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Exclusionary Rules and Deterrence After *Vega v. Tekoh*: The Trend Toward a More Consistent Approach Across the Fourth and Fifth Amendments

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Academism results when the reasons for the rule change, but not the rule.[1]

I. INTRODUCTION

The United States Supreme Court's 2022 term, and the events surrounding it, were historic and controversial.[2] The polemics began on February 25, 2022, when President Joe Biden announced the nomination of Ketanji Brown Jackson to fill the vacancy caused by the departure of Justice Stephen Breyer.[3] Justice Jackson's appointment was especially noteworthy, as she is the first African American woman to serve on the Court. The Senate confirmed her nomination by a vote of fifty-three to forty-seven on April 7, 2022, largely along party lines.[4]

Less than a month later, on May 2, 2022, *Politico* released a leaked ninety-eight page draft majority opinion authored by Justice Samuel Alito in a highly anticipated abortion case, *Dobbs v. Jackson Women's Health Organization*.[5] The leaked opinion, if true, signaled the Court's

1. Attributed to Igor Stravinsky, *as reprinted in* OXFORD DICTIONARY OF QUOTATIONS 762 ¶ 12 (Elizabeth Knowles ed., 6th ed., 2004).
2. *See* Amy Howe, *In a Historic Term, Momentum to Move the Law Often Came From the Five Justices to the Chief's Right*, SCOTUSBLOG (July 7, 2022, 1:34 PM), https://www.scotusblog.com/2022/07/in-a-historic-term-momentum-to-move-the-law-often-came-from-the-five-justices-to-the-chiefs-right/ [https://perma.cc/F8BC-CC38]; Jess Bravin, *Supreme Court Marks New Era of Ambitious Conservatism*, WALL ST. J. (June 30, 2022, 6:18 PM), https://www.wsj.com/articles/supreme-court-marks-new-era-of-ambitious-conservatism-11656618449?page=1 [https://perma.cc/B5TL-ZC6N]; The Editorial Board, *A Court for the Constitution*, WALL ST. J. OPINION (July 1, 2022, 6:45 PM), https://www.wsj.com/articles/a-supreme-court-for-the-constitution-originalism-dobbs-abortion-religious-liberty-11656711597?mod=Searchresults_pos6&page=1 [https://perma.cc/N8S7-L97Q].
3. *See* John Wagner, Mariana Alfaro, Felicia Sonmez & Eugene Scott, *Biden Introduces Historic Nominee Jackson, Tapped to be First Black Female Justice*, WASH. POST (Feb. 25, 2022), https://www.washingtonpost.com/politics/2022/02/25/biden-supreme-court-nominee-live-updates/ [https://perma.cc/FA6W-A47K]; Kenneth Tran, *Justice Breyer Says His Retirement from Supreme Court Effective Thursday as Historic Term Ends*, USA TODAY (June 29, 2022, 12:35 PM), https://www.usatoday.com/story/news/politics/2022/06/29/breyer-retires-supreme-court/7767857001/ [https://perma.cc/HS5E-TGHY].
4. *See* Mike DeBonis & Seung Min Kim, *Senate Confirms Jackson as First Black Woman on Supreme Court*, WASH. POST (Apr. 7, 2022), https://www.washingtonpost.com/politics/2022/04/07/jackson-confirmation-vote-senate/ [https://perma.cc/5WQU-PDDS]; Lindsay Wise, *Senate Advances Judge Jackson Nomination With Three Republicans Supporting Her*, WALL ST. J.: POL., (Apr. 4, 2022, 8:14 PM), https://www.wsj.com/articles/supreme-court-pick-ketanji-brown-jackson-moves-toward-confirmation-11649085652?page=3 [https://perma.cc/5TGG-29TM]. Three Republican senators crossed over and joined fifty Democrats to account for the fifty-three vote total. *Id.*
5. *See* Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/3U2B-H3GC].

intention to overturn *Roe v. Wade,*[6] decided five decades earlier, which was widely considered to be one of its most controversial decisions.[7] Later, *Politco* and *The Washington Post* reported that the five-vote majority was still intact.[8] The authenticity of the draft opinion was confirmed by Chief Justice John Roberts, who also directed the Marshal of the Court to conduct an investigation into the source of the leak.[9] Not surprisingly, these leaks fueled rhetoric and instigated

6. *See* Roe v. Wade, 410 U.S. 113 (1973); *see also* Jake Epstein et al., *As It Happened: Leak Reveals Supreme Court May Gut Abortion Rights by Overturning Roe v. Wade*, BUS. INSIDER: POL., (May 4, 2022, 7:25 AM), https://www.businessinsider.com/roe-wade-abortion-live-updates-2022-5 [https://perma.cc/ZA3L-AUVX]; Bradford Betz & Tyler O'Neil, *Supreme Court Set to Overturn Roe v. Wade, Leaked Draft Opinion Shows: Report*, FOX NEWS (May 2, 2022, 9:59 PM), https://www.foxnews.com/politics/supreme-court-overturn-roe-draft-leaked-draft-opinion-report [https://perma.cc/DMK9-FFMH] (explaining that the leaked draft seems to indicate that the Court intends to return the issue to the legislatures).
7. In 2010, Time Magazine published a list of the Court's 10 most controversial decisions. *See Top 10 Controversial Supreme Court Cases*, TIME (Dec. 13, 2010), http://content.time.com/time/specials/packages/completelist/0,29569,2036448,00.html [https://perma.cc/WXH6-TFY2]. Time listed *Roe v Wade* as the second most controversial case, trailing only Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding racial segregation of children in public schools was unconstitutional: "separate-but-equal" education is not equal). *Time*'s list of the top ten most controversial cases is rounded out by Miranda v. Arizona, 384 U.S. 436 (1966); Citizens United v. FEC, 558 U.S. 310 (2010); Lawrence v. Texas, 539 U.S. 558 (2003); Bush v. Gore, 531 U.S. 98 (2000); District of Columbia v. Heller, 554 U.S. 570 (2008); Plessy v. Ferguson, 163 U.S. 537 (1896); Scott v. Sandford, 60 U.S. 393 (1856); and Marbury v. Madison, 5 U.S. 137 (1803).
8. *See* Josh Gerstein et al., *Alito's Draft Opinion Overturning Roe Is Still the Only One Circulated Inside Supreme Court*, POLITICO (May 11, 2022, 4:31 AM), https://www.politico.com/news/2022/05/11/alito-abortion-draft-opinion-roe-0003 1648 [https://perma.cc/XCJ8-P67M]; Robert Barnes et al., *How the Future of Roe is Testing Roberts on the Supreme Court*, WASH. POST (May 7, 2022, 7:27 PM), https://www.washingtonpost.com/politics/2022/05/07/supreme-court-abortion-roe-roberts-alito/ [https://perma.cc/P7WY-G2ML].
9. *See* Sonam Sheth & Oma Seddiq, *Supreme Court Confirms Authenticity of Draft Opinion Overturning Roe v. Wade*, BUS. INSIDER (May 3, 2022, 11:33 AM), https://www.businessinsider.com/supreme-court-confirms-authenticity-draft-opinion-gutting-roe-v-wade-2022-5 [https://perma.cc/F3F3-8X9Z]; Alexander Ward et al., *Supreme Court Marshal Digs in on Roe Opinion Leak*, POLITICO: LEGAL (May 24, 2022, 3:33 PM), https://www.politico.com/news/2022/05/24/scotus-marshal-roe-opinion-00034670 [https://perma.cc/QW5R-BE54]; Brooke Singman, *Abortion Decision Draft Leaker's Identity Remains a Mystery as Supreme Court Ends Its Term*, FOX NEWS (June 30, 2022, 12:27 PM), https://www.foxnews.com/politics/abortion-decision-draft-leakers-identity-mystery-supreme-court-ends-term [https://perma.cc/D48D-3WGN]. This leak was a serious breach of the Supreme Court's tradition of secrecy regarding its internal operations and deliberations. *See* Marcia Coyle, *'Egregious Breach of Trust': Chief Justice Roberts Orders Investigation of Leaked Draft Abortion Opinion*, NAT'L L.J. (May 3, 2022, 11:51 AM), https://www.law.com/nationallawjournal/2022/05/03/egregious-breach-of-trust-chief-justice-roberts-orders-investigation-of-leaked-draft-abortion-opinion/?slreturn=20220612154047 [https://perma.cc/CQK8-SDYC]; Sara Al-Arshani, *Clarence Thomas Called the Supreme Court's Roe v. Wade Leak an 'Unthinkable*

demonstrations in support and in opposition to the anticipated decision.[10] Some justices even received death threats,[11] and the demonstrations continued long after the final decision was announced.[12]

Breach of Trust', BUS. INSIDER: L. (May 14, 2022, 9:36 AM), https://www.businessinsider.com/justice-clarence-thomas-roe-leak-unthinkable-breach-of-trust-2022-5 [https://perma.cc/EVT7-EFHZ]. Because it is unlikely that the leak violated any federal criminal laws, some legislators proposed laws to criminalize such leaking. *See* John C. Coffee Jr., *Legal 'Leakers': Can They Be Criminally Prosecuted?*, N.Y. L.J. (May 18, 2022, 12:30 PM), https://www.law.com/newyorklawjournal/2022/05/18/legal-leakers-can-they-be-criminally-prosecuted/ [https://perma.cc/FS6Y-MRPY].

10. *See* Ellie Silverman et al., *Crowds Protest at Supreme Court After Leak of Roe Opinion Draft*, WASH. POST (May 3, 2022, 9:45 PM), https://www.washingtonpost.com/dc-md-va/2022/05/03/protests-roe-v-wade-supreme-court/ [https://perma.cc/329Y-59DS]; Steve Thompson & Michelle Boorstein, *With Supreme Court Abortion Ruling Pending, Protestors Rally and Wait*, WASH. POST (June 21, 2022, 1:41 PM), https://www.washingtonpost.com/dc-md-va/2022/06/21/supreme-court-abortion-protest/ [https://perma.cc/NPL8-GU9Y]; Mark Lungariello, *FBI Probes Attacks on Pro-Life Groups as Supreme Court Decision on Roe v. Wade Looms*, N.Y. POST (June 17, 2022, 12:49 PM), https://nypost.com/2022/06/17/fbi-probes-attacks-on-pro-life-groups-as-roe-v-wade-decision-looms/ [https://perma.cc/7TC3-PZ5U].

11. *See* Betsy Woodruff Swan & Josh Gerstein, *Supreme Court Security in Spotlight After Kavanaugh Threat*, POLITICO (June 8, 2022, 9:16 PM), https://www.politico.com/news/2022/06/08/man-gun-arrested-kavanaugh-00038137 [https://perma.cc/48U7-GF4Z]; The Editorial Board, *Why Not Prosecute Intimidation of Supreme Court Justices?*, WALL ST. J.: OP. (June 24, 2022, 6:41 PM), https://www.wsj.com/articles/why-not-prosecute-judicial-intimidation-department-of-justice-supreme-court-justices-glenn-youngkin-larry-hogan-11656108679?page=2 [https://perma.cc/9LJE-FLQE]; Jess Bravin & Eliza Collins, *House Passes Bill Extending Security Protection to Supreme Court Justices' Families*, WALL ST. J.: POL., (June 14, 2022, 6:29 PM), https://www.wsj.com/articles/house-set-to-pass-bill-extending-security-protection-to-supreme-court-justices-families-11655225168?page=2 [https://perma.cc/S29E-BL3F]; The Editorial Board, *The Assault on the Supreme Court*, WALL ST. J.: OP. (June 12, 2022, 5:09 PM), https://www.wsj.com/articles/the-assault-on-the-supreme-court-alito-leak-opinion-draft-kavanaugh-assasination-murder-attempt-gun-abortion-roe-wade-dobbs-jan-6-six-capitol-hill-riot-insurrection-11655063405?page=3 [https://perma.cc/U9MS-EFBX].

12. *See* Pete Williams, *Supreme Court asks Maryland, Virginia Officials to Stop People Picketing at Justices' Houses*, NBC NEWS (July 2, 2022, 12:52 PM), https://www.nbcnews.com/politics/supreme-court/supreme-court-asks-maryland-officials-stop-picketing-justices-houses-rcna36460 [https://perma.cc/ZDK3-6NBY]; Felix Behr, *DC's Morton's Steakhouse Responds To Brett Kavanaugh Protestors*, TASTINGTABLE (JULY 8, 2022, 5:33 PM), https://www.tastingtable.com/921850/dcs-mortons-steakhouse-responds-to-brett-kavanaugh-protesters/ [https://perma.cc/YLH5-MVLR] (discussing the restaurant chain condemning "unruly" pro-choice protestors as Justice Kavanaugh fell victim to another Politico leak revealing his dinner location and suggesting that similar situations will occur "as many see peaceful, yet direct confrontations as the only means to get their ire across"); Omari Daniels & Hau Chu, *More Than 180 Arrested at Abortion Rights Protest near Supreme Court*, WASH. POST (June 30, 2022, 4:56 PM), https://www.washingtonpost.com/dc-md-va/2022/06/30/abortion-protest-dc-supreme-court/ [https://perma.cc/K8Y6-KRFM].

With all this tumult as prelude, the Court began announcing the 2022 term's most notable decisions in late June. The leaked *Dobbs* proved to be accurate and the majority held, thereby overruling *Roe v. Wade* by a vote of six to three.[13] The subject matter of several other Court opinions released in 2022, although less celebrated than *Dobbs*, read like a list of hot button issues. Among the topics addressed by the Court were the Second Amendment and gun rights,[14] climate change and the authority of administrative agencies,[15] school prayer,[16] the free exercise of religion,[17] immigration,[18] Native American rights,[19] the First Amendment and public forums,[20] religion and the death penalty,[21] state secrets,[22] executive privilege,[23] and COVID in the workplace and the vaccine-or-testing mandate.[24]

The sound and fury of these decisions obscured *Vega v. Tekoh*,[25] in which the Court held that a violation of the *Miranda* rights warning and waiver requirements[26] does not provide a basis for claiming a denial of rights under 42 U.S.C. § 1983.[27] While *Tekoh*'s rejection of *Miranda* protections for § 1983 claims may ultimately prove to be significant, of far greater potential import is the Court's rationale in support of its holding, which was premised on its assessment of the inadequacy of deterrent benefits that would be obtained by allowing

13. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242, 2279 (2022) (finding that the United States Constitution does not confer a right to abortion and overruling both Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood v. Casey, 505 U.S. 988 (1992)).
14. U.S. CONST. amend. II; *see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).
15. *See* West Virginia v. EPA, 142 S. Ct. 2587 (2022).
16. *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).
17. *See* Carson v. Makin, 142 S. Ct. 1987 (2022).
18. *See* Biden v. Texas, 142 S. Ct. 2528 (2022).
19. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).
20. *See* Shurtleff v. Boston, 142 S. Ct. 1583 (2022).
21. *See* Ramirez v. Collier, 142 S. Ct. 1264 (2022).
22. *See* FBI v. Fazaga, 142 S. Ct. 1051 (2022).
23. *See* Trump v. Thompson, 142 S. Ct. 680 (2022).
24. *See* Nat'l Fed'n of Indep. Bus. v. DOL, 142 S. Ct. 661 (2022).
25. Vega v. Tekoh, 142 S. Ct. 2095 (2022).
26. *See* Miranda v. Arizona, 384 U.S. 436 (1966). The *Miranda* warnings provide the following procedural safeguards: "[the] 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." *Id.* at 444. A "defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." *Id.*
27. Section 1983, 42 U.S.C. § 1983, provides a cause of action against:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.

Tekoh, 142 S. Ct. at 2101 (quoting 42 U.S.C. § 1983).

such claims.[28] The Court's reasoning in *Tekoh* may signal a future willingness to harmonize its approach to the Fourth Amendment[29] exclusionary rule and the *Miranda* exclusionary rule, so that going forward both rules decisively rest upon a more closely related, if not nearly identical, deterrence-based rationale.[30]

This article explores the possibility that the Court ultimately may adopt a more unified approach to the exclusion of illegally obtained evidence predicated upon these two different bases and the ramifications of such an approach. Part II of this article traces the historical development of the *Miranda* exclusionary rule from its dramatic beginning to its current diminished status. Part III describes a similar transformation of Court's Fourth Amendment exclusionary rule, with special attention on the Roberts Court's 2009 decision in *Herring v. United States*.[31] Next, Part IV reviews *Vega v. Tekoh*, and its unapo-

28. *See Tekoh*, 142 S. Ct. at 2101–03.

29. *Id.* at 2107.

30. The term "exclusionary rule" is an imprecise term that encompasses several different rules and theories for exclusion based on the type and nature of the governmental misconduct at issue and the rights thereby transgressed. For example, confessions obtained in violation of *Miranda* protections, *Miranda*, 384 U.S. at 444–45; those that are coerced in a traditional sense—such as those obtained by torture and threats, Colorado v. Connelly, 479 U.S. 157, 167 (1986); and those obtained after several hours of questioning and manipulation, Spano v. New York, 360 U.S. 315, 321–24 (1959), each has its own distinct exclusionary rule. Evidence obtained via illegal searches so egregious as to "shock the conscience," as discussed *infra* notes 119–122 and in accompanying text, is excluded under a third standard. *See* Rochin v. California, 342 U.S. 165, 172–73 (1952). Additional rules govern the Sixth Amendment, U.S. CONST. amend. VI, for example, United States v. Henry, 447 U.S. 264, 272–74 (1980) (holding that the government violated the defendant's Sixth Amendment right to counsel when it "create[ed] a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel"); Brewer v. Williams, 430 U.S. 387, 400–01 (1977) ("[O]nce adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."); other constitutional violations, for example, Stovall v. Denno, 388 U.S. 293, 294–98 (1967) (holding that some pretrial identifications can be excluded under the Due Process Clause of the Fourteenth Amendment); and statutory transgressions, *see generally* George E. Dix, *Nonconstitutional Exclusionary Rules in Criminal Procedure*, 27 AM. CRIM. L. REV. 53, 63–82 (1989) (discussing various nonconstitutional rules that have exclusionary rules). It might also be noted that the exclusionary rule is not so much a rule as such as it is a description of a particular type of discretionary decision making. *See generally* WILLIAM TWINING & DAVID MIERS, HOW TO DO THINGS WITH RULES (4th ed., 1999) (discussing the attributes and characteristics of rules in general). Its status as a "rule" connotes a greater sense of authority, formality, and precision than may otherwise be deserved.

31. Herring v. United States, 555 U.S. 135, 137, 147–48 (2009) (holding that a criminal defendant's Fourth Amendment rights are not violated when police mistakes that lead to unlawful searches are merely the result of isolated negligence and not "systemic error or reckless disregard of constitutional requirements," and that evidence obtained under these circumstances is admissible and not subject to the exclusionary rule).

logetic reliance on a deterrence-based rationale for the *Miranda* exclusionary rule. With all the foregoing as prelude, Part V considers the future basis and reach of the *Miranda* exclusionary rule, and the possibility that it might be treated more in conformity with Fourth Amendment exclusion. Finally, in Part VI, this article concludes that, with *Vega v. Tekoh,* as well as other recent decisions, the Court has laid substantial groundwork for adopting a more harmonious approach for Fourth Amendment and *Miranda* exclusion, and it identifies some of the consequences of a more unified approach.

II. THE HISTORICAL DEVELOPMENT OF THE *MIRANDA* EXCLUSIONARY RULE

A. Confessions Before *Miranda*

Criminal confession jurisprudence before *Miranda* was largely concerned with voluntariness, for example, whether a suspect's free will was so unduly overborne by police pressure that any incriminating statements made by the suspect would be deemed involuntary.[32] The courts applied a totality of the circumstances approach, in which they considered all of the relevant facts relating to the interrogation of the suspect, including the suspect's traits and background, the conditions of the interrogation, and the actions of the police, in light of broader values implicated by police interrogation.[33] If the police were deemed to have gone too far, the confession would be declared involuntary and would be suppressed at the suspect's trial.[34]

The defense bar and many academics criticized this traditional approach. They complained that it was ad hoc and case-specific, thus failing to provide meaningful standards for the police in future cases.[35] Moreover, they argued that it was largely ineffectual in protecting the constitutional rights of criminal suspects, especially when

32. *See Spano*, 360 U.S. at 319–20, 323 (1959) (holding that a post-indictment confession, obtained by police with the intent of securing a statement that could be used to convict the suspect, violated due process because the suspect's will was overborne by official pressure, fatigue, and false sympathy); Ashcraft v. Tennessee, 322 U.S. 143, 158–59 (1944) (holding a confession obtained from a suspect, after thirty-six consecutive hours of incommunicado questioning, was so "inherently coercive" as to be presumptively involuntary and compelled).

33. *See* Blackburn v. Alabama, 361 U.S. 199, 207 (1960) (explaining that involuntariness is a "convenient shorthand" for a "complex of values" relating to the constitutionality of a confession); Stein v. New York, 346 U.S. 156, 185 (1953) (instructing that "[t]he limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing").

34. *See supra* note 30.

35. *See* Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979) (observing that under the traditional involuntariness test, "[a]lmost everything was relevant, but almost nothing was decisive" (quoting Yale Kamisar, *Gates, 'Probable Cause,' 'Good Faith,' and Beyond*, 69 IOWA L. REV. 551, 570 (1984))). As one observer put it:

naive or undereducated arrestees were subjected to the increasingly sophisticated and psychologically-based methods of interrogation used by police.[36] More broadly, critics saw the traditional approach to confessions as part of a larger, unjust regime that denied defendants and criminal suspects the capacity to exercise effectively their constitutional rights.[37]

If traditional approaches to constitutional protections were the malady, then the Warren Court intended to dispense the cure. From 1953 to 1969, Earl Warren presided as Chief Justice of the United States Supreme Court. Under Warren's leadership, the Court aggressively tackled a variety of controversial matters, announcing landmark decisions addressing racial segregation and discrimination,[38] voting redistricting and malapportionment,[39] free speech,[40]

> Given the Court's inability to articulate a clear and predictable definition of "voluntariness," the apparent persistence of state courts in utilizing the ambiguity of the concept to validate confessions of doubtful constitutionality, and the resultant burden on its own workload, it seemed inevitable that the Court would seek "some automatic device in which the potential evils of incommunicado interrogation [could] be controlled."

Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 102–03 (1977) (alteration in original) (citations omitted).

36. *See* David L. Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25, 37 (1965) (observing that "if the American police manuals are examined, there is a striking similarity between their recommendations and Russian and Chinese interrogation techniques"): Yale Kamisar, *A Dissent From the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 62 (1993) (contending that the protections afforded by the traditional involuntariness approach "were largely 'illusory'" (quoting George H. Dession, *The New Rules of Criminal Procedure*, 55 YALE L.J. 694, 708 (1946))).
37. *See* Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1425 (1985) (observing that a majority of the Court viewed confessions "darkly as the product of police coercion").
38. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that laws prohibiting interracial marriages were unconstitutional); Gomillian v. Lightfoot, 364 U.S. 339, 346 (1960) (finding discriminatory electoral district boundaries to have disenfranchised black voters in violation of the Fifteenth Amendment); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (finding that segregation of the District of Columbia public schools was a "burden that constitutes an arbitrary deprivation of [black students'] liberty in violation of the Due Process Clause"); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that state laws establishing separate public schools for black and white students were unconstitutional).
39. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 560 (1964) (holding that state legislative districts had to be roughly equal in population, basing the decision on the principle of "one person, one vote" (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963))); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (requiring that each state to draw its U.S. Congressional districts so that they are approximately equal in population); Baker v. Carr, 369 U.S. 186, 199 (1962) (holding that federal courts may intervene and decide redistricting issues).
40. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (holding that the government cannot punish inflammatory speech unless that speech is directed to

and the free exercise of religion.[41] The Court also focused on the criminal justice system, deciding issues relating to the basis and scope of searches and seizures,[42] discovery,[43] incorporating constitutional protections in state trials,[44] and punishment.[45]

Reforming the criminal justice system through the presence and representation of defense counsel was of special importance to the Warren Court. Beginning in 1963, the Court announced three important decisions concerning a criminal defendant's or suspect's right to counsel.[46] First, in *Gideon v. Wainwright*,[47] the Court held that states

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inciting, and is likely to incite, imminent lawless action); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964) (establishing the actual malice standard, which has to be met before press reports about public officials can be considered to be defamation and libel); Yates v. United States, 354 U.S. 298, 318 (1957) (holding that the First Amendment protected radical and reactionary speech, unless it posed a "clear and present danger.").

41. *See* Sherbert v. Verner, 374 U.S. 398, 402–03 (1963) (holding that the Free Exercise Clause of the First Amendment required the government to demonstrate both a compelling interest and that the law in question be narrowly tailored before denying unemployment compensation to someone who was fired because their job requirements substantially conflicted with their religion).
42. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 28, 30, 38 (1968) (holding that the Fourth Amendment prohibition on unreasonable searches and seizures is not violated when a police officer stops a suspect on the street and frisks them without probable cause to arrest, if the officer has a reasonable suspicion that the person "has committed, is committing, or is about to commit a . . . crime" and has a reasonable belief that the person "may be armed and presently dangerous"); Katz v. United States, 389 U.S. 347, 362 (1967) (holding that the intrusion on justifiable expectations of privacy was the basis for determining whether a search under the Fourth Amendment had occurred).
43. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the withholding of exculpatory evidence violates due process "where the evidence is material either to guilt or to punishment").
44. *See* Malloy v. Hogan, 378 U.S. 1, 9–10 (1964) (holding that the Fifth Amendment privilege against compulsory self-incrimination is a fundamental right applicable to the states through the Fourteenth Amendment); *see also* Ker v. California, 374 U.S. 23, 30 (1963) (holding that the Fourth Amendment protections against unreasonable searches and seizures is incorporated though the Fourteenth Amendment and applied to the states); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (holding that the Fourth Amendment exclusionary rule is a fundamental right applicable to the states through the Fourteenth Amendment).
45. *See, e.g.*, Robinson v. California, 370 U.S. 660, 666–67 (1962) (striking down a California law that criminalized being addicted to narcotics.); Trop v. Dulles, 356 U.S. 86, 103 (1958) (holding that it was unconstitutional for the government to revoke the citizenship of a United States citizen as a punishment).
46. The Warren Court issued other important criminal procedure decisions during this period, most notably *Malloy*, 378 U.S. at 1 (holding that the Fifth Amendment privilege against compulsory self-incrimination is a fundamental right applicable to the states through the Fourteenth Amendment) and Massiah v. United States, 377 U.S. 201 (1964) (holding that the government may not deliberately elicit statements from a person under indictment in the absence of counsel).
47. Gideon v. Wainwright, 372 US. 335 (1963).

are required, under the Fourteenth Amendment,[48] to provide counsel in criminal cases to represent defendants who are unable to afford to pay for their own attorneys.[49] A year later, in *Escobedo v. Illinois*,[50] the Court ruled that the Sixth Amendment[51] is violated when police question a custodial suspect who is the focus of their investigation in the absence of counsel when the suspect has requested counsel.[52] These decisions demonstrated that the Warren Court's willingness to depart, even radically, from past practices to protect the rights of criminal suspects, and they signaled the Court's belief that it still had more work to do. The Court's next project—the third decision in the trilogy of right to counsel cases—would address the expansion of Fifth Amendment[53] protections, and *Miranda* would become the vehicle to accomplish this objective.[54]

B. The *Miranda* Decision

On March 3, 1963, during the early morning hours, Ernesto Miranda kidnapped, raped, and robbed a young woman as she walked toward her home in Phoenix, Arizona.[55] Miranda was arrested a few days later by police. Without the assistance of counsel, he was placed in a lineup and interrogated. Miranda confessed in short order to these and other, unrelated crimes. Miranda was first advised of his rights, including his Fifth Amendment right to counsel, only after he confessed.[56] Miranda's confession was admitted at his trial over de-

48. U.S. CONST. amend. XIV.
49. *Gideon*, 372 U.S. at 343.
50. Escobedo v. Illinois, 378 U.S. 478 (1964).
51. U.S. CONST. amend. VI.
52. *Escobedo*, 378 U.S. at 490–91. Perhaps *Escobedo*'s enduring significance is that it foreshadowed *Miranda* insofar as it reflected the Warren Court's negative attitudes regarding police interrogations and confessions thereby obtained to prove guilt. *See* Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 666 (1986).
53. U.S. CONST. amend. V.
54. Some commentators have speculated that the *Miranda* rights warning and waiver protocols were not the ultimate objective of the Warren Court. Rather, the Court was moving toward a requirement that custodial interrogation would be permitted only in the presence of a lawyer. *See* OTIS H. STEPHENS, JR., THE SUPREME COURT AND CONFESSIONS OF GUILT 205 (Univ. of Tenn., 1973). The speculation is that the Court approached its ultimate objective incrementally, going as far as it could as fast as it could at the time. Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 12 (1995) (contending that critics who complain *Miranda* did not go far enough "do not seem to appreciate the fact that in 1966 the Court was barely able to go as far as it did"). As a result of the firestorm that followed the *Miranda* decision and due to changes in the Court's membership, the objective of requiring counsel to always be present during custodial interrogation, if it was ever actually intended by the Warren Court, was never realized.
55. *See* LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 3–5 (Atheneum 1983).
56. *Id.* at 13–14.

fense objection, and he was convicted.[57] Miranda appealed the admissibility of his confession without success in the lower courts,[58] and thereafter sought certiorari in the Supreme Court.[59]

At about the same time, the Warren Court was actively looking for cases to serve as a vehicle for further expanding a criminal suspect's right to counsel. The Court eventually granted certiorari in Miranda's case, in part because the facts relating to his crimes seemed less aggravated than those in most of the other suitable cases, many of which involved aggravated murders or child victims.[60]

As Miranda's counsel prepared for oral argument before the Court, they were uncertain whether to focus primarily on an alleged denial of their client's Fifth or Sixth Amendment right to counsel.[61] Accordingly, the lawyers hedged their bets and prepared to argue both theories.[62] It was not until oral argument had begun that Miranda's counsel took his cue from the Justices' questioning and concentrated on a Fifth Amendment theory for reversal.[63]

Ultimately, in a 5–4 vote, Chief Justice Warren announced the Court's decision in *Miranda v. Arizona*.[64] The Court held that statements stemming from custodial interrogation cannot be admitted at trial unless the prosecution demonstrates the use of safeguards securing the privilege against self-incrimination.[65] The Court ruled that, in the absence of other safeguards, custodial interrogation is not permitted unless police first give the suspect four specified warnings[66] and then obtain from the suspect a knowing, intelligent, and voluntary waiver of these rights.[67]

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57. *Id.* at 22–23.
58. *Id.* at 24–25.
59. *Id.* at 25.
60. *Id.* at 103.
61. *Id.* at 72.
62. *Id.*
63. *Id.*
64. Miranda v. Arizona, 384 U.S. 436 (1966). Joining Warren in the majority were Justices Black, Douglass, Brennan and the most recent addition to the Court, Justice Abe Fortas, who joined the Court in 1965. *See* BARRY J. MCMILLION, CONG. RSCH. SERV., RL33225, SUPREME COURT NOMINATIONS, 1789 TO 2020: ACTIONS BY THE SENATE, THE JUDICIARY COMMITTEE, AND THE PRESIDENT at CRS-39 (Mar. 8, 2022), https://sgp.fas.org/crs/misc/RL33225.pdf [https://perma.cc/YQ7Z-KDAR].
65. *See Miranda*, 384 U.S. at 443.
66. *Id.* at 444 ("Prior 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").
67. *Id.* ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently"). The *Miranda* decision gave birth to the cottage industry of producing rights warning cards and their widespread use by police and others who administer *Miranda* rights. *See* BAKER, *supra* note

In the majority's view, *Miranda* accomplished several objectives.[68] It afforded Fifth Amendment protections to criminal suspects at the pretrial stage. It ensured that a suspect's waiver of Fifth Amendment rights would be knowing, intelligent, and voluntary. It helped protect suspects from incommunicado interrogations by police, which allowed them to deal better with modern psychological ploys used by law enforcement to obtain confessions. It recognized that compulsion was an inevitable attribute of custodial interrogation, and that rights warnings were needed to address this compulsion.[69] Finally, it established bright-line standards that could be comprehensively and consistently followed and enforced by the police and the courts. Civil libertarians applauded the Warren Court for its *Miranda* decision.[70]

Two points about the *Miranda* decision deserve special emphasis. First, the Court clearly characterized the *Miranda* warnings requirement to be of a constitutional dimension rather than being merely a Court-made rule. To this end, near the beginning of the *Miranda* opinion, Warren wrote about the need "for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not be compelled to incriminate himself."[71] Warren continued that the Court granted certiorari in *Miranda* "in order further to explore some facets of the problems . . . of applying the privi-

55, at 177–78. It is little known that during his hiatus from serving prison terms, Ernesto Miranda would sell autographed rights warning cards outside the Phoenix courthouse for a nominal sum. *See* LIZ SONNEBORN, MIRANDA V. ARIZONA: THE RIGHTS OF THE ACCUSED 46 (Rosen Publ'g Grp., 2003).

68. It should be noted that the traditional involuntariness test retained viability after *Miranda*, and it continues to serve as an alternate, if less often used, basis for suppression confessions. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 167 (1986) (applying the traditional involuntariness approach under the Due Process Clause to a post-*Miranda* case).

69. *See Miranda*, 384 U.S. at 458; *see also* Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 735 (1987) (observing that *Miranda* found "compulsion inheres in custodial interrogation to such an extent that any confession, in any case of custodial interrogation is compelled"); Eugene R. Milhizer, *Rethinking Police Interrogation: Encouraging Reliable Confessions While Respecting Suspects' Dignity*, 41 VAL. U. L. REV. 1, 15 (2006) (explaining the *Miranda*'s rationale is based on a syllogism that includes the premise that informal compulsion actually or at least presumptively exists in any and every form of custodial interrogation).

70. *See* Richard Carelli, *Court Upholds Miranda: Police Must Read Rights to Suspects*, ATHENS BANNER-HERALD (June 27, 2000), http://onlineathens.com/stories/062700/new_0627000005.shtml#.WH1e687543Q [https://perma.cc/WEQ7-VYZ6] ("Steven Shapiro of the American Civil Liberties Union praised the [C]ourt for upholding the Miranda ruling, which he called 'an emblem of fairness.'"); *see also* BAKER, *supra* note 55, at 61–62 (reporting Robert J. Corcoran, an American Civil Liberties Union (ACLU) volunteer at the organization's Phoenix office, represented Miranda at the United States Supreme Court, and the ACLU covered out-of-pocket expenses for Miranda's attorneys).

71. *See Miranda*, 384 U.S. at 439.

lege against self-incrimination to in-custody interrogation, and to give concrete constitution guidelines for law enforcement agencies and courts to follow."[72] Near the conclusion of the opinion, Warren noted that although "Congress and the States are free to develop their own safeguards, so long as they are fully as effective as [the *Miranda* warnings], . . . the issues presented are of constitutional dimensions and must be determined by the courts."[73] Warren then explained:

> As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when *Escobedo* was before us and it is our responsibility today. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.[74]

Perhaps most tellingly, when turning to the facts pertaining to the custodial interrogation of Ernesto Miranda, the Court "concluded that statements were obtained from the defendant under circumstances that *did not meet constitutional standards for protection of the privilege*."[75]

The Warren Court reiterated in subsequent cases that the *Miranda* requirements were derived from the Fifth Amendment rather than the Court's own rule-making authority. In *Orozco v. Texas*,[76] for example, the Court excluded a confession because it was "[o]btained in the absence of the required warnings [which] was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*."[77] A fair reading of *Miranda* and *Orozco* leaves little doubt that the *Miranda* warnings requirements were of constitutional dimension, at least in the minds of those Justices who comprised the majority in *Miranda*.[78]

Second, *Miranda* clearly instructed that compliance with the rights warnings and waiver provisions were a prerequisite, without exception, for the admission of a suspect's statement obtained during custodial interrogation. In particular, the Court explicitly anticipated

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72. *Id.* at 441–42.

73. *Id.* at 490 (alteration in original).

74. *Id.* at 490–91 (referring to Escobedo v. Illinois, 378 U.S. 478 (1964)).

75. *Id.* at 491 (emphasis added); *see also* Yale Kamisar, Miranda *after* Dickerson*: The Future of Confession Law,* 99 MICH. L. REV. 879, 883 (2001) ("I venture to say that *at the time* the *Miranda* opinion was handed down almost everyone who read it (including the dissenting Justices) understood that it was a constitutional decision—an interpretation of the Fifth Amendment privilege against self-incrimination.") (alteration in original).

76. Orozco v. Texas, 394 U.S. 324 (1969).

77. *Id.* at 326.

78. Professor Yale Kamisar argues that Justice White, a stern *Miranda* dissenter, likewise understood that *Miranda* was a constitutional decision as reflected by remarks he made after the decision was announced. *See* Yale Kamisar, *Forward, From* Miranda *to § 3501 to* Dickerson *to . . .,* 99 MICH. L. REV. 879, 883–84 (2001).

and ruled out the possibility of an impeachment exception to the *Miranda* warnings when it cautioned,

> The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner . . . [S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.[79]

The Court's absolutist approach for the need to provide *Miranda* warnings and obtain a waiver thereof suggests that it would reject any proposed exceptions that would weaken *Miranda* requirements in the future, irrespective of whether suppression would disincentivize future police misconduct. Further, even assuming that full compliance with the *Miranda* protocols was not always deemed to be a prerequisite for the admission of a statement obtained during custodial interrogation, exceptions to the rule would necessarily be rare because the warnings themselves were constitutionally based.

C. Confessions After *Miranda*

When the Supreme Court granted certiorari in *Dickerson* in 1999,[80] it seemed as if *Miranda*'s day of reckoning had finally arrived. In the words of Professor Donald Dripps:

> Once the Court granted [certiorari in *Dickerson*] court-watchers knew the hour had come. At long last the Court would have to either repudiate *Miranda*, repudiate the prophylactic-rule cases, or offer some ingenious reconciliation of the two lines of precedent.[81]

Many predicted the demise of *Miranda* because of all that had happened over the previous thirty-five years since it was announced.[82] The 5–4 Supreme Court decision in *Miranda* was widely unpopular. Congress had swiftly and overwhelmingly passed § 3501 of an omnibus crime bill[83] that, in effect, overruled *Miranda*, which was thereafter signed into law by President Johnson and upheld by the Fourth Circuit.[84] When the statute finally reached the Supreme Court years later for its consideration, that body had been significantly reconstituted, and it was then led by a Chief Justice Warren Burger, who was a longtime critic of *Miranda*. Indeed, the fate of § 3501 and thus *Mi-*

79. *See Miranda*, 384 U.S. at 476–77.
80. *See* Dickerson v. United States, 528 U.S. 1045 (1999).
81. Donald A. Dripps, *Constitutional Theory for Criminal Procedure:* Miranda*,* Dickerson*, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 33 (2001) (alteration in original).
82. *See* GARY L. STUART, MIRANDA: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT 167–68 (Univ. of Ariz. Press, 2004) (noting that before *Dickerson*, many thought the Court would overrule *Miranda*).
83. *See* 18 U.S.C. § 3501.
84. *See* United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999).

randa would be decided by justices who had previously undertaken a multi-decade project of diminishing *Miranda*'s status and influence.

Although the Burger Court's first salvo against *Miranda* was with *Harris v. United States*,[85] it struck the decisive blow to its constitutional status in *Michigan v. Tucker*.[86] In *Tucker*, Justice Rehnquist, himself a longtime critic of *Miranda*[87] and writing for the Court, said,

> A comparison of the facts in this case with the historical circumstances underlying the privilege . . . strongly indicates that the police conduct here did not deprive [the suspect] 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*.[88]

Thus, and for the first time, the Court held that the *Miranda* warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected."[89] According to the Court, the only harm that occurred in *Tucker* was that the police departed "from the prophylactic standards later laid down [in *Miranda*]."[90] In other words, although *Miranda* had been transgressed, there was no violation of the Fifth Amendment privilege against self-incrimination.[91]

Next, with *Oregon v. Elstad*,[92] the Court, per Justice O'Connor, rejected applying the fruit-of-the-poisonous-tree argument to *Miranda* violations.[93] Justice O'Connor wrote that the "fruit of the poisonous tree [analysis] assumes the existence of a constitutional violation."[94] She continued that the *Miranda* exclusionary rule "serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered in the absence of a Fifth Amendment violation."[95] In other words, *Elstad* affirmed that the *Miranda* warnings were not constitutionally compelled, but rather were a court-made prophylaxis established to help ensure Fifth Amendment compliance.

By the end of the twentieth century, *Miranda*'s fate seemed sealed. Congress, the Supreme Court, and the public appeared to be aligned

85. Harris v. New York, 401 U.S. 222, 226 (1971) (holding that statements taken in violation *Miranda* may be used to impeach a defendant's testimony on direct examination); *see also* New York v. Quarles, 467 U.S. 649, 663 (1984) (recognizing a public safety exception to the Miranda warnings requirement).
86. Michigan v. Tucker, 417 U.S. 433 (1974).
87. *See* Eugene R. Milhizer, *Miranda's Near Death Experience: Reflections on the Occasion of Miranda's Fiftieth Anniversary*, 66 CATH. U. L. REV. 577, 593 (2017).
88. *Tucker*, 417 U.S. at 444.
89. *Id.*
90. *Id.* at 446.
91. U.S. CONST. amend. V (providing "[n]o person . . . shall be compelled in any criminal case to be a witness against himself").
92. Oregon v. Elstad, 470 U.S. 298 (1985).
93. *Id.* at 304.
94. *Id.* at 305.
95. *Id.* at 306.

against it, and the pieces were now in place for the Court to deliver the *coup de grâce* and overrule *Miranda*.[96]

But as we now know, *Miranda* survived. In *Dickerson,*[97] decided in 2000, the Court struck down § 3501 and reaffirmed *Miranda*'s continued vitality. More surprisingly, it did so by an overwhelming 7–2 vote. Stranger still, William Rehnquist, now Chief Justice and an outspoken critic of *Miranda*, wrote the majority opinion that stayed its predicted demise.[98]

Rehnquist explained the Court's rationale in *Dickerson* as follows:

> In *Miranda v. Arizona*, . . . we held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence. In the wake of that decision, Congress enacted 18 U.S.C. § 3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.[99]

Any hopes that *Dickerson* signaled an expansive rebirth of an invigorated *Miranda*, however, were quickly dispelled. In *United States v. Patane*,[100] decided in 2004, a detective questioned a suspect about a pistol he was supposed to have owned, without first complying with the *Miranda* warnings and waiver requirements.[101] The suspect told

96. *See* Lucian Paul Sbarra, Note, *Wiping the Dust Off of an Old Statute:* United States v. Dickerson *Eliminates the* Miranda *Warnings,* 35 WAKE FOREST L. REV. 481, 497 (2000) (contending that the "interplay between the Department of Justice's repeated failure to enforce § 3501 and the Supreme Court's limits on the *Miranda* rule provided the fuel for the *Dickerson* Court to pronounce § 3501 as constitutional and to eradicate the necessity for the *Miranda* warnings"); *see also* STUART, *supra* note 82, at 112–14 (stating that some commentators were optimistic that *Miranda* would survive *Dickerson*).

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

98. The oral argument at the Supreme Court in the *Dickerson* case was somewhat irregular. Of course, counsel representing Dickerson did not argue in support of Section 3501. Consistent with its past policies, the Justice Department likewise did not defend the constitutionality of the statute. Accordingly, the Court appointed Professor Paul Cassell to serve as an amicus and argue in defense of Section 3501. Cassell, a former Rehnquist clerk, was no doubt selected for this task because he was a prominent and longtime critic of *Miranda*. *See generally* 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); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996).

99. *Dickerson*, 530 U.S. at 431–32 (citation omitted). For a discussion of the reasons that may have prompted Chief Justice Rehnquist's opinion in *Dickerson*, *see* Milhizer, *supra* note 87, at 602–05.

100. *See* United States v. Patane, 542 U.S. 630 (2004).

101. *Id.* at 635.

the detective where to find the pistol, which the detective soon did.[102] Relying heavily on pre-*Dickerson* cases, the Court barred the use of the statement itself but allowed the pistol to be introduced into evidence.[103] A majority of the Court, including Rehnquist, seemed to attach no significance to the fact that it had instructed four years earlier in *Dickerson* that *Miranda* had "announc[ed] a constitutional rule."[104] *Patane* makes clear that while *Dickerson* preserved *Miranda*, it did so in a diminished form.[105] *Miranda*'s lofty pedigree and reach had been weathered and eroded until it was reduced to a prophylactic, Court-made rule that stood apart from any Fifth Amendment protections.

After *Tucker*, *Withrow v. Williams*[106] was the last bullwork of any consequence that stood against the complete erosion of *Miranda* as originally decided. Justice Souter, writing for the majority, held that the Court's previously announced restriction on the exercise of federal habeas jurisdiction with respect to the Fourth Amendment exclusionary rule does not extend to a state prisoner's claim that his conviction rests on statements obtained in violation of the *Miranda* safeguards.[107]

Winthrow distinguished *Miranda* exclusion from Fourth Amendment exclusion, discussed *infra*, as follows:

> [T]he *Mapp* [Fourth Amendment exclusionary rule] "is not a personal constitutional right," but serves to deter future constitutional violations; although it mitigates the juridical consequences of invading the defendant's privacy, the exclusion of evidence at trial can do nothing to remedy the completed and wholly extrajudicial Fourth Amendment violation. Nor can the *Mapp* rule be thought to enhance the soundness of the criminal process by improving the reliability of evidence introduced at trial. Quite the contrary, as we explained in *Stone*, the evidence excluded under *Mapp* is 'typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.' *Miranda* differs from *Mapp* in both respects. "Prophylactic" though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards "a fundamental trial right." The privilege embodies "principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle . . ."

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102. *Id.*

103. *Id.* at 634.

104. *Dickerson*, 530 U.S. at 439.

105. As former Supreme Court Justice Arthur Goldberg put it, the Court had left *Miranda* "twisting in the wind." Arthur J. Goldberg, Escobedo *and* Miranda *Revisited*, 18 AKRON L. REV. 177, 182 (1984).

106. Withrow v. Williams, 507 U.S. 680 (1993).

107. *Id.* at 682–83, *distinguishing* Stone v. Powell, 428 U.S. 465, 482 (1976) (holding that where states had provided opportunities for full and fair litigation of Fourth Amendment claims, the Constitution did not require the granting of federal habeas corpus relief; any additional benefits from considering search and seizure claims of state prisoners on collateral review would be small in relation to the costs, and the Fourth Amendment values protected by the exclusionary rule would not be significantly enhanced in such situations and that deterrence of police misconduct was unlikely to increase).

> . . . .
> Nor does the Fifth Amendment "trial right" protected by *Miranda* serve some value necessarily divorced from the correct ascertainment of guilt. "'[A] system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses' than a system relying on independent investigation."[108]

Thus, according to *Withrow*, *Miranda* exclusion differs from Fourth Amendment exclusion in two important respects. First, *Miranda* rights are personal rights, in contrast to the deterrent-based Fourth Amendment exclusionary rule, which is not. Second, the exclusion of unwarned confessions under *Miranda* can enhance the search for truth, insofar as this helps protects against the admission of unreliable confessions. The exclusion of physical evidence under the Fourth Amendment, in contrast, can frustrate the search for truth by suppressing reliable and probative evidence of guilt.

With these cases and their rationales as prelude, the Court decided *Vega v. Tekoh*. Before addressing the holding, rationale, and ramifications of that decision with respect to a deterrent basis for *Miranda* exclusion, it is necessary to trace the development of the Fourth Amendment exclusionary rule with respect to deterrence.

III. THE HISTORICAL DEVELOPMENT OF THE FOURTH AMENDMENT EXCLUSIONARY RULE

A. Fourth Amendment Exclusion Before *Mapp*

In its most basic terms, the Fourth Amendment exclusionary rule presumptively excludes[109] evidence from criminal trials that is obtained as a direct result of an illegal search or seizure by police in violation of the Fourth Amendment,[110] as well as any evidence that is derived from the initial illegality.[111]

Weeks v. United States,[112] decided in 1914, is the first important Supreme Court case to address the Fourth Amendment exclusionary rule. In *Weeks*, the Court held that the rule bars the use at federal trials of evidence that is unconstitutionally seized by federal law en-

108. *Withrow*, 507 U.S. at 691–92 (citations omitted) (referring to Mapp v. Ohio, 367 U.S. 643 (1961), discussed *infra* section III.B.).

109. Evidence is presumptively excluded, as the Court has recognized various exceptions to the Fourth Amendment exclusionary rule. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 491 (1963) (holding that the connection between the arrest and the statement had "become so attenuated as to dissipate the taint") (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)); Nix v. Williams, 467 U.S. 431, 450–51 (1984) (recognizing an inevitable discovery exception to the exclusionary rule); United States v. Leon, 468 U.S. 897, 919 (1984) (recognizing a deterrence-based good faith exception to the exclusionary rule).

110. Weeks v. United States, 232 U.S. 383, 398 (1914).

111. *See Wong Sun*, 371 U.S. at 488 (discussing the so-called "fruit of the poisonous tree" doctrine).

112. *Weeks*, 232 U.S. at 393.

forcement officers.[113] More than three decades later, in *Wolf v. Colorado*,[114] the Court instructed that "[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."[115] As a consequence of the holding in *Wolf*, criminal trials in state courts, like those in federal courts, are subject to the substantive provision of the Fourth Amendment through the Fourteenth Amendment Due Process Clause.[116] The Court continued, however, that the Fourth Amendment exclusionary rule "was not derived from the explicit requirements of the Fourth Amendment . . . The [*Weeks*] decision was a matter of judicial implication."[117] Accordingly, *Wolf* suggested that the Fourth Amendment exclusionary rule was not constitutionally required, and, consequently, it did not apply at state trials.[118]

In *Rochin v. California*,[119] decided only three years after *Wolf*, the Court held that police misconduct[120] in violation of the Fourth Amendment that "shock[ed] the conscience" also violated the Fourteenth Amendment Due Process Clause. Accordingly, evidence thereby obtained must be excluded at a state trial, not via a Fourth Amendment exclusionary rule, but rather pursuant to Fourteenth Amendment due process requirements.[121] In later cases, the Court in-

113. *Id.* at 393–94; *see also* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (justifying the Fourth Amendment exclusionary rule on judicial-integrity basis).

114. Wolf v. Colorado, 338 U.S. 25 (1949).

115. *Id.* at 27.

116. *Id.*

117. *Id.* at 28.

118. Of course, states were free to adopt a Fourth Amendment exclusionary rule via a state constitution, a statute, or decisional law. By the early 1960s, "more than half of those [states] since passing upon" the use of the exclusionary rule had adopted some form of such a rule. Mapp v. Ohio, 367 U.S. 643, 651 (1961); *see also* Elkins v. United States, 364 U.S. 206, 219–20 (1960) (recognizing that most states have adopted the exclusionary rule in its entirety, that the movement towards a state level exclusionary rule seems "inexorable," and that most states with an exclusionary rule have held that evidence obtained by federal officers unlawfully under the Fourth Amendment must be suppressed in state courts).

119. Rochin v. California, 342 U.S. 165 (1952).

120. The misconduct in *Rochin* was extreme. Police entered Rochin's home at night without a search warrant and perhaps without probable cause. *See id.* at 166. They then forcibly opened his bedroom door and found Rochin in bed with his wife. *See id.* When Rochin swallowed capsules that had been on his nightstand, three officers jumped on him and tried to forcibly extract the capsules from his mouth. *See id.* When this failed, police handcuffed Rochin and took him to a hospital, where they directed physicians to force an emetic solution through a tube into his stomach to induce him to expel the capsules, which he did. The capsules were tested and found to contain morphine. *See id.*

121. *Id.* at 172–74.

terpreted *Rochin*'s shock-the-conscience standard quite narrowly, such that it would rarely be applied in state cases.[122]

In summary, the Court's early decisions provide that although the Fourth Amendment exclusionary rule can vindicate the rights of individuals and protect the integrity of the criminal justice system, these benefits do not apply at state trials as a matter of Fourth Amendment jurisprudence. Further, in *Weeks,* the Court unequivocally rejected the notion that the remedial purposes of the exclusionary rule were aimed at offending officers, when it instructed that "[w]hat remedies the defendant may have against [the police] we need not inquire, as the Fourth Amendment is not directed to individual misconduct of such officials."[123] The sole exception to these limitations, as recognized in *Rochin*, is the selective incorporation of the Fourth Amendment exclusionary rule that is limited to circumstances involving the most outrageous conduct by the police.

B. The *Mapp* Decision

In *Mapp v. Ohio*,[124] the Warren Court fundamentally changed course with respect to the rationale and application of the Fourth Amendment exclusionary rule. The facts in *Mapp* are appalling. Police demanded entry into Mapp's home for the purported purpose of finding a bombing suspect.[125] Mapp telephoned her attorney and, on his advice, refused to admit the officers without a search warrant.[126] The officers returned three hours later, apparently still lacking a warrant and perhaps without probable cause.[127] When Mapp did not come to the door immediately, the officers forced their way inside, damaging her door.[128] After entering the residence, the officers showed Mapp a piece of paper that they claimed was a search warrant.[129] Mapp grabbed the paper and "placed it in her bosom."[130] A struggle then ensued, during which the officers twisted Mapp's hand and removed the purported warrant from her possession.[131] The officers then forcibly took Mapp upstairs to her bedroom, where they searched her be-

122. *See* Breithaupt v. Abrams, 352 U.S. 432, 437 (1957) (holding that taking a blood sample without violence by a physician at a hospital did not shock the conscience); Irvine v. California, 347 U.S. 128, 134 (1954) (holding that statements obtained illegally by entering a suspect's home to install, and then later move, a hidden microphone did not shock the conscience).
123. Weeks v. United States, 232 U.S. 383, 398 (1914).
124. Mapp v. Ohio, 367 U.S. 643 (1961).
125. *Id.* at 644.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 644–45.

longings.[132] Thereafter, they conducted a thorough search of the remainder of Mapp's home.[133] Although neither a bombing suspect nor evidence of a bombing was found, "obscene materials"[134] were discovered and seized.[135] Mapp was later tried and convicted for the possession of these materials.[136]

Setting aside any First Amendment[137] issues that were potentially raised in the case, the Court held in *Mapp* that the Fourth Amendment exclusionary rule applies fully to state criminal trials just as in federal trials, thereby overruling *Wolf*.[138] Justice Clark, writing for the majority, reasoned that "it was logically and constitutionally necessary that the exclusion doctrine . . . be also insisted upon as an essential ingredient of [Fourth Amendment] right[s]."[139] In other words, the Fourth Amendment exclusionary rule was now deemed to be of constitutional origin and an essential component of the Fourth Amendment. To conclude otherwise, the Court explained, would be tantamount to withholding the Fourth Amendment's substantive protections.[140] As the Court had presaged in an earlier case, the Fourth Amendment, without an exclusionary rule, would be reduced to little more than a "form of words."[141]

To be sure, the Court listed several subordinate reasons in support of its decision to overrule *Wolf* and deem that the exclusion of illegally obtained evidence is part and parcel of a person's Fourth Amendment protections.[142] These included the benefits of symmetry between the federal and state systems[143] and the reasoning that privacy should be treated like other rights, which includes excluding the products of its

132. *Id.* at 645.

133. *Id.*

134. *Id.* at 668. (Douglas, J., concurring) ("[T]his case is based on the knowing possession of four little pamphlets, a couple of photographs and a little pencil doodle—all of which are alleged to be pornographic").

135. *Id.* at 645.

136. *Id.* at 643.

137. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

138. *Mapp*, 367 U.S. at 655.

139. *Id.* at 655–56.

140. *Id.* at 656.

141. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

142. *See generally* Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1380–85 (1983); Yale Kamisar, *(Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition?"*, 16 CREIGHTON L. REV. 565 (1983) (discussing the many theories that have been offered concerning the purpose of the exclusionary rule).

143. *Mapp*, 367 U.S. at 658.

violation.[144] But the opinion makes clear that the Court's decision rested upon two principal, interrelated bases: (1) deterrence of future police misconduct, and (2) the imperative of judicial integrity.[145]

With respect to deterrence, the Court wrote that the "purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it."[146] This idea of deterrence did not originate in *Mapp*. Rather, it is well-recognized in other aspects of the criminal law. Deterrence, for example, is a universally accepted objective of criminal punishment,[147] which is perhaps most intensely debated in the context of the death penalty.[148] Unlike the deterrent objective of criminal punishment, however, the Fourth Amendment exclusionary rule was aimed at deterring future police misconduct rather than future criminal offenders.[149]

The second principal justification for the exclusionary rule is "the imperative of judicial integrity."[150] This rationale for the exclusionary was first expressed decades earlier in *Weeks,*[151] when the Court wrote that the judiciary is "charged at all times with the support of the Constitution,"[152] and that the "people . . . have a right to appeal [to the courts] for the maintenance of . . . fundamental rights."[153] *Weeks* reasoned that to permit the government to use illegally seized evidence at a criminal trial "would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of [the] Constitution."[154] As the Court later put it in *Elkins v. United States*,[155] when courts allow the introduction of illegally obtained evidence, they act as "accomplices in the willful disobedience of [the] Constitution."[156]

Thus, after *Mapp*, two conclusions about the status of the Fourth Amendment exclusionary rule are clear. First, the Fourth Amendment exclusionary rule is an essential part of the Fourth Amendment itself;

144. *Id.* at 656.
145. *See generally* Lawrence Crocker, *Can the Exclusionary Rule Be Saved?*, 84 J. CRIM. L. & CRIMINOLOGY 310, 314–16 (1993) (discussing the bases for the Court's decision in *Mapp*).
146. *Id.* at 316 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).
147. *See* Hudson v. United States, 522 U.S. 93, 105 (1997).
148. *See generally* Symposium, *Punishment Law And Policy: II. Death Penalty in Practice: Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803 (2006); *see* Atkins v. Virginia, 536 U.S. 304, 320 (2002).
149. Crocker, *supra* note 145, at 314–16.
150. *Mapp*, 367 U.S. at 659 (quoting *Elkins*, 364 U.S. at 222).
151. Weeks v. United States, 232 U.S. 383 (1914).
152. *Id.* at 392.
153. *Id.*
154. *Id.* at 394.
155. United States v. Elkins, 364 U.S. 206 (1960).
156. *Id.* at 223.

in other words, the rule is of constitutional in origin and dimension. Second, while deterring future police misconduct is identified as an important objective of the rule, preserving judicial integrity is a second primary justification for the exclusion of evidence obtained in violation of the Fourth Amendment.[157] As discussed next, *Mapp*'s holding and rationale has since been profoundly changed. As is the case with the *Miranda* protections, later decisions by the Burger and Rehnquist Courts have radically redefined the pedigree and reduced the reach of the Fourth Amendment exclusionary rule.

C. Fourth Amendment Exclusion After *Mapp*

Since *Mapp* was decided, the Burger and Rehnquist Courts have undertaken a long-term project to diminish the Fourth Amendment exclusionary rule, similar to what they had achieved with respect to *Miranda* exclusion. The watershed case in this line was *United States v. Calandra*, decided in 1974.[158] Justice Powell, writing for a five-justice majority in *Calandra*, held that a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure.[159]

More significant than the precise holding in *Calandra* was the Court's rationale for its decision. The Court declared that the Fourth Amendment exclusionary "rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."[160] Citing *Elkins v. United States*, the *Calandra* court explained that

157. *Id.* at 222–23 (citing judicial integrity as a justification for the Fourth Amendment exclusionary rule). The dissents of Justices Brandeis and Holmes in Olmstead v. United States, 277 U.S. 438, 469, 471 (1928), are probably the most famous early discussions of judicial integrity in the exclusionary rule context. Arguing for the exclusion of illegally seized wiretap evidence, Brandeis stated:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled [sic] if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means–to declare that the Government may commit crimes in order to secure the conviction of a private criminal–would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Id. at 485 (Brandeis, J., dissenting). Holmes agreed with Brandeis. *See id.* at 469–70 (Holmes, J., dissenting).

158. United States v. Calandra, 414 U.S. 338 (1974).

159. *Id.* at 352–54.

160. *Id.* at 347.

"[t]he 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."[161] The Court was explicit that the Fourth Amendment exclusionary rule is "premised on a recognition [of] the need for deterrence . . . ."[162] Later in its opinion, the Court set forth its cost-benefit calculus for determining whether deterrence justifies exclusion of the evidence:

> Any incremental deterrent effect which might be achieved by extending the [Fourth Amendment exclusionary] rule to grand jury proceedings is uncertain, at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal. Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim. For the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained. We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.[163]

The *Calandra* decision also diminished the jurisprudential underpinnings of the Fourth Amendment exclusionary rule. There, the Court declared that the rule was devoid of a constitutional pedigree contrary to its conclusion in *Mapp*. Rather, the Court instructed in *Calandra* that the Fourth Amendment exclusionary rule was "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[164] In one fell swoop, *Mapp*'s judicial integrity justification for the rule was thus marked for extinction. Two years later, in *Stone v. Powell*, the Court reiterated that judicial integrity has only a "limited role [to play] . . . in the determination whether to apply the rule in a particular context."[165] In

161. *Id.* (citing United States v. Elkins, 364 U.S. 206, 217 (1960)).

162. *Calandra*, 414 U.S. at 348.

163. *Id.* at 351–53. The Court acknowledged that:

> There is some disagreement as to the practical efficacy of the exclusionary rule, and as the Court noted in Elkins v. United States, 364 U.S. 206, 218, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960), relevant '[e]mpirical statistics are not available.' *Cf.* [Dallin H.] Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. CHI. L. REV. 665 (1970). We have no occasion in the present case to consider the extent of the rule's efficacy in criminal trials.

Id. at 349 n.5.

164. *Id.* at 348.

165. Stone v. Powell, 428 U.S. 465, 485 (1976).

United States v. Janis, also decided in 1976, the Court said that deterrence is "the 'prime purpose' of the rule, if not the sole one."[166]

Over the decades since *Mapp*, the Court has further diminished the Fourth Amendment exclusionary rule in two basic ways. First, it has held that the rule does not apply in various situations.[167] Second, it has created and applied exceptions to the rule that were, at root, based solely on deterring future police misconduct.[168]

The aggregate impact of the Court's reductionist approach to the Fourth Amendment exclusionary rule was profound and transformative. As Professor Kamisar, a long-time defender of the Fourth Amendment exclusionary rule, observed:

> The Justices who decided the *Weeks* case, barring the use in federal prosecutions of evidence obtained in violation of the Fourth Amendment, and those who handed down the *Silverthorne* decision, invoking what has come to be known as the "fruit of the poisonous tree" doctrine, would, I think, be quite surprised to learn that some day the value of the exclusionary rule would be measured by—and the very life of the rule might depend on—an empirical evaluation of its efficacy in deterring police misconduct.[169]

Any lingering doubts about the decisive role of deterrence as the basis for the exclusionary rule are put to rest by the Court's 2009 decision in *Herring v. United States*.[170] Bennie Herring traveled to the Coffee County, Sheriff's Department in Alabama to retrieve items from an impounded pickup truck.[171] Mark Anderson, an investigator with the Coffee County Sheriff's Department, asked the department's warrant clerk to check for any outstanding warrants on Herring.[172] The clerk contacted her counterpart at the neighboring Dale County Sheriff's Department, who informed her that Herring had an out-

166. United States v. Janis, 428 U.S. 433, 446 (1976) (quoting *Calandra*, 414 U.S. at 347).

167. *See Calandra*, 414 U.S. at 349 (rule does not apply to federal grand jury proceedings); Stone v. Powell, 428 U.S. 465 (1976) (rule does not apply to remedy a state's failure to apply the rule in a federal habeas corpus proceeding to overturn a state criminal conviction); *see also* Pa. Bd. of Prob. and Parole v. Scott, 524 U.S. 357 (1998) (rule does not apply to proceedings to revoke parole); Giordenello v. United States, 357 U.S. 480 (1958) (rule does not apply to preliminary hearings); United States v. McCrory, 930 F.2d 63 (D.C. Cir. 1991) (rule does not apply to sentencing).

168. *See* United States v. Leon, 468 U.S. 897, 904–05 (1984) (recognizing a deterrence-based good faith exception to the exclusionary rule); Nix v. Williams, 467 U.S. 431, 440 (1984) (recognizing a deterrence-based inevitable discovery exception to the exclusionary rule); Walder v. United States, 347 U.S. 62, 65–66 (1954) (recognizing a deterrence-based impeachment exception to the exclusionary rule); Wong Sun v. United States, 371 U.S. 471, 493 (1963) (applying a deterrence–based rationale to the attenuation of the taint exception to the rule).

169. Yale Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIM. L. BULL. 5, 5 (1979) (footnotes omitted).

170. Herring v. United States, 555 U.S. 135 (2009).

171. *Id.* at 137.

172. *Id.*

standing warrant.[173] Within fifteen minutes, the Dale County clerk called back to advise the Coffee County sheriff's department that there had been a clerical mistake and Herring's warrant had been recalled five months earlier.[174] But by then it was too late, as Anderson had already arrested Herring and searched his vehicle, finding and seizing firearms and methamphetamines that were discovered inside.[175]

Herring was indicted in the United States District Court, Middle District of Alabama for the crimes of felon in possession of firearms[176] and possession of a controlled substance.[177] He invoked the exclusionary rule to suppress the evidence seized from his vehicle, claiming that his arrest (and derivatively the search of the vehicle) was unlawful because they were based on an invalid and recalled warrant issued by the neighboring county.[178] The motion was denied by the trial court and Herring was convicted.[179] The Court of Appeals affirmed, ruling that the evidence was admissible because the mistake relating to the warrant was made by police officials in a different county, the error was promptly corrected, and there was no evidence of a reoccurring problem or pattern of error.[180]

In a 5–4 decision, Chief Justice Roberts, writing for the Court, affirmed Herring's conviction, holding that the Fourth Amendment exclusionary rule does not apply because the mistakes by the police that led to an unlawful search were the result of isolated negligence that was attenuated from the search, rather than systemic errors or a reckless disregard of constitutional requirements.[181]

Herring is instructive in several ways.[182] First, it makes clear that the sole surviving justification for applying the exclusionary rule is its capacity to deter future police misconduct. The Court observed in *Herring* that "[w]e have repeatedly rejected the argument that exclusion

173. *Id.*
174. *Id.*
175. *Id.*
176. 18 U.S.C. § 922(g)(1).
177. 21 U.S.C. § 844(a).
178. *Herring*, 555 U.S. at 138.
179. *See id.* (citing United States v. Herring, 451 F. Supp. 2d 1290 (2005)).
180. *Herring*, 555 U.S. at 138–39 (citing United States v. Herring, 492 F.3d 1212 (11th Cir. 2007)). The Circuit Court relied heavily on United States v. Leon, 468 U.S. 897, 898 (1984), which established the good faith exception to the exclusionary rule. *See Herring*, 492 F.3d 1212.
181. *Herring*, 555 U.S. at 145.
182. One caveat seems in order. *Herring* is a 5–4 decision. Chief Justice Roberts wrote the majority opinion, joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Ginsburg wrote the dissenting opinion, joined by Justices Stevens, Souter, and Breyer. Irrespective of the principle of stare decisis, it is possible that the Court's approach to the exclusionary rule could change, perhaps even dramatically, with a change in the composition of the Court.

is a necessary consequence of a Fourth Amendment violation. Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future."[183] The Court further elaborated:

> Justice Ginsburg's dissent [in *Herring*] champions what she describes as "a more majestic conception of . . . the exclusionary rule," which would exclude evidence even where deterrence does not justify doing so. Majestic or not, our cases reject this conception, and perhaps for this reason, her dissent relies almost exclusively on previous dissents to support its analysis.[184]

Second, *Herring* responds to the criticism that the exclusionary rule is too blunt and crude in application by incorporating an evaluation of the type of police misconduct at issue, i.e., the harm to be deterred, rather than limiting the rule's reach to situations where the source of the illegality does not originate with police. This more nuanced assessment involves two factors: (1) what the Court calls the "nature" of the police misconduct; and (2) what it refers to as the "gravity" of the harm. With regard to the nature of the misconduct, *Herring* suggests that exclusion should be reserved for law enforcement illegality that is flagrant, intentional, or sufficiently deliberate.[185] The Court reasons that this selective application of the rule does not detract from its purpose because "the exclusionary rule serves to deter deliberate, reckless or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[186] According to the Court, police misconduct not rising to this level of egregiousness, such as an isolated occurrence or negligent misconduct, does not justify the costs of exclusion.[187]

With regard to the gravity of the harm, the Court explains that "[t]he extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct."[188] In the Court's words, the police misconduct must be "sufficiently culpable that such deterrence is worth the price paid by the justice system."[189] Put another way, in order for the exclusion of evidence and its consequences to be a lesser evil in the Court's

183. *Id.* at 144 (citations omitted).
184. *Id.* at 141 n.2 (citations omitted).
185. *Id.* at 144–45.
186. *Id.* at 144.
187. *See* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem with Police Compliance with the Law,* 24 U. MICH. J.L. REFORM 311, 332–45 (1991) (arguing that most violations of the Fourth Amendment involve a good faith misunderstanding of the law or misinterpretation of the facts by the police).
188. *Herring*, 555 U.S. at 143.
189. *Id.* at 136. The exclusionary rule can be more easily countenanced by referring to the "price paid by the *justice system*," thereby suggesting that the only victim of the exclusionary rule is an impersonal, faceless and monolithic bureaucracy or process. Of course, the justice system, and therefore the common good, suffers when guilty criminals are released without punishment. People also suffer—widows, orphans, rape survivors, molestation victims, drug addicts, and others. The

deterrence calculus, the misconduct to be deterred must be sufficiently weighty. Otherwise, the benefit of deterring minimally offensive misconduct is not worth the social cost of excluding an undifferentiated range of probative and reliable evidence of guilt.

Although the evaluation of competing harms in *Herring* is perhaps more comprehensive and exacting than previously undertaken by the Court, it is not the first occasion in which the Court declined to exclude evidence when the illegal search or seizure that produced it did not amount to deliberate police misconduct.[190] In *United States v. Leon*,[191] for example, the Court first recognized the "good faith" exception to the exclusionary rule, deciding that evidence need not be excluded when the police act in good faith in reliance upon a facially valid warrant that was later determined to be invalid.[192] In *Massachusetts v. Sheppard*,[193] the Court applied the good faith exception when the police relied upon a warrant that was invalid because a judge forgot to make "clerical corrections."[194] In *Illinois v. Krull*,[195] the Court applied the good faith exception when the police relied on a statute that was later declared to be unconstitutional.[196] And finally, in *Arizona v. Evans*,[197] the Court applied the good faith exception when the police relied on mistaken information in a database prepared by a court employee.[198] In each of these cases, however, the po-

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"justice system" language obscures the many real victims of the exclusionary rule and unfairly minimizes its costs. *Id.*

190. *E.g.*, United States v. Ceccolini, 435 U.S. 268, 274–75 (1978) (holding that witness testimony is more likely than physical evidence to be free from the taint of an illegal search, but declining to adopt a "*per se* rule that the testimony of a live witness should not be excluded at trial no matter how close and proximate the connection between it and a violation of the Fourth Amendment," based on a determination that enough deterrence can be provided with this limitation and thereby avoiding additional social costs); Stone v. Powell, 428 U.S. 465, 494–95 (1976) (holding that the exclusionary rule does not apply in federal habeas corpus proceedings because the static social costs of suppression outweigh the marginal deterrent benefits achieved in such a collateral context); Alderman v. United States, 394 U.S. 165, 174 (1969) (holding that Fourth Amendment rights cannot be vicariously asserted based on a determination that enough deterrence can be provided with this limitation and thereby avoiding additional social costs). In each of these cases, the assumed benefit of deterring future police misconduct is balanced against the social cost of excluding probative evidence of guilt. In each case, the advantage of significant deterrence is deemed to outweigh the burdens of suppression, while the benefit of more attenuated deterrence is determined to be insufficient to outweigh these costs.

191. United States v. Leon, 468 U.S. 897 (1984).

192. *Id.* at 922.

193. Massachusetts v. Sheppard, 468 U.S. 981 (1984).

194. *Id.* at 991.

195. Illinois v. Krull, 480 U.S. 340 (1987).

196. *Id.* at 349–50.

197. Arizona v. Evans, 514 U.S. 1 (1995).

198. *Id.* at 15.

lice acted in conformity with and under the authority of a facially valid court document or statute, which is precisely the type of conduct that the exclusionary rule seeks to encourage rather than deter. The Court has reasoned, in such circumstances, that suppression would gratuitously punish the police[199] and be clearly outweighed by countervailing social costs. According to the Court, to the extent that judges, court employees, and legislators need to be deterred from trampling upon Fourth Amendment rights, this can be accomplished by means other than the exclusionary rule.

But unlike these earlier cases, the perpetrators of the Fourth Amendment violation in *Herring* were the police, albeit from a neighboring county. Thus, and for the first time, the Court was willing to balance away police misconduct premised on an error originating with the *police* in applying the good faith exception to avoid Fourth Amendment exclusion. To the extent that the earlier cases established a bright-line rule with respect to the good faith exception that would lead to the opposite result, the Court was willing to abrogate that line in in favor of a deterrence-based balancing of competing costs and benefits.

The historical parallels between the *Miranda* exclusionary rule and the Fourth Amendment exclusionary rule are striking. Both reached their high-water marks under the Warren Court in the 1960s—*Miranda* in 1966 and *Mapp* in 1960. And in the decades that followed, the Court—under the leadership of Chief Justice Burger, Chief Justice Rehnquist, and Chief Justice Roberts—has systematically diminished the reach of both rules predicated on a similar guiding rationale. It is against this backdrop that *Tekoh* will now be considered.

IV. *VEGA V. TEKOH*

Before unpacking *Vega v. Tekoh*, it is worth noting two fundamental conclusions based on this Article's review thus far—both draw from the growing symmetry of the Fourth Amendment and the *Miranda* exclusionary rules. First, both rules are Court-made and not constitutionally required. Second, both rules are justified, either

199. *See* Hudson v. Michigan, 547 U.S. 586, 594 (2006) (holding that the exclusionary rule "[was] inapplicable" for evidence obtained after a knock-and-announce violation because the interests violated by the abrupt entry of the police "have nothing to do with the seizure of the evidence"); United States v. Ramirez, 523 U.S. 65 (1998) (instructing that the "destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression," *Id.* at 71, and, had the breaking of the window been unreasonable, it would have been necessary to determine whether there had been a "sufficient causal relationship between the breaking of the window and the discovery of the guns to warrant suppression of the evidence." *Id.* at 72 n.3).

wholly or in large part, by the objective of deterring future police misconduct.

Several important consequences flow from these basic premises. First, as both exclusionary rules were judicially created rather than constitutionally compelled, the Court has plenary authority to decide when and how to apply them, if at all. Second, as the deterrence of future police misconduct is the dominant, if not exclusive, basis for both rules, the Court should decline to suppress evidence if the deterrent value of exclusion is outweighed by countervailing social costs. With this understanding of the rules in mind, the potential impact of the *Tekoh* decision comes into sharper relief.

In *Tekoh*, Deputy Carlos Vega questioned Terrence Tekoh at the medical center where Tekoh worked about a reported sexual assault of a patient without first informing Tekoh of his *Miranda* rights.[200] Tekoh eventually provided a written, inculpatory statement apologizing for inappropriately touching the patient's genitals.[201] Tekoh was prosecuted for unlawful sexual penetration, and his written statement was admitted against him at trial.[202] After the jury returned a verdict of not guilty, Tekoh sued Vega under 42 U.S.C. § 1983, seeking damages for alleged violations of his constitutional rights.[203] The Ninth Circuit Court of Appeals held that the use of an un-Mirandized statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a § 1983 claim against the officer who obtained the statement.[204]

The Supreme Court reversed and remanded by a 6–3 vote along predicable lines. Justice Alito, writing for the majority, began by reiterating that "*Miranda* imposed a set of prophylactic rules."[205] Alito continued:

> After *Miranda* was handed down, the Court engaged in the process of charting the dimensions of these new prophylactic rules. As we would later spell out,

200. Vega v. Tekoh, 142 S. Ct. 2095, 2099 (2022).

201. *Id.*

202. *Id.* at 2100.

203. *Id.*

204. *Id.*

205. *Id.* at 2101 (citing Howes v. Fields, 565 U.S. 499, 507 (2012)); *see* J. D. B. v. North Carolina, 564 U.S. 261, 269 (2011); Maryland v. Shatzer, 559 U.S. 98, 103 (2010); Montejo v. Louisiana, 556 U.S. 778, 794 (2009); Davis v. United States, 512 U.S. 452, 458 (1994); Brecht v. Abrahamson, 507 U.S. 619, 629 (1993); Withrow v. Williams, 507 U.S. 680, 691 (1993); McNeil v. Wisconsin, 501 U.S. 171, 176 (1991); Michigan v. Harvey, 494 U.S. 344, 350 (1990); Duckworth v. Eagan, 492 U.S. 195, 203 (1989); Arizona v. Roberson, 486 U.S. 675, 681 (1988); Connecticut v. Barrett, 479 U.S. 523, 528 (1987); Oregon v. Elstad, 470 U.S. 298, 309 (1985); New York v. Quarles, 467 U.S. 649, 654 (1984); South Dakota v. Neville, 459 U.S. 553, 564, n. 15 (1983); United States v. Henry, 447 U.S. 264, 274 (1980).

> this process entailed a weighing of the benefits and costs of any clarification of the rules' scope.[206]

Next, the Court explained that some post-*Miranda* decisions found that the balance of competing interests justified restrictions on the application of the rule that would not have been possible if *Miranda* described the Fifth Amendment right as opposed to a set of Court-made rules designed to protect that right.[207]

But how would *Tekoh* account for *Withrow*,[208] which still stands as the last-best bulwark protecting against a total capitulation of the *Miranda* exclusionary rule to the preeminence of a utilitarian calculation based on deterrence? The Court in *Tekoh* said:

> [I]n *Withrow v. Williams*, the Court rejected an attempt to restrict *Miranda*'s application in collateral proceedings based on the reasoning in *Stone v. Powell*. In *Stone*, the Court had held that a defendant who has had a full and fair opportunity to seek suppression of evidence allegedly seized in violation of the Fourth Amendment may not obtain federal habeas relief on that ground, and in *Withrow*, a state prison warden argued that a similar rule should apply to a habeas petitioner who had been given an opportunity to litigate a *Miranda* claim at trial. Once again acknowledging that *Miranda* adopted prophylactic rules, the Court balanced the competing interests and found that the costs of adopting the warden's argument outweighed any benefits. On the cost side, the Court noted that enforcing *Miranda* "safeguards 'a fundamental *trial* right'" and furthers "the correct ascertainment of guilt" at trial. And on the other side, the Court found that the adoption of a *Stone*-like rule "would not significantly benefit the federal courts in their exercise of habeas jurisdiction, or advance the cause of federalism in any substantial way."[209]

Tekoh concluded, "all the post-*Miranda* cases we have discussed acknowledged the prophylactic nature of the *Miranda* rules and engaged in cost-benefit analysis to define the scope of these prophylactic rules."[210] Thus, for *Miranda* exclusion, as with Fourth Amendment exclusion, deterrence of future police misconduct is king. Further, *Tekoh* confirms that *Withrow* does not confer a more elevated status on the *Miranda* exclusionary rule as compared to the Fourth Amendment exclusionary rule, except insofar as *Miranda* exclusion presumes

206. *Tekoh*, 142 S. Ct. at 2102–03. Further, "[a] judicially crafted rule is 'justified only by reference to its prophylactic purpose,' . . . and applies only where its benefits outweigh its costs." *Shatzer*, 559 U.S. at 106 (quoting *Davis*, 512 U.S. at 458).

207. *Tekoh*, 142 S. Ct. at 2103. Similarly, the Court in *Tucker* held that the "fruits" of an un-Mirandized statement can be admitted; the Court "distinguished police conduct that 'abridge[s] [a person's] constitutional privilege against compulsory self-incrimination' from conduct that 'depart[s] only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege.'" Michigan v. Tucker, 417 U.S. 443, 446 (1974) (refusing to exclude a signed confession and emphasizing that an officer's error "in administering the prophylactic *Miranda* procedures . . . should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself.").

208. *Tekoh*, 142 S. Ct. at 2097–98, 2104–05.

209. *Id.* at 2104–05 (citations omitted).

210. *Id.* at 2105.

that unwarned confessions may lead to false convictions, whereas suppression based on a Fourth Amendment violation would likely have the opposite effect.

V. THE FUTURE OF THE *MIRANDA* EXCLUSIONARY RULE

The following hypothetical scenario illustrates the potential future impact of *Tekoh*. Assume Suspect S kills a resident in River City and flees to a neighboring jurisdiction. There, S is lawfully arrested by police, who administer a deficient *Miranda* rights warning, for example, the officers neglect to advise S that a lawyer would be appointed to represent them if they could not afford counsel. S, who is wealthy and has already retained counsel, is then returned to River City, where a detective assigned to that jurisdiction asks the arresting officers whether S was already advised of their *Miranda* rights and waived them. The arresting officers mistakenly respond in the affirmative. The River City detective then takes S to an interrogation room and asks S if they have been advised in accordance with *Miranda*. S replies that they have been so advised and tells the detective he is willing to make a statement. The River City detective then questions S about the homicide without readvising them, and S thereafter confesses to murder. S, who is represented by their retained high-priced lawyer at their murder trial, moves to suppress their confession under the *Miranda* exclusionary rule. The judge denies S's motion. Thereafter, S's confession is admitted on the merits at their trial, and S is convicted. All parties agree that if the confession had instead been suppressed, the prosecution would have had insufficient evidence to proceed to trial against S, who is unquestionably guilty. Based on these facts and under current Supreme Court precedent, did the judge err in admitting S's confession?

In *California v. Prysock*,[211] the Court held that although no "talismanic incantation" of the *Miranda* warnings is required, a police officer's explanation of the suspect's constitutional rights must be a "fully effective equivalent" of the *Miranda* warnings.[212] Although the Court seemed to be a bit more forgiving in *Duckworth v. Eagan*,[213] it adhered to the basic proposition that the *Miranda* rights warning must reasonably convey to a suspect all his rights as required by *Miranda*.[214] In our hypothetical scenario above, and quite to the contrary, the only rights advisement that S ever received completely omitted any mention of one of the four basic requirements of a valid *Miranda* warning: S's right to appointed counsel if they could not af-

211. California v. Prysock, 453 U.S. 355 (1981).
212. *Id.* at 359–60.
213. Duckworth v. Eagan, 492 U.S. 195 (1985).
214. *Id.* at 203.

ford an attorney. Accordingly, under the existing precedent's bright-line rule, S's confession should have instead been suppressed.

But could *Tekoh* change the outcome and allow S's confession to be admitted? Applying a cost-benefit, deterrence-based rationale to these facts, suppression would not be automatically required pursuant to the Court's established bright-line rule. Instead, the suppression decision would be based on all relevant factors. Under such an approach, admitting S's confession seems to be the better result.

The analysis begins with acknowledging that the social costs of suppression in this case would be especially weighty. If the confession is excluded, S, a guilty murderer by all accounts, would be set free based on what many would consider to be no more than a mere "technicality."[215] Besides potentially putting the community at risk, S's acquittal and release following the suppression of his reliable confession would predictably lead to widespread criticism of the criminal justice system and a loss of public confidence in its efficacy and legitimacy. In an extreme case, the acquittal of a guilty murderer might even provoke vigilantism.

On the benefits side of the equation, suppression of the confession, in *Tekoh*'s words, would not detract from "the correct ascertainment of [S's] guilt."[216] Quite to the contrary, the admission of S's reliable and uncoerced confession would be necessary to reach a correct ascertainment of guilt, and thereby .vindicate justice and provide some sense of closure to the victim's family. Further, as S was wealthy and was represented by counsel at all times, the failure to advise S of their right to counsel if indigent would seem to have little, if any, relevance with respect to, again to *Tekoh*'s words, the protection of "fundamental trial rights."[217] Moreover, and analogous to the circumstances in *Herring*, it seems likely that the suppression of S's confession would have, at most, an attenuated and minimal deterrent impact on the arresting officers from the neighboring jurisdiction who misadvised S and misinformed the River City detective. At first brush, therefore, one could readily conclude that any marginal deterrence achieved by exclusion of S's confession would be substantially outweighed by the predictable and serious social costs of its suppression.

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215. Lego v. Twomey, 404 U.S. 477, 488–89 (1972) (cautioning against expanding "currently applicable exclusionary rules by erecting additional barriers to placing ruthful and probative evidence before state juries . . ."); *see generally* Paul Cassell, *Miranda's Social Costs: An Empirical Reassessmen*t, 90 NW. L. REV. 387, 391 (2011) (assessing *Miranda*'s social costs and concluding that they are "unacceptably high, particularly because alternatives such as videotaping police interrogations can more effectively prevent coercion while reducing *Miranda*'s harms to society.").

216. Vega v. Tekoh, 142 S. Ct. 2095, 2105 (2022).

217. *Id.* (emphasis omitted).

But what about the argument that the police from both jurisdictions should be treated as a single entity for purposes of the *Miranda* exclusionary rule? In other words, does not the *Miranda* exclusionary rule seek to deter police misconduct in a corporate sense, rather than in a more limited sense which focuses on a particular officer or department?

Herring offers a convincing rejoinder, presuming that the Court is willing to harmonize its Court-made and deterrence-based *Miranda* exclusionary rule with its Court-made and deterrence-based Fourth Amendment exclusionary rule. Recall that in *Herring*, the Court held that isolated, negligent mistakes by the police in a neighboring jurisdiction—as opposed to systemic errors or a reckless disregard of constitutional rights—does not require suppression under the Fourth Amendment. Although the police in *Herring*, who relied on a withdrawn warrant, were arguably less culpable than the River City detective in our hypothetical scenario,[218] the fact remains that the initial misconduct (the poisonous tree) in *Herring* was performed by the police, albeit from a different jurisdiction. The same is true in our hypothetical scenario, as the source of the *Miranda* violation in S's case, like in *Herring*, was an isolated, negligent mistake by police in a neighboring jurisdiction.

Herring is potentially predictive for another reason related to the presumed inviolability of the Court's bright-line rules. Put simply, the Court disregards its rules whenever a majority of its members determine that suppression is unwarranted. Before *Herring*, the Court had established and adhered to a de facto bright-line rule for the application of good faith exception to the Fourth Amendment exclusionary rule[219] with respect to the source of the error, i.e., the "poisonous tree."[220] Under the Court's precedent, suppression could only be avoided via the good faith exception when the police misconduct at issue (the fruit of the poisonous tree) was derived from a source (the poisonous tree) other than a law enforcement entity, such as when police reasonably rely on a statute later declared unconstitutional,[221] or computer records generated by court employees.[222] By analogy,

218. In our hypothetical, one may argue that the detective should have readvised S of his *Miranda* warnings and obtained a waiver, regardless of whether S had been previously advised in the neighboring jurisdiction.

219. *See* United States v. Leon, 468 U.S. 897, 898 (1984).

220. *See, e.g.,* Wong Sun v. United States, 371 U.S. 471, 488 (1963) (explaining that the Fourth Amendment "fruits of the poisonous tree" doctrine involves evidence that would not have come to light but for the illegal actions of the police); *see also* Oregon v. Elstad, 470 U.S. 298, 319 (1985) (explaining that the *Miranda* "fruits of the poisonous tree" doctrine prohibits the use of evidence presumptively derived from official illegality).

221. Illinois v. Krull, 480 U.S. 340, 350 (1987).

222. Arizona v. Evans, 514 U.S. 1, 14 (1995).

with *Prysock*[223] and *Duckworth*,[224] the Court likewise established a bright-line rule regarding the minimum required content of a valid *Miranda* warning. The Court's decision in *Herring* demonstrates that it is prepared to disregard its bright-line rules when this result is justified by a deterrence-based, cost-benefit analysis.[225] Using this same approach, the Court could similarly depart from *Miranda*'s bright-line requirements in our hypothetical scenario and permit the introduction of S's confession despite the fact that the violation originated with the police.

Herring is but one of many cases in which the Court declined to apply its own previously established, Fourth Amendment bright-line rules. In *Riley v. California*,[226] for example, the Court unanimously held that the police may not, without a warrant, search digital information on a cellphone seized from an individual who has been arrested.[227] Thus, *Riley* carved out an exception to the Court's venerable search-incident-to-arrest bright-line rule, which provides that police may search an arrestee and items in his possession or under his immediately control contemporaneously with a lawful arrest without the need for a search warrant or probable cause to search.[228] The holding in *Riley* is premised on a cost-benefit analysis. *Riley* recognized that especially weighty social costs were implicated, for example, the intrusion on privacy and dignity that would inevitably occur when a cell phone's digital contents were searched by police.[229] Balanced against this serious intrusion on individual rights was the government's ordinary law enforcement interests, which could have been fully vindicated by obtaining a search warrant based on probable cause.[230] Further, *Riley* observed that the presumptive justification for the search incident to arrest exception—to protect the safety of the police and prevent the destruction of evidence—did not arise when it came to searching a cell phone's digital contents.[231] Together, *Herring* and

223. California v. Prysock, 453 U.S. 355, 361 (1981).

224. Duckworth v. Eagan, 492 U.S. 195, 203 (1989).

225. For a more expansive discussion of *Herring*, see Eugene R. Milhizer, *"The Exclusionary Rule Lottery" Revisited*, 59 CATH. U.L. REV. 747, 755–56 (2010) (discussing how the decision in *Herring* reaffirms that the sole justification for the exclusionary rule is the deterrence of future police misconduct and how it responds to criticism that the exclusionary rule is too blunt and crude by incorporating an evaluation of police misconduct).

226. Riley v. California, 573 U.S. 373 (2014).

227. *Id.* at 403.

228. *See* Chimel v. California, 395 U.S. 752, 763 (1969); United States v. Robinson, 414 U.S. 218, 232 (1973).

229. For a more expansive discussion of *Riley*, see Eugene R. Milhizer, *Applying the Digital Search Incident to Arrest Doctrine to Predigital Content*, 61 ST. LOUIS U.L. REV. 165, 175 (2017).

230. *Riley*, 573 U.S. at 384.

231. *Id.* at 401–02.

Riley demonstrate that the Court may disregard its previously established Fourth Amendment bright-line rules when countervailing social costs, including serious intrusions upon an individual's personal rights, outweigh deterrence or other benefits achieved by admitting or suppressing illegally obtained evidence.

Likewise, the Court has departed from its bright-line *Miranda* exclusionary rule premised on a similar cost-benefit analysis. In *Quarles v. New York*,[232] for example, the Court decided that serious public safety concerns outweighed the ordinary deterrent benefits achieved by excluding a confession.[233] The *Quarles* decision makes clear that the Court feels free to impose or forego *Miranda* exclusion as it chooses because the rule is a judicially created rather than constitutionally required.[234]

Harris v. New York[235] is another example. There, and again using pragmatic balancing, the Court held that statements taken in violation of *Miranda* may be used to impeach the credibility of a defendant's testimony at his trial.[236] The weighty social costs in favor of foregoing *Miranda*-based exclusion identified in *Harris* centered on the preventing the defendant from giving perjurious testimony free from the risk of confrontation with prior inconsistent utterances.[237] When balanced against this significant detriment, the Court concluded that exclusion was unwarranted given the marginal deterrence that would be achieved by suppression of an unwarned statement offered for impeachment purposes, as police would be sufficiently deterred from violating *Miranda* because they knew that the unwarned statement would be excluded on the merits.[238] To be sure, *Harris* departed from *Miranda* in its original form, as *Miranda* instructed, albeit in dicta, that statements taken in violation could not be used to impeach a defendant's testimony.[239]

Perhaps the starkest example of the Court exercising quasi-legislative, rule-making authority concerning *Miranda* involves the reinitiation of custodial interrogation after a rights invocation. *In Edwards v. Arizona*,[240] the Court held that once a suspect invokes his *Miranda* right to counsel, police may reinitiate custodial interrogation only if counsel were previously made available to the suspect.[241] Later, in

232. New York v. Quarles, 467 U.S. 646 (1984).
233. *Id.* at 653.
234. *Id.* at 660.
235. Harris v. New York, 401 U.S. 222 (1971).
236. *Id.* at 226.
237. *Id.*
238. *Id.* at 225.
239. Miranda v. Arizona, 384 U.S. 436, 439 (1966).
240. Edwards v. Arizona, 451 U.S. 477 (1981).
241. *Id.* at 484–85.

Minnick v. Mississippi,[242] the Court held that it was not sufficient that counsel be made available; the police may reinitiate interrogation of a suspect after an assertion of the *Miranda* right to counsel only if the suspect actually met with counsel.[243] In *Arizona v. Roberson*,[244] the Court explained that the requirement to meet with counsel before re-interrogation applied even when different officers, unaware of the earlier invocation, conducted a second interrogation that involved a different crime.[245]

The indefinite period of the bar to re-interrogation suggested by these decisions was predictably criticized by law enforcement officials and prosecutors.[246] In response, the Court, in *Maryland v. Shatzer*,[247] created a fourteen-day rule, i.e., police may reinterrogate a suspect after an assertion of the *Miranda* right to counsel if the suspect had a prior consecutive fourteen-day break in custody.[248] Why fourteen days and not ten days or twenty-one days, or some other arbitrary time limit? Put simply, the period is fourteen days because the Court said so. In the Court's words:

> [T]his is a case in which the requisite police action (. . . abstention from further interrogation) has not been prescribed by statute but has been established by opinion of this Court. We think it appropriate to specify a period of time to avoid the consequence that continuation of the *Edwards* presumption "will not reach the correct result most of the time." *It seems to us that period is 14 days.* That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.[249]

Shatzer thus reflects that the Court is willing to wield its plenary authority to fashion *Miranda* exclusionary rules as it sees fit by its own lights.

A potential future retrenchment of *Miranda*'s bright-line rule need not be limited to the Court's previous decisions discussed above. For example, in the future the Court may decline to require suppression in circumstances such as our hypothetical scenario presented earlier. Likewise, and under the Court's same deterrence-based approach to suppression, the Court may someday decide that a voluntary and un-

242. Minnick v. Mississippi, 498 U.S. 146 (1990).
243. *Id.* at 154–55.
244. Arizona v. Roberson, 486 U.S. 675 (1988).
245. *Id.* at 687–88.
246. The problematic scenarios are not difficult to imagine. For example, a suspect is arrested for a minor offense in California in 1990. He asserts his *Miranda* right to counsel but never goes to trial, and later his arrest record is expunged. In 2010, the same suspect is arrested for murder in New York. This time he waives his *Miranda* rights. The police are unaware of his earlier assertion of his right to counsel. The suspect thereafter confesses. Under *Minnick* and *Roberson*, the confession is arguably inadmissible.
247. Maryland v. Shatzer, 559 U.S. 98 (2010).
248. *Id.* at 110–11.
249. *Id.* at 110 (emphasis added) (citation omitted).

warned statement obtained from a suspect subjected to custodial interrogation may be admitted when the suspect is demonstrably aware of their *Miranda* rights, such as where the suspect has been properly warned and waived their rights on a prior occasion, or the suspect is a lawyer or police officer. In such circumstances, the Court could reasonably conclude that any negligible deterrent benefits derived from suppression are substantially outweighed by weighty, countervailing social costs. Based on such a calculation, the statement should be admitted.

VI. CONCLUSION

Over the last several decades, the Court's Fourth Amendment and *Miranda* decisional authority has become increasingly indistinguishable. Exclusion under either basis now rests solely on a Court-made rule. Exclusion under either basis is now premised on the deterrence of future police misconduct. And the Court has retreated from imposing a bright-line requirement for suppression under either basis, choosing instead to apply a cost-benefit analysis according to its own lights. The *Tekoh* decision affirms all of this with respect to *Miranda*-based exclusion in clear and uncompromising terms. *Tekoh* thus helps set the stage for the Court to merge, or at least to harmonize more closely, the rationales and outcomes of the Fourth Amendment and *Miranda* exclusionary rules in the future.

Predicting the outcome of hypothetical future Supreme Court decisions is risky business. Notwithstanding this truism, several conclusions may be confidently drawn from the Court's opinion in *Tekoh* and the decisions that preceded it. First, the Court will continue to adhere to its precedent that the *Miranda* exclusionary rule, like the Fourth Amendment exclusionary rule, is a Court-made decree that is justified only when the benefits of deterrence outweigh the many social costs of the suppression of a reliable confession. Second, the Court will use its unfettered discretion to reject or modify the application of an exclusionary rule whenever five justices decide that this is pragmatically justified. Third, in exercising its unfettered discretion, the Court will not be hamstrung by what it considers irrelevant normative considerations, even when admitting illegally obtained evidence would transgress previously established bright-line rules. Finally, the Court, as now composed, seems to have a committed 6–3 majority that would likely support an even more restrained application of deterrence-based exclusion.

Should the Court decide to harmonize the Fourth Amendment and *Miranda* exclusionary rules as this article suggests it might, one predictable result will be the further erosion of judicially created bright lines in favor of utilitarian balancing based on all the relevant circumstances. As a consequence, the reach of the *Miranda* and Fourth

Amendment exclusionary rules will become even more modest and nuanced, as well as less certain.[250] Also, the Court will continue to reject a normative-based approach to the exclusion of such evidence, based on values such as judicial integrity, in favor of an increasingly utilitarian approach, which assigns the highest value to the deterrence of future police misconduct, as determined by its own pragmatic calculations.[251] As the Court's approach to deterrence becomes more explicitly empirical, litigants will be motivated to provide data and statistical evidence to courts in support of the reception or exclusion of evidence. This would, in turn, recast judges as quasi-lawmakers, as contrasted to their traditional role as jurists. And when judges undertake an empirical cost-benefit assessment of *Miranda*'s social costs, advancements in technology, and the greater availability of certain types of technology, such as body cameras and videotaping interrogations, may render the costs of *Miranda* exclusion increasingly unwarranted.[252] Finally, law enforcement personnel will have less incentive to satisfy themselves that the earlier conduct of officers from another jurisdiction complied with the Court's exclusionary rules before executing a search or questioning a suspect.

If the Court ultimately moves in this direction and blurs one of *Miranda*'s last remaining bright lines,[253] the result would be ironic. *Miranda* was born, in part, from dissatisfaction and criticism of the

250. Rakas v. Illinois, 439 U.S. 128 (1978), provides a useful Fourth Amendment counterpart. In *Rakas*, the Court departed from its previous bright-line analysis holding that standing to raise a Fourth Amendment claim was based on whether the person was legitimately on the premises. In its place, the Court announced a new case-specific and nuanced approach to "standing," which focused on a person's capacity to claim a Fourth Amendment violation, i.e., "whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Id.* at 143.

251. That being said, the Court will no doubt adhere to its precedent that coerced confessions must be suppressed. *See*, *e.g.*, Arizona v. Fulminante, 499 U.S. 279, 287 (1991) (holding that coerced confessions must be suppressed).

252. *See generally* Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessmen*t, 90 NW. U.L. REV. 387, 473–79 (1996) (assessing *Miranda*'s social costs and concluding that they are unacceptably high, particularly because alternatives such as videotaping police interrogations can more effectively prevent coercion while reducing *Miranda*'s harms to society).

253. *Miranda*'s other surviving bright lines could likewise be blurred based on a deterrence rationale. For example, the Court's present decisional authority holds that a defendant's testimony on direct or proper cross-examination may be impeached with statements taken in violation of *Miranda*. Harris v. New York, 401 U.S. 222, 225 (1984); *see* United States v. Havens, 446 U.S. 620, 622–24 (1980). But the testimony of a defense witness may not be impeached on this same basis. James v. Illinois, 493 U.S. 307, 320 (1990). If, however, the Court were to determine that the deterrent value of suppressing a defendant's statement taken in violation of *Miranda* to impeach a defense witness' testimony is, under the circumstances, minimal, and the countervailing social costs of doing so are weighty, then suppression should not be required under a deterrence rationale.

Court's totality of the circumstances approach to the admissibility of confessions under due process standards.[254] If the Court were to decide that the failure to give proper *Miranda* warnings was no longer a decisive basis for excluding statements obtained during custodial interrogation, this would result in a return to a more ad hoc approach to admissibility, this time focusing largely on deterrence. A proper *Miranda* warning and waiver would thus be reduced to one of a constellation of relevant circumstances bearing on admissibility, just as § 3501[255] was designed to achieve over fifty years ago. Everything old is new again.[256]

Of course, only time will tell about the future impact of *Tekoh*. The decision, which was born in relative obscurity, may amount to little more than an evolutionary dead end in the development of doctrine pertaining to *Miranda* exclusion, which is applied only in limited circumstances relating to civil suits. Or, instead, *Tekoh* may someday be recognized as an important next step in the Court's broader project of harmonizing a deterrence-based approach to the exclusion of illegally obtained evidence, regardless of whether the evidence was acquired in violation of the Fourth Amendment or *Miranda*. If the history of the Fourth Amendment and *Miranda* exclusionary rules teach anything,

254. *See* Blackburn v. Alabama, 361 U.S. 199, 207 (1960) (explaining that involuntariness is a "convenient shorthand" for a "complex of values" relating to the constitutionality of a confession); Stein v. New York, 346 U.S. 156, 185 (1953) (instructing that "[t]he limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing").

255. 18 U.S.C. § 3501.

256. Or, as Mark Twain put it,

> There is no such thing as a new idea. It is impossible. We simply take a lot of old ideas and put them into a sort of mental kaleidoscope. We give them a turn and they make new and curious combinations. We keep on turning and making new combinations indefinitely; but they are the same old pieces of colored glass that have been in use through all the ages.

3 ALBERT BIGELOW PAINE, MARK TWAIN: A BIOGRAPHY 1343 (Daniel Aaron ed. 1980).

it is that the Court's approach to these doctrines will not remain static, but rather it will evolve and change, sometimes radically, over time.[257]

257. There are many examples, besides those already discussed in this article, of the Court's willingness to dramatically change and evolve doctrine pertaining to the Fourth Amendment and confessions. For example, in Terry v. Ohio, 392 U.S. 1, 11 (1968), the stop and frisk doctrine was first applied only to human suspects. In later cases, the doctrine evolved so that it was applied to the frisking of vehicles, Michigan v. Long, 463 U.S. 1032, 1064–65 (1983), and inanimate objects, United States v. Place, 462 U.S. 696, 710 (1983). Moreover, the Court's traditional approach to the exclusion of confessions based on due process grounds (i.e., coercion), focused on the reliability of the confession; in other words, coerced confessions were excluded because they might be unreliable. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278, 287 (1936) (holding that confessions, "shown to have been extorted by officers of the State by brutality and violence," were inadmissible and unreliable). However, the Court later instructed, in dicta, that a confession's reliability is irrelevant on the question of its admissibility under due process standards. *See, e.g.*, Colorado v. Connelly, 479 U.S 157, 167 (1986) (instructing that the potential unreliability of a suspect's confession is a matter that "the Constitution rightly leaves . . . to be resolved by state laws governing the admission of evidence"); *see generally* Eugene R. Milhizer, *Confessions After* Connelly*: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1 (2008) (discussing whether reliability should be a consideration in the admission of a confession under due process standards).