

June 2005

# Dickerson v. United States: The Case That Disappointed Miranda's Critics--and Then Its Supporters

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## Digital USD Citation

Kamisar, Yale, "Dickerson v. United States: The Case That Disappointed Miranda's Critics--and Then Its Supporters" (2005). *University of San Diego Public Law and Legal Theory Research Paper Series*. 33.  
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Revised Version  
May 4, 2005

*DICKERSON v. UNITED STATES: THE  
CASE THAT DISAPPOINTED MIRANDA'S  
CRITICS – AND THEN ITS SUPPORTERS\**

By  
*Yale Kamisar\*\**

INTRODUCTION

It is difficult, if not impossible, to discuss *Dickerson*<sup>1</sup> intelligently without discussing *Miranda*,<sup>2</sup> whose constitutional status *Dickerson* reaffirmed (or, one might say, resuscitated). It is also difficult, if not impossible, to discuss the *Dickerson* case intelligently without discussing cases the Court has handed down in the five years since *Dickerson* was decided. The hard truth is that in those five years the reaffirmation of *Miranda*'s constitutional status has become less and less meaningful.

In this paper I want to focus on the Court's characterization of statements elicited in violation of the *Miranda* warnings as not *actually* "coerced" or "compelled" but obtained *merely*

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\*This paper is based on a talk given at a conference on the Rehnquist Legacy held at the University of Indiana (Bloomington) Law School on April 1-2, 2005. A revised version will appear as a chapter of a book edited by Professor Craig Bradley on the Rehnquist Legacy.

\*\*Professor of Law, University of San Diego; Clarence Darrow Distinguished University Professor Emeritus of Law, University of Michigan. I am grateful to Craig Bradley for his helpful comments.

<sup>1</sup>*Dickerson v. United States*, 530 U.S. 428 (2000).

<sup>2</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

in violation of *Miranda*'s "prophylactic rules." This terminology has plagued the *Miranda* doctrine and puzzled and provoked many commentators since then-Justice Rehnquist utilized this label to describe and to diminish *Miranda* – and he was the first Justice ever to do so – thirty-one years ago

At that time, Justice Rehnquist observed for the Court: "[T]he police conduct at issue here did not abridge respondent's constitutional privilege against self-incrimination, but departed only from the prophylactic standards later laid down by the Court in *Miranda* to safeguard the privilege."<sup>3</sup>

Rehnquist's opinion for a 7-2 majority in *Dickerson* calls *Miranda* "a constitutional decision of this Court,"<sup>4</sup> a case that "announced a constitutional rule that Congress may not supersede legislatively,"<sup>5</sup> and one that "laid down 'concrete constitutional guidelines for law enforcement agencies and courts to follow.'"<sup>6</sup> But the "prophylactic" language has not disappeared. Indeed, since *Dickerson* was decided the Chief Justice has joined two plurality opinions that refer to the *Miranda* rules as "a prophylactic employed to protect against violations

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<sup>3</sup>*Michigan v. Tucker*, 417 U.S. 433, 445-46 (1974). Justice Rehnquist was not the first Justice to describe the *Miranda* rules as "prophylactic" (Justice Powell was), but the first to use this terminology to disparage *Miranda*. In *Michigan v. Payne*, 412 U.S. 47, 53 (1973) in the course of explaining and defending a presumption designed to protect against indicative sentencing when a defendant is retried, Powell spoke *approvingly* of *Miranda*. He considered the rule protecting against vindictive sentencing "analogous to *Miranda*."

<sup>4</sup>*Dickerson*, p. 432.

<sup>5</sup>*Id.* at 444.

<sup>6</sup>*Id.* at 435 (quoting from *Miranda*).

of the Self-Incrimination Clause”<sup>7</sup> and as “prophylactic rules designed to safeguard the core constitutional right protected by the Self-Incrimination Clause.”<sup>8</sup>

REHNQUIST’S VIEWS ON THE WARREN COURT’S  
CRIMINAL PROCEDURE CASES BEFORE ASCENDING  
TO THE SUPREME COURT

Mark Tushnet, the author of a new book on the Rehnquist Court, informs us that Rehnquist kept in mind “the constitutional theories of Robert Jackson, the Supreme Court justice for whom he had clerked,”<sup>9</sup> and that “to understand Rehnquist, it helps to understand Jackson.”<sup>10</sup> If so, this helps explain why Rehnquist did not welcome the Warren Court’s “revolution” in American criminal procedure.

In a famous 1944 confession case, *Ashcraft v. Tennessee*,<sup>11</sup> a majority of the Court concluded that thirty-six hours of continuous relay interrogation was “inherently coercive.” It is hard to believe that anybody would disagree with that conclusion *today*.<sup>12</sup> But when *Ashcraft*

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<sup>7</sup>United States v. Patane, 124 S.Ct. 2620, 2626 (2004) (Thomas, J., joined by Rehnquist, C. J., & Scalia, J.).

<sup>8</sup>Chavez v. Martinez, 538 U.S. 760, 770 (2003) (Thomas, J., joined by Rehnquist, C.J., & O’Connor & Scalia, J.).

<sup>9</sup>MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 9 (2005).

<sup>10</sup>*Id.* at 14.

<sup>11</sup>322 U.S. 143.

<sup>12</sup>Cf. Scalia, J., dissenting in *Minnick v. Mississippi*, 498 U.S. 146, 164 (1990): “We are authorized by the Fifth Amendment to exclude confessions that are ‘compelled,’ which we have interpreted to include confessions that the police obtain from a suspect in custody without a knowing and voluntary waiver of his right to remain silent. Undoubtedly some bright-line rules

was decided, Justice Jackson wrote a powerful dissent, severely criticizing the majority for departing from the traditional “due process”/“totality of the circumstances”/“voluntariness” test.<sup>13</sup>

Five years later, in another coerced confession case, *Watts v. Indiana*,<sup>14</sup> concurring Justice Jackson warned that the Bill of Rights, as interpreted by the Supreme Court up to that time, had imposed “the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself” – good reason for not indulging in any further expansive interpretation of them.<sup>15</sup>

Justice Jackson’s 1949 observation about the Bill of Rights imposing the maximum restrictions on organized society allowable is worth dwelling on. I have little doubt that many shared Jackson’s view *at the time*.<sup>16</sup> But looking back on it more than a half-century later, Jackson’s comment seems astonishing.

Jackson’s observation was made more than a decade before the Warren Court’s “revolution” in criminal procedure got underway. Although the right to counsel has aptly been called “the most pervasive” right of an accused “for it affects his ability to assert any other rights

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can be adopted to implement that principle, marking out the situations in which knowledge or voluntariness cannot possibly be established – for example, a rule excluding confessions obtained after five hours of continuous interrogation.”

<sup>13</sup>See 322 U.S. at 164-67. Justices Roberts and Frankfurter joined Jackson’s dissent.

<sup>14</sup>338 U.S. 49 (1949).

<sup>15</sup>*Id.* at 61.

<sup>16</sup>When I started teaching law in 1957, I had the distinct impression that a goodly number of my colleagues and many of my students agreed with Jackson.

he may have,<sup>17</sup> 1949 was a time when the U.S. Constitution, as then interpreted, did not entitle indigent defendants in non-capital state criminal prosecutions, to appointed counsel.<sup>18</sup> Thus, in some states whose own laws or court rules did not provide for appointed counsel, indigent persons charged with such serious crimes as manslaughter and armed robbery had to fend for themselves. Nineteen forty-nine was also a time when there were no constitutional constraints on pre-trial identification (indeed, there was no constitutional restrictions on one-person lineups)<sup>19</sup> – even though mistaken identification has probably been the single greatest cause of conviction of the innocent.<sup>20</sup>

Moreover, 1949 was a time when many state courts, and the U.S. Supreme Court as well, were upholding the admissibility of confessions obtained under conditions that would jolt many of us today.<sup>21</sup> It was also a time when state courts were free to admit illegally seized evidence – and most of them did so.<sup>22</sup>

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<sup>17</sup>Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L.Rev. 1, 8 (1956).

<sup>18</sup>The Supreme Court did not construe the Sixth and Fourteenth Amendments as requiring indigent defendants who could not afford a lawyer to be provided with appointed counsel in non-capital state prosecutions until 1963. See *Gideon v. Wainwright*, 372 U.S. 335.

<sup>19</sup>The Supreme Court did not begin to address the problem of lineups and other pretrial identifications until 1967, when it decided a trilogy of cases: *United States v. Wade*, 388 U.S. 218; *Gilbert v. California*, 388 U.S. 263; and *Stovall v. Denno*, 388 U.S. 293.

<sup>20</sup>See Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1974 U.Ill.L.F. 518, 541-42.

<sup>21</sup>See, e.g. *Stroble v. California*, 343 U.S. 181 (1952).

<sup>22</sup>In 1949, thirty-one states admitted evidence seized in violation of the protection against unreasonable search and seizure, including California, Massachusetts, New York, Ohio and Pennsylvania. See *Wolf v. Colorado*, 338 U.S. 25, 29, 38 (1949), overruled, *Mapp v. Ohio* 367

Mark Tushnet also tells us that although he harbored no hatred or disdain for African Americans, Rehnquist was “simply indifferent” to their situation and “placed the claims of the civil rights movement in a framework of constitutional theory shaped by his experience as Jackson’s law clerk.”<sup>23</sup> Nor did his views change. Years later, as an important player in Goldwater’s effort to transform the Republican Party, Rehnquist was of the view, Tushnet tells us, “that advocates of civil rights were going too far, trampling on other important constitutional values in their misguided effort to cleanse the United States of racism.”<sup>24</sup>

This is another reason why Rehnquist was unlikely to be impressed by – or even see the need for – the Warren Court’s criminal procedure revolution. As Dean Kenneth Pye observed as the Warren Court era was coming to an end:

The Court’s concern with criminal procedure can be understood only in the context of the struggle for civil rights. . . . Concern with civil rights almost inevitably required attention to the rights of defendants in criminal cases. It is hard to conceive of a Court that would accept the challenge of guaranteeing the rights of Negroes and other disadvantaged groups to equality before the law and at the same time do nothing to ameliorate the invidious discrimination between rich and poor which existed in the criminal process. . .

If the Court’s espousal of equality before the law was to be credible, it required not only that the poor Negro be permitted to vote and to attend a school with whites, but also that he and other disadvantaged individuals be able to exercise, as well as possess, the same rights as the affluent white when suspected of crime.<sup>25</sup>

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U.S. 643 (1961).

<sup>23</sup>Tushnet 23.

<sup>24</sup>*Id.*

<sup>25</sup>A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 Mich.L.Rev. 249, 256 (1968).

So far I have been largely speculating about why Rehnquist was probably discontented with *Miranda* and other Warren Court criminal cases before he himself was appointed to the Supreme Court. But there is more direct – and quite powerful – evidence of Rehnquist’s displeasure with the so-called criminal procedure revolution – a memorandum he wrote when he worked for the Nixon Administration.

On April 1, 1969, when he had been Assistant Attorney General in charge of the Office of Legal Counsel for less than ninety days, Rehnquist sent a nineteen-page memorandum to John Dean (of Watergate fame), then the Associate Deputy Attorney General. The memorandum charged that “there is reason to believe that the Supreme Court has failed to hold true the balance between the right of society to convict the guilty and the obligation of society to safeguard the accused.”<sup>26</sup> Therefore, recommended Rehnquist, “the President [should] appoint a Commission to review these decisions, to determine whether the overriding public interest in law enforcement . . . requires a constitutional amendment.”<sup>27</sup>

Although Rehnquist’s memorandum complained about other matters, such as the ban on comments about the defendant’s refusal to take the stand in his own defense, the search and seizure exclusionary rule, and the sharp increase in habeas corpus petitions,<sup>28</sup> its heaviest fire was

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<sup>26</sup>Memorandum from William H. Rehnquist to John W. Dean, III, re: Constitutional Decisions Relating to Criminal Law, April 1, 1969, Summary of Memorandum, p. 2. The memorandum was marked “administratively confidential,” which, according to Dean, “kept it locked up for many years.” JOHN W. DEAN, *THE REHNQUIST CHOICE* 268 (2001). I am indebted to Professor Thomas Y. Davies of the University of Tennessee College of Law for calling this memorandum to my attention and providing me with a copy (which he obtained from the National Archives).

<sup>27</sup>*Id.*

<sup>28</sup>See *id* at 6, 8-9, 12-14.

directed at *Miranda*:

The past decade has witnessed a dramatic change in the interpretation given by the Supreme Court of the United States to the constitutional rights of criminal defendants. Limitations both drastic and novel have been placed on the use by both the state and federal governments of pre-trial statements of the defendants....<sup>29</sup>

The impact of *Miranda* and its progeny on the practices of law enforcement officials is far-reaching.

The Court is now committed to the proposition that relevant, competent, uncoerced statements of the defendant will not be admissible at his trial unless an elaborate set of warnings be given which is very likely to have the effect of preventing a defendant from making any statement at all. As Mr. Justice Jackson observed in *Watts v. Indiana* [a confession case discussed in the text at note 14 supra]:

“Any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement under any circumstances.”<sup>30</sup>

The Rehnquist memorandum then made an argument that other critics of the Warren Court’s criminal cases, and *Miranda* particularly, have made:<sup>31</sup>

The Court, believing that the poor, disadvantaged criminal defendant should be made just as aware of the risk of incriminating himself as the rich, well-counseled criminal defendant, has undoubtedly put an additional hurdle in the way of

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<sup>29</sup>*Id.* at 1.

<sup>30</sup>*Id.* at 5. In the *Miranda* context, the quotation from Justice Jackson is somewhat misleading. A suspect can waive his *Miranda* rights and agree to talk to the police *without ever consulting* with an attorney – and, as every student of police interrogation agrees today, the great majority of suspects do waive their right to counsel, as well as their right to remain silent. As Justice O’Connor emphasized in *Moran v. Burbine*, 475 US. 412, 426 (1986), *Miranda* rejected the argument – what the *Burbine* Court called “the more extreme position” – that the actual presence of a lawyer is necessary to dispel the coercion inherent in custodial interrogation.

<sup>31</sup>See, e.g., Gerald M. Caplan, *Questioning Miranda*, 38 Vand.L.Rev. 1417, 1471-73 (1985).

convicting the guilty.<sup>32</sup>

I find two things especially interesting about the Rehnquist memorandum:

First of all, Rehnquist *never mentions* a provision of Title II of the Omnibus Crime Control and Safe Streets Act of 1968 (usually called § 3501 because of its designation under Title 18 of the United States Code) that purports to abolish *Miranda* and to make the pre-*Miranda* “voluntariness” rule the sole test for the admissibility of confessions in federal prosecutions. This strikes me as astonishing.

How could the Assistant Attorney General in charge of the Office of Legal Counsel write a good-sized memorandum spelling out the need for a commission to consider repealing or greatly modifying *Miranda* by constitutional amendment without making any reference to a recently enacted federal law purporting to overturn *Miranda*? Rehnquist was too good a lawyer, and the nineteen-page document he authored was too carefully written, for him to miss a ten-month old statute that had an important bearing on the subject of his memorandum. (Moreover, presumably some of the bright lawyers in his office must have contributed to, or at least seen, a draft of the memorandum.)

One cannot help wondering whether Rehnquist ignored § 3501 because he thought it was obviously unconstitutional. It would hardly be surprising if he did.

Only *a few days* before Rehnquist finished writing the memorandum, the Supreme Court had reversed a conviction because “the use of these admissions obtained in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment

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<sup>32</sup>Rehnquist memorandum, p. 5.

as construed in *Miranda*.<sup>33</sup> No member of the Court seemed troubled by this language. Indeed, Justice Harlan, one of the *Miranda* dissenters, concurred in the result “purely out of respect for *stare decisis*.”<sup>34</sup>

This brings me to the other interesting thing about the Rehnquist memorandum. No doubt is expressed about *Miranda*'s constitutional status. Nowhere are the *Miranda* rules described as “prophylactic” or “procedural” rules or “protective” of the Self-Incrimination Clause. When he discussed *Miranda* in April, 1969, Rehnquist told us that although “[t]here was no evidence of physical coercion [in *Miranda* and its three companion cases], nor were the cases examples of unusual psychological pressure having been brought to bear in the interrogation process,” the Court “held that the statements elicited from each of the defendants violated the Fifth Amendment’s privilege against self-incrimination.”<sup>35</sup>

This, too, is hardly surprising. The *Miranda* opinion itself never called the warnings “prophylactic” or “not themselves right protected by the Constitution.”<sup>36</sup> Nor did any of the three Justices who wrote separate dissenting opinions.<sup>37</sup> Justice White wrote the angriest and most-

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<sup>33</sup>*Orozco v. Texas*, 394 U.S. 324 (1969). *Orozco* was decided on March 25, 1969; Rehnquist’s memorandum is dated April, 1969.

<sup>34</sup>*Id.* at 328.

<sup>35</sup>Rehnquist memorandum, pp. 4-5.

<sup>36</sup>This is how the Court, speaking through Justice Rehnquist, characterized the *Miranda* rules in *Michigan v. Tucker*, p. 444.

<sup>37</sup>Justice White did say, 384 U.S. at 544, that “the Court’s *per se* approach may not be justified on the ground that it provides a ‘bright line,’” but he did not suggest that there was anything “illegitimate” or improper about a *per se* approach or a rule that provides a “bright line.” One could plausibly say that when *Gideon v. Wainwright*, 372 U.S. 335 (1963) overturned the old “special circumstances” rule for appointing counsel and held that indigent non-capital

quoted dissent, but he called the *Miranda* holding a “reinterpretation of the Fifth amendment”<sup>38</sup> and, although he disagreed, he saw nothing “illegitimate” or improper about it. Indeed, he called *Miranda* the “mak[ing] [of] new law and new public policy in much the same way [the Court has gone about] interpreting other great clauses of the Constitution.”<sup>39</sup>

A year later, in an address he gave at the annual meeting of the Conference of Chief Justices, an address that has never received the attention I think it deserves, Justice White made clear that, as much as he disagreed with the result in *Miranda*, he considered the decision a straightforward interpretation of the privilege against self-incrimination:

Is the arrested suspect, alone with the police in the station house, being “compelled” to incriminate himself when he is interrogated without proper warnings? Reasonable men may differ about the answer to that question, but the question itself is a perfectly straightforward one under the Fifth Amendment and little different in kind from many others which arise under the Constitution and which must be decided by the courts. . . . The answer lies in the purpose and history of the self-incrimination clause and in our accumulated experience.

. . . In terms of the function which the Court was performing, I see little difference between *Miranda* and the several other decisions, some old, some new, which have construed the Fifth Amendment in a manner in which it has never been construed before, or as in the case of *Miranda*, contrary to previous decisions of the Court and of other courts as well.<sup>40</sup>

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defendants had an unqualified, automatic right to appointed counsel in all serious state criminal prosecutions, the Court adopted a *per se* approach that provided a “bright line.”

<sup>38</sup>384 U.S. at 531.

<sup>39</sup>*Id.* at 531.

<sup>40</sup>Justice Byron R. White, *Recent Developments in Criminal Law*, Address Before the Nineteenth Annual Meeting of the Conference of Chief Justices (Aug. 3, 1967), in COUNCIL OF STATE GOVERNMENTS, PROCEEDINGS OF THE NINETEENTH ANNUAL MEETING OF THE CONFERENCE OF CHIEF JUSTICES (1967).

THE DEPARTMENT OF JUSTICE MEMORANDUM AND  
JUSTICE REHNQUIST'S OPINION IN *MICHIGAN V. TUCKER*

At the time Rehnquist sent his memorandum to John Dean, it may fairly be said that there was a wide consensus that *Miranda* was a straightforward interpretation of the Fifth Amendment's privilege against self-incrimination and that a confession elicited in violation of the *Miranda* rules was one obtained in violation of the Constitution. A short time later, however, that consensus came to an end.

In June, 1969, with the authorization of the head of the Department of Justice, Attorney General John Mitchell, a memorandum "consistent with President Nixon's frequent criticism of Warren Court decisions on interrogation and related aspects of police procedure"<sup>41</sup> was sent to all United States Attorneys. It explained why "the failure to give the warnings required by *Miranda* will not necessarily require exclusion of a resulting confession."<sup>42</sup>

The DOJ memorandum made the best case – indeed, the only tenable case – ever made up to that point for the constitutionality of § 3501. It foreshadowed the reasoning in later Supreme Court opinions disparaging *Miranda*. I have in mind such cases as *Michigan v. Tucker*<sup>43</sup> (which allowed the testimony of a witness whose identity had been discovered as a result of questioning the defendant without giving him a complete set of warnings), *New York v. Quarles*<sup>44</sup> (another

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<sup>41</sup>OTIS H. STEPHENS, JR., *THE SUPREME COURT AND CONFESSIONS OF GUILT* 164 (1973).

<sup>42</sup>Memorandum from the Department of Justice to the United States Attorneys (June 11, 1969), 5 Crim. L.Rep. (NBA) 2350 (1969).

<sup>43</sup>417 U.S. 433 (1974).

<sup>44</sup>467 U.S. 649 (1984).

Rehnquist opinion, which recognized a “public safety” exception to the need for the *Miranda* warnings and thus held admissible both the suspect’s statement, “the gun is over there,” and the gun found as the result of the statement), and *Oregon v. Elstad*<sup>45</sup> (an O’Connor opinion, where the fact that the police had obtained a statement from defendant when they questioned him without giving him the required *Miranda* warnings did not bar the admissibility of a subsequent statement obtained at another place when, this time, the police did comply with *Miranda*).

The reasoning in the DOJ memorandum was quite similar to the reasoning of Justice Rehnquist’s opinion in *Tucker*, an opinion, which, in turn, greatly influenced the way later cases viewed *Miranda*. Indeed, looking back on the memorandum more than three decades later, it seems to have provided a road map for those who wanted to read *Miranda* as narrowly as possible.

Who wrote the 1969 Justice Department memorandum? Will Wilson, the Assistant Attorney General in charge of the Criminal Division, signed the communication to “United States Attorneys,” notifying them that “[t]he attached memorandum sets forth the Department’s position in respect to implementing” § 3501 and another provision of the Crime Control Act of 1968 concerning the admissibility of eye-witness testimony.<sup>46</sup> But who actually wrote “the attached memorandum”?

The memorandum was described as Attorney General Mitchell’s memorandum, but surely Mitchell did not write this memorandum by himself, if he contributed to it at all. The

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<sup>45</sup>470 U.S. 298 (1985).

<sup>46</sup>See 5 Crim.L.Rep. At 2350. Wilson’s communication to United States Attorneys also contained a brief summary of the arguments in the attached memorandum.

memorandum skillfully dissected both the *Miranda* opinion and the text of § 3501. The writing had a certain talmudic quality to it.

Assistant Attorney General Wilson may have had a hand in writing the memorandum. What about Assistant Attorney General Rehnquist? Given his position and his earlier memo disparaging *Miranda*, he seems an obvious choice.

Although Rehnquist had not mentioned § 3501 in his memorandum, there might be a connection between Rehnquist's memo and the Justice Department's memorandum a short time later defending the constitutionality of § 3501. At the time he rejected Rehnquist's proposal,<sup>47</sup> Attorney General Mitchell might have asked himself: Why do we need a constitutional amendment to deal with *Miranda* when we already have a federal statute on the books that purports to overturn that case? Surely the lawyers in the Office of Legal Counsel can make a credible argument that the statute is constitutional.

Whether or not Rehnquist contributed to the DOJ memorandum, he must have known about it and studied it when the memorandum was sent to all United States Attorneys and published in its entirety in the Criminal Law Reporter. After all, he *was* the head of the Office of Legal Counsel. Whether or not he had a hand in writing it, he must have remembered it when he wrote his first opinion of the Court in a *Miranda* case, the aforementioned *Michigan v. Tucker*. I don't think it can be denied that the arguments Justice Rehnquist makes in *Tucker* are quite similar to those made five years earlier in the DOJ memorandum.

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<sup>47</sup>According to John Dean, Mitchell had a negative reaction to Rehnquist's proposal because he doubted whether the Nixon Administration could control a constitutional commission. See Dean, *supra*, at 268.

The 1969 memorandum emphasized (as Justice Rehnquist was to do in *Tucker*),<sup>48</sup> that the *Miranda* Court itself had recognized that the Constitution does not require adherence to “*any particular* solution for the inherent compulsion of the interrogation process,”<sup>49</sup> only compliance with “*some* ‘system’ to safeguard against [the] inherently compulsive circumstances” which jeopardize the privilege.<sup>50</sup> Therefore, continued the DOJ memorandum, the *Miranda* warnings “are not themselves constitutional absolutes.”<sup>51</sup>

Five years later, in *Tucker*, Justice Rehnquist was to point out that the *Miranda* Court had observed that it could not say that “the Constitution necessarily requires adherence to *any particular solution* for the inherent compulsion of the interrogation process.”<sup>52</sup> Therefore, concluded Justice Rehnquist, the *Miranda* Court itself had recognized that the *Miranda* safeguards “are not themselves rights protected by the Constitution.”<sup>53</sup>

All this is quite misleading. The *Miranda* warnings are not “constitutional absolutes” or “not themselves rights protected by the Constitution” in the sense that *another* set of procedural safeguards, *another* system to protect against the inherently compulsive circumstances of custodial interrogation, *might* constitute a suitable substitute. Unfortunately, however, § 3501 did not provide a suitable substitute. Chief Justice Rehnquist was to make this very point a

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<sup>48</sup>See 417 U.S. at 444.

<sup>49</sup>DOJ memorandum at 2351 (emphasis added).

<sup>50</sup>*Id.* (emphasis in the original).

<sup>51</sup>*Id.* at 2351-52.

<sup>52</sup>417 U.S. at 444, quoting *Miranda*, 384 U.S. at 467 (emphasis added).

<sup>53</sup>417 U.S. at 444.

quarter-century later in *Dickerson* when he wrote the opinion of the Court invalidating § 3501: When it had enacted the statutory provision known as § 3501, pointed out the Chief Justice, Congress had “intended . . . to overrule *Miranda*” and simply replace it with the old “totality-of-the-circumstances”/“voluntariness” test<sup>54</sup> – one that the *Miranda* Court had found woefully inadequate.

The author of the majority opinion in *Tucker* overlooked some key language in the *Miranda* opinion:

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 law. *However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards [the Miranda warnings] must be observed.*<sup>55</sup>

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It is also urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rule making. 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 . . . *so long as they are fully as effective as those described above [the Miranda warnings] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it.*<sup>56</sup>

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<sup>54</sup>See 530 U.S. at 436-37.

<sup>55</sup>*Id.* at 467 (emphasis added).

<sup>56</sup>*Id.* at 490 (emphasis added).

We turn now [to the facts of the cases before us] to consider the application to these cases of *the constitutional principles discussed above*. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet *constitutional standards for protection of the privilege*.<sup>57</sup>

In this respect, the 1969 DOJ memorandum – although it is a piece of advocacy straining to make “a legitimate constitutional argument” in favor of § 3501<sup>58</sup> – is more balanced than Justice Rehnquist’s majority opinion in *Tucker*. Unlike Justice Rehnquist’s opinion, the DOJ memorandum does recognize that, although various alternatives to the method spelled out by Chief Justice Warren for dispelling the inherent coercion of the custodial interrogation are potentially available, “the [*Miranda*] Court stated, *until* such ‘potential alternatives for protecting the privilege’ are devised by Congress and the states [384 U.S. at 467], a person must be warned [in/accordance with *Miranda*] prior to any in-custody questioning.”<sup>59</sup>

As Geoffrey Stone described it many years ago, in what I consider the classic critique of *Tucker*, Rehnquist’s reading of *Miranda* in 1974 constituted nothing less than a “rewriting” of that famous case.<sup>60</sup> That is a strong word, but I don’t think it is an exaggeration.

Although the *Tucker* opinion certainly suggested otherwise, absent any suitable substitute

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<sup>57</sup>*Id.* at 491 (emphasis added).

<sup>58</sup>At one point (p. 2361), the memorandum states: “The area where we believe the statute [§ 3601] can be effective and where a legitimate constitutional argument can be made is where a voluntary confession is obtained after a less than perfect warning or a less than conclusive waiver. . . .”

<sup>59</sup>*Id.* (emphasis added).

<sup>60</sup>In *The Miranda Doctrine in the Burger Court*, 1977 Sup.Ct.Rev. 99, Professor Stone analyzed the first eleven cases involving *Miranda* decided by the Supreme Court since Warren Burger became Chief Justice. The subheading for Stone’s ten-and-a-half analysis of *Tucker* was “*Miranda Rewritten*.” See *id.* at 115.

(and there was none in *Tucker* or any of the other post-*Miranda* cases), the *Miranda* warnings *are required* to dispel the compelling pressures inherent in custodial interrogation. Absent an equally effective alternative, the police *must* give an individual about to be subjected to custodial questioning the *Miranda* warnings if the privilege is not to be violated.

To respond directly to the DOJ memorandum and Justice Rehnquist's opinion in *Tucker*, absent another equally effective protective device, there is no gap between a violation of the *Miranda* warnings and a violation of the privilege – in the context of custodial interrogation the privilege and the *Miranda* warnings are inseparable. The *Miranda* warnings cannot be breached without breaching the privilege as well.

Absent an adequate alternative, the *Miranda* warnings are not “*suggested*” safeguards (as both the DOJ memorandum and the *Tucker* Court called them).<sup>61</sup> Nor are they “*recommended* procedural safeguards” (as the *Tucker* Court characterized them at one point).<sup>62</sup> Neither are they “*protective guidelines*” (as *Tucker* characterized them at another point).<sup>63</sup>

One may disagree strongly with the conclusions the *Miranda* Court reached. One may even think the *Miranda* Court's interpretation of the Fifth Amendment was preposterous. Nevertheless, according to *Miranda*, absent a suitable substitute, the warnings are “an absolute prerequisite to interrogation”;<sup>64</sup> they are safeguards *required by the Constitution* to prevent the privilege from being violated.

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<sup>61</sup>DOJ memorandum at 2352; *Tucker* at 444.

<sup>62</sup>*Tucker*, p. 443 (emphasis added).

<sup>63</sup>*Id.* (emphasis added).

<sup>64</sup>*Miranda* 471.

In short, as Professor Stone expressed it, “the conclusion that a violation of *Miranda* is not a violation of the privilege is flatly inconsistent with the Court’s declaration in *Miranda* that “[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege.”<sup>65</sup>

*Tucker* did not only rewrite *Miranda* by driving a wedge between the privilege and the *Miranda* warnings. It also rewrote *Miranda* by badly blurring the distinction between the privilege against self-incrimination and the “voluntariness” doctrine, (the prevailing test for the admissibility of confessions before *Miranda* applied the privilege to custodial interrogation).<sup>66</sup>

At one point, in discussing why the police conduct “did not deprive [Mr. Tucker] of his privilege against compulsory self-incrimination as such,” but only the “procedural safeguards associated with that right since *Miranda*,”<sup>67</sup> Justice Rehnquist pointed out that Tucker’s statements “could hardly be termed involuntary as that term has been defined in the decisions of this Court.”<sup>68</sup> This was one of the reasons the *Tucker* Court concluded that “the interrogation involved no compulsion sufficient to breach the right against self-incrimination.”<sup>69</sup>

At another point, Rehnquist observed that there was no need to exclude the statement the police obtained from Tucker, as a result of their uncoercive questioning, in order to protect the

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<sup>65</sup>Stone, *supra*, at 119, quoting *Miranda* at 476.

<sup>66</sup>See Justice Rehnquist’s discussion of the pre-*Miranda* test in *Tucker* at pp. 441-43.

<sup>67</sup>417 U.S. at 444.

<sup>68</sup>*Id.* at 445.

<sup>69</sup>*Id.*

courts “from reliance on untrustworthy evidence”<sup>70</sup> for such concerns arise only “[w]hen involuntary statements or the right against compulsory self-incrimination are involved.”<sup>71</sup>

Compulsory self-incrimination cases, continued Rehnquist “must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be *compelled* to give evidence against himself.”<sup>72</sup>

Treating “coerced” and “compelled” interchangeably is confusing and misleading, “Coerced” and “compelled” or “coercive” and “compelling” may have the same dictionary meanings, but they are words of art with significantly different meanings.

When we talk about a “coerced” or “involuntary” confession, we mean a confession that is inadmissible under the pre-*Miranda* due process/totality of circumstances test because, as the courts usually put it when they apply such a test, taking into account the totality of circumstances, the confession was not a “product of free choice” or “free will” but one where the defendant’s will was “overborne” or “broken.”<sup>73</sup> More oppressive police methods were needed to render a confession “coerced” or “involuntary” under the pre-*Miranda* test for the admissibility of confessions than are necessary to make a confession “compelled” within the meaning of the self-

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<sup>70</sup>*Id.* at 448.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

<sup>73</sup>See, e.g., Albert Alschuler, *Constraints and Confessions*, 74 *Denver U.L.Rev.* 957 (1997); Yale Kamisar, *What Is An “Involuntary” Confession?*, 17 *Rutgers L.Rev.* 728 (1963); Monrad Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 *Stan.L.Rev.* 411 (1954). See also the discussion in *United States v. Rutledge*, 900 F.2d 1127, 1129 (7<sup>th</sup> Cir. 1990), where Judge Posner maintains that the rhetoric often used in coerced confession cases, such as “product of a free choice,” is extremely unhelpful.

incrimination clause. That, at least, is the premise of *Miranda*. And that, at least, appears to have been the understanding of everyone involved in the case.

At one point during the oral arguments, Justice Harlan asked the lawyer for a defendant in one of the companion cases to *Miranda*<sup>74</sup> whether he was claiming that his client's confession was "coerced." The lawyer, Victor Earle, replied:

In no sense. I don't think it was coerced at all. Mr. Justice White asked yesterday a question about compelling someone to give up his Fifth Amendment privilege. I think there is a substantial difference between that and coercing a confession. I mean, it wasn't until 1964 that the Fifth Amendment privilege applied to the states, and so . . . all through until the 1960's, really, state convictions were overturned only by looking to the generality of the totality of circumstances under the due process clause.

Now, we have specific constitutional guarantees that are applied in branch to the states. . . . It is true that the word "compel" is used in the Fifth Amendment with respect to the privilege, but it is quite different to say that the privilege is cut down and impaired by detention and to say a man's will has been so overborne a confession is forced from him. . . .

. . . [I]f we go back to the totality of circumstances, that means this Court will sit all by itself as it has so many years to overturn the few confessions it can take. . . . The lower courts won't do their job. We need some specific guidelines . . . to help them along the way.<sup>75</sup>

Justice Harlan did not ask a follow-up question. But later, when he wrote his dissenting opinion in *Miranda*, he observed that "[h]aving decided that the Fifth Amendment privilege does apply in the police station, the Court reveals that privilege imposes more exacting restrictions

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<sup>74</sup>The *Miranda* opinion was actually an opinion for four consolidated cases: *Miranda*, *California v. Stewart*, *Vignera v. New York*, and *Westover v. United States*.

<sup>75</sup>See YALE KAMISAR, et al., *MODERN CRIMINAL PROCEDURE*, 457, 460-61 (10<sup>th</sup> ed. 2002) (extracts from oral arguments in *Miranda* and companion cases).

than does the Fourteenth Amendment's voluntariness test."<sup>76</sup>

The difficulties a defendant faced in establishing that his confession was coerced or involuntary was a principal reason why many considered the due process/totally of the circumstances test inadequate.<sup>77</sup> That is also why at the time of *Miranda* law enforcement officials preferred the old test and resisted the application of the self-incrimination clause to custodial police interrogation. And that is why, too, Ernesto *Miranda*'s confession was held inadmissible – despite the fact that the police questioning of him had been quite mild compared to the harsher and more offensive police methods that had barred the use of statements in the cases applying the old voluntariness test.

If *Tucker*'s view of *Miranda* were the correct one – if statements were “compelled” in violation of the privilege only if they were deemed “coerced” or “involuntary” under traditional due process standards – it is hard to see what *Miranda* would have accomplished by applying the privilege against self-incrimination to the proceedings in the police station. If the privilege were violated only when the confession was obtained under circumstances that made it coerced or involuntary under the pre-*Miranda* test for the admissibility of confessions, why was the decision in *Miranda* much-awaited, much-discussed and much-criticized? Why did it matter whether or not the privilege applied to the police station?

THE APPARENT DECONSTITUTIONALIZATION  
OF *MIRANDA*

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<sup>76</sup>*Miranda*, 384 U.S. at 511.

<sup>77</sup>See Stone, *supra*, at 102-03. See also Yale Kamisar, *A Dissent from the Miranda Dissents*, 65 Mich.L.Rev. 59, 67-76 (1966); Stephen J. Schulhofer, *Confessions and the Court*, 79 Mich.L.Rev. 865, 867-78 (1981); Welsh S. White, *What Is an Involuntary Confession Now?*, 50 Rutgers L.Rev. 2001 (1998).

Although *Tucker* turned out to be a highly significant case – its way of viewing and talking about *Miranda* was to be used repeatedly to downsize *Miranda* and establish exceptions to it – it seems fairly clear that at least some of the Justices who concurred in the result had no idea how much damage *Tucker* would ultimately do to *Miranda*.

From the point of view of the prosecution, *Tucker* was just about the most appealing case imaginable. The defendant had been questioned and had confessed before *Miranda* was decided, although his trial had taken place afterwards. Thus, *Miranda* was just barely applicable.<sup>78</sup>

Second, the police had only failed to give the defendant one of the four *Miranda* warnings – the advice that he would be provided free counsel if he could not afford counsel himself. No police officer could be faulted for that omission at that time – two months *before* the *Miranda* case was handed down.

Finally, *Tucker* did not deal with the admissibility of the defendant’s own statements – they had been excluded – but only with the testimony of a witness whose identity had been discovered by questioning the defendant without giving him a complete set of *Miranda* warnings. Of all the kinds of evidence derived from police misconduct (and it would be a stretch to so characterize the police action in *Tucker*), the testimony of a “tainted” witness, *i.e.*, one located as a result of police misconduct, seems the most attenuated.<sup>79</sup>

The special facts of *Tucker* explain why only one member of the Court, Justice Douglas,

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<sup>78</sup>In *Johnson v. New Jersey*, 384 U.S. 719 (1966), the Court ruled that *Miranda* affected only those cases in which *the trial* began after that decision was handed down. This was a mistake. The Court probably should have held that *Miranda* affected only those confessions obtained by *police questioning* conducted after the date of the decision.

<sup>79</sup>See, *e.g.*, *United States v. Ceccolini*, 435 U.S. 268 (1978).

dissented. (Douglas argued that a confession obtained in violation of *Miranda* had to be a confession obtained in violation of *constitutional* standards because “[t]he Court is not free to prescribe preferred modes of interrogation [for the states] absent a constitutional basis.”<sup>80</sup>

Rehnquist did not respond to Douglas, but two and a half decades later, in *Dickerson*, he was to make essentially the same argument in defense of *Miranda*’s constitutionality).

Justice White concurred in the result in *Tucker* on the ground that *Miranda* did not deal with the testimony of witnesses derived from statements obtained in violation of that case and he would not extend *Miranda* that far.<sup>81</sup> Justice Brennan, joined by Justice Marshall, also concurred in the result, maintaining that the rule applying *Miranda* to trials begun after the date of that decision should not extend to derivative evidence but be confined to “those cases in which the *direct statements* of an accused made during a pre-*Miranda* interrogation were introduced at his post-*Miranda* trial.”<sup>82</sup>

Justice Rehnquist’s opinion in *Tucker* was the opinion of the Court only because Justice Stewart joined it. Stewart pointed out, however, that he “could also join” Justice Brennan’s concurring opinion, for it struck him that “despite differences in phraseology, and despite the disclaimers of their respective authors,” the two opinions “proceed on virtually parallel lines.”<sup>83</sup>

At one point, Justice Rehnquist informed us that he “consider[ed] it significant to our

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<sup>80</sup>417 U.S. at 462.

<sup>81</sup>See *id.* at 460 (White, J. concurring).

<sup>82</sup>*Id.* at 458 (Brennan, J., concurring).

<sup>83</sup>*Id.* at 453 (Stewart, J., joining the opinion of the Court and writing a one-paragraph concurring opinion).

decision” in *Tucker* “that the officers’ failure to advise respondent of his right to appointed counsel occurred prior to the decision in *Miranda*.”<sup>84</sup> He also told us that rather than “resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place,” the Court would “instead place [its] holding on a narrower ground” – the fact that “at the time respondent was questioned these police officers were guided, quite rightly, by [pre-*Miranda*] principles.”<sup>85</sup>

Although, again speaking for the Court, Justice Rehnquist relied heavily on *Tucker* in *New York v. Quarles* (the case that established a “public safety” exception to *Miranda*)<sup>86</sup> and made sure to quote *Tucker*’s language to the effect that “[t]he prophylactic *Miranda* warnings . . . are ‘not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected,’”<sup>87</sup> he did not mention any of the unusual facts in *Tucker* – facts that he himself had said greatly contributed to the *Tucker* holding. Nor, a year later, did Justice O’Connor do so when, in *Oregon v. Elstad*,<sup>88</sup> she, too, chanted the *Tucker* mantra that “[t]he prophylactic *Miranda* warnings are ‘not themselves rights protected by

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<sup>84</sup>*Id.* at 447.

<sup>85</sup>*Id.* The key case at the time the police questioned Mr. Tucker was *Escobedo v. Illinois*, 378 U.S. 478 (1964), and that case had focused on the suspect’s right to have *retained* counsel with him during the police interrogation. Thus, in *Tucker*, “the police asked respondent if he wanted counsel, and he answered that he did not.” *Id.*

<sup>86</sup>467 U.S. 649 (1984).

<sup>87</sup>*Id.* at 654.

<sup>88</sup>470 U.S. 298 (1985).

the Constitution.”<sup>89</sup>

In *Elstad*, a 6-3 majority, speaking through Justice O’Connor declined to apply the “fruit of the poisonous tree” doctrine to a “second confession” (one immediately preceded by the *Miranda* warnings) following a confession obtained an hour earlier without giving the defendant the required warnings. Although Justice O’Connor relied heavily on Justice Rehnquist’s opinions in *Tucker* and *Quarles*, she seemed to be even more emphatic about *Miranda*’s unconstitutional status than he was.

The *Elstad* Court chided the state court for having “misconstrued” the protections afforded by *Miranda* by assuming that “a failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as ‘fruit of the poisonous tree.’”<sup>90</sup> There is, Justice O’Connor emphasized, “a vast difference between the direct consequences flowing from coercion of a confession by physical violence [and] the uncertain consequences of disclosure of a ‘guilty secret’ freely given in response to an unwarned but noncoercive question, as in this case.”<sup>91</sup> At one point, she described a person whose *Miranda* rights had been violated as someone “who has suffered no identifiable constitutional harm.”<sup>92</sup>

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<sup>89</sup>*Id.* at 305.

<sup>90</sup>*Id.* at 304.

<sup>91</sup>*Id.* at 312.

<sup>92</sup>See *id.* At 307: “[Under *Miranda*], unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded. . . . Thus, in the individual case, *Miranda*’s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.”

Justice O'Connor also observed:

Respondent's ["fruit of the poisonous tree" argument] assumes the existence of a constitutional violation. . . . But as we explained in *Quarles* and *Tucker*, a procedural *Miranda* violation differs in significant respect from violations of the Fourth Amendment, which have traditionally mandated a broad application of the "fruits" doctrine. . . .<sup>93</sup>

The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. . . .<sup>94</sup>

If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself.<sup>95</sup>

Although *Elstad* can be read fairly narrowly,<sup>96</sup> the majority opinion seems to say – it certainly can plausibly be read as saying – that a violation of *Miranda* is not a violation of a *real* constitutional right, but only a procedural safeguard or prophylactic rule designed to protect a constitutional right. Therefore, unlike evidence derived from an unreasonable search or a coerced confession (in the traditional due process sense) – which *are* real constitutional violations – it is not entitled to, or worthy of, the "fruit of the poisonous tree" doctrine.

When § 3501 was enacted, few, if any, had taken it seriously. One of the nation's leading

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<sup>93</sup>*Id.* at 305-06.

<sup>94</sup>*Id.* at 306.

<sup>95</sup>*Id.* at 309.

<sup>96</sup>At the very end of her opinion, *id.* at 318, Justice O'Connor states: "We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings."

constitutional law scholars, and one whose criticism of the bill containing the anti-*Miranda* section “was especially weighty” because he was “unsympathetic with the *Miranda* decision,”<sup>97</sup> concluded that offensive as § 3501 was, it did not justify a veto of the bill because it was so likely to be held “constitutionally ineffective” that –

[n]o responsible trial judge would jeopardize a criminal conviction by following the statute in his rulings on admissibility, nor would a sensible prosecutor even seek a ruling in these terms since it would certainly invite reversal.<sup>98</sup>

A decade and a half later, however, the Burger Court’s characterization of *Miranda* and its comments about the case gave reason to believe that § 3501 might survive constitutional attack after all.

It had all started with *Tucker*, a case whose facts read like a law professor’s exam question, a case where the police could hardly have been expected to anticipate all the *Miranda* warnings, a case which never would have arisen if the Court had thought through its retroactivity jurisprudence.<sup>99</sup> Then came *Quarles* and *Elstad*.

When the Warren Court’s revolution in criminal procedure was at its height, Judge Henry Friendly complained about what he called “the domino method of constitutional adjudication” – a method that made a case that was extremely appealing from the defendant’s perspective the

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<sup>97</sup>Charles Alan Wright, *Federal Practice and Procedure: Criminal* §76 at 187 n. 30 (3d ed. 1999).

<sup>98</sup>Herbert Wechsler, *Letter to the Editor: Legislating Crime Control*, N.Y. Times, June 16, 1968, at B 19.

<sup>99</sup>A year after *Miranda*, the Court seemed to realize its mistake. It applied the new rules governing lineups announced in *United States v. Wade*, 388 U.S. 218 (1967), to identification procedures (not trials) conducted after the date *Wade* was handed down. See *Stovall v. Denno*, 388 U.S. 293 (1967).

occasion for a general expansion of the rights of the accused.<sup>100</sup> (Friendly thought the Court should handle the extremely appealing case on an individualized basis.)

During the Burger Court era, however, it became the turn of the defense-minded to complain about the Court's use of a very sympathetic case from the prosecution's perspective (and it is hard to think of a better example than *Tucker*) as the occasion to contract the rights of the accused or to throw some dirt on landmark decisions like *Miranda*. Moreover, the defense-minded couldn't help wondering whether some day the domino effect of *Tucker*, *Quarles* and *Elstad* would end with the overruling of *Miranda*.

FROM *TUCKER* TO *DICKERSON*  
— AND BACK AGAIN

In 1999, despite the fact that the Justice Department had instructed the United States Attorney's office not to rely on § 3501, a panel of the U.S. Court of Appeals for the Fourth Circuit in *United States v. Dickerson*,<sup>101</sup> held that a confession was admissible under that statutory provision. In sustaining the constitutionality of § 3501, the Fourth Circuit relied heavily on the fact that the post-Warren Court had “consistently (and repeatedly) . . . referred to the [*Miranda*] warnings as ‘prophylactic’ . . . and ‘not themselves rights protected by the Constitution.’”<sup>102</sup> Indeed, the Fourth Circuit went so far as to say that § 3601 had been “enacted

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<sup>100</sup>See Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L.Rev. 929, 950, 954-55 & n. 135 (1965).

<sup>101</sup>166 F.3d 667 (4<sup>th</sup> Cir. 1999), overruled, 530 U.S. 428 (2000).

<sup>102</sup>*Id.* at 689.

at the invitation of the Supreme Court.”<sup>103</sup>

When the *Dickerson* case reached the Supreme Court, the Department of Justice refused to defend the constitutionality of § 3501. Instead, during the oral arguments in the Supreme Court, Solicitor General Seth Waxman attacked the reasoning of *Tucker* and its progeny early and often. Again and again, he explained how *Miranda* is a constitutional decision even though the *Miranda* warnings are not constitutionally required. The warnings, he pointed out, would not be constitutionally required if Congress or a state legislature were to come up with a suitable substitute (perhaps a videotape system, time limits or questioning by magistrates). In the absence of an effective alternative, however, emphasized the Solicitor General, the warnings *are* required.<sup>104</sup>

To the surprise of some (including me), Justice O’Connor, author of the majority opinion in *Elstad*, joined a 7-2 majority opinion “conclud[ing] that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.”<sup>105</sup> To the surprise of many (especially me), Chief Justice Rehnquist, author of the *Tucker* and *Quarles* opinions, wrote the opinion of the Court.

The Chief Justice put on a remarkable display of nimble backpedaling.

What about the reasoning in *Tucker* and *Quarles* and what Rehnquist had said about *Miranda* in those cases? In *Dickerson*, Rehnquist dismissed his *Tucker* and *Quarles* opinions in

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<sup>103</sup>*Id.* at 672. See also *id.* at 688-89.

<sup>104</sup>Transcript of Oral Arguments in *Dickerson*, pp. 6-8.

<sup>105</sup>530 U.S. at 444.

one sentence:

Relying on the fact that we have created several exceptions to *Miranda*'s warnings requirement and that we have repeatedly referred to the *Miranda* warnings as “prophylactic” [citing *Quarles*] and “not themselves rights protected by the Constitution” [citing *Tucker*], the Court of Appeals concluded that the protections announced in *Miranda* are not constitutionally required.

We disagree with the Court of Appeals conclusion, although we concede that there is some language in some of our opinions that supports the view taken by that court.<sup>106</sup>

I doubt that any Justice in Supreme Court history has dismissed his own majority opinions more summarily or nonchalantly.

In *Tucker*, Rehnquist maintained that the fact that the *Miranda* Court stated that it would not say that “the Constitution necessarily requires adherence to any particular solution for the inherent compulsion of the interrogation process as it is presently conducted”<sup>107</sup> was proof that “[t]he [*Miranda*] Court recognized that these procedural rights were not themselves protected by the Constitution.”<sup>108</sup> But in *Dickerson* the fact that the *Miranda* Court invited the Congress to consider equally effective alternatives to the *Miranda* warnings somehow *cut the other way*: “Additional support for our conclusion that *Miranda* is constitutionally based is found in the *Miranda* Court’s invitation for legislative action to protect the constitutional right against

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<sup>106</sup>*Id.* at 437-38.

<sup>107</sup>417 U.S. at 444, quoting *Miranda*, 384 U.S. at 467.

<sup>108</sup>417 U.S. at 444.

coerced self-incrimination.”<sup>109</sup>

Some portions of Chief Justice Rehnquist’s *Dickerson* opinion read as if he had read the *Miranda* opinion closely for the first time or thought about it intensely for the first time.

In *Tucker*, as Professor Stone has pointed out, “[t]he only evidence Mr. Justice Rehnquist offered to support his conclusion [that a violation of *Miranda* is not a violation of the privilege] was the Court’s statement in *Miranda* that the Constitution does not necessarily require ‘adherence to any particular solution’ to the problem of custodial interrogation.”<sup>110</sup> In *Tucker*, he failed to mention that the *Miranda* Court had made it clear that “any particular solution” other than the *Miranda* warnings had to be *at least as effective* as the *Miranda* warnings. Chief Justice Rehnquist did not make that mistake in *Dickerson*: “[The *Miranda* Court] opined that the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were ‘at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it.’”<sup>111</sup>

Are we supposed to believe that when Justice Rehnquist wrote his opinion in *Tucker* he was unaware that the *Miranda* opinion had stated that *unless* alternatives were devised by the legislature that were *fully as effective as the warnings* the fourfold warnings *were* constitutionally required? The *Miranda* Court issued the caveat that any alternatives to the warnings had to be “fully as effective” or “at least as effective” as the warnings were in apprising custodial suspects

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<sup>109</sup>530 U.S. at 440. As pointed out earlier, the *Dickerson* Court should have referred to the constitutional right against *compelled* self-incrimination; “coercion” is a term of art used when the Court is applying the traditional due process test.

<sup>110</sup>Stone, *supra*, at 119 (*emphasis added*).

<sup>111</sup>530 U.S. at 440, quoting *Miranda*, 384 U.S. at 467 (*emphasis added*).

of their right of silence and assuring a continuous opportunity to exercise that right as many as five times!<sup>112</sup>

In *Dickerson*, Chief Justice Rehnquist points out that the *Miranda* opinion “is replete with statements indicating that the majority thought it was announcing a constitutional rule.”<sup>113</sup> “Indeed,” he continues, “the Court’s ultimate conclusion was that the unwarned confessions obtained in the four cases before the Court in *Miranda* ‘were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.’”<sup>114</sup>

Are we supposed to believe that Justice Rehnquist did not know the *Miranda* opinion contained the language referred to above when he told us in *Tucker* that the *Miranda* Court itself “recognized that these procedural safeguards [the *Miranda* warnings] were not themselves rights protected by the Constitution”?<sup>115</sup>

In *Dickerson*, Chief Justice Rehnquist told us that “first and foremost of the factors on the other side – 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.”<sup>116</sup> Since the Supreme Court has no supervisory authority over state courts, reasoned Rehnquist, the *Miranda* Court must have announced a constitutional rule.<sup>117</sup>

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<sup>112</sup>See 384 U.S. at 444, 467, 476, 478 and 490.

<sup>113</sup>530 U.S. at 439.

<sup>114</sup>*Id.* at 439-40.

<sup>115</sup>417 U.S. at 444.

<sup>116</sup>530 U.S. at 438.

<sup>117</sup>See *id.* at 437-48.

“*First and foremost* of the factors . . . that *Miranda* is a constitutional decision”? If so, why didn’t Justice Rehnquist take this into account when he wrote about *Miranda*’s constitutional status (or lack of it) in *Tucker* and *Quarles*? Justice Douglas made the same point Justice Rehnquist was to make many years later when Douglas dissented in *Tucker*.<sup>118</sup> Justice Stevens also made the same point when he dissented in *Elstad*.<sup>119</sup> Are we supposed to believe that in the 1970s and 1980s Justice Rehnquist didn’t realize the significance of the fact that *Miranda*’s full name was *Miranda v. Arizona*?

Why did Chief Justice Rehnquist, who could hardly be called a friend of *Miranda*, come to its rescue?<sup>120</sup>

The Chief Justice might have regarded *Dickerson* as an occasion for the Court to maintain its power against Congress.<sup>121</sup> But that doesn’t explain the Rehnquists’ and six other Justices’

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<sup>118</sup>See text at note 80 *supra*.

<sup>119</sup>Observed Justice Stevens, dissenting in *Elstad*, 470 U.S. at 370-71: “This Court’s power to require state courts to exclude probative self-incriminatory statements rests entirely on the premise that the use of such evidence violates the Federal Constitution. The same constitutional analysis applies whether the custodial interrogation is actually coercive or irrebuttably presumed to be coercive. [Otherwise, the Court] must regard the holding in the *Miranda* case itself, as well as all of the federal jurisprudence that has evolved from that decision, as nothing more than an illegitimate exercise of raw judicial power.”

<sup>120</sup>Of course, there is always the possibility that he would not have voted this way if the Court had been split 4-4 and he could have cast the pivotal vote. He might have voted in favor of *Miranda* so that he could assign the opinion to himself, rather than let someone like Justice Stevens write the opinion of the Court. But I shall proceed on the premise that Chief Justice Rehnquist would have voted the way he did regardless of how his colleagues were voting.

<sup>121</sup>See Craig Bradley, *Behind the Dickerson Decision*, Trial, Oct. 2000, at 80; Michael C. Dorf & Barry Freedman, *Shared Constitutional Interpretation*, 2001 Sup.Ct.Rev. 61, 72.

unwillingness “to overrule *Miranda* ourselves.”<sup>122</sup>

Was the Chief Justice concerned that the “overruling” of *Miranda* would have wiped out more than three decades of confession jurisprudence – and almost 60 cases? Was this worth doing when the police had come to learn to live fairly comfortably with *Miranda*?<sup>123</sup> The Chief Justice must have been aware that the police obtain waiver of rights in the “overwhelming majority” of cases and that once they do “*Miranda* offers very little protection.”<sup>124</sup>

Then there is my favorite reason why Chief Justice Rehnquist and six of his colleagues voted the way that they did: Overruling *Miranda* after all these years would have caused enormous confusion.<sup>125</sup>

The due process/voluntariness totality of the circumstances test had become “increasingly meticulous through the years.”<sup>126</sup> One week after *Miranda*, in the course of declining to apply that case retroactively, but only to trials begun after the decision was announced, Chief Justice Warren had pointed out that the traditional “voluntariness” test “*now takes specific account of*

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<sup>122</sup>530 U.S. at 444.

<sup>123</sup>According to Professor Richard A. Leo, a close student of police interrogation and confessions, and a leading commentator on the subject, *Questioning the relevance of Miranda in the Twenty-First Century*, 69 Mich.L.Rev. 975, 1027 (2001): “Once feared to be the equivalent of sand in the machinery of criminal justice, *Miranda* has now become a standard part of the machine.”

<sup>124</sup>*Id.* See also William J. Stuntz, *Miranda’s Mistake*, 99 Mich.L.Rev. 975, 977 (2001).

<sup>125</sup>See Yale Kamisar, *Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 Ariz. St. L.J. 387, 388-90 (2001).

<sup>126</sup>*Johnson v. New Jersey*, 384 U.S. 719, 730 (1966). Consider, too, *Miranda*, 384 U.S. at 508 (Harlan, J., dissenting) (“synopses of the cases [applying the pre-*Miranda* voluntariness test] would serve little use because the overall gage has been steadily changing, usually in the direction of restricting admissibility.”)

the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance.”<sup>127</sup>

If *Miranda* had been overturned in *Dickerson*, it would have been extremely difficult for a police officer to know how to respond when (a) a suspect *not warned* of her rights *had asserted* what she thought were her rights or (b) *asked the police* whether she had a right to remain silent or c) whether the police had *a right* to get answers from her or (d) whether she could meet with a lawyer before answering any questions or (e) whether the officer would *prevent her* from trying to contact a lawyer.

If the Court had wiped out *Miranda* – after the police had worked with and relied on that landmark case for more than three decades – I venture to say the situation in the “interview room” would have been close to chaotic.

□

Although it finally said “good riddance” to a 38-year-old statutory provision that purported to “overrule” *Miranda*, the *Dickerson* Court left a number of questions unanswered. It is hard to improve on Professor Donald Dripps’s comment:

Once the Court granted [certiorari in *Dickerson*], court-watchers knew the hour had come. At long last the Court would have to either repudiate *Miranda*, repudiate the prophylactic-rule cases, or offer some ingenious reconciliation of the two lines of precedent. The Supreme Court of the United States, however, doesn’t “have to” do anything, as the decision in *Dickerson* once again reminds us.<sup>128</sup>

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<sup>127</sup>Johnson v. New Jersey, 384 U.S. 719 730 (1966) (*emphasis added*). See also *id.* at 731: “[P]ast decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confession.”

<sup>128</sup>Donald A. Dripps, *Constitutional theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 Wm. & Mary L.Rev. 1, 33 (2001).

Logically, *Dickerson* undermines the holdings in the prophylactic-rule cases, especially *Elstad*, which repeatedly emphasized that *Miranda* was a subconstitutional rule. But the Chief Justice did not repudiate any of the prophylactic-rule cases. Indeed, he labored hard to avoid doing so.<sup>129</sup> But he did not approve of the reasoning in those cases either. How could he?

Rehnquist's one attempt to explain *Elstad* in light of *Dickerson* – and most commentators agree that it was an extremely feeble attempt –<sup>130</sup> was to say:

Our decision in that case [*Elstad*] – refusing to apply the traditional “fruits” doctrine developed in Fourth Amendment cases – does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.<sup>131</sup>

But *why* is a statement obtained in violation of the *Miranda* rules “different from” evidence obtained in violation of the Fourth Amendment? As far as the “fruit of the poisonous

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<sup>129</sup>See *id.* at 62.

<sup>130</sup>Indeed, Professor Susan Klein commented, with considerable justification, that Chief Justice's attempt to explain why the “poisonous tree” doctrine developed in search and seizure cases doesn't apply to *Miranda* violations “comes dangerously close to being a non sequitur.” Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 Mich.L.Rev. 1030, 1073 (2001).

The fact that the Chief Justice's attempt to reconcile *Elstad* with the “constitutionalized” *Miranda* doctrine was inadequate does not mean, however, that no tenable explanations exist. As David Strauss has suggested, one might have said that although *Miranda* strikes the best balance of advantages and disadvantages in the circumstances presented, a different balance might be best in the *Elstad* circumstances. As Professor Strauss observed, “The fact that the Court refined the balance it struck in *Miranda*, when cases presenting different circumstances arose, has no bearing on the constitutional status or legitimacy of that decision.” David A. Strauss, *Miranda, The Constitution, and Congress*, 99 Mich. L.Rev. 958, 969 (2001).

<sup>131</sup>530 U.S. at 441.

tree” doctrine is concerned, *there is nothing inherently different* between a coerced statement or one obtained in violation of the privilege on the one hand and a violation of the Fourth Amendment on the other.

Last year Chief Justice Rehnquist joined a plurality opinion by Justice Thomas which recognized that “the physical fruit of actually coerced statements” must be excluded.<sup>132</sup> In the same case, Deputy Solicitor General Michael Dreeben conceded that if, in response to a grand jury subpoena, a person under threat of contempt of court revealed the existence of a gun, the weapon, as well as the statement itself, would have to be excluded.<sup>133</sup>

The only difference the *Elstad* Court recognized was one between a violation of the Constitution and a violation of a rule or set of rules *lacking constitutional status*, notably *Miranda*. But didn’t *Dickerson* change that?

If, as the *Dickerson* Court seems to have told us, in the absence of an equally effective alternative procedure (and nobody claims there was an effective alternative in *Elstad* or *Dickerson*), the *Miranda* warnings *are constitutionally required* – are “constitutional standards for protection of the privilege” – then a breach of the warnings *does amount to* a breach of the Constitution – and the distinction the *Elstad* Court repeatedly made is no longer valid.

This point did not escape dissenting Justice Scalia: Unless one agrees with the *Elstad* Court that “*Miranda* violations are not constitutional violations,”<sup>134</sup> it would be hard to explain why the “fruits” doctrine applies to the fruits of illegal searches but not to the fruits of *Miranda*

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<sup>132</sup>United States v. Patane, 124 S.Ct. 2620, 2630 (2004).

<sup>133</sup>Transcript of Oral Argument at 15, United States v. Patane.

<sup>134</sup>530 U.S. at 455 (Scalia, J., dissenting).

violations “since it is *not* clear on the face of the Fourth Amendment that evidence obtained in violation of that guarantee must be excluded from trial, whereas it *is* clear on the face of the Fifth Amendment that unconstitutionally compelled confessions cannot be used.”<sup>135</sup>

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Nevertheless, a recent *Miranda* “poisoned fruit” case, *United States v. Patane*,<sup>136</sup> leaves little doubt that *Elstad* has survived *Dickerson* completely unscathed.

The *Patane* case arose as follows: Without administering a complete set of *Miranda* warnings, a detective questioned defendant Patane about the location of a Glock pistol he was supposed to own. Patane responded that the weapon was on a shelf in his bedroom. This admission led almost immediately to the seizure of the weapon where the defendant said it was. The prosecution conceded that Patane’s statement was inadmissible, but argued that the physical fruit of the failure to comply with *Miranda* – the pistol itself – should be admitted. A unanimous panel of the Tenth Circuit disagreed, concluding that “*Miranda*’s deterrent purpose would not be vindicated meaningfully by suppression only of Patane’s statement.”<sup>137</sup>

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<sup>135</sup>*Id.* See also Dripps, *supra*, at 35: “The Chief Justice must know . . . that the Fifth Amendment exclusionary rule for fruits under *Kastigar* [*v. United States*, 406 U.S. 441 (1972)] is *more* strict, not more lax, than the Fourth Amendment exclusionary rule. The difference between the Fourth and Fifth Amendment exclusionary rules cut against, not in favor of, reconciling *Elstad* with *Miranda*, *Dickerson*, and *Kastigar*.”

As Professor Dripps points out elsewhere in his article, see *id.* at 31, *Kastigar* makes it quite clear that immunity for testimony compelled by formal process before a grand jury would not be constitutional if evidence derived from compelled testimony were admissible.

<sup>136</sup>124 S.Ct. 2620 (2004).

<sup>137</sup>*Patane v. United States*, 304 F.3d 1013, 1029 (10<sup>th</sup> Cir. 2002) (Ebel, J.), *rev’d*, 124 S.Ct. 2620 (2004).

The government relied on both *Tucker* and *Elstad*, but judge Ebel, who wrote the Tenth Circuit opinion, thought that neither case was still good law: “Both *Tucker* and *Elstad* “were predicated upon the premise that the *Miranda* rule was a prophylactic rule, rather than a constitutional rule” whereas the “poisonous tree” doctrine “requires suppression only of the fruits of *unconstitutional* conduct.” However, continued Judge Ebel, “the premise upon which *Tucker* and *Elstad* relied was fundamentally altered in *Dickerson*. [That case] undermined the logic underlying *Tucker* and *Elstad*.<sup>138</sup>

Those of you who have come with me this far know that I think Judge Ebel’s reading of *Dickerson* is a plausible, sensible one – indeed a perfectly logical one. Unfortunately, I don’t have any votes on the Supreme Court – and five people who do disagreed.

There was no opinion of the Court. Justice Thomas, who wrote a three-Justice plurality opinion, announced the judgment of the Court and delivered a three-Justice plurality opinion. The Court was able to reverse the Tenth Circuit only because Justice Kennedy, joined by Justice O’Connor, concurred in the judgment.

The fact that Justice Scalia joined Thomas’s plurality opinion is not surprising. The fact that the Chief Justice did is. In a post-*Dickerson* confession case, the two dissenters in *Dickerson* and the author of the majority opinion in *Dickerson* make strange bedfellows.

At no time in *Dickerson* did Chief Justice Rehnquist contrast the prophylactic rules of *Miranda* with the “actual Self-Incrimination Clause.” Nor, in *Dickerson*, did he ever contrast *Miranda* violations with a “core” violation of the Self-Incrimination Clause itself. Indeed, at no

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<sup>138</sup>*Id.* at 1019.

time in *Dickerson* did Rehnquist call the *Miranda* rules “prophylactic.”<sup>139</sup>

However, in his *Patane* plurality opinion, Justice Thomas repeatedly characterizes the *Miranda* rules as “prophylactic”<sup>140</sup> and repeatedly refers to “the core protection afforded by the Self-Incrimination Clause,”<sup>141</sup> “the core privilege against self-incrimination”<sup>142</sup> protected by prophylactic rules, “the actual right against compelled self-incrimination”<sup>143</sup> and “actual violations of the Due Process Clause or the Self-Incrimination Clause.”<sup>144</sup>

Justice Thomas also tells us in language very similar to that used in *Elstad*, that because prophylactic rules such as the *Miranda* rule “necessarily sweep beyond the actual protections of the Self-Incrimination Clause, any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination.”<sup>145</sup>

To be sure, Justice Thomas only wrote for three Justices. But *Miranda* supporters will gain little comfort from Justice Kennedy’s concurring opinion.

Although he did not, as Thomas had done, contrast *Miranda*’s “prophylactic rules” with the “core privilege” or “actual right against compelled self-incrimination,” Kennedy did not seem at all troubled by the fact that the plurality had reiterated the old *Tucker-Quarles-Elstad* rhetoric

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<sup>139</sup>In *Dickerson* the Chief Justice did note that earlier cases had characterized the *Miranda* rules as “prophylactic.”

<sup>140</sup>See 124 S.Ct. at 2626, 2627, 2630.

<sup>141</sup>*Id.* at 2626.

<sup>142</sup>*Id.* at 2627.

<sup>143</sup>*Id.*

<sup>144</sup>*Id.* at 2529.

<sup>145</sup>*Id.* at 2627.

about *Miranda* four years after *Dickerson*. Nor did Kennedy give any indication that he thought *Dickerson* had any bearing on the case.

Justice Kennedy did mention *Dickerson* once – but only to say that he “agree[d] with the plurality that *Dickerson* did *not* undermine [cases like *Elstad* and *Quarles*] and, in fact, cited [those cases] in support.”<sup>146</sup> (In support of what? Surely not *Dickerson*’s holding that *Miranda* is a constitutional decision).

Not only did Justice Kennedy fail to question the soundness of *Elstad*’s reasoning in light of *Dickerson*, he actually praised *Elstad*. The result in cases like *Elstad*, he told us, cases upholding the admissibility of evidence obtained “following an unwarned interrogation,” was “based in large part on our recognition that the concerns underlying the *Miranda* rule must be accommodated to other objectives of the criminal justice system.”<sup>147</sup>

Have I overlooked the companion case to the *Patane* case, *Missouri v. Seibert*?<sup>148</sup> I think not. In *Seibert*, a 5-4 majority did uphold the suppression of a so-called second confession, one obtained after the police had deliberately used a two-stage interrogation technique designed to undermine the *Miranda* warning. But Justice Souter, who wrote a four-Justice plurality opinion, never relied on *Dickerson*. His opinion is written just as if *Dickerson* had never been decided. Nor did Souter ever question the continued validity of *Elstad*. Indeed, at one point he treated *Elstad* with some reverence. In the course of rejecting Ms. Seibert’s argument that her confession should be excluded under the “poisonous tree” doctrine developed in *Wong Sun v.*

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<sup>146</sup>*Id.* at 2631 (emphasis added).

<sup>147</sup>*Id.*

<sup>148</sup>124 S.Ct. 2601 (2004).

*United States*,<sup>149</sup> Justice Souter reminded the defendant that *Elstad* had “rejected the *Wong Sun* fruits doctrine for analyzing the admissibility of a subsequent warned confession following ‘an initial failure to administer the warnings required by *Miranda*.’”<sup>150</sup>

The *Seibert* facts were easy to distinguish from *Elstad*’s and Justice Souter did so. The failure to advise Mr. Elstad of his *Miranda* rights the first time seemed inadvertent. At one point Justice O’Connor called it an “oversight.”<sup>151</sup> This was a far cry from *Seibert*.

As I have observed elsewhere, the decision in *Seibert* turns on its extreme facts and would have turned on these same facts even if *Dickerson* had never been written:

The officer involved had “resort[ed] to an interrogation technique he had been taught.” At the first questioning session he had made “a ‘conscious decision’ to withhold *Miranda* warnings” and after obtaining incriminating statements, had called a short recess (twenty minutes) before resuming the questioning. At the outset of the second session the officer did advise the suspect of her rights, and did obtain a waiver, but he then confronted the suspect with the statements she had made during the first session (when she had not been warned of her rights). Not surprisingly, the suspect confessed again. The new statement was “‘largely a repeat of information . . . obtained’ prior to the warnings.”

The failure to comply with *Miranda* was so deliberate and so flagrant that an 8-1 or 7-2 ruling in favor of the defense would not have been surprising. The fact that the vote on these extreme facts was 5-4 and that the derivative evidence was held inadmissible only because of Justice Kennedy’s somewhat grudging concurring opinion is significant evidence of the low state to which *Miranda* has fallen.<sup>152</sup>

It should be noted that although he concurred in the *Seibert* judgment, Justice Kennedy

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<sup>149</sup>371 U.S. 471 (1963).

<sup>150</sup>*Id.* at 2610 n. 4.

<sup>151</sup>*Elstad*, 470 U.S. at 316.

<sup>152</sup>Yale Kamisar, *Postscript: Another Look at Patane and Seibert, the 2004 Miranda “Poisoned Fruit” Cases*, 2 Ohio St.J.Crim.L. 97, 108 (2004).

took no more cognizance of *Dickerson* than he did when he concurred in the result in *Patane*. And in *Seibert*, too, he had nice things to say about *Elstad*. That case, he maintained, “was correct in its reasoning and its result. *Elstad* reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning.”<sup>153</sup> And he left no doubt that in the typical “second confession” case he would admit the evidence.<sup>154</sup>

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A final word about Justice Thomas’s plurality opinion in *Patane*. At one point, he discusses and quotes from a number of cases that have read *Miranda* narrowly and/or established exceptions to it. Then, in case we haven’t quite grasped his message, he tells us: “Finally, nothing in *Dickerson*, including its characterization of *Miranda* as announcing a constitutional rule, changes any of these observations.”<sup>155</sup>

Why not? Aside from invalidating § 3501, did *Dickerson* accomplish *anything*? A majority of the Court seems to think not. Indeed, *Patane* and *Seibert* leave us wondering whether *any* member of the Court believes that *Dickerson* affected *Tucker*, *Quarles* or *Elstad* – or, for that matter, *any* of the nearly sixty confession cases the Court has handed down since *Miranda* was decided. To borrow a line from Justice Roberts, *Dickerson* seems to be a decision good for “this day and train only.”<sup>156</sup>

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<sup>153</sup>124 S.Ct. At 2615.

<sup>154</sup>See *id.* At 2616.

<sup>155</sup>124 S.Ct. At 2628.

<sup>156</sup>*Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J. dissenting).

It is not too surprising that only four years after *Dickerson* was decided Justice Thomas would more or less shrug off that case. After all, Thomas did join Justice Scalia's long, forceful dissent in *Dickerson*. What is quite surprising, however, is that the Chief Justice, the author of the majority opinion in *Dickerson*, would join Thomas's plurality opinion in *Patane*.

It is hard to believe that any Justice could write an opinion of the Court "reject[ing] the core premises of *Miranda*,"<sup>157</sup> and establishing the groundwork for its overruling,<sup>158</sup> only to come to its rescue a quarter-century later. It is also hard to believe that any Justice could write an opinion of the Court advancing almost every argument conceivable for why *Miranda* must be said to have announced a constitutional rule only to concur four years later in an opinion written by a colleague neither impressed by, nor even interested in, what that Justice had to say four years earlier. It is doubly astonishing when we are talking about *the same Justice*.

Despite the fact that he wrote the opinion of the Court in *Dickerson*, Chief Justice Rehnquist's majority opinions in *Tucker* and *Quarles* make him the Justice who has probably contributed more to the depreciation of *Miranda* than any other member of the Court. Those opinions drove a wedge between the *Miranda* rules and the privilege against self-incrimination. There was reason to believe that *Dickerson* had removed that wedge. But it is hard to miss *Patane*'s message that the wedge is still there – or has been reinserted.

Moreover, because he wrote the majority opinions in *Tucker* and *Quarles*, then flipfopped in *Dickerson* and then flipfopped again in *Patane*, the Chief Justice has probably contributed more to the confusion over *Miranda* than any other member of the Court.

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<sup>157</sup>Stone, *supra*, at 118.

<sup>158</sup>See *id.* at 123.