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“Voluntariness With A Vengeance:” Miranda and a Modern Alternative

Jonathan B. Zeitlin

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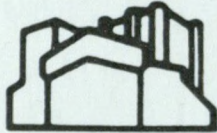
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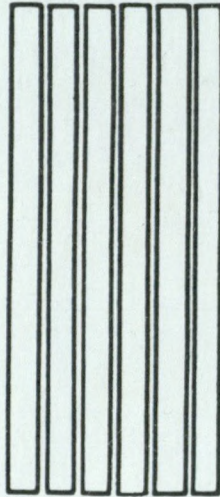
"VOLUNTARINESS WITH A VENGEANCE:"
MIRANDA AND A MODERN ALTERNATIVE.

Jonathan B. Zeitlin

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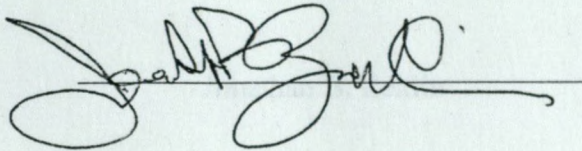


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The author of this thesis is:

Jonathan Ben Zeitlin
3451 Ellenwood Park Drive
Roswell, Georgia 30075

The director of this thesis is:

Dr. Barbara Hall
Georgia State University
Department of Philosophy

**“Voluntariness With A Vengeance:”
Miranda and a Modern Alternative.**

*This thesis is dedicated to the law enforcement officers of Georgia and the United States
who risk their lives every day to protect ours.*

A Thesis

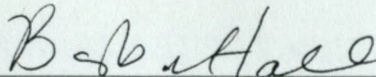
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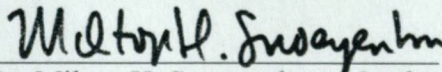
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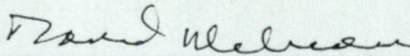
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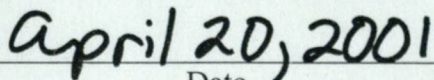
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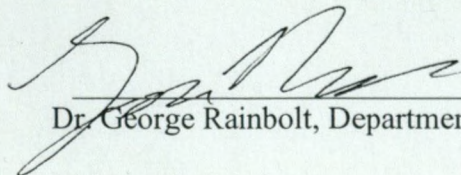
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VOLUNTARINESS WITH A VENGEANCE¹:

Figure 1: Illustration of the “Continuum of Harm.”²

Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.²

INTRODUCTION

One of the most famous opinions in American jurisprudence is that of the United States Supreme Court in the case of *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court's prophylactic rule in *Miranda* has been followed in both state and federal courts with little derogation for over thirty years. On February 8, 1999, in *Dickerson v. United States*, 166 F.3d 667, the United States Court of Appeals for the Fourth Circuit ignored *Miranda*, turning instead to 18 U.S.C. § 3501, a relatively obscure federal statute enacted in 1968 in response to the Court's decision in *Miranda*. The United States Supreme Court

¹ *Miranda v. Arizona*, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

VOLUNTARINESS WITH A VENGEANCE¹: Miranda and a Modern Alternative

Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.²

INTRODUCTION

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¹ Miranda v. Arizona, 384 U.S. 436, 505 (1966)(Harlan, J., dissenting).

granted certiorari and heard oral arguments early in the summer of last year and on June 26, 2000, the Court reversed the opinion of the Fourth Circuit in Dickerson and reaffirmed Miranda and its progeny.³ There were many who felt the need for Miranda had passed; indeed, Congress enacted a legislative replacement just a few years after Miranda, and even today educators and politicians continue to criticize the opinion.

The discussion in Dickerson focused on whether Miranda was a constitutional rule and thus, whether § 3501 of the United States Code was a proper exercise of Congress' power. Had that argument been successful, § 3501 would have been validated and Miranda would have faded into quiet disuetude. But the argument failed. The Supreme Court rejected § 3501 and reaffirmed Miranda and preserved all of its exceptions; exceptions created by the Court itself.

Thus Miranda is still the law today, despite its steady erosion by the judiciary over the decades and despite the early attempt by Congress to legislate an alternative. With the opinion in Dickerson, the Court has made it quite clear that Miranda will linger into the uncertain future. Acknowledging Miranda's survival, this thesis will explore the relevant facts and opinions in some detail then submit an alternative to the unpleasant result reached when a defendant's voluntary confession is suppressed due to a technical violation of the Court's famous rule.

² Michigan v. Tucker, 417 U.S. 433, 446 (1974).

³ Dickerson v. United States, 120 S.Ct. 2326 (2000).

CHAPTER ONE

A. FACTS OF MIRANDA V. ARIZONA⁴

Near midnight on March 2nd, 1963, an eighteen year old girl named Sandra Smith was walking home down an unlit street in Phoenix, Arizona. She had taken the bus home from work and had just been dropped off at her stop. While she was walking, a car approached and stopped in front of her path. A man emerged from the vehicle and grabbed her. He pressed a sharp object against her throat and told her not to scream. He opened the back door and ordered her to get in and lie down. He bound her wrists and ankles with rope and drove her to a desolate part of the city. He raped her, then ordered her to get dressed and returned her to the area where she was abducted. He robbed her of the four dollars she had in her purse, then asked her to "pray for him." After he left, Sandra ran to her sister's home and her sister called the Phoenix Police Department.

Sandra was brought to the hospital for an examination. Responding officers turned her case over to Detective Carroll F. Cooley, a five-year veteran police officer. The detective interviewed Sandra, who described her attacker as "a Mexican or possibly Italian, with dark, curly hair, combed back, about 25 or so, average height and build, wearing a white T-shirt and blue jeans." She described the car as "an old four-door sedan, light green, with a piece of rope across the back of the front seat." She added that "the

⁴ Taken from the first hand account of former-Phoenix police Captain Carroll F. Cooley, the detective who interrogated Ernie Miranda. His account was reprinted verbatim in "The Statute That Time Forgot," Paul G. Cassell, 85 Iowa L. Rev. 175(1999) and summarized here with Mr. Cassell's express permission.

upholstery was a light beige with vertical stripes; there were paint brushes on the floor” and she “remembered smelling turpentine.”

After a week Sandra returned to work. One of her relatives, Dave Henry, waited for her at the bus stop when she came home each night. Approximately one week after the rape, while Dave was waiting for her to get off the bus, he noticed a car cruising slowly through the area where Sandra was abducted and glanced at the license plate number. Later, after Sandra emerged from the bus and began walking with Dave, he saw the vehicle again. When he pointed the vehicle out to Sandra she commented that it looked like the same vehicle into which she was forced. They called the police and from the vehicle description and tag number Detective Cooley was able to determine that the vehicle belonged to Twila M. Hoffman.

Twila Hoffman was married to Ernie Miranda. The detectives checked the name "Ernest Miranda" and discovered the suspect had several arrests for assault with intent to commit rape, robbery and auto theft. Eventually the investigation led the detectives to Miranda's address and when they arrived they noticed the suspect vehicle parked outside. The tag matched⁵, and so did Sandra's description of the interior, including the rope found within.

When Miranda answered the door the detectives asked him to accompany them to the police station. At the station the detectives explained why they wanted to speak with him and Miranda denied any involvement. Miranda agreed to stand in a line-up. Sandra

⁵ Actually, Dave Henry mistook the last three numbers of the tag when he called the police, but correctly described the make and model of the vehicle. After further investigation the detectives matched the partial tag number to the vehicle as described by Mr. Henry.

tentatively identified him but could not be sure. Another woman was summoned to the line-up but she was equally unsure.⁶ When the detectives returned to Miranda, he appeared nervous and asked if he had been identified. When the detectives informed him that he indeed had been identified, his response was "well, I guess I'd better tell you about it then."⁷

Miranda proceeded to tell the detectives a story matching Sandra's account of what happened. He mentioned his statement to Sandra asking her to pray for him, and described the sharp object used to abduct her.⁸ After describing his action in sufficient detail to convince the detectives, he agreed to sign a written statement. On the statement was typed the following:

I, [Miranda's signature], do hereby swear that I make this statement voluntarily and of my own free will, with no threats, coercion, or promises of immunity, and with full knowledge of my legal rights, understanding any statement I make may be used against me.

I, [Miranda's signature], am [23] years of age and have completed the [8th] grade in school.

After he signed the statement, Sandra was brought into the room where Miranda identified her as his victim. Sandra also identified him with certainty. Following this identification, the detectives formally arrested Miranda for kidnaping, rape and robbery.

Finally, Miranda was asked to write in longhand a statement explaining his actions, to which he agreed and wrote the following⁹:

⁶ This woman was abducted under similar circumstances in the same general area, and Miranda was later convicted of this attack as well. Arizona v. Miranda, 109 Ariz. 337, 509 P.2d 607 (1973).

⁷ The detectives did not inform Miranda that the identification was not made with strong conviction.

⁸ Miranda stated that it was a fingernail file.

⁹ "eam" are Miranda's initials, indicating any mistakes of his and indicating the beginning and end of his statement.

"eam. Picked eam. Seen a girl walking up street. Stopped a little ahead of her got out of car walked towards her grabbed her by the arm and asked to get in car. Got in car without force tied hands and ankles. Drove away for a few mile. Stopped asked to take clothes off. Did not, asked me to take her back home. I started to take clothes off her without any force and with cooperation. Asked her to lay down and she did. Could not get penis into vagina got about 1/2 (half) inch in. Told her to get clothes back on. Drove her home. I couldn't say I was sorry for what I had done but asked her to pray for me. eam."

The statement was attached to a form, upon which was typed "I have read and understand the foregoing statement and hereby swear to its truthfulness." The form was then signed by the defendant, Detective Cooley and a witness, Officer Wilfred M. Young. So ended Ernest A. Miranda's written confession.

B. MIRANDA V. ARIZONA: THE TRIAL AND THE APPEALS

At trial, Miranda's confession was admitted over objection, and upon conviction Miranda was sentenced to 20 years in prison. On appeal, the Arizona Supreme Court affirmed the conviction. The Court held that Miranda's confession was voluntary and that because he did not request a lawyer he had no right to counsel. Miranda's application for certiorari to the United States Supreme Court was granted, and in his appeal he argued that by eliciting his confession the detectives violated his right to counsel under the Sixth Amendment. The Supreme Court, however, focused on the Fifth Amendment in its opinion,¹⁰ and reversed Miranda's conviction.¹¹

¹⁰ As noted by Professor Cassell, the Appellant in Miranda did not even mention the Fifth Amendment in his brief to the Court, focusing only on the Fourth and Fourteenth Amendments; however, the Court unilaterally focused on the Fifth Amendment in its opinion.

C. POSITION OF THE U.S. SUPREME COURT IN MIRANDA V. ARIZONA

It is clear that the Court in Miranda v. Arizona, 384 U.S. 436 (1966), was concerned with the perceived abuses by law enforcement officers in their interrogation of suspects. Chief Justice Warren, in a majority opinion shared by four others, deplored the use of the “third degree” and other physical or psychological means of coercion employed by the police to secure a confession. The opinion also cited a long list of studies and articles concerning the use of the “third degree.” The opinion then clarified that “the modern practice of in-custody interrogation is psychologically rather than physically oriented.”¹²

While deploring the use of the “third degree,” the Court admitted that it had no actual knowledge of the conduct of an investigation and that the secrecy of the interrogation process itself “results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.”¹³ The Court referred to the afore-mentioned studies and articles and also to “various police manuals and texts which document procedures employed with success in the past.”¹⁴ It is from these texts that the Court was able to describe what was referred to as the “third degree.” It is telling to list these eight practices before any further discussion:

¹¹ The Supreme Court remanded for a new trial. Miranda was retried and convicted. Arizona v. Miranda, 104 Ariz. 174, 450 P.2d 364 (1969).

¹² Id. at 448.

¹³ Id.

- (1) Privacy: Being alone with the person under interrogation.
- (2) Displaying "an air of confidence in the suspect's guilt."
- (3) Emotional appeals.
- (4) Tricks. These tricks include placing the suspect in a staged line-up and having someone identify him, or the "Mutt and Jeff" act, to be described under (7).
- (5) "Dogged persistence." This is qualified with the recognition that the investigator must tend to the suspect's need for food, sleep and necessities.
- (6) The offering of legal excuses. This includes the investigator putting the facts of the crime in a different light to make the crime sound more justifiable and make it more likely that the suspect will admit the crime.
- (7) The show of hostility. This is the "Mutt and Jeff" routine. It is a scenario commonly seen employed by actors in the role of investigators on television and consists of one investigator acting the part of the angry and forceful accuser and his partner, apologetic and good-natured.
- (8) This practice usually comes after the above steps have failed. Once the suspect has refused to speak or refuses to speak until he sees a member of his family or his attorney, the investigator is to "concede him the right to remain silent," then explain that his refusal to speak only shadows him with an air of guilt and that if he were innocent there should be no need for any of this.¹⁵

There is then documented the long history of the law on confessions. That confessions be voluntary has been an accepted part of American constitutional jurisprudence for some time.

In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the [F]ifth amendment * * * commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'¹⁶

¹⁴ 384 U.S. at 461 (citing *Brady v. United States*, 168 U.S. 572, 582 (1897)).

¹⁵ "No one is bound to accuse himself."

¹⁴ *Id.*
¹⁵ *Id.* at 449-52.

This is not a concept peculiar to American jurisprudence. The Miranda Court recognized the maxim, “nemo tenetur seipsum accusare”¹⁷, and acknowledged that the concept long predated the birth of our nation.¹⁸ The Court believed that “[t]he presence of an attorney, and the warnings delivered to the individual enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process.”¹⁹ The evils are, presumably, the eight practices listed above.

Critics of the Miranda opinion, beginning with Justice Clark himself in dissent, have argued that this privilege has been unduly extended beyond its original intent. “Until today, the role of the Constitution has been only to sift out undue pressure, not to assure spontaneous confessions.”²⁰

Even more telling is the fact that while the majority cites the Fifth Amendment as the source of and justification for the Miranda warnings, the arguments given are essentially couched in and dependent upon Sixth Amendment concepts, those same concepts which formed the basis of Miranda’s argument to the Supreme Court. The warnings that one has a right to counsel or if indigent, the appointment of counsel are two examples of such Sixth Amendment protections. Justice White, in his dissent to Miranda, went so far as to accuse the majority of “creat[ing] a limited Fifth Amendment right to counsel.”²¹

¹⁶ 384 U.S. at 461 (citing Bram v. United States, 168 U.S. 532, 542 (1897)).

¹⁷ “No-one is bound to accuse himself.”

¹⁸ Miranda, 384 U.S. at 442.

¹⁹ Id. at 466.

²⁰ Id. at 515.

²¹ Id. at 537.

Having established the history of confessions and the alleged abuses of modern law enforcement in investigating crimes the Court prescribed its judicial remedy, namely, the following:

- (1) “[A] person in custody ... must first be informed in clear and unequivocal terms that he has the right to remain silent.”
- (2) “[A]nything said can and will be used against the individual in court.”
- (3) “[T]he right to have counsel present at the interrogation . . . [and] also to have counsel present during any questioning if the defendant so desires.”
- (4) “[I]t is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him.”²²

It seems beyond dispute that these warnings are not per se required by the Constitution.

[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.²³

As expressly stated by the Supreme Court, it is impossible for one to “foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States.”²⁴ The Court admitted that the warnings are only required when no “other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored.”²⁵ The Miranda dissent

²² Id. at 467-73.

²³ Id. at 467.

²⁴ Id.

²⁵ Id. at 479.

criticized the ruling as nothing more than “hazardous experimentation,”²⁶ and warned that the “social costs of crime are too great” for such a cavalier approach. In response, the majority argued that “[t]he limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement.”²⁷

The pre-interrogation warnings long administered by the FBI were praised by the Miranda majority as a practice which “can readily be emulated by state and local law enforcement agencies.”²⁸ Yet the FBI-administered warnings were not inclusive of everything required by Miranda. Justice Clark noted in dissent that the FBI’s warnings are different from those propounded by the majority in two respects. First, “[t]he offer of counsel is articulated only as a ‘right to counsel;’ nothing is said about a right to have counsel present at the custodial interrogation.”²⁹ Second, suspects are warned “of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge.”³⁰ The problem with this latter warning, according to the dissent, was that it “[did] not indicate that the agent [would] secure counsel. Rather, the statement may well be interpreted by the suspect to mean that the burden is placed upon himself and that he may have counsel appointed only when brought before the judge or at trial-but not at custodial interrogation.”³¹

²⁶ Id. at 517.

²⁷ Id. at 481.

²⁸ Id. at 486.

²⁹ Id. at 501, n.3.

³⁰ Id.

³¹ Id.

CHAPTER TWO

*Congressional Committees and Subcommittees are better situated to explore human experience, to analyze the impact of judicial decisions, to conduct detailed hearings, and to make extensive findings on the total situation than is a Court considering a single factual situation and a specific legal issue.*³²

A. CONGRESS' RESPONSE TO MIRANDA: 18 U.S.C. § 3501

The Court's opinion in Miranda was not well received by Congress. The case became a rallying point for local law enforcement, legislators and politicians who felt the Court had dealt yet another "disastrous blow to the cause of law enforcement in this country."³³ With few exceptions, most members were quite critical of the opinion. Soon after Miranda was unveiled, the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures initiated discussions and it was from these discussions that the legislative process began, and from which the Omnibus Crime Control and Safe Streets Act of 1968 (the "Act") was formed. The legislative history of the Act, of which § 3501 is one part, recorded the opinions of both supporters and objectors to Miranda and included studies and surveys³⁴ from various sources the results of which are used as

³² United States Code Congressional and Administrative News: 1968 U.S.C.C.A.N. 2261 (82 Stat. 197) ("Mr. Scott")

³³ Id. at 2127. The criticism came in the wake of several other opinions: McNabb v. United States, 318 U.S. 332 (1943), Mallory v. United States, 354 U.S. 449 (1957) and Escobedo v. Illinois, 378 U.S. 478 (1964).

³⁴ The studies mentioned in the legislative history include the following:

1. Arlen Specter, then District Attorney for the City of Philadelphia, noted that suspects would give statements, whether incriminating or not, 68% of the time before Miranda, and only 41% after the decision. Act of June 19, 1968, Pub. L. No. 90-351, 1968 U.S.C.C.A.N. 2128 (82 Stat. 197).

evidence to support their respective positions. It is clear from this legislative history that Congress strongly favored the passage of § 3501 and after some heated discussion in Congress the Act was passed. The statute, in relevant part, appears below:

- (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
- (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including
 - (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment,
 - (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession,
 - (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him,
 - (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and

-
- 2. Aaron Koota, District Attorney for Kings County, New York, conducted a survey indicating that 10% of suspects questioned refused to give a statement or confession prior to Miranda, opposed to 41% who refused after its arrival. *Id.*
 - 3. Charles E. Moylan, Jr., State's Attorney for the City of Baltimore, stated that the percentage of suspects who confessed to crimes before and after Miranda dropped from approximately 20 to 25% down to 2%. *Id.*
 - 4. Frank S. Hogan, District Attorney for New York County, New York, arrived at similar figures, with 49% making statements before and 15% after Miranda. *Id.* at 2129.
- Not all studies concluded that Miranda was an important issue for the criminal justice system. Judge Nathan Sobel conducted a study that revealed that only 10% of all indictments contained a confession. *Id.*

(5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

* * *

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self incriminating statement made or given orally or in writing.

18 U.S.C. § 3501.

The main difference between the rule in Miranda and § 3501 is as follows: in Miranda, if law enforcement fails to warn a suspect as required, then any confession or inculpatory statement made as a result must be suppressed. Section 3501 instead applied a totality of the circumstances approach. The reading of the warnings required by Miranda were but one of several factors to be considered by a judge in determining whether a confession or inculpatory statement should be admitted or suppressed. For example, if a suspect was advised of all the Miranda rights except the warning that counsel would be appointed to represent him if he could not afford to retain one, then under Miranda any statement made after such warnings would be suppressed. Under § 3501, however, such a mistake would be but one factor of several that the judge may consider. Other factors include the time elapsed between arrest and confession, or whether the suspect knew with what offenses he was charged, or even whether he had with him an attorney at the time of his questioning. In fact, there are circumstances under

which Miranda would allow the admission of incriminating statements when § 3501 may have suppressed them. An example may be illustrative of the difference.

A woman murders her husband, shoves his body into the trunk of her Rolls Royce and takes him to a sand trap at his favorite golf course, where she buries him. She leaves the state for two weeks to celebrate. Upon her return she goes straight to the local bar for the evening. On her way home she is stopped under suspicion that she is driving under the influence of alcohol. It is approximately 3:00 in the morning. After stopping the vehicle, the officer approaches her and determines that she is impaired: her speech is slurred and she is unsteady on her feet. When the officer takes her drivers license and asks her out of the car, he realizes that she is the wife of a person reported missing by his employer, and wanted for questioning. After failing several field tests, the woman is arrested for DUI and taken to the hospital to have a blood test, then on to the station. Her Rolls Royce is impounded, angering the woman greatly. The officer arranged for the detective investigating the man's disappearance to be waiting for her at the station. He sits down with her and reads the Miranda warnings to her quickly and without explanation. Handing her a rights waiver form, she signs at all the appropriate places and drops her head to the table, mumbling something about her car. The detective determines that although she was probably too drunk to drive, she was coherent and capable of waiving her rights. He then begins questioning her, but she only continues complaining about her impounded Rolls Royce. The detective asks her where her husband was, to which she sneers and says "what difference does that make? Maybe he is playing a really long game of golf!" She then mutters something about getting stuck in a sand trap then asks for her lawyer.

At trial, her attorney demands a hearing, alleging that the police violated Miranda. After a brief hearing the judge rules in favor of law enforcement, noting that all the warnings were recited to her and she signed a waiver form. The attorney points out that she had no idea she was under suspicion of murder. Had she known, she would have immediately asked for her attorney. The judge nevertheless admits the statements, pointing out that the defendant was properly Mirandized. The husband's body is recovered beneath a sand trap near the ninth hole of the local golf course.

Had § 3501 been applied, the judge may have suppressed the confession. Section 3501 lists among several factors whether the suspect was aware of the nature of the charges against her. Here, the suspect thought she was under arrest for DUI, not murder. Had she known, she certainly would have done things differently. Perhaps a more common and more likely example will be helpful. Suppose instead that before the detective recites to her the Miranda warnings, she looks at him and asks him if he likes to play golf. The detective gives her a quizzical look and responds "Sure. How about you?" The suspect says in response that she was not very good and always ended up in the sand trap. The detective then reads her the Miranda warnings but she refuses and asks for her lawyer. Something about her demeanor causes the detective to summon a police dog and his handler to check the local golf course, where the body of the suspect's husband is found. When she is charged with murder and she calls her attorney, the attorney files a motion to suppress. At the hearing the judge discovers the suspect was not warned before the detective questioned her and suppresses the statement. The woman is released and the charges are dropped because there is no other evidence linking the murder to the woman.

Applying § 3501, the fact that the warnings were not read before the seemingly innocent exchange would be but one of several factors to be considered in determining the admissibility of the confession.

If properly applied, § 3501 would allow the judge to use common sense when considering whether a confession should be admitted or suppressed. The judge would not be limited to a technical application of Miranda and instead could consider all the circumstances of a conversation. It is for this reason that § 3501 has been supported by so many in the field of law enforcement, as will be shown below.

²⁵ 1968 U.S.C.A.N. 2135 (2d Sess. 1971).

²⁶ *Id.* at 2126 (quoting from Judge Richard, *Crime and Punishment*, 1963).

²⁷ *Id.* at 2135 (quoting from J. Edward Lysaght, Chief Judge, U.S. Court of Appeals, 7th Circuit).

B. THE LEGISLATIVE HISTORY OF § 3501

*[C]rime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities. The traditional right of the people to have their prosecuting attorneys place in evidence before juries the voluntary confessions and incriminating statements made by defendants simply must be restored*³⁵.

Some voices preserved in the legislative history echo popular criticisms of and arguments against Miranda, some of which are repeated today. As one prosecutor opined, “[t]he question of guilt or innocence becomes relegated to the background, because in many of these instances guilt isn’t seriously in dispute. The only matters that are tried nowadays are these side issues. And I must say that sometimes I feel, when I am trying a criminal case, as though I am . . . not trying the accused, I am trying the policeman . . .”³⁶

Another common criticism is that the Miranda ruling usurped the superior power of Congress to legislate on issues requiring ongoing research and study. The admissibility of confessions is such an issue. “The legislative process is far better calculated to set standards and rules by statute than is the process of announcing principles through court decision in particular cases where the facts are limited. The legislative process is better adapted to seeing the situation in all its aspects and establishing a system and rules which can govern a multitude of different cases.”³⁷

³⁵ 1968 U.S.C.C.A.N. 2128 (82 Stat. 197).

³⁶ *Id.* at 2126 (quote from Judge Holtzoff, made during hearings on § 3501).

³⁷ *Id.* at 2133 (quote from J. Edward Lumbard, Chief Judge, U.S. Court of Appeals, 2nd Circuit).

Participants in the legislative history also expressed the opinion that the Court was mistaken about the widespread problem of police brutality and abusive tactics.³⁸ The Court admittedly used as evidence of police action and current police practices several police manuals that outlined how interrogations should be handled.³⁹ Looking at these manuals and public sentiment, the conclusion reached by several commentators was that “the Court overreacted to defense claims that police brutality is widespread.”⁴⁰ The investigation conducted by Congress was much more in depth and involved more than researching police manuals. Historically, Congress has been best equipped to conduct fact-finding investigations, and it is often their role. The Supreme Court should decide cases and controversies. Here, the legislative history makes it clear that the Court reached a decision by investigating the facts and reaching a conclusion. Congress has applied the same rule as that announced in Miranda, only Congress reached a different conclusion by applying different facts and after much more research and debate. “Stated simply, the Court has previously made a constitutional decision . . . on the basis of constitutional theory and of *its* appraisal of the facts With [§ 3501], Congress did not change the constitutional theory; rather, it made *its* appraisal of the facts and reached a different factual conclusion than the Court had.”⁴¹ Certainly the Court has the power to change the rule of law; in this case, however, it seems Congress was better equipped and prepared to fully investigate the facts and conduct the research required to reach a more informed conclusion.

³⁸ See *id.* at 2134-35

³⁹ Miranda v. Arizona, 384 U.S. 436, 449 (1966).

⁴⁰ 1968 U.S.C.C.A.N. at 2134.

⁴¹ *Id.* at 2148.

Eventually the Act, of which § 3501 was a part, was passed. What remained, however, was the question of whether and to what extent § 3501 would be applied. The Court, on the subject of the right against self-incrimination, explicitly stated in its opinion in Miranda that Congress is “free to develop [its] own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.”⁴² The question that remained was whether § 3501 would do so in practice.

C. THE DEPARTMENT OF JUSTICE AND THE COURT’S RESPONSE TO § 3501

The position of the Department of Justice during the Dickerson debate was that § 3501 had been neither supported nor applied by previous administrations. Certainly its use has been sporadic at best through the years⁴³. John Mitchell, Attorney General in 1968 when § 3501 was passed, in a somewhat bland assertion, testified before the House

⁴² 384 U.S. at 490.

⁴³ See, e.g., United States v. Albert M. Dickerson, 291 F.Supp. 633(N.D.Ill. 1968)(Government argued admissibility of confession based on § 3501); United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975)(“[T]he trial court did not err in applying the guidelines of section 3501 in determining the issue of the voluntariness of Crocker’s confession.”); United States v. Powe, 591 F.2d 833(D.C.Ct.App. 1978)(Court discussed and applied both Miranda and § 3501 to a confession); United States v. Perez-Bustamonte, 963 F.2d 48, 53(5th Cir. 1992)(“Under the § 3501 totality of the circumstances test . . . we cannot say that the delay prior to the confession rendered it inadmissible.”); United States v. Iwegbu, 6 F.3d 272(5th Cir. 1993)(Court applied § 3501); United States v. Makes Room for Them, 49 F.3d 410(8th Cir. 1995)(Court applied § 3501); United States v. Quinn, 123 F.3d 1415, 1424(11th Cir. 1997)(“The admissibility of confessions is covered by 18 U.S.C. § 3501); United States v. Rosario-Diaz, et. al., 2000 WL 72080 (1st Cir.(Puerto Rico) 2000).

Select Committee on Crime that "until such time as we are advised by the courts that [§ 3501] does not meet constitutional standards, we should use it."⁴⁴

Federal prosecutors used § 3501 in several cases, but primarily relied on Miranda. Because of this strategy, courts rarely needed to reach a conclusion as to § 3501's legitimacy: the investigating agents in each case persisted in using the warnings required by Miranda; thus there was no need to go past Miranda and apply § 3501.⁴⁵ The position of the Justice Department on the legitimacy of § 3501, therefore, is at best mere speculation. What is certain is that the Court, with its opinion in Dickerson, settled any confusion on the issue.

A. THE FACTS IN DICKERSON

On January 24, 1983, there was a robbery at the First Virginia Bank in Alexandria, Virginia. A witness saw the tag of the getaway car and reported it. The FBI ran the tag and went to the address of record, which was registered to Dickerson. The FBI made contact with Dickerson and while they were in his home they saw a large amount of cash in plain view. After some questioning, Dickerson agreed to go to the FBI field office with them.

During Dickerson's interview at the field office he admitted to being in the area of the robbery. The FBI contacted a judge who agreed to let the telephone sign a search

⁴⁴ 85 Iowa L. Rev. 175, 199 (citing U.S. Dep't of Justice, Office of Legal Policy, Report to the Attorney General on the Law of Pre-trial Interrogation 67 (1986).

⁴⁵ Despite law enforcement officer's continued use of Miranda, there is no evidence to support the inference that they either approved or were critical of the rule.

CHAPTER THREE

If errors are made by law enforcement officers in administering the prophylactic Miranda procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.⁴⁶

A. THE FACTS IN DICKERSON

On January 24, 1997, there was a robbery at the First Virginia Bank in Alexandria, Virginia. A witness saw the tag of the getaway car and reported it. The FBI ran the tag and went to the address on record, which was registered to Dickerson. The FBI made contact with Dickerson, and while they were in his home they saw a large amount of cash in plain view. After some questioning, Dickerson agreed to go to the FBI field office with them.

During Dickerson's interview at the field office he admitted to being in the area of the robbery. The FBI contacted a judge who agreed over the telephone to sign a search warrant. The FBI then told Dickerson that agents were about to search his apartment.

⁴⁶ *Oregon v. Elstad*, 470 U.S. 298, 309 (1985).

Some time later, Dickerson expressed the desire to make a statement. According to the FBI, Dickerson was read the Miranda warnings and signed a waiver agreeing to speak with the agents.⁴⁷ He then admitted to being the getaway driver in the bank robbery, admitted to similar conduct in several other robberies. He identified another, Jimmy Rochester, as the actual bank robber. Dickerson also told the agents that after the robbery, Rochester gave him a silver handgun and some dye-stained money. Following these statements, Dickerson was placed under arrest.

The search of Dickerson's apartment produced a silver .45 caliber handgun, dye-stained money, a bait bill from another robbery, ammunition, masks and latex gloves. Dickerson was indicted on several counts related to the bank robbery. Dickerson filed a motion to suppress those statements he made to the FBI, any evidence found as a result of his statements, any physical evidence obtained during the search of his apartment and finally, any physical evidence obtained during the search of his car. The Government submitted a brief in opposition to the motion to suppress. A hearing on the motion to suppress was held in the United States District Court for the Eastern District of Virginia on May 30, 1997.

B. THE TRIAL AND THE APPEAL

The FBI testified that Dickerson was read (and waived) his rights under Miranda prior to his confession and that he confessed "shortly after" the warrant was obtained to search Dickerson's apartment. Dickerson, however, testified that he confessed prior to

⁴⁶ Oregon v. Elstad, 470 U.S. 298, 309 (1985).

being read (and waiving) his Miranda rights and about “thirty minutes” after being informed about the warrant to search his apartment.

After reviewing the evidence, the district court suppressed Dickerson’s statements, finding that they were made while he was in police custody, in response to police interrogation and without the necessary Miranda warnings. The district court found that Dickerson was not advised of his Miranda rights until after he had completed his statement to the government.

The evidence found as a result of the confession, which included the contacting and subsequent admission of Rochester, who later implicated Dickerson, was not suppressed. The district court, relying upon the Fourth Circuit’s decision in United States v. Elie, 111 F.3d 1135 (4th Cir. 1997), noted that evidence found as a result of a statement made in violation of Miranda may only be suppressed if the statement was involuntary within the meaning of the Due Process Clause of the Fifth Amendment. Because Dickerson’s statement was voluntary by Fifth Amendment standards, the district court concluded that the evidence found as a result thereof was admissible at trial.

Thus, although the district court specifically found that Dickerson’s confession was voluntary for purposes of the Fifth Amendment, it nevertheless suppressed the confession because it was obtained in technical violation of Miranda. In ruling on the admissibility of Dickerson’s confession, the district court did not consider § 3501, which provides, in pertinent part, that “a confession ... shall be admissible in evidence if it is

⁴⁷ There was a discrepancy between the time of the giving of the Miranda warnings and the confession.

voluntarily given.”⁴⁸ Thus, if the court applied § 3501 in Dickerson, then the defendant’s voluntary confession may have been admissible as substantive evidence in the Government’s case-in-chief.

The United States Court of Appeals for the Fourth Circuit held that Congress, “pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted within its authority in enacting § 3501. As a consequence, § 3501, rather than Miranda, governs the admissibility of confessions in federal court.”⁴⁹ The Fourth Circuit held that the Miranda warnings were not constitutional in nature, and that Miranda encouraged Congress and the states to create their own methods to protect one’s constitutional rights guaranteed under the Fifth Amendment. The Fourth Circuit held that Appellant’s confession was admissible because it was received in compliance with § 3501.

C. THE UNITED STATES SUPREME COURT IN DICKERSON

i. INTRODUCTION

As was predicted by many, the Supreme Court reversed the Fourth Circuit in Dickerson. The Court used many of the academic arguments familiar to those who have studied Miranda, but the most important of the issues was whether Miranda was a constitutional decision or merely a rule of evidence or procedure. If it is the former, then Congress does not have the power to change the rule through legislation. If the latter, then Congress can legislatively overrule the decision. The Dickerson Court held that Miranda was “constitutionally based” and made several arguments in support, but “first

⁴⁸ 18 U.S.C. § 3501(a).

and foremost of the factors . . . that Miranda is a constitutional decision--is that both Miranda and two of its companion cases applied the rule to proceedings in state courts--to wit, Arizona, California, and New York.”⁵⁰ Because the majority held that Miranda was constitutionally based, Congress did not have the power to legislatively override it. The majority cited several other common grounds for preserving Miranda, such as the idea that law enforcement prefers its “bright line rule,” or that as one of the most famous and celebrated decisions in criminal law, both stare decisis and public sentiment demand that Miranda remain the law of the land.

Of course the opinion was not without its detractors. Justice Scalia authored a sharp and biting dissent. He referred to the majority as a “nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy.”⁵¹ He closed by stating that “until § 3501 is repealed, [he] will continue to apply it in all cases where there has been a sustainable finding that the defendant’s confession was voluntary.”⁵²

Because the Court determined that Miranda is constitutionally based, § 3501 was held to have been improperly enacted and could no longer be applied. Had the Court determined otherwise, viz., that Miranda was not a constitutional rule and merely one of “constitutional dimensions,” then of course the Court would have been obliged under its own logic to recognize the legitimacy of § 3501.

⁴⁹ U.S. v. Dickerson, 166 F.3d 667, 671 (1999).

⁵⁰ Id. at 2333.

⁵¹ Dickerson v. United States, 120 S.Ct. 2326, 2342 (2000).

⁵² Id. at 2348.

ii. MAJORITY VIEW AND DISSENT

The argument of the majority can be consolidated into two related themes: first, that of the superiority and constitutionality of Miranda and second, as a concomitant issue, the insufficiency and illegitimacy of § 3501 as Miranda's replacement. Both the dissent and the majority hold as mutually exclusive the requirements of Miranda and the dictates of § 3501. "[Section] 3501 reinstates the totality test as sufficient. Section 3501 therefore cannot be sustained if Miranda is to remain the law."⁵³ "I agree with the Court that § 3501 cannot be upheld without also concluding that Miranda represents an illegitimate exercise of our authority to review state-court judgments...."⁵⁴ In other words, the acceptance of one requires the invalidity of the other.

The majority begins by accepting one of the most basic premises of Miranda, that police interrogation by definition "exact[s] a heavy toll on individual liberty and trades on the weakness of individuals."⁵⁵ The majority concluded that police interrogation and practice leads to confessions that reside in a gray area between voluntary and involuntary under the Fifth Amendment, hence the necessity for a prophylactic rule such as Miranda. As correctly stated by the majority, the requirement that confessions be voluntary is a direct application of the Fifth Amendment's guarantee against self-incrimination and the Due Process Clause of the Fourteenth Amendment.⁵⁶ The conclusion reached in Miranda was that the centuries-old totality of the circumstances test for determining the

⁵³ Id. at 2336(majority).

⁵⁴ Id. at 2346(dissent).

⁵⁵ Dickerson v. United States, 120 S.Ct. at 2331(citing Miranda v. Arizona, 384 U.S. 436, 455).

⁵⁶ Id. at 2330.(The majority surveys case law as far back as 1783 as proof of its assertion that the requirement that confessions be voluntary has existed for hundreds of years).

voluntariness of a confession was not good enough to insulate oneself from the compulsive nature of such interrogations.⁵⁷ The list of warnings created in Miranda was the Court's solution, and the Dickerson majority took great pains in affirming and justifying their continued use. Justice Scalia, in dissent, thought it absurd to assume that one who is not read the warnings required by Miranda is automatically subjected to such coercive power that one's will is overborne.⁵⁸ As he also correctly notes, almost everyone in our society is familiar with the Miranda warnings, and that there is "simply no basis in reason for concluding that a response to the very first questions asked, by a suspect who already knows all of the rights described in the Miranda warning, is anything other than a volitional act."⁵⁹ Justice Scalia added that the result of the Miranda warning that one has a right to counsel as early as the questioning stage of an investigation is to discourage the suspect from speaking to law enforcement at all.⁶⁰ Scalia argued that such a warning is unnecessarily offensive to the entire idea of confessions and argues that "[t]he Constitution is not, unlike the Miranda majority, offended by a criminal's commendable qualm of consciousness or fortunate fit of stupidity."⁶¹ One of the main issues of contention in Dickerson was whether Miranda instituted a constitutional rule, viz., whether the Court's holding in Miranda was an interpretation of the Constitution. Whether Miranda is a constitutional rule is important for several reasons. If indeed

⁵⁷ "A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise." Miranda v. Arizona, 384 U.S. at 462 (citing Bram v. United States, 168 U.S. 532 (1897)).

⁵⁸ Id. at 2338.

⁵⁹ Id. at 2339.

⁶⁰ Id.

Miranda is a constitutional rule, then it is a pronouncement by the United States Supreme Court interpreting what some part of the Constitution means. This interpretation cannot be changed or defeated by later Congressional legislation.⁶² However, if it is merely a rule of evidence or procedure, viz., not an interpretation of the Constitution but a procedural rule as to how to apply the Fifth Amendment, for example, then Congress has the authority to legislatively overrule such a holding.⁶³ Conversely, if Congress has already spoken regarding such a rule, then the Supreme Court has no power to later supercede it.⁶⁴ The separation of powers is a fundamental principle of American jurisprudence. The dissent believed “[b]y disregarding congressional action that concededly does not violate the Constitution, the Court flagrantly offends fundamental principles of separation of powers, and arrogates to itself prerogatives reserved to the representatives of the people.”⁶⁵

This is also important because the Supreme Court has no power to supervise the actions of state or local law enforcement unless such action somehow conflicts with the United States Constitution. In other words, the Court may only “correct wrongs of constitutional dimension.”⁶⁶ “With respect to proceedings in state courts, our ‘authority is limited to enforcing the commands of the United States Constitution.’”⁶⁷ While this was not an issue in Dickerson, which involved the actions of the FBI, it was certainly relevant

⁶¹ Id. at 2340.

⁶² See, generally, City of Boerne v. Flores, 521 U.S. 507 (1997); Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60(1803).

⁶³ Carlisle v. United States, 517 U.S. 416 (1996).

⁶⁴ Dickerson, 120 S.Ct. at 2332.

⁶⁵ Id. at 2342.

⁶⁶ Dickerson, 120 S.Ct. at 2333.

⁶⁷ Id. at 2333(citing Mu’Min v. Virginia, 500 U.S. 504, 508-09(1991)).

in Miranda and important for states and local law enforcement agencies in the wake of Dickerson.

It is appropriate to note here one argument of the dissent, that in Oregon v. Elstad, 470 U.S. 298 (1985), the Court held that a Miranda-defective confession is nevertheless admissible as impeachment evidence, while a confession deemed involuntary under the Fifth Amendment could not be used for any purpose.⁶⁸ The dissent points out several other exceptions to Miranda that have developed over the years⁶⁹, to which the Dickerson majority responds as follows: “[t]hese decisions illustrate the principle—not that Miranda is not a constitutional rule—but that no constitutional rule is immutable.”⁷⁰ The dissent argues that this is nonsense, that if Miranda is indeed a constitutional rule, then there can be no exception for allowing evidence obtained in violation of the Miranda warnings into evidence.⁷¹

In a somewhat bizarre argument, the majority bolsters its support of Miranda by arguing not only that the language of Miranda proves that it is a constitutional rule, but further, that this is so because Miranda has been applied to the states. In other words, because Miranda and its progeny have been applied to the states, Miranda must be an interpretation of the federal constitution. Otherwise, the holding would have no effect on the admissibility of confessions in state courts. Scalia vehemently disagreed, attacking this argument as judicial bootstrapping: “That the Court has, on rare and recent occasion,

⁶⁸ Dickerson, 120 S.Ct. at 2341.

⁶⁹ Most notably, the “public safety exception” and the “fruit of the poisonous tree” exception. Id. at 2341.

⁷⁰ Id. at 2335.

⁷¹ Id. at 2342.

repeated the mistake does not transform error into truth, but illustrates the potential for future mischief that the error entails.”⁷²

The dissent was distressed at the variance between the result of a confession deemed involuntary under the Fifth Amendment and one deemed in violation only of Miranda. The difference in the result, viz., the fruits of such a confession suppressed in the former example and admissible in the latter, does not obtain: if Miranda is a constitutional rule, then there should be no distinction as to such confessions: “In my view, our continued application of the Miranda code to the States despite our consistent statements that running afoul of its dictates does not necessarily--or even usually--result in an actual constitutional violation, represents not the source of Miranda's salvation but rather evidence of its ultimate illegitimacy.”⁷³

As for the language of Miranda, the Dickerson majority points out several passages in Miranda as proof that its drafters thought they were issuing a constitutional rule. Some of these passages include calling the warnings “safeguards to protect precious Fifth Amendment rights,” that the issues presented in Miranda were of “constitutional dimensions,” and that the warnings were “grounded in a specific requirement of the Fifth Amendment of the Constitution.”⁷⁴ The majority preceded this litany with the admission that “we concede that there is language in some of our opinions that supports the view taken by [the Fourth Circuit in Dickerson].”⁷⁵

⁷² Id. at 2345.

⁷³ Id. at 2343.

⁷⁴ Dickerson, 120 S.Ct. at 2334.

⁷⁵ Id.

The dissent is quite clear in its response: nowhere in Miranda does the majority say that a violation of its warnings amounts to a violation of the Fifth Amendment. The Dickerson majority, too, fails to expressly state in its opinion that a violation of Miranda is a violation of one's constitutional rights.⁷⁶ In fact, each Justice of the Dickerson majority has, in prior opinions, held that a violation of Miranda is not a violation of the Constitution.⁷⁷

Another favorite argument of the majority is as follows:

[S]tare decisis carries such persuasive force that the Court has always required a departure from precedent to be supported by some special justification. . . . There is no such justification here. Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.⁷⁸

Essentially the majority believed that the prophylaxis of Miranda could not be changed because the police have become accustomed to it and the public has seen it on television so often that the average child in America can recite it. Justice Scalia disagreed. "Far from believing that stare decisis compels this result, I believe we cannot allow to remain on the books even a celebrated decision-- especially a celebrated decision--that has come to stand for the proposition that the Supreme Court has power to impose extra-constitutional constraints upon the Congress and the States."⁷⁹

⁷⁶ See Dickerson, 120 S.Ct. at 2342(dissent points out that the language of Miranda used as evidence by the Dickerson majority that they had announced a constitutional rule is nothing more than "word games").

⁷⁷ Id. at 2337(listing Justices and opinions in which they expressed such a view).

⁷⁸ Id. at 2329.

⁷⁹ Id. at 2348.

iii. IS MIRANDA A CONSTITUTIONAL RULE?

A brief inspection of the Miranda opinion reveals the probability that the warnings are not constitutionally required. “We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege”⁸⁰ The Supreme Court has consistently referred to these warnings as “prophylactic measures,” New York v. Quarles, 467 U.S. 649, 654 (1984), “procedural safeguards,” Miranda v. Arizona, 384 U.S. at 444, and “not themselves rights protected by the Constitution.” Dickerson v. United States, 166 F.3d at 672(citing Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

Defenders of Miranda have consistently cited one passage in the voluminous opinion in which the majority opines that “the issues presented are of constitutional dimensions and must be determined by the courts.”⁸¹ From these vague words alone some have argued that the warnings required under Miranda are actually required by the Constitution. Considering the language in the rest of the opinion, it is likely that the passage was intended to convey the idea that the warnings are not themselves per se required but the presumption in their absence will be that a suspect’s Fifth Amendment rights were not protected unless there was some objective basis, some overt attempt to inform a suspect of his rights, upon which law enforcement can demonstrate its compliance with Miranda. The Court admitted that the Constitution does not require a

⁸⁰ Id. at 490.

“specific code” to protect one’s rights during questioning and that Congress and the States are free to “develop their own safeguards.” The only qualification was that they be “fully as effective . . . in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.”⁸² What of the right to have counsel appointed or an explicit statement of the right to have counsel present during questioning? The conspicuous absence of these other warnings from this qualification can only underscore the argument that they are not required by the Constitution.

It is plausible that the absence of the additional warnings suggests that in order for the police to pass constitutional muster a suspect need only be warned of his right of silence and his continuous opportunity to exercise that right.⁸³ This assertion is defensible for two reasons. First, the other rights in question, including the appointment of counsel to indigent persons and the right to have counsel present during questioning, “actually derive from quotation and analogy drawn from precedents under the Sixth amendment, which should properly have no bearing on police interrogation.”⁸⁴ Therefore, these rights should not attach until adversary proceedings have begun. Second, the Miranda majority asserted that the FBI’s form of pre-interrogation warnings was a model for other agencies to emulate. The FBI, however, does not include in its warnings a clear statement of the indigent suspect’s right to the appointment of counsel and no warning at all of the right to have counsel present during questioning, which are both explicitly required by Miranda. Thus, it is questionable whether Miranda truly was intended to specifically require the

⁸¹ Id. at 490.

⁸² Id.

⁸³ Id.

⁸⁴ 384 U.S. at 510.

above-mentioned warnings; this is especially true considering the substance of these warnings, which more properly belongs to the Sixth Amendment and its progeny.

The advocates of § 3501 mustered a formidable defense of the statute, as did the many amicus curiae who filed supporting briefs.⁸⁵ In any event, the fight was lost and Miranda appears to be here to stay. Section 3501 is still printed in the United States Code, but with the Court's proclamation in Dickerson it seems only to be a matter of time before the statute is repealed. Given the Court's rule in Miranda, the question that remains is whether the criminal justice system is better off with Miranda as it now stands, or with some other solution or re-interpretation. As for whether Miranda is a constitutional rule, the Dickerson majority made the answer to that question no more clear than Miranda itself:

The dissent argues that it is judicial overreaching for this Court to hold § 3501 unconstitutional unless we hold that the Miranda warnings are required by the Constitution. . . . But we need not go farther than Miranda to decide this case. In Miranda, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, . . . a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something more than the totality test was necessary. . . . As discussed above, § 3501 reinstates the totality test as sufficient. Section 3501 therefore cannot be sustained if Miranda is to remain the law.⁸⁶

In the end, and without any actual support, the majority held that "Miranda announced a constitutional rule that Congress may not supersede legislatively."⁸⁷ In other words, the Court essentially avoided the question of whether Miranda was actually a

⁸⁵ Mr. Paul G. Cassell, a law professor at the University of Iowa, dedicated much of his time over the past years supporting a remedy for the (problems) with Miranda. In addition to his scholarly contributions he had the honor to be heard in oral argument to the United States Supreme Court in Dickerson.

⁸⁶ Id. at 2336.

constitutional rule, basing their decision instead on the fact that § 3501 was simply inadequate. “Whether or not we would agree with Miranda's reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now.”⁸⁸

A very recent decision from the Supreme Court of Tennessee illustrates these observations. In Tennessee v. Walton, No. W1998-00329-SC-R11-CD (Tn. Sup. Ct. March 15, 2001), police officers asked a man suspected of several burglaries to come to the station house to speak with them. The suspect agreed, but before getting into the police car the officers informed him that for their safety he had to wear handcuffs. The suspect was specifically informed that he was not under arrest. On the way to the station the suspect mentioned the name of Charles Thompson, and told the officers “I know what lies and things that [Thompson has been] telling on me. And I've got some information where we can get him.”⁸⁹ The suspect proceeded to direct the police officers all over town, including his own home, making several stops to point out hidden items that the officers had known were stolen. At times the suspect would give the police officers directions, then would exit the police car and lead them to the property.

After the suspect finished he was brought to the station, where he was Mirandized and signed a written waiver of those rights. He then detailed a complete statement for the police officers. At trial the defendant moved for suppression of his statements and the evidence acquired as a result of those statements. When the trial court denied the motion

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id. at *1.

the defendant pled guilty. On appeal the motion was granted and the charges were dismissed because the Court of Criminal Appeals believed that regardless of the spontaneity of the statements, they "were not made by the defendant with the full knowledge of his rights."⁹⁰

The Tennessee Supreme Court remanded. In so doing, the Court had been concerned whether or not "a violation of Miranda is also now a violation of the Fifth Amendment."⁹¹ The Court looked to Dickerson and determined that it did not, as "this reading is contradicted by the language of the opinion itself."⁹² The Court continued:

Not only did the majority plainly refuse to extend its holding that far, but the majority also limited its decision to holding that the "totality of the circumstances" test, without more, is inadequate to protect the privilege against self-incrimination. Indeed, when read in this context, Dickerson practically does little more than did Miranda itself, which, in holding that the "totality of the circumstances" test was insufficient to safeguard Fifth Amendment protections, was clear that the constitution did not require any particular set of procedures.

* * *

[W]e have never viewed the failure to administer the Miranda warnings as an actual violation of the Fifth Amendment.⁹³

Thus, it seems the best that can be said is that a violation of Miranda is not necessarily a violation of the Fifth Amendment. Constitutional rule or not, Miranda is still the law, and the question becomes how it is to be interpreted or whether it causes more harm than good.

⁹⁰ Id. at *3.

⁹¹ Id. at *10.

CHAPTER FOUR

*Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays and defeats the prosecution of crime.*⁹⁴

A. EMPIRICAL ARGUMENTS AGAINST MIRANDA

Defenders of Miranda worried that the affirmance of § 3501 would have clogged up the already severely taxed court systems with voluntariness determinations. This is not supported by the evidence.⁹⁵ First, in state courts the percentage of criminal cases that actually go to trial are very low. See generally, Andrew Horwitz, "Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases," 40 Ariz. L. Rev. 1305, 1378 (1998)(In the year of 1995 only 4% of criminal cases went to trial). The number is not significantly higher in federal courts. See H.W. Perry, Jr., "United States Attorneys- Whom Shall They Serve?," 61-WTR LCPR 129 (1998)(no publication page references available)(12% of all criminal cases in federal courts are settled by trial). If a voluntariness hearing is held and the judge rules in favor of the defendant then there is no

⁹² Id.

⁹³ Id.

⁹⁴ 1968 U.S.C.C.A.N. 2263 (82 Stat. 197)(citing U.S. v. Garsson, 291 F. 646, 649 (S.D.N.Y., Feb 01, 1923)(Learned Hand, District Judge).

⁹⁵ For an exhaustive summary and discussion of various studies over the decades of the effect of Miranda, see Paul G. Cassell, Miranda's Social Costs: An Empirical Reassessment, 90 Nw. U.L.Rev. 387(1996).

trial. Therefore it is difficult to argue that a voluntariness determination overly taxes the courts.⁹⁶

Second, the criminal justice system is not solely responsible for the heavy administrative burdens borne by the courts. At least equally responsible are the civil dockets and other judicial duties. If “clogged courts” are the concern, then there are less drastic means that are less likely to intrude upon the rights of the criminal defendant. For example, states can raise the amount in controversy limits that dictate whether civil cases are filed in superior courts or elsewhere, such as in magistrate court, thereby freeing to some degree the superior courts’ time for hearing felony cases. Another obvious resolution would be to hire more judges, or institute better, more modern alternatives such as drug courts or teen courts. These are but three examples of less intrusive means available to lighten the burden of the courts; prohibiting voluntariness hearings to ease this burden is far more costly to the criminal justice system. These alternatives involve in large part a mere administrative redistribution of resources.⁹⁷

Furthermore, Miranda itself does not supplant the Fifth Amendment’s prohibition against coerced confessions; therefore any question regarding the voluntariness of a confession under Miranda would require a hearing anyway. Such is the case with Miranda, § 3501 or any other conceivable procedure. This means that choosing Miranda over § 3501 or some other option in no way saves any court any amount of time. It

⁹⁶ Further, hearings to determine the voluntariness of a statement or confession are already held in virtually every criminal case that goes to trial and involves such a statement.

⁹⁷ Some options that could be discussed in Georgia include: allowing state probation violations to be heard by an administrative law judge, or allowing defendants to plea guilty with a joint recommendation for punishment outside of court, with the plea to be judicially reviewed after the fact to ensure it was voluntary.

merely selects the substance of the arguments that will be asserted during any voluntariness hearings.

There is even evidence that Miranda itself has burdened the courts more than mere voluntariness hearings. "It is not immediately apparent . . . that the judicial burden has been eased by the "bright-line" rules adopted in Miranda. In fact, in the 34 years since Miranda was decided, this Court has been called upon to decide nearly 60 cases involving a host of Miranda issues, most of them predicted with remarkable prescience by Justice White in his Miranda dissent."⁹⁸

Another argument cited by the Dickerson majority is that many local law enforcement agencies would prefer to keep Miranda in place. The truth or falsity of that statement aside, this fact should be completely irrelevant in determining whether Miranda should be applied in federal courts. Section 3501, for example, would only apply in the courts of states that have adopted the statute in whole or in part.⁹⁹ It is clear from the opinion in Miranda that Congress, as well as the states, are free to follow Miranda or apply their own "fully effective" alternative.¹⁰⁰ Even today's Dickerson Court remains cautiously vague as to the issue of whether it fully supports Miranda, choosing instead to say that it is a constitutional rule and therefore cannot be legislatively overruled by Congress.¹⁰¹ But the Court is not silent¹⁰².

⁹⁸ Dickerson, 120 S.Ct. at 2347.

⁹⁹ Of course, by now Miranda has been firmly entrenched in every state's highest court and will, therefore, continue to be applied unless and until each individual state chooses to adopt some form of § 3501.

¹⁰⁰ Id. at 479.

¹⁰¹ Id. at 2336

¹⁰² "Whether or not we would agree with Miranda's reasoning and its resulting rule . . . the principles of *stare decisis* weigh heavily against overruling it now. Id.

Not only is the opinion of local law enforcement irrelevant as applied to the issues presented here, but the opinion of law enforcement itself as presented by the Dickerson majority is subject to dispute. Virtually every major law enforcement support group was represented by amicus brief to the United States Supreme Court in support of § 3501.¹⁰³ Even a former Assistant United States Attorney who was the Chief of Appeals in Virginia when Dickerson began made his feelings known to the Department of Justice.¹⁰⁴ Even after Dickerson, it is of significance that subsequent cases have nevertheless applied or at least discussed the language of § 3501.¹⁰⁵ While some in the criminal justice community¹⁰⁶ have voiced their preference for Miranda because they see it as a bright-line rule and thus a perceived ease of administration for police and courts, there is no

¹⁰³ To name a few: Americans for Effective Law Enforcement, Inc., The International Association of Chiefs of Police, Inc., The National Sheriff's Association, The Virginia Association of Chiefs of Police and the Fraternal Order of Police.

¹⁰⁴ William G. Otis, upon his resignation from the Department of Justice, wrote Seth Waxman on September 13, 1999, encouraging the Department to preserve § 3501.

¹⁰⁵ "We find Coleman's confession was knowingly and voluntarily given in accordance with both [Miranda and § 3501]." United States v. Coleman, 225 F.3d 655 (4th Cir. July 25, 2000); "Courts look to 18 U.S.C. § 3501(c) to determine whether pre-arraignment statements obtained in violation of Rule 5(a) are admissible." United States v. Oropeza-Flores, 230 F.3d 1368 (9th Cir. Aug. 30, 2000). One should note that these opinions were unpublished, and until recently, unpublished opinions were of limited precedential value. That issue has been settled, and unpublished opinions are entitled to precedential value as is any other judicial opinion. See Anastasoff v. United States, 223 F.3d 898, 900(8th Cir. August 22, 2000)(case rendered moot at rehearing for unrelated reason in Anastasoff v. United States, 235 F.3d 1054(8th Cir. Dec. 18, 2000)). The holding in Anastasoff has been recognized in virtually every other circuit. See generally Amgen, Inc. v. Hoechst Marion Roussel, Inc., 126 F.Supp.2d 69, 136(D.Mass. Jan. 19, 2001); Luciano v. U.S., 2000 WL 1597771, *1 (E.D.N.Y. Oct 23, 2000); In re Mays, 256 B.R. 555, 559 (Bkrtcy.D.N.J. Dec. 19, 2000); U.S. v. Lopez-Pastrana, 2001 WL 293262, *12 (C.A.9 (Nev.), Jan. 12, 2001); U.S. v. Carrillo, 123 F.Supp.2d 1223, 1247 (D.Colo. Nov. 20, 2000).

¹⁰⁶ Not to mention lawyers and politicians.

evidence that this group is of a significant size or in the majority of those law enforcement professionals with an opinion on the matter.¹⁰⁷

Assuming that there is a significant number of law enforcement professionals who prefer to follow the dictates of Miranda, there is yet another, more fundamental reason why that opinion is irrelevant. The ease of administration for the police of a rule of this Court in securing the constitutional rights of the people should never be a part of the calculus this Court applies in determining which of several rules should be preserved. This is especially true when the rule in question, although easier to administer, does not offer as complete a protection as another proposed rule. Simply put, just because a rule is easier to apply does not mean it is more protective of one's rights under the Constitution. Also, just because the police like one rule better than another is not, and never has been, a reason for preserving the rule.

As already discussed, § 3501 has never achieved the fame and universal application enjoyed by Miranda. One obvious reason why this is the case is that law enforcement continued to use Miranda; indeed, members of law enforcement had already acquired the habit of asking the famous questions. Perhaps a bright line rule offered comfort to line officers unaware of § 3501. Because of this practice, federal prosecutors rarely bothered to argue § 3501 because it was not necessary; if Miranda was satisfied then there would be no reason to further complicate matters. Thus, courts rarely had to address the issue of whether § 3501 was valid: once they determined that Miranda was followed, courts simply did not go further.

¹⁰⁷ There is certainly no evidence cited in the briefs to the Court or the opinion itself.

So Miranda remains. The Court has made it clear that Congress has but a limited part in the discussion; § 3501 has been overruled and any attempt by Congress to change the rule now will be met with a scrutiny too strict for any legislation to survive. One is left with the same problem discerned by those who enacted § 3501 over thirty years ago; that of incriminating statements and confessions being suppressed because they were made in technical violation of Miranda and despite the fact that a violation of Miranda is not necessarily a violation of the Fifth Amendment. Without turning to legislation, the only avenue left for one trying to avoid this result is through the judiciary. If Miranda is here to stay, then a re-interpretation of the rule may prove helpful. This thesis will next explore such a possibility and then suggest one such re-interpretation.

The result of a technical violation of Miranda is the suppression of a confession or any other statements. Depending on the nature of the violation, it can also result in the exclusion of any evidence that stems from those statements. This is far too costly a result for such a violation. Consider an example:

A man murders a child. Several days go by, and the police have no leads. Facing remorse, the perpetrator wants to admit his crimes to law enforcement. He calls the assigned detective to confess, and the detective secures a warrant for the man's arrest. He then sends a uniformed police officer to the caller's home. The officer arrives and places the man in custody and brings him to the station. On the way to the station, it begins to rain very hard, and the rain turns to sleet. The officer begins talking about the fact that the child deserves to have a proper Christian burial, instead of lying exposed in the woods somewhere in the cold and rain. The man eventually makes several incriminating statements, including giving the location of the child. When they arrive at the police station the man is

¹⁰⁶ 1968 U.S.C.A.N. 2765 (82 Stat. 47) *Wong Sun v. United States*, 392 U.S. 83, 104 U.S. 97, 122, 54 S.Ct. 530 (1968) *Cardozo*, 23

CHAPTER FIVE

*[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.*¹⁰⁸

A. ARGUMENT

The result of a technical violation of Miranda is the suppression of a confession or any other statements. Depending on the nature of the violation, it can also result in the exclusion of any evidence that stems from those statements. This is far too costly a result for such a violation. Consider an example:

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¹⁰⁸ 1968 U.S.C.C.A.N. 2263 (82 Stat. 197)(citing Snyder v. Commonwealth of Massachusetts 291 U.S. 97,122, 54 S.Ct. 330(1934)(Cardozo, J.).

charged with murder. At trial the perpetrator's lawyer argues that the statements must be suppressed because the man was never read the warnings required by Miranda. The statements are suppressed.¹⁰⁹

The defendant portrayed above was being given a ride to the police station at the defendant's request and in the course of a conversation with a police officer, he made incriminating remarks. It was hardly the coercive environment feared by the Miranda Court. Miranda could not have intended nor foreseen the full implications of its opinion, and Dickerson recognized as much. "No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision."¹¹⁰ Indeed, a strict observance of the Court's prophylactic rule in Miranda would indeed hamper criminal investigations, and later courts strayed from the rule in several significant ways. Some of the most important exceptions follow.

The Supreme Court has chiseled away at Miranda over the decades, creating various exceptions to the rule in an effort to accommodate the ever-changing nature of society and the law. In Michigan v. Tucker, 417 U.S. 433 (1974), the Court held that evidence obtained based on the substance of a Miranda-defective confession can be admissible in court even if the statement itself is suppressed. In Harris v. New York, 401 U.S. 222 (1971), it created an exception allowing evidence to be admitted that was obtained in violation of Miranda for the purpose of impeaching the testimony of the defendant. From New York v. Quarles, 467 U.S. 649 (1984), came the birth of the public

¹⁰⁹ Taken loosely from Brewer v. Williams, 430 U.S. 387 (1977) (the actual case is factually similar, but the Court suppressed the statements as made in violation of the defendant's 6th Amendment right to counsel).

¹¹⁰ Id. at 2335.

safety exception to Miranda, allowing the admission into court of statements elicited from a defendant when the public safety is at risk. Finally, in Oregon v. Elstad, 470 U.S. 298 (1985), the Court even recognized the admissibility of properly Mirandized statements that followed a Miranda-defective confession. The practical result of these rulings is that a Miranda-defective confession can often be, and often is, used against a defendant in court.

Michigan v. Tucker, 417 U.S. 433 (1974), was decided relatively soon after Miranda.¹¹¹ In Tucker, the defendant was advised of all those rights required by Miranda, save for his right to have counsel appointed free of charge if he could not afford one. The confession that resulted led officers to a witness who was questioned and later called to testify in trial. The question before the Court was whether the subsequent witness' testimony would be allowed even though it was discovered through the defendant's confession, which was obtained without a proper warning as required by Miranda. The Tucker Court's response phrased the issue presented in this thesis quite succinctly¹¹²:

Our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination does not mean there was not a disregard, albeit an inadvertent disregard, of the procedural rules later established in Miranda. The question for decision is how sweeping the judicially imposed consequences of this disregard shall be.¹¹³

¹¹¹ Though not a significant factor in the plurality opinion, it is of historical interest to note that the facts of the case actually predated the opinion reached in Miranda.

¹¹² Despite his opinion in Dickerson, in Tucker now Chief Justice Rehnquist held that Miranda was not required by the Constitution, thus a violation of Miranda did not indicate a concomitant violation of one's Fifth Amendment right not to incriminate oneself. "The Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected." Michigan v. Tucker, 417 U.S. at 444.

¹¹³ Id. at 445.

Thus, the Court determined that the violation of the procedural rules of Miranda did not necessarily render the confession involuntary. The Court decided that such evidence should be admissible despite the initial defects in the investigatory process. The Tucker Court recognized that the efficacy of the criminal justice system would be compromised by the imposition of technical rules that ignore good and valuable evidence. “[W]hen balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce.”¹¹⁴ Tucker is important for its recognition of the fact that Miranda is a procedural rule designed to protect one’s constitutional rights, but not actually a constitutional right in itself. Tucker also illustrated that Miranda can be placed on a “continuum of coercion.” At one end would be the classic involuntary confession, an interrogation taking place with the infamous “bamboo shoots under the fingernails,” and on the other end would be perhaps a simple police-citizen exchange of pleasantries. Tucker offers the proposition that a technical violation of Miranda falls somewhere in between, and closer to the latter than the former. But of all the famous exceptions to Miranda, it is the case that follows which is most significant for promoting further scrutiny of the rule created in Miranda and preserved in Dickerson.

In New York v. Quarles, 467 U.S. 649 (1984), the Court allowed the statement of one tackled by a police officer then handcuffed to be used in court although the Miranda warnings were neither given nor even attempted. It is a landmark decision. In that case, a

¹¹⁴ Id. at 450.

woman approached two police officers and told them she had just been raped and that the person who raped her had entered a nearby supermarket. One of the officers radioed dispatch so backup could arrive while the other officer entered the store, saw the suspect and chased him. After tackling and handcuffing the suspect, he discovered an empty shoulder holster on him. While Quarles was still on the ground, and without reciting the Miranda warnings, he asked the suspect where he hid the gun. The defendant revealed the location of the weapon, said something like “the gun is over there,” and the officer retrieved it. Several other police officers arrived to take control of the scene and no-one was injured. After retrieving the gun the officer read the defendant the Miranda warnings from a pre-printed card, and the defendant waived his right to have an attorney present and answered the officer’s questions about the weapon.

The New York Supreme Court suppressed the gun and his statements due to the failure of the officer to read Miranda, despite the fact that the defendant subsequently waived those rights described in the warnings. Both the New York Supreme Court Appellate Division and the New York Court of Appeals affirmed the suppression. On certiorari to the United States Supreme Court, the New York Court of Appeals was reversed and the original statement and the gun itself was allowed under what came to be known as the “public safety” exception to the Miranda rule.

The Court asserted that the situation before them was factually different from that in Miranda, and that the facts in Quarles justified an exception to the rule.

Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of Miranda require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety Procedural

safeguards which deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost.¹¹⁵

So the Court created an artificial distinction between a “concern for the public safety” and merely the “possibility of fewer convictions.”¹¹⁶ The Court thought that the temporal immediacy of an incident would dictate the level of threat to society. The Court had the utmost faith in law enforcement being able to determine the difference: “We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.”¹¹⁷

Quarles has become a well established exception to *Miranda*, and has achieved nationwide approval. It has been expanded over the years in several cases to accommodate societal and legal development. In *Price v. Indiana*, 591 N.E.2d 1027 (1992), the suspect shot his victim with a rifle, then fled the area. When the police arrived, the victim gave the officers the suspect’s name and told them he had a rifle. Later the police stopped several people asking if one of them was the suspect. When the suspect identified himself the police pointed a gun at his head and took him to the ground. They demanded he tell them where the rifle could be located, as it obviously was

¹¹⁵ *New York v. Quarles*, 467 U.S. 649, 656-57 (1984).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 659.

not on his person, and the suspect responded as follows: "I ain't gonna lie, I shot her and I'll show you where the gun is."¹¹⁸ The court found a public safety exception existed¹¹⁹.

Even more telling is the scenario in Wisconsin v. Kunkel, 404 N.W.2d 69 (1987). In Kunkel, a small child had been missing for over 24 hours. The defendant was the prime suspect and he was arrested around midnight, brought to the jail and waited over an hour before he was questioned by a detective, in what was determined by the trial court to be an interrogation in violation of the technical requirements of Miranda.¹²⁰ The detective's stated goal was to bring the child to safety as soon as possible. The detective was too late. The court of appeals in Wisconsin, in finding a public safety exception to the requirements of Miranda, compared Quarles to a California rule even older than Miranda, known as the rescue doctrine¹²¹. The court then analogized its case to Quarles, and pointed out that while Quarles addressed the risk of harm to innocent persons in a general sense, here the court recognized a similar exception when the harm was to a specific person:

The overriding similarity between the facts in Quarles and those before us is a danger to life which must be weighed against the risk that a guilty suspect might eventually go free. The Quarles court weighed the public safety against that risk. We must weigh a possible imminent loss of a known person's life against the risk that a guilty suspect might be freed for want of evidence obtained from the suspect's own lips.

¹¹⁸ Id. at 1028.

¹¹⁹ For a more recent example, see Pennsylvania v. Stewart, 740 A.2d 712 (1999).

¹²⁰ When the detective Mirandized the suspect, the suspect responded that he could not afford a lawyer, but the detective began his interrogation anyway. The court determined that this was an invocation of his right to counsel. Id. at 74.

¹²¹ People v. Modesto, 62 Cal.2d 436, 398 P.2d 753 (1965) ("where the interrogation of a suspect is undertaken by the police for the paramount reason that information is being sought to save a life, the interrogating officers are justified in "not impeding their rescue efforts by informing defendant of his rights to remain silent and to the assistance of counsel." [cits. omitted] The interest in saving a human life is considered to be outside of the parameters of the constitutional protection afforded against self incrimination. Kunkel, 404 N.W.2d at 74.

* * *

The companion to the public safety exception must be a private safety exception, whether labelled as such or as a "rescue doctrine." In our calculus the possible imminent loss of the life of a known and identifiable individual is entitled to the same weight as the public safety. If on the facts before it, the Quarles court could conclude that the need for answers to protect the public safety outweighed the need for Miranda warnings, then surely, on the facts before us, it is reasonable to conclude that the need for answers to protect the life of one person outweighs the same need.¹²²

Quarles is no magic cure to a violation of Miranda, however, and under certain circumstances, courts have refused to apply it. In Iowa v. Deases, 518 N.W.2d 784 (1994), one prison inmate murdered another with a shank.¹²³ The inmate was taken into custody and the shank secured in evidence. Authorities then questioned the inmate in a manner determined to be violative of Miranda. The state, in response to the defendant's appeal after his conviction, argued that the questions were admissible subject to the public safety exception because they were asked in order to determine whether there were other shanks loose in the prison that were potentially dangerous to the prison population. The court refused to recognize the exception, first, because the shank in question had been secured along with the suspect, thus neutralizing the threat and second, because the questioning sought to be admitted "[did] not reflect this limited purpose."¹²⁴ In Utah v. Montoya, 937 P.2d 145 (1997), the suspect was questioned in violation of Miranda while under suspicion for using heroin. The suspect was acting extremely irrational, harassing patrons of a store while undressed, and had trouble speaking to

¹²² Id. at 76.

¹²³ A shank is a crude prison made knife, made from metal scraps or other material.

¹²⁴ Id. at 791.

police officers when they were dispatched to the scene. His condition seemed to progressively worsen, and police officers called for medical assistance. They asked the suspect if he was on drugs, and he responded affirmatively. He was arrested and an inventory of his vehicle revealed the presence of heroin. After the trial court denied defendant's motions to suppress, he was convicted for the possession of heroin. The defendant appealed these rulings. On appeal the state argued that the answers to the questioning should be admitted, even though in violation of Miranda, based on a paternalistic interpretation of the public safety exception. In an argument reminiscent of California's rescue doctrine,¹²⁵ the prosecution asserted that the defendant posed a risk of danger to *himself*. The court was not convinced.

In Quarles, the Court was concerned about the safety of the general public, not the safety of a particular defendant. Here, there was no showing that there was any danger of imminent harm to the public at large. The State's attempt to expand the "narrow exception" devised in Quarles to a situation in which a defendant's personal safety may be at risk goes far beyond the underlying purpose of the public safety exception to the Miranda rule, and we decline to so extend the exception.¹²⁶

Since the public safety exception was created, it has been tested many times. In some cases courts have been willing to expand the doctrine, and in others they have refused. Courts have not limited the exception to finding hidden weapons; nor has it been limited to the initial split-second response of uniformed police officers into a "kaleidoscopic situation."¹²⁷ Kunkel expanded the public safety exception to include a jailhouse interrogation in the middle of the night over 24 hours after the crime in question

¹²⁵ People v. Modesto, 62 Cal.2d 436, 398 P.2d 753 (1965).

¹²⁶ Montoya, 937 P.2d at 151.

¹²⁷ Quarles, 467 U.S. at 649.

had occurred.¹²⁸ Certainly, if the public safety exception applied in such a case as Kunkel by a detective interrogating a suspect in the middle of the night in a jail and 24 hours after a crime, it could have been applied under the facts of Dickerson.

Quarles is no panacea, however. Miranda requires that unwarned custodial statements that are in response to police questioning cannot be used in evidence. That part of the opinion is quite clear. Quarles is in direct conflict with that very basic requirement of Miranda. It is the only exception that is not founded on some later attempt by a defendant to take unfair advantage of the Miranda rule. These other exceptions include the ability of the state to impeach a defendant with his Miranda-defective confession when he takes the stand and lies, for “the shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior utterances.”¹²⁹ If the defendant takes the stand in his trial and maintains that he was not at the scene of the crime, the prosecution may impeach him with his earlier incriminatory statement, As the Harris Court further opined:

If, for example, an accused confessed fully to a homicide and led the police to the body of the victim under circumstances making his confession inadmissible, the petitioner would have us allow that accused to take the stand and blandly deny every fact disclosed to the police or discovered as a “fruit” of his confession, free from confrontation with his prior statements and acts. The voluntariness of the confession would, on this thesis, be totally irrelevant. We reject such an extravagant extension of the Constitution.¹³⁰

¹²⁸ None of the aforementioned cases interpreting the public safety exception have been appealed to the Supreme Court. Therefore, they are persuasive for the proposition that the exception is being expanded in various jurisdictions across the nation, and are mandatory authority in those states where the cases originated.

¹²⁹ Harris v. New York, 401 U.S. 222, 226 (1971)

¹³⁰ Id.

Second, in Oregon v. Elstad, 470 U.S. 298, 299 (1985), it was held that a Miranda-defective confession can nevertheless be “rehabilitated” by a subsequent Mirandized confession. This seems appropriate, as the impermissibly obtained statement still does not come into the trial: only the properly warned statement:

It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.¹³¹

The public safety exception requires no subsequent attempt by the defendant to benefit from the Miranda violation. In Quarles, the defendant was tackled by police officers, handcuffed, then immediately questioned without the Miranda warnings. His responses were deemed admissible not based on some action by the defendant, but simply because of the Court's concern that in some hypothetical emergency situation a police officer might spend precious time thinking about whether he should protect society or acknowledge and respect a suspect's Fifth Amendment rights.

Clearly, both in Quarles and in subsequent opinions, the Court has been conscious of the sometimes inequitable result reached by strict application of the Miranda rule. This is clear through an examination of the exceptions themselves, which are based on more than a simple calculus of whether the defendant's chances for an acquittal increase or diminish; not so with Quarles. As Quarles noted, “when the primary social cost of those added protections is the possibility of fewer convictions, the Miranda majority was

¹³¹ Id.

willing to bear that cost.”¹³² In Quarles, it was apparently not so willing. Nowhere in the Miranda opinion did the Court state any exceptions to its rule based on the physical safety of others. In fact, that innocent people may be put at risk has never been of importance to the court when considering the usefulness of a constitutional rule.

The Quarles Court merely asserted that “[t]he doctrinal underpinnings of Miranda do not require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.”¹³³ However, it does not logically follow, nor does fairness dictate, that the good intentions of police officers may provide an exception to the otherwise “bright-line” rule of Miranda.¹³⁴ The Miranda majority certainly did not suggest such an exception. As discussed earlier, Quarles focused only on its concern that police officers, when confronted with an emergency, would waste valuable time wondering whether they should ignore Miranda when questioning suspects, or apply Miranda and risk losing information that may save lives.

This is a novel argument for this Court to make; after all, it is the same tribunal that created Miranda after reviewing police textbooks that offered and encouraged non-violent methods for eliciting confessions from suspects.¹³⁵ It also felt that those methods were “created for no purpose other than to subjugate the individual to the will of his examiner,”¹³⁶ and that while not a physical assault, such methods were “equally

¹³² 467 U.S. at 657.

¹³³ Id. at 650.

¹³⁴ The “good faith” of law enforcement has never been a permissible exception to the requirements of Miranda.

¹³⁵ See Miranda, 384 U.S. at 448-49.

¹³⁶ Id. at 457.

destructive of human dignity.”¹³⁷ The Court believed that its rule would not hamper law enforcement’s efforts to fight crime. Thirty years later, the courts of this country suppress statements every day due to a technical violation of this Court’s rule, a rule which was created with full awareness of the potential implications. The police officer who arrested Quarles interrogated him without any of the Miranda warnings and demanded that he divulge the location of his gun. Quarles’ response was admitted against him in court because the safety of the public was paramount, despite the blatant disregard for Miranda. The only difference between Quarles and Dickerson is the type and temporal immediacy of the danger. In both events, the questioning began after the defendant had been subdued, leaving only a speculative, potential danger: in one case, a hidden gun in a grocery store and in the other, an unidentified and un-apprehended armed bank robber. In fact, if one considers the seriousness of the public safety emergency, it is equally compelling to argue that Quarles’ statement should have been suppressed, but in Dickerson a public safety exception should have been allowed.

In these post-Miranda cases, and indeed in Miranda itself, the facts are subject to so much interpretation that it becomes no more than a random distinction that may set two cases apart. A further observation can also be made: as found in comparing the results reached in Quarles and Dickerson, sometimes the application of the Miranda rule leads to the admission of evidence in one case that may be considered violative of Miranda or even the Fifth Amendment, yet in another, evidence could be suppressed where there is seemingly no constitutional harm at all to the defendant.

¹³⁷ Id.

In Quarles, the defendant was in custody and the gun was hidden in a store with several police officers in control of the scene. There was no pressing reason to violate Miranda. In Dickerson, two suspects had been robbing banks. Detectives found one suspect, Dickerson, but knew there was another still at large. The police questioned Dickerson and learned the identity of the codefendant, Rochester. If the location of a gun in Quarles was so important as to justify an exception to Miranda, why not the location of an armed and dangerous man who had been actively robbing banks and was at large in the community?¹³⁸ The police in Quarles could easily have cleared the store of citizens and found the weapon. In Dickerson, however, the un-apprehended suspect may have continued to rob banks or commit even more serious crimes. If the concern is public safety, securing Rochester was far more important than finding a hidden gun in a grocery store filled with police officers.

The Court felt police officers would be able to use their instincts in applying its rule, viz., they would “instinctively” know when they could ignore the Miranda warnings. The Court must have also assumed the police would know how far they could go in applying this instinct. In fact, the Court thought it would be able to avoid “post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer,” such was its faith in these officers, despite the fact that the purpose for creating the rule in the first place was to insulate suspects from the coercive environment of the interrogation room, which the Miranda majority believed was “destructive of human

¹³⁸ Rochester later admitted to robbing 18 banks and an armored car. Dickerson v. United States, 166 F.3d 667, 674 (1999)(U.S. Ct. App. 4th).

dignity.”¹³⁹ A more suitable argument must be proffered to justify the result in Quarles; one that will provide both guidance for police officers in the field and for prosecutors in the court room.

The logical error in Quarles was made in moving from the incident¹⁴⁰ to the admission of the statement in court and letting the *circumstances of the former justify the latter*.¹⁴¹ This is improper for several reasons. First, the facts and circumstances of any given case must be irrelevant when considering the admissibility of a statement by the Court’s own argument. If the reason for disallowing a suspect’s response to questioning is that the goal of the questioning was merely to secure a conviction, then how can some questions asked in violation of Miranda be allowed *when their very admission in court is for no other reason but to secure a conviction!* The only logical outcome the Quarles Court could have reached in starting with the facts and moving to the courtroom would be to commend the officer for protecting the innocent patrons of the supermarket from danger by securing the weapon as quickly as possible, then suppressing the inculpatory statement. The Supreme Court of New York suppressed the statement, as well as the appellate division and New York Court of Appeals. There is no satisfactory reason by the Court’s own argument for allowing Quarles’ statement to be later admitted into evidence in court.¹⁴²

¹³⁹ Id. at 457.

¹⁴⁰ The incident here can represent the crime itself, a statement or confession made during or after the crime, or a later statement made during an investigation.

¹⁴¹ The proper analysis will be submitted toward the close of this thesis.

¹⁴² The Court offered the following justification: “We decline to place officers . . . in the untenable position of having to consider . . . whether it best serves society for them to ask the necessary questions without the Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or

Next, by letting case-specific facts justify their later admission in court, Miranda doctrine becomes nothing more than a re-invented totality of the circumstances test. Recall the earlier comparison of the facts in Quarles and Dickerson. The facts in either case lent themselves equally well to admission or exclusion under the public safety doctrine. It could depend on the artfulness of the prosecutor or defense, or the disposition of the judge. Without a concrete method for determining the admissibility of a confession, Miranda is no bright-line rule: with its host of exceptions, especially the public safety exception, it suffers from the same criticism lodged against the old totality of the circumstances test: it is insufficient for determining in any given case whether a suspect's Fifth Amendment guarantee not to incriminate himself has been adequately safeguarded. It is no more reliable than the test prescribed by § 3501, which at least offers specific factors for a judge to consider in determining the admissibility of a confession. Under Miranda and the public safety exception, that decision is left to the police officer on the street.

Finally, if the Court draws an imaginary distinction between un-Mirandized questioning for the purpose of protecting the public and un-Mirandized questioning for the purpose of acquiring testimonial evidence, how much freedom did the Court intend to give to these police officers acting on their judicially acknowledged and supported "instinct?" What if the police officer in Quarles tackled the suspect and beat him until he

destroy their ability to obtain that evidence and neutralize the volatile situation confronting them." 467 U.S. at 657-58. It is a classic bootstrapping argument: some questions asked by police officers are intended to build a case against the suspect and others merely to "protect society" or the officer himself. The court does not explain the difference in these questions, relying instead on the police, who will "instinctively" know the difference. Of course the court reserves the power to decide after the fact, with the benefit of hindsight, whether it feels that the officer's instincts were correct.

confessed to where he hid the weapon? The goal of public safety, as cited in Quarles, would be satisfied regardless of the treatment of the suspect. And to what extent should this exception be allowed? Justice Marshall, dissenting in Quarles, offers a perfect example of the possible limits to police action, involving the imminent explosion of a bomb. Justice Marshall stated:

[T]he police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. . . . While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in Miranda v. Arizona proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.¹⁴³

It seems, then, virtually the entire Court in Quarles¹⁴⁴ believed that police officers, depending on the circumstances, may interrogate a suspect without the Miranda warnings. The only difference in the majority and dissenting opinions was whether the suspect's answers could later be deemed admissible in court. The same objection remains here. In an emergency such as the impending explosion of a bomb, how far would the police be allowed to go? A slap in the face to encourage the suspect to reveal the hiding place of the bomb? A punch in the jaw? What of breaking an arm? A gunshot to the knee? The rationale behind police officers interrogating a suspect under the dissent's example is the safety of the public. The Court disagreed as to whether the information

¹⁴³ Id. at 686. Note that while the Fourteenth Amendment would cast an unfavorable eye upon a confession beaten out of a suspect, even if in the interest of public safety, police officers would still be in a position where they are forced to decide between violating a constitutional right of a suspect and possibly saving lives, and would hopefully choose the latter.

¹⁴⁴ With the exception of Justice O'Connor.

could later be used against the suspect in court, yet all the Justices approved of the questioning without Miranda, such was its concern for the innocent people in the path of the bomb. This is not further developed in the Court's opinion.¹⁴⁵ More importantly, the Court would no doubt refrain from suggesting that there are circumstances where it would encourage police officers to disregard the Fourteenth Amendment, even if the suspect admitted planting a bomb and informed the authorities that it would explode in a public place, killing many innocent people.¹⁴⁶

The application of violence to obtain incriminatory statements is a classic example of coercion, or an involuntary confession, offensive to the Fourteenth Amendment. Such a confession is inadmissible for any reason; indeed this has been a long-accepted and fundamental aspect of our jurisprudence. By the Quarles Court's analysis, however, this becomes an irrelevant distinction. If public safety is the concern, then police officers on the street will not only disregard Miranda, but tread on the Fourteenth Amendment, especially when such a distinction is blurred by concern for the safety of others. The premises behind disallowing a truly involuntary confession is that, first, it is without sufficient indicia of reliability, and second, to discourage the type of

¹⁴⁵ This is probably due to the fact that it would be bad form to encourage police officers to physically torture a suspect into revealing the location of a bomb, regardless of the fact that in certain cases to not do so would cost lives.

¹⁴⁶ Fourth Amendment doctrine has not been so restrained in its consideration of the application of physical force to obtain evidence. For example, in Sanders v. State, 247 Ga. App. 170(2000), a police officer suspected the defendant had crack cocaine hidden in his mouth. The officer grabbed the defendant around his neck and squeezed, preventing the defendant from swallowing. The Georgia Court of Appeals determined this was not an unreasonable search and seizure. See also Beck v. State, 216 Ga. App. 532(1995)(Under similar circumstances, the court approved of a police officer spraying the suspect in the face with pepper spray); Merriweather v. State, 228 Ga. App. 246 (1997)(Police officer justified in performing Heimlich maneuver on suspect who swallowed crack cocaine).

abusive tactics the Miranda court cited and feared would continue to be implemented by the police.

As for the first premise, if this involuntary statement is found to be reliable; in other words, after the beating, the suspect revealed the location of the gun and it was actually recovered, or the bomb found in its hiding place after the suspect is beaten into submission, then the coercive and physically abusive questioning conducted by the police led to a result lauded in Quarles as acceptable because it lessened the risk of harm to innocent bystanders, no matter that the suspect was injured, even hospitalized, and no matter that the statement violated the Fifth and Fourteenth Amendments.

As for the second premise, that the Court wished to discourage the abusive tactics previously utilized by some police officers, this goal is directly subverted by the Court's justification for its holding in Quarles. Quarles essentially holds that there are times when police coercion is to be applauded no matter the possible, albeit incidental, constitutional violations against the suspect. Put more succinctly, Miranda is based on the fear that some suspects will be tricked or scared or forced into making incriminating statements to the police: Miranda was a method by which the Court could ensure that questioning by the police did not cross a judicially created line or "safety zone." With Quarles, however, the Court drew an exception to Miranda which not only permits the questioning of a suspect without the Miranda warnings being recited, but accedes to behavior which ignores Miranda's barrier and approaches true constitutional trespasses. Thus, Quarles may promote the very behavior for which the Miranda rule had been created in the first place!

The reasoning behind this second premise is obvious. If the purpose for allowing the unwarned statement into evidence in Quarles was that police officers should not have to decide whether the safety of others is more important than securing incriminating evidence, then that purpose is met even in the case of an involuntary confession. Of course, the Quarles Court maintained that its opinion did not affect the admission of an involuntary statement, for, “[a]s the Miranda Court itself recognized, the failure to provide Miranda warnings in and of itself does not render a confession involuntary, Miranda v. Arizona, 384 U.S. at 457, and respondent is certainly free on remand to argue that his statement was coerced under traditional due process standards.”¹⁴⁷ The entire issue may become merely a hair-splitting constitutional discussion: both the police officer in the bomb example and the police officer in Quarles detained a suspect and demanded the location of the weapon for the purpose of “protecting the public,” and in violation of Miranda. The only difference is that the former officer beat the suspect until he confessed. The justification given in Quarles might support either scenario despite the Court’s insistence to the contrary, because the officer’s interest is in protecting the public from imminent danger. Alternatively, even assuming a coerced confession is suppressed as violative of the Fourteenth Amendment, the analysis in Quarles shows that the Court nevertheless would acquiesce to such police behavior if it involved a threat to public safety.

Thus, the analysis in Quarles is based on a distinction without a difference. The Court has lauded two major concepts in our society: the preservation of individual rights

¹⁴⁷ The dissent disagreed. “The “public-safety” exception is efficacious precisely because it permits police

and the safety of the public and society at large. These concepts have been introduced in varying degrees against the historical backdrop of traditional Fifth Amendment jurisprudence.¹⁴⁸ Over the years the Court has experimented by balancing the two concepts, trying to find a proper combination. In Miranda, the focus was primarily the protection of individual rights, with nary a thought given to the interests of public safety.¹⁴⁹ In Quarles and its progeny, however, the Court returned its focus to the safety of the public. If Quarles should be interpreted, as it must, to stand for the proposition that a confession will be admissible in court as long as it is voluntary and obtained in violation of Miranda during an “emergency situation,” then the risk cited in Miranda, that the baby will be tossed with the bath water, presents itself, for the risk is that a confession may be admitted that impinges on the Fifth Amendment. So Miranda, when considered with all of its exceptions, becomes a rule no more protective of one’s rights than either § 3501 or a simple voluntariness test.

To continue with the same examples, a suspect tackled, handcuffed and surrounded by police officers, then immediately interrogated by the arresting officer as to the location of a firearm, would face the admission of his response in court. Certainly the suspect has a strong argument that his response was coerced, yet the Quarles Court disagreed. However, if instead of interrogating the suspect while on the ground in

officers to coerce criminal defendants into making involuntary statements.” Id. at 660.

¹⁴⁸ Classically, there is no dispute that there have been no exceptions to suppression in the case of an involuntary confession; it cannot be used as impeachment evidence or for any other reason. Further, Miranda’s public safety exception may allow confessions that come dangerously close to coercion, while an ordinary Miranda situation would suppress a clearly un-coerced and quite voluntary confession.

¹⁴⁹ The Court did not address the issue but for its stated belief that “[t]he limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement.” Miranda, 384 U.S. at 481.

handcuffs, the police officer walked him to a more quiet room, offered him a drink and a chair and patiently questioned him about the firearm's location, without reading the Miranda warnings, as occurred in Dickerson, Miranda must disallow his response.

Over the years, the Court's priorities again shifted, for Dickerson hearkens back to Miranda, and is the opinion of a Court that has returned to the belief that the rights of the individual are paramount. The Court must recognize that these two interests are each of independent significance and each deserving of some degree of tribute. Quarles focused only on public safety, and Dickerson only on the individual. Miranda gave lip service to public safety, stating that its ruling "should not constitute an undue interference with a proper system of law enforcement,"¹⁵⁰ but time has revealed its misapprehensions.

Quarles went largely unnoticed in the Miranda-Dickerson debate. It was not argued on appeal by the Department of Justice in Dickerson, nor was it discussed in the Court's final opinion. It is unfortunate that the opinion was not explored.

B. OUR PARADIGM OF JURISPRUDENCE AND THE ANOMALY OF MIRANDA

No matter the measuring stick by which a legal system is weighed, such a system must make sense. Miranda as currently understood no longer fits the paradigm of modern American jurisprudence. Thomas S. Kuhn described it perfectly for the scientific world, and his argument rings true here as well:

Discovery commences with the awareness of anomaly, i.e. with the recognition that nature has somehow violated the paradigm-induced expectations that govern normal science. It then continues with a more or

¹⁵⁰ Id.

less extended exploration of the area of anomaly. And it closes only when the paradigm theory has been adjusted so that the anomalous has become the expected.¹⁵¹

Our belief in and support of the Constitution and all its interpretations as a correct aggregate description of human rights in America is just such a paradigm. When irregularities were recognized over the years, the paradigm shifted to accommodate them.¹⁵² In this case, the Supreme Court's Miranda jurisprudence is the lawyer's attempt to describe and explain part of this paradigm, part of our Constitution. While the Court's voluntariness jurisprudence has always been accepted as appropriate and sensible without too much friction, Miranda was no such animal. "Miranda has been continually criticized by lawyers, law enforcement officials, and scholars since its pronouncement."¹⁵³ Certainly Miranda possessed some degree of utility in addressing judicially perceived notions of police misconduct, but as the rule was applied to varying facts, it proved to be a rule requiring the constant creation of exceptions to avoid inequitable results. With the advent of the exception recognized in Quarles, the stiffly supported rule in Miranda has become so compromised that it has become dangerous. Despite the Court's insistence to the contrary, Miranda no longer fits properly in our paradigm.

Dickerson cites as one of the main reasons for Miranda's continued existence the fact that it has "become embedded in routine police practice to the point where the warnings have become part of our national culture."¹⁵⁴ This argument is not adequately

¹⁵¹ Kuhn, Thomas S. The Structure of Scientific Revolutions, 3rd ed. Chicago: University of Chicago Press, 1996.

¹⁵² Some obvious examples include the constitutional amendments establishing women's suffrage and abolishing slavery.

¹⁵³ Dickerson, 120 S.Ct. at 2347.

¹⁵⁴ Dickerson, 120 S.Ct. at 2336.

supported. First, if Miranda has indeed become part of our national culture, then it is primarily attributable to television and the media, as was suggested in the dissent.¹⁵⁵ The media often portrays interrogations as conducted in darkened rooms, with violent physical assaults, threats and lengthy periods of incommunicado confinement. These examples of our “national culture” are not representative of modern police practices. Second, the media portrays Miranda as something that must be recited the moment anyone is arrested, whether or not questioning ensues. This is not the law. There are really only two alternative conclusions to be made. First, because society gets such an unrealistic and inaccurate description of what Miranda really is, it cannot be said that Miranda as a legal doctrine is really part of our national culture. The fact that society believes that one must be “read his rights” the moment he is arrested does not mean either that it must be so or that the law must adapt itself to conform to this interpretation. What has become part of our national culture is an idealized and romanticized media vision of Miranda, and one which is likely to prove disappointing to a suspect expecting their rights to be read to them the moment they are placed in handcuffs. In the alternative, if the reason for preserving Miranda is that everyone is already familiar with the warnings, then there is no longer a reason to inform someone of those rights. It becomes merely a formality that serves no purpose but to create a possible avenue for suppression and subsequent acquittal.

Our constitutional paradigm still attempts to recognize Miranda as a valid description of the Fifth Amendment, viz., it is still intended to be of significance when we

¹⁵⁵ Id. at 2347.

say one's confession was elicited in violation of the Miranda rule. The problem is that Miranda no longer describes our *understanding* of the Constitution, and it is based on what is no longer a proper description of police techniques. It has become mere sacrament; something we do that is no longer of operative significance.

This said, it is not proposed here that Miranda be overruled. Miranda does still occasionally function to prevent the use in court of a confession or incriminating statement extracted nearly in violation of the Fifth Amendment. It is also effective when a police officer avoids reading a suspect his warnings when no danger to others is cognizable, or after a display of hostility or menacing non-physical behavior directed at the police officer. Certainly Miranda has utility under these circumstances. To declare that Miranda should be discarded now would be difficult, especially in light of the Court's recent endorsement. To support Miranda's destruction would be problematic for several more reasons. First, unlike science, the law cannot be forced to adapt and change: statutes remain in force long after their time for usefulness has past. Judges apply the law even while commenting that the law or rule being enforced must be erased by the legislature. Instead of addressing changes that are needed in the law, legislators introduce irrelevant or unnecessary bills for political purposes. Even if the public at large or the legal community were all convinced that Miranda is an anachronism, it is a far cry from convincing the Court to overrule the opinion now, or legislatively overriding it in Congress. On a related matter, such an extreme solution or suggestion in the face of the Court's fresh re-evaluation of Miranda would have no effect on the legal community; at best it would be merely another complaint, another unremarkable criticism to be lodged

against the Court. Instead, the hope is that the ideas set forth here provide a present alternative to the result sometimes reached with Miranda, without calling for Miranda's complete extinction and without defying the Court's ruling in Dickerson. As already conceded, there are occasions when Miranda does solve the problem it was designed to address. But it is hoped that the reader examines Quarles more closely, and attempts to apply it in any case where the police can articulate some concern for the public, some danger to innocent parties. In Dickerson, the public safety exception should have been applied; at least it should have been argued. The FBI knew that the accomplice, Rochester, was at large and dangerous. He had robbed at eighteen banks. He was armed. He had avoided capture and may have known that Dickerson was in the custody of law enforcement. Every minute the FBI waited was more opportunity for him to distance himself from Dickerson and the FBI. Dickerson was questioned under circumstances that did not even approach the realm of coercion. The only thing at issue was whether his Miranda warnings were read to him before or after he confessed. Under these circumstances, a public safety exception should have been applied.¹⁵⁶

It is difficult to outline the parameters of such a development of the public safety doctrine. It is, and has always been a fact-sensitive exception that the Court has been careful to apply. The important distinction, however, is that the Court look beyond the event in question and consider the entire situation as understood by the police officer. In other words, instead of looking only at the interrogation of Dickerson, the Court should

¹⁵⁶ If the concern is that such an expanding of the public safety exception would swallow the rule in Miranda, one possible solution would be to only expand the exception under circumstances where without such an expansion the state would have no case whatsoever.

consider the entire contemporaneous set of circumstances, which would include the FBI's need to identify and arrest the co-defendant, Rochester, who was armed, dangerous and free. The goal was the protection of those rights addressed by the Fifth Amendment.

One possible criticism to this approach is that the public safety exception recognized under Miranda, were it to be expanded at all, would completely undermine Miranda, i.e., Quarles would allow, but for due process analysis, the admission of involuntary statements that are, nevertheless, in compliance with Miranda. The Dickerson Court felt Miranda was necessary to protect "precious 5th Amendment guarantees,"¹⁵⁷ yet the warnings themselves may allow confessions that are violative of the very rights they were designed to protect. It is the Fifth Amendment which "protects one's precious 5th Amendment guarantees."¹⁵⁸ Miranda is merely the pathway leading to the home. "The requirement that Miranda warnings be given does not, of course, dispense with the voluntariness inquiry."¹⁵⁹ Thus, Miranda does not save the courts any time in determining whether one's confession was elicited under coercion or duress. Nor does the rule ensure that police officers respect one's Fifth amendment guarantees; after all, Miranda can be followed even though the Fifth Amendment is ignored. The Dickerson Court admitted this much.¹⁶⁰

To implement the public safety exception, one merely need re-examine Quarles. As already asserted, the error in Quarles was letting the circumstances of the police-extracted confession justify its later admission in court. The more proper approach is the

¹⁵⁷ Dickerson, 120 S.Ct. at 2340.

¹⁵⁸ Id.

¹⁵⁹ Id. at 2336.

¹⁶⁰ Id.

exact opposite. A more clear and succinct rule will emerge if the Court considers the desired result first. This is the same procedure by which Miranda itself was intended to be applied. The goal was the protection of those rights addressed by the Fifth Amendment. Miranda was forward looking, requiring the warnings in every custodial questioning situation, not merely those that occurred in certain places or under certain circumstances. In Quarles, the Court balanced the protection of society from harm as weighed against the protection of an individual's constitutional rights and decided that the safety of society was paramount. Perhaps it is an over-generalization of the opinion, but even in a more narrow sense, viz., that the safety of society is more important than one's right not to be compelled to incriminate himself, the same principle obtains. Having established this general principle, the Court felt the safety of society would be compromised if police officers had to consider whether it was more important to violate Miranda to keep others from danger, or to follow Miranda and risk the safety of others. This should be the starting point for the Court. From that point the application of the facts to the desired result should be more proper¹⁶¹.

Dickerson discarded § 3501 because the Miranda Court "noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession."¹⁶² Yet over the decades Miranda has become such a patchwork conglomeration of exceptions that it has become a totality of the

¹⁶¹ It does not obtain to argue that the goal in Quarles was to prevent one from giving up his Fifth or Fourteenth Amendment right not to be coerced into confessing to a crime. As already argued and accepted by the Dickerson Court, the application of Miranda does not necessarily insure that a confession is voluntary, although it is conceded that such a case would be rare. 120 S.Ct. at 2336.

circumstances test itself. It began as a mandate simple enough to apply and enforce: if the warnings were not given, the statement would not be admitted. Over the decades many exceptions have been created, to the point where even a blatant disregard for the Miranda warnings was deemed acceptable¹⁶³. Like any judicial exception to a rule, it was made to create and further define the rule it modifies so that it will weather time and progress and keep close the interests of justice and fairness. To do otherwise would cause Miranda to become a stale and useless edict with no foundation in logic or justice. The Court has essentially placed Miranda on a "continuum of harm," drawing the line where the Court felt the risk to others was imminent. Since Quarles, the Court has instituted a de facto totality of the circumstances rule, where despite the clear violation of Miranda, the Court refused to apply it because it determined the danger too great, the potential for future injury too palpable.

We decline to place officers . . . in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.¹⁶⁴

This continuum paradigm is not an inappropriate method for applying Miranda. Quarles has already established the proper dividing line between admission and suppression: *the clear potential danger to others*. What remains is to look backward and

¹⁶² Id. at 2335(citing Miranda, 384 U.S. at 457).

¹⁶³ Quarles

¹⁶⁴ New York v. Quarles, 467 U.S. 649, 657-58(1984).

decide where on the line any given factual scenario would fall. Both the Dickerson and Miranda Courts feared that a totality of the circumstances approach was not as effective a system to protect one's constitutional rights as the rule instilled by Miranda. But the proposal offered here is no more a totality of the circumstances test than Miranda is already. Recognizing this continuum approach may lead to a rule that applies Miranda but recognizes the potential for absurd results and prevents such an outcome. This continuum may stand for the balancing required between individual rights and the collective rights of the people to be safe from harm, a balance that must be preserved, as it is a cornerstone of our jurisprudence.

FIGURE 1. "The Continuum of Coercion"

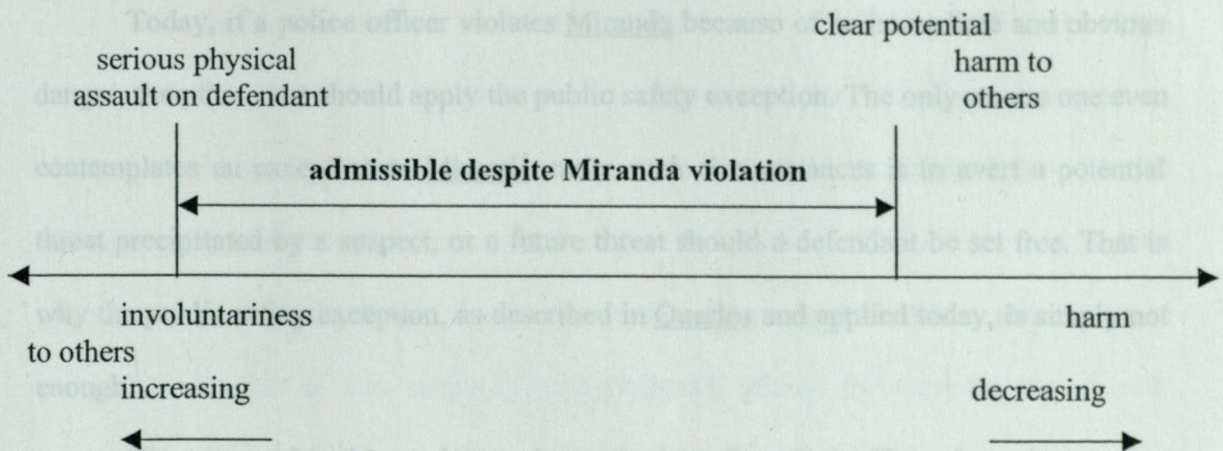
C. THE CONTINUUM AND THE CONCLUSION

The totality test feared by the Dickerson Court was that of reviewing the circumstances in each case and basing its decision to suppress or admit on specific case-sensitive facts. This is quite different from the rule proposed here. The proposal, as illustrated in Figure 1, is that the Court draw two lines in the sand: the first at the point where a confession becomes involuntary under well-settled Fifth Amendment and Fourteenth Amendment jurisprudence, and the second at the point where there is an articulable harm to others. Any confession falling between these two lines should be deemed admissible. Anything exceeding constitutionally sound voluntariness cannot be allowed; nor can Miranda be completely ignored in allowing an unwarned confession when there is no reckonable danger to others. The balancing here is between the

This contains regardless of the Court's discomfort for such a fact.

individual rights of the defendant and the risk to society. If a police officer employs coercive tactics to neutralize a threat to others, for example, both goals can be satisfied: the threat is neutralized and the defendant's coerced confession can be suppressed.¹⁶⁵ If Miranda is violated but the risk of harm to others speculative or so far removed as to be irrelevant, then the standard rule may be applied and the confession suppressed. This is a more appropriate application of Miranda and a more stable explanation for the situation presented in Quarles.

FIGURE 1. "The Continuum of Coercion"



In the earlier example of the wife murdering her husband, this proposal would likely be ineffective. But by applying this "continuum of coercion," the trial judge could have ruled that there was a technical violation of Miranda but that it was, nevertheless, a

¹⁶⁵ This obtains regardless of the Court's discomfort for such a fact.

voluntary confession, and that the public safety interest in finding the accomplice, Rochester, justified the FBI's questioning of Dickerson and the subsequent admission of his confession in court.

The potential for abuse is no doubt looming in the mind of the reader. However, the potential for abuse in Quarles is already present. Quarles has instituted an imprecise and subjective test for officers in the field to apply, and trusted their instincts to know when it was appropriate to ignore Miranda.¹⁶⁶ The judiciary is the body that is best designed for such decisions, and should be the group to shoulder the burden of determining when a confession is to be admitted. As such, by accepting this continuum approach police officers will be able to learn and apply one simple rule instead of the patchwork quilt known as Miranda.

Today, if a police officer violates Miranda because of an immediate and obvious danger, then the court should apply the public safety exception. The only reason one even contemplates an exception to Miranda under such circumstances is to avert a potential threat precipitated by a suspect, or a future threat should a defendant be set free. That is why the public safety exception, as described in Quarles and applied today, is simply not enough.

The true goal in the conduct and questioning of a police officer, from the street to the courtroom, is to keep the streets safe. That goal includes asking a suspect with a history of sexual assaults whether he raped a specific person or asking a person in custody where a gun is located without reciting Miranda, and in eliciting a confession

¹⁶⁶ Quarles, 467 U.S. at 659.

from a suspect who, along with another suspect, had been participating in the armed robbery of numerous banks across several states and will continue to do so if not stopped. The rapist will keep raping and the bank robber will keep robbing, constituting clear future threats, and the gun hidden by the suspect is a present threat. The desired objective, whatever the case, is the safety and protection of the people.

Furthermore, defendants in criminal cases are not the only participants in the criminal justice system that are entitled to the protection guaranteed by the Constitution. Under Miranda today, some defendants will go free because a police officer forgot to inform a suspect that if she cannot afford an attorney, one will be given her at no cost. Such is not a violation of the Constitution,¹⁶⁷ and a person should not go with his victimization unpunished because of such a minor trespass.

This thesis is not meant to stand Miranda on its head. It is a proffer narrow in scope: simply put, if the prosecution's case includes the *voluntary* statement or confession of a defendant that was elicited in technical violation of Miranda and under circumstances where it can be argued by the government that public safety required such questioning,¹⁶⁸ then the Court should not immediately suppress such a statement and release a criminal to the streets. Quarles already allows the introduction of such statements. This thesis merely illustrates that the judicial gloss placed on the "public safety exception" is far too restrictive. In Dickerson, such an exception should have been recognized and applied. That the FBI failed to mirandize Dickerson before questioning

¹⁶⁷ "Justices whose votes are needed to compose today's majority are on record as believing that a violation of Miranda is not a violation of the Constitution." Dickerson, 120 S.Ct. at 2337.

¹⁶⁸ See the continuum of coercion, Figure 1.

him is unfortunate; that such failure should result in Dickerson's acquittal is deplorable.¹⁶⁹ It is time for a better solution.

¹⁶⁹ To date, Dickerson has not been re-tried on these charges. He remains a free man.

him is unfortunate that such failure should result in Dickson's acquittal is
deplorable. It is time for a better solution.

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To date, Dickson has not been re-arrested on these charges. He remains a free man.

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