).
274. *Dickerson*, 530 U.S. at 441.

In summary, the Court concluded that *Miranda* announced a constitutional rule Congress could not legislatively supersede, and as such, the Court declined to overrule *Miranda*.[275]

C. Dissenting Opinion of Justice Scalia

In a dissenting opinion, Justice Scalia argued that the majority abused its power in holding that 18 U.S.C. § 3501 could not overrule *Miranda*. According to Scalia, to justify the result in *Dickerson*, "the Court must adopt a significant new, if not entirely comprehensible, principle of constitutional law."[276] Scalia argued that according to the "new" principle, Congressional statutes may be disregarded, not only when what they prescribe violates the Constitution, but also when what they prescribe contradicts a Supreme Court decision announcing a constitutional rule.[277] According to Scalia,

> [t]he only thing that can possibly mean in the context of this case is that this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful "prophylactic" restrictions upon Congress and the States. That is an immense and frightening antidemocratic power, and it does not exist.[278]

Scalia reasoned that to justify the holding in *Dickerson*, the court must affirm that "custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States."[279] However, a majority of the Court does not hold to this opinion, and therefore, the Court has acted in plain defiance of the Constitution when it to section 3501 unconstitutional.[280]

Scalia argued that by imposing the Court-made code on the States, the court has "convert[ed] Miranda from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance."[281] Scalia held that the court should not allow even a celebrated decision to remain "on the books" when it stands for the proposition that the Court has the power to impose extraconstitutional constraints upon Congress and the States.[282]

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275. *Id.* at 442.
276. *Id.* at 445 (Scalia, J., dissenting).
277. *Id.*
278. *Id.* at 446.
279. *Id.*
280. *Id.*
281. *Id.* at 465.
282. *Id.*

IV. ANALYSIS

A proper analysis of *Dickerson v. United States*[283] and its place on the continuum of post-*Miranda* holdings begins with a look at how the past decisions by the United States Supreme Court have analyzed the issue of the admissibility of confessions. From cases as early as *Bram v. United States*,[284] the Supreme Court has based its holdings concerning voluntary and involuntary confessions on the relationship of their voluntariness to the Federal Constitution. Prior to the 1960s, the basis of admissibility of voluntary and involuntary confessions was whether the admission of the confession violated the defendant's due process rights under the Fourteenth Amendment. Any objections to "coerced" confessions including torture (which inherently deprived the defendant of due process) had to be raised under the Fourteenth Amendment due process clause.

In *Brown v. Mississippi*[285] the Court examined the torturous methods used to procure the confessions of the defendants and concluded that the use of these coerced confessions for conviction purposes was a clear denial of the due process rights inherent in the Fourteenth Amendment to the Constitution.[286] From *Brown* forward, several other Supreme Court cases dealt with the relationship between involuntary coerced confessions and the Due Process Clause of the Fourteenth Amendment.[287] In each of these cases, the Supreme Court applied the due process totality-of-the-circumstances test to determine the voluntariness of the suspect's confession.[288]

In 1964 with *Malloy v. Hogan*[289] the Court applied the Fifth Amendment protection against self-incrimination to the states. In *Malloy*, the Court re-examined the early case of *Twining v. New Jersey*[290] which held that the Fifth Amendment protection did not apply in state courts. In *Brown*, the Court successfully distinguished between the state processes of requiring an accused to be called as a witness and testify and compulsion by torture to exhort a confession.[291]

In *Miranda* the Supreme Court based its holding on protecting the constitutional rights inherent in the Fifth Amendment. According to the Court in *Miranda*, the issue concerned "the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."[292] The Court recognized that police interrogation in and of itself carries a cloud of intimidation, and psychologically, that it has the potential of overbearing the sus-

283. 530 U.S. 428 (2000).
284. 168 U.S. 532 (1897).
285. 297 U.S. 278 (1936).
286. *See id.*
287. The Court cites Haynes v. Washington, 373 U.S. 503 (1963); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Chambers v. Florida, 309 U.S. 227 (1940).
288. *Dickerson*, 530 U.S. at 434.
289. 378 U.S. 1 (1964).
290. 211 U.S. 78 (1908).
291. *See Brown*, 297 U.S. at 285.
292. Miranda v. Arizona, 384 U.S. 436, 439 (1966).

pect's will to the point of extorting an involuntary confession. *Miranda* seemed to prohibit all pressure whatsoever on the defendant to confess-that in the absence of these "warnings" no statement made by the defendant, regardless of how voluntarily made could be admissible.

As noted earlier, cases decided after *Miranda* have often held that certain situations merit a departure from the guidelines set out in *Miranda*. There may be times when it is acceptable not to have *Miranda* warnings given. But how is the Court to reconcile its reasoning that because *Miranda* is not constitutionally required,evidence obtained as a result of a violation of *Miranda* may be treated differently than evidence obtained as a result of a constitutional violation? If *Miranda* is in fact constitutionally required, then the departure from its holding in several cases should have been constitutional violation. In *Harris v. New York*, for example, the Court held that a prior unwarned statement, inadmissible to establish the prosecution's case in chief, could be used to impeach the credibility of the petitioner.[293] In *Harris*, the Court was concerned with the possibility of a defendant taking advantage of the Miranda shield by using it to justify perjurious testimony.[294] The Court therefore decided that the contradictory statements may be used for cross-examination impeachment purposes. If *Miranda* were in fact constitutionally required, the Court in *Harris* should not have allowed the unwarned statement for any purpose, including to impeach the defendant's credibility. This would have violated the defendant's Fifth Amendment right to protection from compelled self-incrimination since the "purpose" of *Miranda*, if constitutionally based, would be to secure the Fifth Amendment privilege. The purpose of *Miranda* warnings is to safeguard Fifth Amendment rights. Impeaching the defendant's credibility with his own incriminating statement violates that right if *Miranda* is in fact constitutionally based.

Tucker presented another instance to the Supreme Court that appeared to contradict the holding in *Miranda*. In *Tucker*, the issue again focused on the deprivation of the defendant's constitutional rights under the Fifth Amendment. The key to understanding the Court's decision in *Tucker* is the fact that Tucker's interrogation took place prior to the *Miranda* decision, and his trial took place afterward. According to the Court, prior to *Miranda* it had been well established that the issue was not whether the defendant had waived his Fifth Amendment rights but whether his statement was voluntary.[295] It was not until *Miranda* that the Fifth Amendment privilege was seen as primary.[296] In the situation in *Tucker*, there was no need to apply *Miranda* retroactively because there was not police conduct directly infringing on the defendant's rights. Tucker's interrogation did not involve compulsion sufficient to breach Tucker's Fifth Amendment right. The problem in *Tucker* was that there was a procedural violation according to *Miranda* in that the police officers failed to advise Tucker of his right to appoint-

293. *See Harris*, 401 U.S. at 226.
294. *See Id.* at 224.
295. *See Tucker*, 417 U.S. at 441.
296. *Id.*

ed counsel. However, since at the time of the questioning in *Tucker* the *Miranda* decision had not been rendered, the inadvertent police error need not bar the entire statement from the subsequent trial.

New York v. Quarles[297] provided yet another instance where the Supreme Court looked beyond its holding in *Miranda*, this time, to illustrate the reaches where the *Miranda* decision could not go. The Court did not effectively abandon the Miranda holding to consider the issue in *Quarles*. Instead, it examined the decision closely to determine the scope of the *Miranda* requirements. In *Quarles*, the Court decided that when a police officer asks questions of a suspect in a situation where the safety of the officers or the safety of others is at stake, the doctrinal underpinnings of *Miranda* will not prevent the unwarned statements from being admitted. The Court provided that there is a public safety exception to *Miranda*, but this in no way interferes with the rationale behind *Miranda* if *Miranda* was intended to only provide prophylactic guidelines to follow in assuring that a defendant was apprised of his Fifth Amendment rights. However, if *Miranda* were constitutionally required, as it now appears to be under *Dickerson*, then this public safety exception would be a violation of a defendant's or suspect's Fifth Amendment privilege.

In *Elstad* the Court revisited *Tucker* to determine the admissibility of a confession made after proper *Miranda* warnings but also subsequent to a prior admission before the warnings were given. The issue here was whether the unwarned statement "tainted" the subsequent confession rendering it inadmissible. Reaffirming its holding in *Tucker*, the Court again noted that there was no coercion involved in the prior admission. It was entirely voluntary and as such did not fall under the protection of the Fifth Amendment. The Court noted that there is a presumption of compulsion if there is a failure to administer proper *Miranda* warnings; however, this presumption does not require the statement and its "fruits" to be excluded as tainted evidence.[298] The Court looked at *Elstad* as reaching beyond the sweep of the *Miranda* presumption and therefore subject to the due process voluntariness test.

The problem with *Dickerson* is that it put *Miranda* in a box by officially making the pre-interrogation warnings constitutionally required. The Court fell short of this in *Miranda* itself basing the warnings on constitutional premises but never formally making them a constitutional requirement. Instead, *Miranda* made the warnings, whose purpose was to apprise a defendant of his existing Fifth Amendment right against compelled self-incrimination, procedurally required before any incriminating statements could be admitted into evidence in court. The warnings serve a gate-keeping function for the admissibility of confessions. What *Miranda* seemed to do was to make the act of confession itself seem unacceptable rather than rendering compelled confessions alone unacceptable.[299] "The Constitution is not, unlike the *Miranda* majority, offended by a criminal's com-

297. 467 U.S. 649 (1984).
298. *See Elstad*, 470 U.S. at 307.
299. Dickerson v. United States, 530 U.S. 428, 449-50 (2000)(Scalia, J., dissenting).

mendable qualm of conscience or fortunate fit of stupidity."[300] The gist of the Fifth Amendment privilege is freedom from "compelled" confessions. Compulsion connotes force. According to Scalia, "[t]here is a world of difference, which the Court recognized under the traditional voluntariness test but ignored in *Miranda*, between compelling a suspect to incriminate himself and preventing him from foolishly doing so of his own accord."[301] Neither history, precedent, nor common sense supports a conclusion that a violation of the *Miranda* rules amounts to a violation of the Fifth Amendment privilege against self-incrimination.[302]

A problem with making *Miranda* constitutionally required is that *Miranda* imposes more exacting restrictions on the Fifth Amendment privilege than actually exists. It seems from *Miranda* that for a confession to be admissible under the Fifth Amendment, the confession must have been given by a suspect "distinctly aware of his right not to speak and shielded from 'the compelling atmosphere' of interrogation."[303] Further, *Miranda* eliminates all pressure whatsoever on the defendant to confess "though it be only the subtle influence of the atmosphere and surroundings."[304] The Fifth Amendment, on the other hand, has never forbidden of all pressures to incriminate oneself in the various situations it covers.[305] However, there are sharp limits imposed by history and policy on various incriminating circumstances.[306] "The [*Miranda*] Court's unspoken assumption that *any* pressure violates the privilege is not supported by the precedents and it has failed to show why the Fifth Amendment prohibits that relatively mild pressure the Due Process Clause permits."[307]

In the cases subsequent to *Miranda*, the Court has faltered in its attempt to consistently enforce the requirement of *Miranda* warnings in every instance of police interrogation. Yet, the Court in *Dickerson* itself said that since *Miranda*, "we have consistently applied *Miranda's* rule to prosecutions arising in state courts."[308] The *Dickerson* Court seems to suggest that the fact that *Miranda* has been applied to the states in various situations means that the *Miranda* warnings have always been constitutionally required. Federal courts can only step into the regulation of state proceedings when a constitutional issue is involved.[309] The Court surely would not have abused its power in enforcing *Miranda* upon the several States if *Miranda* were not a constitutional requirement. Thus, with *Dickerson*, the Court is simply officially stating what it seems to believe has been the case since 1966—that *Miranda* warnings are constitutional requirements and, as such, are binding on the states.

300. *Id.* at 450.
301. *Id.* at 449.
302. *Id.* at 450.
303. *Miranda*, 384 U.S. at 512 (Harlan, J., dissenting).
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 513.
308. *Dickerson*, 530 U.S. at 438.
309. *Id.*

This reasoning places the Court in a dilemma, however. *Dickerson* cites a long line of cases where *Miranda* has been consistently applied in state prosecutions,[310] but cases like *Tucker*, *Harris*, and *Quarles* illustrate a deviation from the application of *Miranda* as a constitutional requirement. If, as the *Dickerson* Court holds, *Miranda* is constitutionally required, then it is justified in applying it to the States. However, the Court is not justified in establishing exceptions to the constitutional requirement as it has with *Tucker*, *Harris*, and *Quarles*, among others. There can be no exceptions to the Fifth Amendment protection against compelled self-incrimination. If, on the other hand, *Miranda* is not constitutionally required, then the Court is justified in allowing exceptions to the "prophylactic" guidelines set forth in its holding, but it has overstepped its judicial authority by forcing the guidelines upon the States.

By officially making the *Miranda* warnings a constitutional requirement under *Dickerson*, the Court has opened itself up to even more litigation. Can the Court distinguish between a constitutional requirement and a constitutional violation? Scalia is correct in his conclusion that the Court has created a new level of constitutional protection, prophylactic rules that protect the constitutional right. Scalia correctly notes that

> [i]t takes only a small step to bring today's opinion out of the realm of power-judging and into the mainstream of legal reasoning: The Court need only go beyond its carefully couched iterations that "*Miranda* is a constitutional decision," that "*Miranda* is constitutionally based," and that *Miranda* has "constitutional underpinnings," and come out and say quite clearly: "We reaffirm today that custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States."[311]

Scalia places history and precedent aside and notes that "the decision in *Miranda*, if read as an explication of what the Constitution requires, is preposterous.[312] There is no reasonable basis for concluding, for example, that a response to the very first question asked of a suspect who already knows all of his constitutional rights is anything other than a voluntary act.[313] "And even if one assumes that the elimination of compulsion absolutely requires informing even the most knowledgeable suspect of his right to remain silent, it cannot conceivably require the right to have counsel present."[314] The suspect is not entitled to the presence of counsel to tell him that he need not speak.[315] Essentially, the only logical reason for having counsel present is to tell the suspect that he should not speak, a job that the interrogators can surely do.[316] The point of *Miranda* is to

310. *Id.*, See cases cited *supra* note 267.
311. *Id.* at 446 (citation omitted).
312. *Id.* at 448.
313. *Id.* at 448-49. (citing Miranda v. Arizona, 384 U.S. 436, 533-34 (1966)(White, J., dissenting)).
314. *Id.*
315. *Id.*
316. *Id.*

apprise the suspect of his right against compelled self-incrimination in custodial interrogations. This right does not magically attach at the point that the Miranda warnings are read. The Fifth Amendment protection exists apart from any "prophylactic" reminders of its existence. If a suspect chooses to talk before the warnings, then he has made a voluntary statement. If he chooses to talk after the warnings are given, then he has likewise made a voluntary statement.

In the seminal cases decided subsequent to *Miranda*, the Court has more or less emphatically concluded that it is more than possible-and quite common-for police to violate Miranda without also violating the Constitution.[317]

V. CONCLUSION

In an effort to promote an efficient enforcement of the criminal laws, Congress drafted section 3501 two years after the *Miranda* decision, arguing that the *Miranda* Court invited Congress to enact legislation in the field of voluntary confessions because of the "widespread notion that Congress is better able to cope with the problem of confessions than is the Court."[318] Section 3501 reinstated the pre-Miranda totality-of-the-circumstances test as sufficient for the determination of the voluntariness of a suspect's confession.[319] The section completely omitted one of the Miranda warnings: whether the suspect was told that if he could not afford a lawyer but wanted one, that one would be provided for him before he was questioned.[320] Even more significant is the fact that section 3501 did not list any warnings nor require any; it only directs the trial judge to consider certain factors when determining the voluntariness of a suspect's confession.[321] Kamisar noted that

> [s]till more important, although to somebody who has not read or reread the pre-Miranda confession cases recently, the factors listed in § 3501 do look like something resembling the Miranda warnings, they are not. They are not even emanations from Miranda. They are simply some of the many components of the pre-Miranda voluntariness test.[322]

The Court in *Dickerson* ultimately held that 18 U.S.C. § 3501 was unconstitutional because it was an attempt by the legislature to supersede the "constitutional" rule announced in *Miranda*.[323] If *Miranda* is constitutionally required then the Court has consistently allowed violations to the rule. *Miranda* never purported itself to be a constitutional requirement. While its foundations are a bit shaky and the decision locks the Fifth Amendment protection against self-incrimination into a box, the warnings are only guidelines serving as tools to apprise an accused of his rights-rights that exist apart from the warnings themselves.

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317. *Id.* at 451.
318. Kamisar, *supra* note 114, at 909 (citing *S. Rep. No.* 90-1097, at 46 (1968)).
319. *See Dickerson*, 530 U.S. at 442-43..
320. *See* Kamisar *supra* note 114, at 929.
321. *Id.*
322. *Id.*
323. *Id.*