# TAKING *MIRANDA'S* PULSE

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## I. INTRODUCTION

The Supreme Court decided five *Miranda*[1] cases in 2003-2004, making this one of the most active fifteen-month periods for the law of self-incrimination since the controversial case was decided in 1966.[2] In this Article, we consider three of those five cases—*Chavez v.*

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

2. It also decided what most commentators expected would be a sixth *Miranda* case, Fellers v. United States, 540 U.S. 519 (2004), but it did not reach the *Miranda* issue in that case. *See infra* note 34.

*Martinez*,[3] *Missouri v. Seibert*[4] and *United States v. Patane*[5]—along with the blockbuster decision four years ago in *Dickerson v. United States*.[6] in an attempt to decipher what, if anything, this remarkable level of activity teaches us about the direction of the Court's self-incrimination jurisprudence. In the end, while these cases, like those before them, may not entirely clarify where the Court is going, they do make it plainly clear where the Court is not yet willing to go. As unsatisfactory as this may be to the purists on both sides of the *Miranda* controversy, this most recent set of self-incrimination cases demonstrates that a solid majority of the Court, anchored by Justices O'Connor and Kennedy, is willing to keep the *Miranda* rule pretty much where it has been mired for almost forty years: with its head in a constitutional never-never land but its feet firmly planted in a majority of the Court's apparently unshakable view of the realities of police interrogation.

By continuing to treat *Miranda's* core as a decision under the Self-Incrimination Clause of the Fifth Amendment, but analyzing its extensions and limitations using the tools of due process, these new cases also confirm that the Court intends to continue to confound these two very different constitutional principles. Ironically, that continued confounding will insure *Miranda's* continued survival, because, as these new cases illustrate, due process principles keep *Miranda* contained but they also keep it alive.

## II. BIRTH AND EARLY CHILDHOOD

For 175 years, the Supreme Court interpreted the Fifth Amendment's Self-Incrimination Clause to mean nothing more than what it says: namely, that criminal defendants cannot be compelled to testify in their own criminal proceedings.[7] "Proceeding" meant the criminal trial in question.[8] "Compelled," in the context of testimony,[9]

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3. 538 U.S. 760 (2003).

4. 124 S.Ct. 2601 (2004).

5. 124 S.Ct 2620 (2004). The other two cases, though touching on self-incrimination, were much less significant, and will not be discussed in this Article. *See* Hiibel v. Sixth Jud. Dist. of Nevada, 542 U.S. 177 (2004) (Nevada statute criminalizing properly stopped citizen's refusal to give police name and address does not violate Fifth Amendment) and Yarborough v. Alvarado, 541 U.S. 652, 666, 667 (2004) (state court's failure to consider suspect's young age in making its determination of whether suspect was in custody for *Miranda* purposes was not a violation of clearly established law for habeas corpus purposes).

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

7. The Self-Incrimination Clause provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

8. *See, e.g.*, Edward S. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 2 (1930) (arguing that the Self-Incrimination Clause should be

meant that a defendant could not be held in contempt for refusing to testify; there was no "right to remain silent," only the right not to be held in contempt if one chose to remain silent.[10]

Both of these pillars of limitation came crashing down in 1966 with the Court's decision in *Miranda v. Arizona*.[11] In a 5-4 decision, the Court held for the first time that the Self-Incrimination Clause operated in the stationhouse and not just in the courthouse.[12] The Court also held for the first time that confessions would be deemed "compelled" for self-incrimination purposes, and therefore inadmissible, if they were obtained without first advising the suspects of their "right to remain silent," of a new Fifth Amendment right to

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interpreted to mean that no one shall be compelled to give oral testimony against him- or herself as a defendant in a criminal proceding). As recently as 2000, the Court described the protections of the Self-Incrimination Clause as being limited to "compelled testimony that is used against the defendant *in the trial itself*," United States v. Hubbell, 530 U.S. 27, 37 (2000), although there is a long line of cases extending the protections to pre-criminal proceedings such as grand juries or civil cases where the questioning could incriminate the witness in any future criminal proceedings. *See, e.g.*, Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); Kastigar v. United States, 406 U.S. 441, 444-45 (1972). This extension of the words "in any criminal case" to pre-criminal case testimony was the first of what the Court would later call "prophylactic" extensions of the text of the Self-Incrimination Clause. *See infra* text accompanying notes 28-38. *But see* Thomas Y. Davies, *Farther and Farther from the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 TENN. L. REV. 987, 1026-30 (2003) (arguing that the Framers actually intended the Self-Incrimination clause to prohibit coerced confessions quite apart from their admission at any trial).

9. One very interesting question, which the Court has never expressly addressed, is whether the word "witness" in the self-incrimination clause means one who gives testimony, or whether the Founders intended the word to mean one who provides any evidence at all, whether testimonial or non-testimonial. The cases have presumed, without any particular historical inquiry, that "witness" is limited to its testimonial context, though Justices Scalia and Thomas, of all people, have suggested otherwise. *See infra* note 111.

10. *See, e.g.*, 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2266, at 400 (John T. McNaughton ed., rev. ed. 1961) (noting that courts tend to confound the rule excluding confessions and the rule creating a privilege against coerced testimony). Professor Alschuler makes a powerful case that the restrictive language of the Self-Incrimination Clause did not fully reflect pre-constitutional English and colonial common law, which really did recognize a "right to remain silent" bound up with deeply held views about the theological nature of the oath. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2631-32 (1996). That observation, however, does not really advance the constitutional inquiry, since the Founders, whether mistaken or not, chose language in the Fifth Amendment that did not create a "right to remain silent" in this broad sense.

11. 384 U.S. 436 (1966).

12. In dicta in *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (quoting Bram v. United States, 168 U.S. 532, 542 (1897)), the Court had hinted that it might be moving in this direction when it announced that the voluntariness of a confession was controlled by the privilege against s elf-incrimination. This dicta was criticized at the time as a "shotgun wedding of the privilege to the confessions rule." Lawrence Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449, 465 (1965).

counsel,[13] and of the rest of the now famous litany of mandatory advisements.[14]

The Court's interpretation was not only an unprecedented stretch of the language of the Self-Incrimination Clause,[15] it was also done in the face of a long history of judicial supervision of the problem of coerced confessions, first under the common law and then under the Due Process Clauses of the Fifth and Fourteenth Amendments. The Court has always expressed disapproval of coerced confessions, a disapproval whose roots can be traced to the Star Chamber, as Chief Justice Warren pointed out in his majority opinion in *Miranda*.[16] That disapproval had always been grounded in the confluence of twin evils: coerced confessions can be less trustworthy than voluntary confessions; and, distinct from trustworthiness, the dignity of the individual is offended when the state tortures or otherwise unduly coerces citizens to confess.[17]

These principles undergirded a rich pre-*Miranda* case law dealing with the problem of involuntary confessions, and included an evolving notion of "coercion"—facilitated by evolving notions of due process—extending beyond physical torture to include psychological

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13. *Miranda* introduced an implied Fifth Amendment right to counsel that attaches upon custodial interrogation, separate from the explicit right to counsel contained in the Sixth Amendment, which generally does not attach until charges are filed. United States v. Gouveia, 467 U.S. 180, 180-81 (1984). This has caused some confusion over whether the standards for waiving these two rights to counsel should be the same. *See, e.g.*, Patterson v. Illinois, 487 U.S. 285, 286 (1988) (holding that the *Miranda* warnings are sufficient to show a knowing and intelligent waiver prior to questioning of a suspect whose Sixth Amendment right to counsel had attached).

14. The complete litany, as crafted by Chief Justice Warren's own words, is:

> [The suspect] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

*Miranda*, 384 U.S. at 479.

15. In dissent, Justice Harlan labeled the majority's reasoning a "*trompe l'oeil*," a French phrase describing a kind of illusory painting. *Id.* at 510-11 (Harlan, J., dissenting). Joining Justice Harlan's dissent were Justices Stewart and White, with Justice Clark separately dissenting.

16. *Id.* at 459 (Harlan, J., dissenting).

17. *Faretta v. California*, 422 U.S. 806 (1975), is one of the most interesting due process cases because these twin objectives of due process—the reliability of the truth-finding process and the dignity of the individual—pulled in opposite directions. Mr. Faretta wanted to represent himself at trial, but the state trial judge ruled he must be represented by counsel in order to assure him a fair trial. The Supreme Court sided with Faretta, despite its acknowledgment that defendants who choose to represent themselves will usually be acting to their detriment. The Court held that a defendant's choice in this matter must control, out of "that respect for the individual which is the lifeblood of the law." *Id.* at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970)).

torture and even, in some circumstances, simple police deceit.[18] This voluntariness inquiry was plenary—courts were directed to look at the totality of circumstances in a given case to determine whether, under the Due Process Clause, a particular confession was voluntary.[19]

The *Miranda* majority rejected this level of protection as ineffective in a modern world where, it claimed, the very nature of police/citizen interaction was coercive, and traditional judicial attempts to ferret-out police coercion were ineffective. The majority therefore imposed a positive obligation on police to advise suspects of a given litany of rights before any custodial interrogation could begin. The price of failing to do so was that any unadvised statements would be deemed "coerced," and would not be admitted at trial.

Criticisms of the decision, including those of the four dissenters, have coalesced around the opinion's three most controversial aspects: (1) Is the majority's view of the "inherently coercive" nature of the police/citizen relationship an accurate one?[20]

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18. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 505 (1963) (confession involuntary where suspect held incommunicado for sixteen hours and told he would be not be allowed to call wife or lawyer until he confessed); Lynumn v. Illinois, 372 U.S. 528, 531 (1963) (confession involuntary where suspect's apartment surrounded by police and suspect told that financial aid to her children would be cut off and her children taken from her unless she cooperated); Leyra v. Denno, 347 U.S. 556, 558-61 (1954) (confession involuntary where suspect questioned on different days for eight hours, twenty-three hours and two hours, and during last session police psychiatrist, posing as medical doctor called to treat suspect's sinus condition, attempted to hypnotize suspect); Brown v. Mississippi, 297 U.S. 278, 285-86 (1936) (confession involuntary where defendant beaten and tortured over several days).

19. *See, e.g., Haynes*, 373 U.S. at 513 (holding that a court must consider "all of the attendant circumstances" when determining whether a confession was coerced); *see also* Payne v. Arkansas, 356 U.S. 560, 562 (1958) (noting that coercion can only be found "by reviewing the circumstances under which the confession was made"); Chambers v. Florida, 309 U.S. 227, 228 (1940) (requiring a "review of the facts upon which that issue [coercion] necessarily turns").

20. Most of the early critics on this point argued that the Court had an unduly cynical view of police interrogation, that what it characterized as an "inherently coercive" atmosphere was merely a conclusory description, that the Court made factual assumptions about the coercive nature of police interrogation for which there was no support in the record, and that *Miranda* might spell the end of effective police interrogation. For example, Justice Clark argued in his dissent that the majority had misrepresented what actually happens during interrogation. *Miranda*, 384 U.S. at 499-500 (Clark, J., dissenting). He pointed out that the "police manuals" described at length in the majority opinion, far from having been shown to have been widely adopted in police departments, had not been shown to be the official police manual for even a single police department. *Id.* He worried that the Court's broad opinion would undermine all interrogation efforts, not just those that put coercive pressure on suspects. *See id.* at 500 ("Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient."). Until there was better empirical support for the majority's concerns, Justice Clark would have preferred that the Court continue to control abuses through the Due Process Clause. *Id.* at 501. Versions of Justice Clark's empirical criticisms were echoed by many commentators. *See infra* note 21.

(2) Even if it were, does *Miranda* cure the disease?[21] (3) Finally, does the majority's view of the problem justify, as a constitutional matter, the Court's unprecedented extension of the Self-Incrimination Clause?[22]

Despite an unbroken cavalcade of criticisms—including Congress's 1968 legislation purporting to overrule the decision in federal cases[23]—*Miranda's* early years were relatively uneventful. Between 1966 and 1971, the Court decided only a handful of self-incrimination cases, and none of those was terribly controversial. The most important were *Johnson v. New Jersey*[24] and *Jenkins v. Delaware*,[25] two cases that established that *Miranda* was not retroactive.[26]

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21. Justice Harlan, in a dissent joined by Justices Stewart and White, worried that the majority opinion's system of warnings might have the perverse effect of stopping permissible police questioning of suspects, but not stopping unduly coercive questioning. He argued that police officers who would engage in impermissible forms of coercion to extract a confession were likely to be quite capable of lying about the pressures they had employed to extract a *Miranda* waiver. *Miranda*, 384 U.S. at 504-05 (Harlan, J., dissenting). More recent critics have taken up this argument that *Miranda's* formalism has left police in a position to do more mischief rather than less. *See, e.g.*, William J. Stuntz, Miranda's *Mistake*, 99 MICH. L. REV. 975, 988 (2001) (reviewing data that suggest that few suspects exercise their *Miranda* rights during questioning and that coercive questioning is pervasive); George C. Thomas III, Miranda's *Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091, 1092 (2003) (noting that if *Miranda* rights are waived, courts rarely question whether coercive measures were used). These criticisms have been bolstered by studies showing that giving or not giving the *Miranda* warnings has very little impact on a suspect's willingness to talk, *See* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda's *Defenders*, 90 NW. U. L. REV. 1084, 1087 (1996) (arguing that the benefits of *Miranda* are far outweighed by its costs). *But see* Stephen J. Schulhofer, Miranda's *Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 563 (1996) (arguing that *Miranda* is the best method of dealing with high crime rates). One of best presentations about *Miranda's* empirical failures is WELSH S. WHITE, *MIRANDA'S* WANING PROTECTIONS (2001).

22. The constitutional criticisms of *Miranda* have included not only the textual critiques outlined in this Article, but also deeper, federalism-based criticisms about the Court's Article III power to regulate the manner in which *state* police officers conduct their interrogations. *See, e.g.*, Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 147-56 (1985). As discussed *infra* in the text accompanying notes 46-48, the Court has managed to turn this potential constitutional infirmity into a constitutional strength, by concluding that Miranda must have been a rule of constitutional import precisely because the Court could not have otherwise constitutionally exercised supervisory authority over state courts.

23. 18 U.S.C. § 3501 (1968). This provision was held unconstitutional in *Dickerson v. United States*, 530 U.S. 428, 431-32 (2000), which is discussed in Part IV.A below.

24. 384 U.S. 719, 721 (1966) (holding that *Miranda* only applied to trials begun after the decision).

25. 395 U.S. 213, 213-14 (1969) (holding that *Miranda* did not apply retroactively to post-*Miranda* retrials).

26. There were only two other substantive *Miranda* cases decided by the Court in those first five years: Frazier v. Cupp, 394 U.S. 731 (1969) (dealing with the problem of a suspect's ambiguous invocation of the right to counsel) and Orozco v. Texas, 394 U.S. 324 (1969) (dealing

The first significant limitation on the case came in 1971, when the Court held in *Harris v. New York*[27] that *Miranda's* exclusionary rule is limited to use of the un-Mirandized statement by the prosecution in its case in chief, and that prosecutors are not prohibited from using otherwise voluntary but un-Mirandized statements to impeach defendants who choose to testify. *Harris* was a startlingly short opinion—it consumed a mere four pages in the U.S. reports—and the 5-4 majority's reasoning, written by the then new Chief Justice Burger, was terse: defendants have the right not to testify, but if they elect to testify they have no right to perjure themselves. Their voluntary, albeit un-Mirandized prior statements can be used to impeach them just like any traditionally voluntary prior statement can be used to impeach any witness on cross-examination.

*Harris* was the first ripple in what would become, over the next fifteen years, a tidal wave of controversy over *Miranda's* implications, a controversy driven by the decision's fundamental paradox of treating perfectly voluntary and reliable confessions as if they were "coerced" in a very new and untested sense.

## III. PUBERTY AND THE PAINFUL QUESTION OF PROPHYLAXES

The Fifth Amendment's Self-Incrimination Clause contains its own exclusionary rule; indeed, the clause itself is a kind of preemptive exclusionary rule.[28] A defendant simply cannot be compelled to testify by threat of contempt. The jury therefore never hears such compelled testimony. The rule in *Miranda*, by contrast, is a steroidal extension of that internal constitutional exclusionary rule, and was designed as a prophylaxis to discourage what the majority believed were widespread, fundamentally unfair, and often undetectable police practices in the interrogation room.

The *Miranda* majority was convinced that police, restrained only by the prospects of a difficult case-by-case voluntariness inquiry, were regularly overpowering suspects' volition, both by the "inherently

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with the question of when a suspect is in "custody" for purposes of *Miranda*). These are difficult problems in the every day world of police interrogation and trial court motions to suppress, and as a result they have generated a considerable body of law. But neither question touches too deeply on the core of *Miranda's* meaning, and certainly nowhere as deeply as the tumult that would be caused by the so-called "fruits" cases discussed in the balance of this article.

27. 401 U.S. 222, 226 (1971).

28. Justice Thomas made this point this Term in United States v. Patane, 124 S.Ct. 2620, 2628 (2004), discussed *infra* text accompanying notes 95-117. The Fourth Amendment, by contrast, does not contain any language suggesting that evidence obtained in its violation should necessarily be excluded. In this sense, the Fourth Amendment exclusionary rule created by Mapp v. Ohio, 367 U.S. 643, 657-58 (1961), is substantially more adventurous, and strays much farther from the constitutional text, than the exclusionary rule aspects of *Miranda*.

coercive" nature of custodial interrogation and by specific techniques touted in modern police manuals. Chief Justice Warren expressed concern over police manuals that advised interrogating officers to do their questioning at the police station in order to deprive the suspect "of every psychological advantage," to "exude an air of confidence" in order to "highlight the isolation," to "posit [the suspect's guilt] as a fact," to "minimize the moral seriousness of the offense, to cast blame on the victim of society," and generally "to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already."[29] The majority adopted the warnings regime, and its companion exclusionary rule, in an attempt to eradicate this sort of police abuse.

But what about other prophylaxes? We know from *Harris v. New York* that un-Mirandized but otherwise voluntary statements can be used to impeach defendants who decide to testify, but can they be used to lead police to other evidence—witnesses, subsequent Mirandized statements, or physical evidence—that in other contexts might be considered fruits of improper police conduct?[30] To the extent the answers to these questions depend on characterizing the *Miranda* exclusionary rule as a rule of constitutional import, or merely a prophylactic, non-constitutional extension of the core protections of the Fifth Amendment, the questions themselves go to the heart of the Court's own conception of the basis for the rule and its willingness to adhere to it.

In 1974, the Court faced this "fruits" question for the first time in *Michigan v. Tucker*,[31] a habeas corpus case in which the defendant's state conviction was obtained with evidence from a witness whose identity police discovered during an un-Mirandized but otherwise voluntary interrogation of the defendant. The defendant argued that his interrogation was "illegal" because he hadn't been Mirandized, and therefore that all the fruits of that "illegal" interrogation should be suppressed, including all the testimony from the witness. The Court, by an impressive 8-1 majority, disagreed, and characterized the un-Mirandized interrogation only as a departure from the

29. 384 U.S. at 449-50. With this rather mild description of the parade of modern interrogation horribles, one can understand the dissenters' concern that the real target of the majority's wrath was not unfair interrogations but any kind of interrogation at all. Moreover, as mentioned *supra* note 20, Justice Clark pointed out in his separate dissent that there was no evidence that even one of the police manuals relied on by the majority had actually been adopted by any police department.

30. The analogy refers to the Fourth Amendment's fruit of the poisonous tree doctrine. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963) (evidence procured after an illegal arrest inadmissible).

31. 417 U.S. 433, 435-37 (1974).

"prophylactic standards" set down in *Miranda*, and not as a violation of the defendant's core privilege against self-incrimination.[32]

The Court reached a similar result eleven years later in *Oregon v. Elstad*,[33] in which it refused to suppress a second, Mirandized, statement as the fruit of a first, un-Mirandized, statement, holding that the second statement could be admitted as long as it was voluntary. The Court specifically held that the mere fact that the police had failed to include in the *Miranda* warnings given prior to the second statement advice that the first state was inadmissible did not by itself render the second statement involuntary. Again, since the *Miranda* warnings are merely prophylactic and their violation does not necessarily give rise to a constitutional violation, a valid advisement can cure a prior failure to advise.[34]

The same "mere prophylaxis" approach drove the Court's analysis in the 1975 case of *Oregon v. Haas*.[35] In that case, the Court extended the rule announced in *Harris v. New York* to circumstances in which a defendant had been Mirandized, but whose statement was elicited after his request for a lawyer was disregarded and questioning

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32. *Id.* at 445-46. Actually, only six Justices took that approach; Justices Brennan and Marshall concurred only in the result, and they based their concurrence on their view that *Miranda* should not be applied retroactively. *Id.* at 455-56 (Brennan, J., concurring in the judgment). Only Justice Douglas opined that the witness's testimony was the fruit of an illegal interrogation and should be suppressed. *Id.* at 463-64 (Douglas, J., dissenting).

33. 470 U.S. 298, 300 (1985).

34. Two important "fruits" questions were left open by *Elstad*. First, is the result the same if the police *intentionally* decide not to give *Miranda* warnings before obtaining the first or "beachhead" statement? Second, is the result the same if the defendant's Sixth Amendment right to counsel attaches prior to the beachhead statement? The Court answered the first question this Term in *Seibert*, discussed *infra* text accompanying notes 76-94. It seemed poised to answer the second question, also this Term, in Fellers v. United States, 540 U.S. 519 (2004). Police questioned Fellers in his home, after he had already been indicted on methamphetamine charges. *Id.* at 521. Although they told him about the indictment, they did not give him *Miranda* warnings. *Id.* Fellers admitted knowing the other defendants and also admitted he had methamphetamines. *Id.* Later, at the station, the police gave Fellers his *Miranda* warnings, he waived his rights, and reiterated, in even more incriminating detail, his prior statement. *Id.* at 521-22. The Court declined to decide whether this case should be treated differently from *Elstad*. Instead, it remanded it back to the Eighth Circuit because that court had erroneously assumed that the Sixth Amendment had not been violated because Fellers had not been "interrogated" in his home. *Id.* at 524-25. Because the Sixth Amendment is broader than the Fifth Amendment and protects a defendant from any attempt "to deliberately elicit incriminating statements," *see* United States v. Henry, 447 U.S. 264, 270 (1980), the Court directed the Eighth Circuit to reconsider the Sixth Amendment issue using the proper standard. *Fellers*, 540 U.S. at 525. On remand, the Eighth Circuit concluded that there was no Sixth Amendment violation, noting that the initial statements were voluntary, that the police did not make any reference to Feller's initial uncounseled statements when questioning him at the police station, and that the questioning at the police station would have proceeded along the same lines even if Fellers had made no initial statement to the police. United States v. Fellers, 397 F.3d 1090, 1098 (8th Cir. 2005).

35. 420 U.S. 714 (1975).

continued. Such a defendant, if he chooses to testify, can be impeached with the non-Mirandized statements notwithstanding the fact that those statements were wrongfully elicited after the defendant invoked his right to counsel.[36]

Finally, in *New York v. Quarles*,[37] the Court once again emphasized the "prophylactic," non-constitutional nature of the *Miranda* warnings when it created a public safety exception to *Miranda*. In that case, police had information that an armed rapist was in a grocery store. When they arrested him in the back of the store, he had no gun on him. Without giving him any *Miranda* warnings, police asked him where the gun was, and he pointed toward some empty cartons on the floor, saying "The gun is over there." Police found a loaded revolver in one of the empty cartons. A majority of the Court permitted both the defendant's un-Mirandized statement about the location of the gun, and the gun itself, to be admitted. As a matter of public safety—in this case to prevent a loaded gun from remaining somewhere in a grocery store open to the public—the majority agreed that police could ask the defendant about the gun without violating *Miranda*.[38]

After *Quarles*, the non-constitutional pedigree of the *Miranda* extension seemed firmly established, and many opponents spent the ensuing years predicting that the Court would soon abandon *Miranda* entirely.[39] When it finally agreed, in 2000, to entertain the question of

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36. *Id.* at 722-23. *Haas* is a cross-examination version of the difficult fruits question the Court avoided in *Fellers*, discussed *supra* notes 2, 34. Under *Haas*, a violation of the *Miranda* right to counsel will not free a defendant to take the stand and testify, with impunity from cross-examination, in a manner different from the voluntary statement he gave, even if the statement was obtained in violation of his Fifth Amendment right to counsel. *Id.* at 722-24. It is difficult to see how a subsequent *Miranda* advisement and voluntary waiver—which, after all, includes the waiver of the new-found Fifth Amendment right to counsel - would not likewise cure a prior Sixth Amendment violation of the sort in *Fellers*.

37. 467 U.S. 649, 655-56 (1984).

38. Justice O'Connor concurred only in the result, and wrote separately that it was unnecessary to create a public safety exception in this case, because, in her view, the gun was admissible in any event under the rule announced in Michigan v. Tucker, 417 U.S. 433, 445 (1974). New York v. Quarles, 467 U.S. 649, 660-64 (1984) (O'Connor, J., concurring). Citing *Tucker*, she maintained that as long as statements taken in violation of *Miranda* were not used at trial, the use of evidence derived from those statements was permissible. *Id.* at 663. This issue of tangible fruits remained open until the Court's decision this Term in United States v. Patane, discussed *supra* text accompanying notes 95-117.

39. *See* Daniel P. Collins, *Farewell* Miranda*?*, 1995 PUB. INT. L. REV. 185, 202-06 (1995) (reviewing JOSEPH D. GRANO, CONFESIONS, TRUTH, AND THE LAW (1993)) (stating that the argument for overruling *Miranda* is persuasive); Alfredo Garcia, *Toward an Integrated Vision of Criminal Procedural Rights: A Counter to Judicial and Academic Nihilism*, 77 MARQ. L. REV. 1, 25 (1993) (suggesting that the exception announced in *Tucker* will lead to *Miranda's* abandonment); Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L.J. 733, 742 (1987) (noting the Attorney General's

whether Congress had the authority to overrule *Miranda*, virtually all commentators—opponents and supporters alike—were poised for *Miranda's* final demise. They would be surprised by the resilience of the thirty-four-year-old case.

## IV. THE MID-LIFE CRISIS: *DICKERSON* AND *CHAVEZ*

### *A.* Dickerson v. United States

In *Dickerson v. United States*,[40] the Court held, in a 7-2 decision written by Chief Justice Rehnquist, that despite all the earlier cases labeling *Miranda* as a "prophylactic" extension of the Self-Incrimination Clause of the Fifth Amendment, the rule was in fact a rule of constitutional magnitude for purposes of deciding whether Congress could overrule it. *Dickerson* dealt with a statute intended in part to overrule *Miranda* in federal courts, passed by Congress only two short years after *Miranda* was decided. The legislation was the Omnibus Crime Control and Safe Streets Act of 1968,[41] and Title II purported to undo *Miranda* by making voluntariness the sole issue for determining the admissibility of a confession or statement in federal criminal cases.[42]

The statute set out several factors that the federal judge hearing the suppression motion could take into account in determining the voluntariness issue, including whether the suspect had been advised of his right to remain silent and of his right to counsel.[43] But of course in declaring that none of those factors was to

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doubt as to the need for *Miranda*); Scott Lewis, Miranda *Out On a Limb*, CRIMINAL JUSTICE, Fall 1994, at 20, 60 (arguing that the Supreme Court seems poised to retreat from *Miranda*); Kathleen A. Barry, Note, *The Court Approves Ambiguous* Miranda *Warnings – Dims the "Bright Line" of Pre-Indictment Procedural Requirements*, 15 S. ILL. U. L. J. 213, 233 (1990) (arguing that the end result of the Court's efforts to "muddy" *Miranda's* "bright line" will be to abandon *Miranda* completely); Steven A. Drizin, Note, *Supreme Court Review: Fifth Amendment—Will the Public Safety Exception Swallow the* Miranda *Exclusionary Rule?:* New York v. Quarles, 75 J. CRIM. L. & CRIMINOLOGY 692, 713-14 (1984) (suggesting that *Quarles's* public safety exception will lead to *Miranda's* abandonment); Lisa Patrice Taylor, Note, Illinois v. Perkins: *Balancing the Need for Effective Law Enforcement Against a Suspect's Constitutional Rights*, 1991 WIS. L. REV. 989, 1022 (suggesting that the exceptions to *Miranda* will come to swallow the rule).

40. 530 U.S. 428, 451 (2000).

41. 18 U.S.C. § 3501 (1968).

42. 18 U.C.S. § 3501(a) (1999). The statute provided that "in any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given." *Id.*

43. *Id.* at § 3501(b). Another of the listed factors would have had the effect of broadening the voluntariness inquiry beyond its pre-*Miranda* boundaries. Section 3501(b)(2) expressly permitted the trial court to consider whether the suspect knew the nature of the suspected

be "conclusive on the issue of voluntariness,"[44]—and thus that a trial court could find a confession voluntary even though a suspect received no pre-interrogation warnings at all—the statute was a direct challenge to *Miranda*.[45]

In *Dickerson*, the Court held that Section 3501 was an unconstitutional invasion of the Court's exclusive power to interpret and apply the Constitution.[46] It also declined the defendant's alternative request that *Miranda* be overruled. Chief Justice Rehnquist's majority opinion, after conceding that "there is language in some of our opinions" that supports the view that *Miranda* was a non-constitutional exercise of the Court's supervisory powers over the lower federal courts,[47] nevertheless relied on three arguments to conclude that *Miranda* is a rule of constitutional law that Congress cannot overrule: (1) the *Miranda* rule was announced in a state case, not a federal case, and the United States Supreme Court has no supervisory powers over state courts; (2) the *Miranda* majority opinion clearly relied on the Self-Incrimination Clause and announced that it was giving "concrete constitutional guidelines" for law enforcement to follow; and (3) the *Miranda* majority invited Congress to create alternative protections against interrogative overreaching, but made it clear that any such alternatives must meet or exceed the protections provided by the rule announced by the Court.

The *Dickerson* majority admitted it had some doubts about the reasoning of *Miranda* and even went so far as to question whether it would reach the same result were it faced with the question for the

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offense at the time of his interrogation, an inquiry that the Court had acknowledged as late as 1987 was virtually irrelevant to voluntariness. Colorado v. Spring, 479 U.S. 564, 577 (1987) (holding that Miranda was not violated where a suspect was not informed of all possible interogation subjects in advance).

44. 18 U.S.C. § 3501(b).

45. That it took more than thirty years for the challenge to Section 3501 to reach the Court is testament to the fact that, for most of the intervening period, the Justice Department—whether under a Republican or Democrat administration—preferred to neglect the statute and avoid a direct challenge to *Miranda*. For an excellent account of the way administrations from Johnson through Clinton avoided Section 3501, *see generally* Michael Edmund O'Neill, *Undoing* Miranda, 2000 BYU L. REV. 185, 210-32. Indeed, the Clinton Justice Department, in its briefs in *Dickerson*, conceded that the statute was unconstitutional. Reply Brief of the United States, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525).

46. 530 U.S. at 437 (citing City of Boerne v. Flores, 521 U.S. 507, 517-21 (1997)). Had the rule in *Miranda* been characterized only as a non-constitutional exercise of the Court's supervisory authority over the lower federal courts, and in particular over the rules of evidence, then Congress would have had the ultimate authority to displace it. *Id.*; *see* Palermo v. United States, 360 U.S. 343, 353 n.11 (1959) ("[T]he power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress.").

47. *Dickerson*, 530 U.S. at 438.

first time.[48] But, in a much-quoted portion of the opinion, the Chief Justice described the *Miranda* warnings as having become "part of our national culture,"[49] hinted that precisely because they have become so routine, they are not interfering with legitimate police investigations,[50] and concluded that traditional "voluntariness" under the Due Process Clause is an ineffective substitute because it is more difficult for police to "to conform to. . . and for courts to apply in a consistent manner."[51]

Yet the majority was completely silent on the impact of its apparent re-constitutionalization of *Miranda*. Were *Tucker*, *Harris*, *Elstad*, and *Quarles* being overruled? Was the Court returning to a fully vigorous *Miranda* rule, and foreclosing all the past exceptions and any future exceptions, or just putting a halt to future exceptions? Or, even more narrowly, was it merely drawing a line between the Court and Congress? Paul Cassell (now a federal district judge, but then a law professor), whom the Court appointed in *Dickerson* to argue the constitutionality of Section 3501 because the Clinton Justice Department refused to do so,[52] wrote that when he first read the decision, he asked himself, "Where's the rest of the opinion?"[53]

In a scathing dissent, Justices Scalia and Thomas not only rejected each of the majority's justifications, but accused it of "writ[ing] a prophylactic, extraconstitutional Constitution, binding on Congress and the States."[54] Most commentators, regardless of their position on *Miranda*, chastised the *Dickerson* majority for its stubborn refusal to harmonize *Miranda* with its prophylactic offspring.[55] If the

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48. *Id.* at 443 ("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").

49. *Id.*

50. *Id.* at 443-44. *See supra* note 21 for articles in which commentators discuss the apparently paradoxical contention that "conservatives" should support *Miranda* and "liberals" should oppose it, because it leaves police interrogation without meaningful regulation. Perhaps the Chief Justice's opinion in *Dickerson* can be understood as an expression of this practical perspective.

51. *Dickerson*, 530 U.S. at 444.

52. *Cf. supra* note 45.

53. Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in* Dickerson, 99 MICH. L. REV. 898, 898 (2001).

54. *Dickerson*, 530 U.S. at 461.

55. *See, e.g.*, Cassell, *supra* note 53, at 901; Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1071-77 (2001); Stephen J. Schulhofer, Miranda, Dickerson, *and the Puzzling Persistence of Fifth Amendment Exceptionalism*, 99 MICH. L. REV. 941, 941-44 (2001). These articles were part of an entire symposium issue in the Michigan Law Review devoted to *Dickerson* and its impact on the law of confessions. *See also, e.g,* Yale

*Miranda* warnings are constitutionally required (that is, if un-Mirandized statements are "involuntary" in some constitutional sense), then how can fruit from such statements be admissible? How can such statements nevertheless be used to impeach testifying defendants? Conversely, if the real reason fruits from un-Mirandized statements are admissible, and testifying defendants can be impeached with their un-Mirandized statements, is that the *Miranda* warnings themselves are not constitutionally mandated, then why can't Congress dispense with the warnings? *Dickerson* was not only surprising in result, it reflected a surprising, even maddening, unwillingness by a majority of the Court to acknowledge the fundamental *Miranda* problem, in a case seemingly designed to force such acknowledgment.[56]

Because Chief Justice Rehnquist's opinion commanded such a large majority, and also because it was written by one of *Miranda's* strongest critics, several commentators[57] and even a few courts[58] predicted that the Court would now undo many if not all of the *Tucker*-to-*Quarles* restraints imposed on *Miranda* during its "prophylactic" years, and revert to the much more vigorous

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Kamisar, Miranda *Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in* Dickerson, 33 ARIZ. ST. L.J. 387, 391-401 (2001).

56. Professor Klein was typical of the harshest *Dickerson* critics:

> [W]hen squarely faced with the issue of whether the four *Miranda* warnings were required by the federal constitution, [the Court] not only refused to answer coherently, but breached its duty to provide a justification for *Miranda* or *Dickerson* and squandered an opportunity to rationalize contradictory case law regarding *Miranda's* exceptions.

Klien, *supra* note 55, at 1071.

57. *See, e.g.*, Anthony X. McDermott & H. Mitchell Caldwell, *Did He or Didn't He? The Effect of* Dickerson *on the Post-Waiver Invocation Equation*, 69 U. CINN. L. REV. 863, 928 (2001); Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda?, 85 CORNELL L. REV. 883, 936-55 (2000).

58. Only one Circuit actually held that *Dickerson* overruled any of the prior *Miranda* exceptions—the Tenth Circuit, in United States v. Patane, 304 F.3d 1013, 1019-23 (2002), which, of course, the Supreme Court reversed. *See infra* text accompanying notes 95-117. One other Circuit mused, in dictum, about the possibility that *Dickerson* had overruled the prior *Miranda* exceptions. Allen v. Roe, 305 F.3d 1046, 1050, n.4 (9th Cir. 2002). Only one district court and one state supreme court reached that same result: United States v. Kruger, 151 F. Supp.2d 86, 101 (D. Me. 2001); State v. Knapp, 666 N.W.2d 881, 896-900 (Wis. 2003), *vacated by* 124 S.Ct. 2932 (2004). Every other reported decision addressing the issue concluded that *Dickerson* did not displace any of the exceptions. *See, e.g.*, United States v. Villalba-Alvarado, 345 F.3d 1007, 1011 (8th Cir. 2003); United States v. Sterling, 283 F.3d 216, 219 (4th Cir. 2002), cert. denied, 536 U.S. 931 (2002); United States v. DeSumma, 272 F.3d 176 (3rd Cir. 2001), *cert. denied*, 535 U.S. 1028, 180 (2002); United States v. Orso, 266 F.3d 1030, 1040 (9th Cir. 2001), *cert. denied*, 537 U.S. 828 (2002); United States v. Gilmore, No. 03-CR-0030-C-01, 2004 WL 602646, at *6 (W.D. Wis. Mar. 16, 2004); United States v. Bin Laden, No. S(7) 98 CR. 1023(LBS), 2001 WL 30061, at *3, n.4 (S.D.N.Y. Jan. 5, 2001); *see also* United States v. Faulkingham, 295 F.3d 85, 94 (1st Cir. 2002) (tangible fruits not suppressed because underlying *Miranda* violation was only negligent, not intentional).

"constitutional form" of the opinion for which its original supporters had argued. Alas, as if simply to confound the "Chicken Littles" on all sides of the question, the Court decided in 2002 that *Miranda* was once again just a "prophylactic" decision.

### *B.* Chavez v. Martinez

In *Chavez v. Martinez*,[59] the Court held, in a four-Justice plurality opinion, that suspects in custody have no constitutional right to be free of un-Mirandized interrogations, and thus that such suspects have no claims under Section 1983 merely because police officers interrogate them without giving them Miranda warnings.[60]

Police officers near Oxnard, California were questioning a man about suspected drug trafficking when they noticed another man approach on a bicycle.[61] They ordered the bicyclist, Mr. Martinez, to stop and he complied. He also obeyed their commands to dismount, to spread his legs and to place his hands on his head.

During a pat down search for weapons (during which a knife was found), an altercation developed between Martinez and the stopping officers. The officers testified that Martinez began to flee, and they had to tackle him to prevent his escape. Martinez testified he never tried to escape, and that the officers tackled him for no justifiable reason. In any event, during this altercation, one of the officers yelled, "He's got my gun," and in response another officer shot Martinez several times, leaving him permanently blinded and paralyzed from the waist down. Martinez was then arrested, without being Mirandized.

Sergeant Ben Chavez, who was a patrol supervisor, arrived at the scene together with several paramedics after the arrest. He accompanied Martinez to a hospital emergency room where, without Mirandizing him, he conducted a forty-five-minute interrogation, often over the treating doctors' objections,[62] that focused on the central

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59. 538 U.S. 760 (2003).

60. As discussed *infra* text accompanying notes 67-69, this plurality opinion was limited to the so-called *Miranda* issue; the Court was just as badly split, along different lines, on the two other issues it decided: whether the Self-Incrimination Clause applied at all since Martinez was never charged with a crime; and whether Martinez had a § 1983 claim under the due process clause of the Fourteenth Amendment.

61. Since there was no trial, these are the facts as developed at the hearing on the cross-motions for summary judgment.

62. The Ninth Circuit noted that medical personnel on numerous occasions ordered Sergeant Chavez to leave the emergency room, but that he remained, and would continue the interrogation and turn his tape recorder back on whenever medical personnel temporarily left

question of whether Martinez did in fact pull one of the other officers' guns. Viewed in a light most favorable to Martinez, the interrogation, which was taped and the full transcript of which was attached as an appendix to the record, could be characterized as involving s uggestions by Sergeant Chavez that he would continue to interrupt Martinez's receipt of medical care unless Martinez confessed that he had pulled the officer's gun and pointed it at her. Eventually, after punctuating his responses with phrases that included "I am choking" and "I am dying," Martinez admitted he pointed a gun at the police before he was shot.[63]

In a nuance that should have made the case easier, yet appears to have made it much more difficult, Martinez was never charged with a crime. He filed an action under 42 U.S.C. § 1983 against all the officers, including Sergeant Chavez, asserting three claims for relief: (1) that the officers illegally stopped him, (2) that the officers used excessive force, and (3) that Sergeant Chavez coerced his confession.

Both sides filed cross motions for summary judgment. The district court, after an evidentiary hearing, denied both sets of cross motions on the no probable cause and excessive force claims, but granted partial summary judgment (on liability) in favor of Martinez on his claim that Sergeant Chavez coerced the confession.[64] Sergeant Chavez filed an interlocutory appeal challenging that ruling.

The Ninth Circuit affirmed, concluding that Martinez had a constitutional right under the Self-Incrimination Clause of the Fifth Amendment to be free of coercive police interrogation despite the fact that no criminal case was ever filed against him, and upholding the district court's finding that the confession was in fact coerced.[65] It further concluded that Martinez's confession claim was alternatively cognizable as a violation of his right to substantive due process under the Fourteenth Amendment, although Martinez never made that argument either in district court or in the Ninth Circuit.[66]

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the room. Martinez v. City of Oxnard, 270 F.3d 852, 854 (9th Cir. 2001), *reversed by sub. nom* Chavez v. Martinez, 538 U.S. 760 (2001). Presumably, this explains why the total interrogation time was forty-five minutes but the taped portion lasted only ten minutes.

63. 538 U.S. at 764. Although Martinez eventually admitted pointing a gun, he never did explicitly admit that he took the gun from the other officer.

64. The district court opinion was not published. The cross motions were raised in the context of the defense of qualified immunity, with Sergeant Chavez claiming that he was immune as a matter of law and Martinez claiming that there was no immunity as a matter of law. The immunity issue, in turn, depended on whether Martinez demonstrated that he was deprived of a "clearly established" constitutional right. Saucier v. Katz, 533 U.S. 194, 199 (2001). It was in this context that the Ninth Circuit decided that citizens have a "right" not to be coercively interrogated, and that the Supreme Court decided otherwise.

65. Martinez v. Oxnard, 270 F.3d 852 (9th Cir. 2001).

66. *Id.* at 857.

The Supreme Court reversed, basing its decision on the two issues discussed by the Ninth Circuit—whether the Self-Incrimination Clause of the Fifth Amendment is violated by a coerced confession when no criminal case is ever filed, and whether the confession in this case violated substantive due process—and adding a third issue for good measure—whether the failure to give *Miranda* warnings itself was a constitutional violation, another claim Martinez had never made either in the trial court or in the Ninth Circuit. The case generated six separate opinions, none of which commanded a majority on either of the *Miranda* issues.

In a plurality opinion written by Justice Thomas, joined by the Chief Justice and Justices O'Connor and Scalia, the Court concluded that Martinez had no Fifth Amendment claim at all—whether based on the argument that the confession was coerced or merely on the argument that it was un-Mirandized—because Martinez had never been charged with a crime.[67] In another plurality opinion again written by Justice Thomas, the Court concluded that Martinez did not have a claim based on the lack of *Miranda* warnings because those warnings are required only as a "prophylactic" matter and do not rise, at the moment an un-Mirandized interrogation takes place, to the level of a constitutional violation.[68] In a 5-3 opinion written by Justice Souter, the Court concluded that Martinez *might* have a substantive due process claim under the Fourteenth Amendment and remanded that claim for further proceedings.[69]

The fractious opinions in *Chavez* reflect the Court's profound and longstanding divisions over the meaning of the "core" of the Self-Incrimination Clause and its "prophylactic" *Miranda* extensions. Justice Thomas and those who concurred with him make a strong textual case when they insist that the Self-Incrimination Clause has nothing to do with this case because Martinez was never charged with a crime. But of course neither had Ernesto Miranda been charged with a crime as of the time of his confession. Once we accept *Miranda's* axiom that the Self-Incrimination Clause is not limited to the courthouse, there is no obvious reason it should be limited to

67. *Chavez*, 538 U.S. at 763. Justice Kennedy, joined by Justices Stevens and Ginsburg, dissented from this portion of the opinion, claiming that a self-incrimination violation occurs the moment a suspect is coerced into making a statement. *Id.* at 789 (Kennedy, J., concurring).

68. *Id.* at 776.

69. *Id.* at 778-80. On remand, the Ninth Circuit concluded as a matter of law that Sergeant Chavez's alleged conduct, if true, would violate Martinez's rights of substantive due process, and therefore that Sergeant Chavez enjoyed no qualified immunity. Martinez v. Oxnard, 337 F.3d 1091, 1092 (9th Cir. 2003). It remanded the case to the district court for trial on the Section 1983 claim based on substantive due process, as well as on the no probable cause and excessive force claims. *Id.*

circumstances in which a criminal case happens to be filed at a later date, which is precisely what Justice Kennedy argues in his dissent to this portion of the case.[70]

Likewise, the plurality holding that the mere lack of *Miranda* warnings is not in itself a constitutional violation is hard to explain after *Dickerson*. Apparently, and with no principles to guide the Court other than the arithmetic of its own internal divisions, *Miranda* continues to be a non-constitutional "prophylactic" decision for all purposes other than the question of who gets to decide whether to keep it around. As we shall see in the Court's latest cases, that is precisely the course that a shifting five-Justice majority has chosen.

Finally, Justice Souter's 5-3 opinion on the substantive due process claim is remarkable only because three Justices dissented to it. How can it be that a suspect, shot and paralyzed by police, whose emergency room treatment has been arguably interrupted and will continue to be interrupted unless he confesses, does not at least state a claim for a violation of substantive due process?[71] *Miranda's* confounding of the Fifth and Fourteenth Amendments, as we discuss below, has not only blurred its supporters to the limits of the Fifth Amendment, it has also blurred its detractors to the reach of the Fourteenth Amendment.[72]

## V. SETTLING INTO A POST-CRISIS MATURITY: *SEIBERT* AND *PATANE*

In the first of the Court's 2004 *Miranda* cases, *Missouri v. Seibert*,[73] the Court began to confront the "fruits" questions left open by *Elstad*.[74] In the second, *United States v. Patane*,[75] decided on the

70. *Chavez*, 538 U.S. at 789 (Kennedy, J., dissenting).

71. Our rhetorical question makes the non-rhetorical assumption that there is such a thing as substantive due process under the Fifth and Fourteenth Amendments. Although it does appear that even the Court's strictest textualists—Justices Scalia and Thomas—have succumbed at least to the precedential, if not doctrinal, view that the Constitution's reference to "due process" embodies unarticulated substantive limitations on the power of the state, judges and legal scholars alike remain divided over the legitimacy, and scope, of the doctrine. *Compare* Mays v. East St. Louis, 123 F.3d 999, 1001 (7th Cir. 1997) (Easterbrook, J.) ("Substantive due process is an oxymoron"), John Harrison, *Substantive Due Process and The Constitutional Text*, 83 VA. L. REV. 493, 495 (1997) (arguing there is little textual or historical support for the idea of substantive due process), *and* ROBERT J. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 240 (1990) (same), *with* Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 892 (2003) (arguing that Court should read the notion of substantive due process even more broadly); Gregory C. Cook, *Footnote 6: Justcie Scalia's Attempt to Impose the Rule of Law on Substantive Due Process*, 14 HARV. J. L. & PUB. POL'Y 853 (1991) (same).

72. *See infra* text accompanying notes 117-134.

73. 124 S.Ct. 2601, 2613 (2004).

74. *See supra* note 34.

same day, the Court answered the tangible fruits question left open by Justice O'Connor's concurrence in *Quarles*.[76] Both cases confirm that the Court remains inexplicably wedded to simultaneously preserving the *Miranda* rule and all of its gutting exceptions.

### *A.* Elstad *Revisited*

*Seibert* answered the question specifically left open in *Elstad*: what if police *intentionally* fail to Mirandize suspects with the specific purpose of getting them to confess, then Mirandize them and get them simply to repeat the earlier confession? The Court refused to apply *Elstad* in such circumstances, and thus created a kind of bad faith exception to the *Elstad* exception.

Patrice Seibert was convicted of second degree murder in a Missouri state court for her role in the death of Donald Rector, a

Rector to die in the fire. Once this admission was obtained, and after a twenty-minute break for coffee and a cigarette, Seibert was Mirandized and, after a waiver was obtained, interrogated on audio tape. During this second interrogation, with the officer occasionally reminding Seibert of her earlier statements, Seibert again admitted that she knew the plan was for Rector to die.

Relying on *Elstad*, the trial judge denied Seibert's motion to suppress the taped statement, that statement was admitted in the prosecution's case in chief, and Seibert was convicted of second degree murder. The Missouri Court of Appeals affirmed the conviction, also relying on *Elstad*.[77]

In a 4-3 decision, the Missouri Supreme Court reversed the conviction, concluding that the rule in *Elstad* cannot apply when the police intentionally fail to Mirandize the first statement with the express purpose of then locking the suspect into a second, Mirandized, confession.[78] Announcing that *Miranda's* twin purposes were the suppression of untrustworthy testimony and the deterrence of "improper," albeit not coercive, police conduct, and frequently citing Justice Brennan's dissent in *Elstad*, the majority on the Missouri Supreme Court held that police tactics designed to avoid the impacts of *Miranda* are themselves the very sort of "misconduct" *Miranda* was designed to deter. "To hold otherwise," said the majority, "would encourage future *Miranda* violations and, inevitably, *Miranda's* role in protecting the privilege against self-incrimination would diminish."[79] It reversed the conviction and remanded for a new trial without the statements from either interrogation.[80]

The Supreme Court granted certiorari,[81] and in a 5-4 decision affirmed the Missouri Supreme Court, creating a kind of bad faith

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77. State v. Seibert, No. 23729, 2002 WL 114804, at *9 (Mo. Ct. App. Jan. 30, 2002), *vacated by* 93 S.W.3d 700, 707 (Mo. 2002).

78. State v. Seibert, 93 S.W.3d 700, 704, 707 (2002).

79. *Id.* at 706-07.

80. The three dissenting justices relied on *Elstad*, and chided the majority for its conclusion that the first un-Mirandized statement was designed "to weaken Seibert's ability to knowingly and voluntarily exercise her constitutional rights." *Id.* at 709 (Benton, J., dissenting). In the dissent's view, the only legitimate inquiry, given *Elstad*, was whether the first statement was coerced in the old fashioned due process sense. Absent that, the dissent believed *Elstad* required affirmance. *Id.* at 709-11.

81. *Elstad* had left open the question of whether a second Mirandized confession would still be admissible if the police *intentionally* failed to Mirandize in the first interrogation, *supra* note 34, and in the intervening years the circuits had become split on this issue. *Compare* United States v. Gale, 952 F.2d 1412, 1418 (D.C. Cir. 1992) (dictum) (deliberate "end run" around *Miranda* would not be permitted) *and* United States v. Carter, 884 F.2d 368, 373 (8th Cir. 1989) (same), *with* United States v. Orso, 266 F.3d 1030, 1036-37 (9th Cir. 2001) (en banc) (applying *Elstad* despite intentional failure to Mirandize first statement) *and* United States v. Esquilin, 208 F.3d 315, 319-21 (1st Cir. 2000) (same).

exception to the *Elstad* exception. We say "kind of bad faith exception" because the plurality opinion, written by Justice Souter and joined by Justices Stevens and Ginsburg, specifically resisted the temptation to create a classic bad faith test focused on the subjective intent of police. Instead, the plurality described the inquiry to be made in any two-step interview situation as whether "the *Miranda* warnings delivered midstream could have been effective enough to accomplish their object" of truly rendering the second statement voluntary, and not a mere regurgitation of the un-Mirandized first statement.[82] In making this determination, the plurality focused on the external circumstances of the interrogations, rather than on the subjective state of mind of the police.[83] It listed factors such as whether the two interrogations took place at the same place and were performed by the same police personnel, the subject matter of the two interrogations, and the time between the two interrogations.[84]

In his concurring opinion, Justice Kennedy attempted to articulate a more meaningful explanation of the tension between *Miranda* and its exceptions—that is, more meaningful than the axioms in *Dickerson* (Congress cannot overrule *Miranda*) and in the plurality opinion (police cannot overrule *Miranda*). He argued that the inquiry should be whether a given exception "further[s] important objectives without compromising *Miranda's* central concerns."[85] This drives Justice Kennedy to propose a much more traditional, and narrower, bad faith exception to *Elstad*: only where police are intentionally using the two-step interrogation technique "in a calculated way to undermine the *Miranda* warning" would Justice Kennedy depart from the *Elstad* exception, and suppress the second, Mirandized, statement.[86]

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82. Missouri v. Siebert, 124 S.Ct. 2601, 2612 (2004). Yet a strange kind of bad faith seems to have crept into the plurality's opinion when it concluded the Missouri police engaged in "a police strategy adapted to undermine the Miranda warnings." *Id.*

83. The Court has tried in other Fifth Amendment cases to avoid tests that focus specifically on the subjective intent of the officers, presumably because such tests might be too easy for police to manipulate to their advantage. Thus, for example, in Rhode Island v. Innis, 446 U.S. 291, 301 (1980), where the Court was faced with the issue of whether statements between two police officers in their patrol car constituted "interrogation," the Court announced that the test to be applied was whether the words or actions on the part of the police were such that "the police should know are reasonably likely to elicit an incriminating response from the suspect." The test did not ask specifically whether the police were attempting to get a response from the suspect. William T. Pizzi, *The Privilege Against Self-Incrimination in a Rescue Situation*, 76 J. CRIM. L. & CRIMINOLOGY 567, 581-82 (1985).

84. *Seibert*, 124 S.Ct. at 2612-13.

85. *Id.* at 2614 (Kennedy, J., concurring).

86. *Id.* at 2616.

Justice Breyer concurred with the plurality result from exactly the opposite direction. In his view, all fruits of un-Mirandized statements—including second statements—should be presumed inadmissible, and that presumption could be rebutted only by a showing that the initial failure to warn was done in good faith.[87]

The dissent was written by Justice O'Connor, joined by the Chief Justice and Justices Scalia and Thomas. The central point of O'Connor's dissent is that *Miranda* itself is grounded on the assumption that the warnings work, and *Elstad* made it clear that, despite an earlier violation, a suspect is no more "coerced" into waiving his right to remain silent by an earlier statement than by the inherently coercive nature of police interrogation in general. As she put it, *Elstad* was precisely about the question of the "psychological impact of the suspect's conviction that he has let the cat out of the bag,"[88] and that:

> In Elstad, we refused to "endo[w] those psychological effects" with "constitutional implications." [Citation omitted.] To do so, we said, would "effectively immuniz[e] a suspect who responds to pre-Miranda warning questions from the consequences of his subsequent informed waiver," an immunity that "comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being compelled to testify against himself."[89]

There are several interesting things about the opinions in *Seibert*. First, the plurality opinion begins, unlike the Chief Justice's opinion in *Dickerson*, with a detailed, almost nostalgic, recapitulation of *Miranda*.[90] It is clear, again unlike *Dickerson*, indeed despite *Dickerson*, that a majority of Justices are re-engaging in a debate about *Miranda* itself, a debate expected in *Dickerson*, but which never came. For example, Justice Souter begins one section of his opinion with this observation: "There are those, of course, who preferred the old way of doing things, giving no warnings and litigating the voluntariness of any statement in nearly every instance."[91]

Also interesting, of course, is what appears to be the stirrings of a new *Miranda* alignment on the Court, with Justice Kennedy now wielding the fifth vote, and Justice O'Connor in the minority. When was the last time Justice O'Connor was in the minority in a *Miranda*

87. *Id.* at 2613-14 (Breyer, J., concurring).

88. *Id.* at 2619 (O'Connor, J., dissenting) (quoting Oregon v. Elstad, 470 U.S. 298, 311 (1985)).

89. *Id.* (quoting *Elstad*, 470 U.S. at 312).

90. *Id.* at 2607-08.

91. *Id.* at 2608. This is a somewhat inaccurate suggestion, since even after *Miranda*, defendants have been free to litigate the traditional voluntariness of their confessions, and in fact, in the judge-author's experience, quite freely do so.

case?[92] Too much can be read into the tea-leaves of sheer nose-counting, especially given *Patane*, which we discuss below and in which Justice O'Connor was back again in her comfortable position of defending both *Miranda's* core and its traditional exceptions. But there can be no doubt that *Seibert* marks an important moment, perhaps not so much because of Justice O'Connor's dissent, but because of what she was dissenting against: both the plurality's willingness to gut the *Elstad* exception beyond recognition, as well as Justices Kennedy's and Breyer's willingness to inject the subjective intentions of the interrogating police into the *Miranda* controversy.

In the end, we suggest that this latter point is what makes *Seibert* potentially significant—a thin four-person plurality is grudgingly willing to cut back on the *Elstad* exception and to enforce *Miranda's* exclusionary rule in the two-interview situation under certain limited circumstances (circumstances that will be easily avoided by clever police), but is not quite yet willing to cast the whole *Elstad* exception to the bad faith / good faith wolves. The focus has remained on the *suspect*, and on the effect the first non-Mirandized interview may have had on the voluntariness of the second statement.

With Justices Kennedy and Breyer now in the fold, the Court is coming perilously close to recognizing a generalized bad faith exception to the *Miranda* exceptions,[93] which could be the final straw in any colorable attempt to keep the *Miranda* rule bounded by some semblance of constitutional meaning. Despite all the *Miranda* waxings and wanings over the last forty years, the Fifth Amendment is still about compulsion, and any self-incrimination inquiry into the constitutionality of police interrogation must still be grounded in some fashion, no matter how attenuated, on the voluntariness of the confession. As Justice O'Connor put it, "voluntariness is a matter of the suspect's state of mind, [so] we focus our analysis on the way in which suspects experience interrogation. . . . Thoughts kept inside a police officer's head cannot affect that experience."[94]

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92. The answer is that Justice O'Connor has *never* been in the minority in any significant *Miranda* case. She was the fifth, and occasionally sixth, vote in all the exceptions cases decided since her appointment and she voted with the majority in the *Dickerson* retrenchment, and voted with the majorities, at least as to the results, in all three of the partial opinions in *Chavez v. Martinez*..

93. Or, in Justice Breyer's case, to recognize a good faith exception to a complete undoing of the *Miranda* exceptions. *Seibert*, 124 S.Ct. at 2613.

94. *Id.* at 2617 (O'Connor, J., dissenting).

### B. Tangible Fruits

In the last of the new cases, *United States v. Patane*,[95] the Court again addressed the "fruits" issue. This time it tackled the problem of tangible fruits, a problem it had managed to dodge for thirty-eight years. The Court held, in accordance with the result Justice O'Connor had suggested in her concurrence in *Quarles*,[96] that tangible fruits are no different than any other kind of *Miranda* "fruit," and that the *Tucker-Elstad* rule applies to admit such fruits despite the failure to Mirandize.[97]

The case initially arose when two police officers in Colorado Springs, Colorado, went to the residence of Samuel Patane to arrest him for violating a restraining order that prohibited him from contacting his ex-girlfriend.[98] One of the officers, Detective Josh Benner, had received information from an agent of the federal Bureau of Alcohol, Tobacco, and Firearms that Patane was in possession of a Glock pistol. After reaching the residence and inquiring into the violation of the restraining order, the other officer placed Patane under arrest.[99] At this point, Detective Benner began to give Patane his *Miranda* warnings, but after informing him of his right to remain silent, Patane interrupted Benner, stating that he knew his rights, and neither officer completed the full set of *Miranda* warnings.[100]

Detective Benner then asked Patane about the Glock.[101] Patane was initially reluctant to discuss the matter because, he told Detective Benner, "I don't want you to take it away from me."[102] But Benner persisted, and Patane eventually told Benner that the gun was in his bedroom.[103] He then gave Benner permission to retrieve the pistol, which Benner did.[104]

Patane was booked on state charges of violating the restraining order.[105] After the police confirmed that Patane had a prior felony

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95. 124 S.Ct. 2620 (2004).

96. *See supra* note 38.

97. United States v. Patane, 124 S.Ct. 2620, 2628 (2004). Assuming, pursuant to *Seibert*, that the failure to Mirandize did not seem to be intentional. *See supra* text accompanying notes 82-86.

98. *Id.* at 2624.

99. *Id.* at 2625.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

drug conviction, he was also charged in federal court with possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1).[106]

At his federal trial, the district court suppressed the gun because it concluded police lacked probable cause to arrest him on the restraining order charge.[107] For that reason, there are no district court findings specific to the self-incrimination issues. The Tenth Circuit reversed the district court on the probable cause issue, and it then concluded that the gun should nevertheless be suppressed as fruit of the *Miranda* violation.[108] It reasoned (without the benefit of *Chavez*) that *Dickerson* impliedly overruled *Elstad* and all the other "fruits" cases, and that because *Miranda* violations are now of constitutional magnitude, the tangible fruits of those constitutional violations must now be suppressed.[109]

The Supreme Court reversed in an opinion written by Justice Thomas, joined by the Chief Justice and Justice Scalia, and in which Justices O'Connor and Kennedy concurred. This five-Justice majority rejected the Tenth Circuit's holding that *Dickerson* wiped out the traditional *Miranda* fruits exceptions, and it did so in an opinion that used the word "prophylactic" no less than six times. *Miranda* may itself be a rule of constitutional import, but the majority held that "the closest possible fit must be maintained between the Self-Incrimination Clause and any rule designed to protect it."[110] It concluded that, because the Fifth Amendment traditionally has not applied to non-testimonial evidence,[111] there was no reason to create a

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106. *Id.*

107. *Id.*

108. 304 F.3d 1013, 1023 (10th Cir. 2002), *reversed by* 124 S.Ct. 2620 (2004).

109. *Id.* at 1029. The Tenth Circuit, in *Patane*, was the only Circuit to hold that *Dickerson* displaced any of its "mere prophylactic" predecessors. *See supra* note 58.

110. 124 S.Ct. 2628.

111. The dissenters quite properly labeled this proposition "an overstatement." *Id.* at 2631 (Souter, J., dissenting). The line between "testimonial" and "non-testimonial" evidence has not always been easy to draw. *See, e.g.*, United States v. Fisher, 425 U.S. 391, 410 (1976) (the very act of producing documents can sometimes have "communicative aspects" quite apart from contents). This so-called "act of production" doctrine was reaffirmed in United States v. Hubbell, 530 U.S. 27 (2000), although in a concurring opinion Justices Scalia and Thomas suggested it should be re-examined in light of the history of the Fifth Amendment. *Id.* at 49-55 (Thomas, J., concurring). These two Justices suggest that there is evidence that the word "witness" in the Self-Incrimination Clause was never intended to be limited to testimony, and that a "witness" is anyone who gives evidence of any kind, whether testimonial or non-testimonial (*e.g.*, physical evidence). *Id.* at 49 (Thomas, J., dissenting). For discussions of the act-of-production doctrine, and of the suggestions by Justices Scalia and Thomas in their *Hubbell* concurrence, see generally Richard Nagareda, *Compulsion "To Be a Witness" and the Resurrection of* Boyd, 74 N.Y.U. L. REV. 1575 (1999) (arguing that textual, historical, and doctrinal grounds exist to show that the Fifth Amendment's phrase "to be a witness" is synonymous with "to give evidence"); *see also* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 883-89 (1995) (describing the Supreme Court's movement away

prophylactic extension of *Miranda* to exclude non-testimonial evidence obtained pursuant to an otherwise voluntary statement.

Justice Thomas concluded the plurality opinion by noting that exclusionary rules in general are premised on the proposition that certain police conduct must be deterred. Since the core of the Fifth Amendment is self-executing, the plurality argued that there simply is nothing to deter in these *Miranda* cases. Traditional coercion—by torture, or gross deception—is deterred by the traditional voluntariness inquiry, which not only excludes involuntary statements but their fruit as well.[112] But, said the plurality, there is no constitutional violation the moment the police interrogate a custodial suspect without Mirandizing him;[113] the Fifth Amendment violation occurs only when the un-warned statement is used at trial.[114] The Court need not concern itself with fashioning rules to insure that police give the *Miranda* warnings, because the real deterrent is in the Fifth Amendment itself, not any deterrence in the form of prophylactic extensions of *Miranda*.

Justices Kennedy and O'Connor concurred in the first two of the plurality's conclusions—that *Dickerson* did not overrule *Tucker* and *Elstad*, and that those exceptions should apply to tangible fruits—but found gratuitous the plurality's observations that *Miranda* itself is not "violated" when police fail to Mirandize suspects, and that there is nothing to deter as long as the un-Mirandized statement itself is not used at trial. Their opinion focused instead on the "important probative value of physical evidence," and concluded that any marginal deterrent benefit is outweighed by that probative value.[115]

There were two separate dissents, one written by Justice Souter, joined by Justices Stevens and Ginsburg, and one written by Justice Breyer. Justice Souter chastised the majority for its failure to recognize the fundamental insight of *Miranda*: police interrogation is inherently coercive, and un-Mirandized statements are presumptively coercive. Justice Souter argued that in order to protect these twin pillars from clever police erosion, all derivative evidence obtained from an un-Mirandized statement must also be considered presumptively

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from an "over-expansive view of the word witness" that included personal documents to its current distinction between words and physical evidence).

112. *Patane*, 124 S.Ct. at 2627-28 (citing New Jersey v. Portash, 440 U.S. 450 (1979) (holding the fruits of testimony compelled by grant of immunity inadmissible)).

113. *Id.* at 2628. This is the critical issue upon which the *Chavez* Court was so divided. *See supra* text accompanying notes 66-72.

114. *Id.* at 2628-29. As Justice Thomas stated: "The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn." *Id.* at 2626.

115. *Id.* at 2631 (Kennedy, J., concurring).

inadmissible.[116] Under the plurality's rule, these dissenters argue, police will have an irresistible incentive to interrogate suspects without giving the *Miranda* warnings, in the hope of learning about the location of physical evidence.

Justice Breyer's separate dissent makes the point he made in his separate concurrence in *Seibert*: there should be a presumption that all fruit from un-Mirandized statements is to be excluded, unless the failure to Mirandize was in good faith.[117] Because no court had yet ruled on the question of whether the officers acted in good faith in interrupting the warnings when Mr. Patane told them to stop because he knew the rest, Justice Breyer would remand the case for such a determination.

Just when we thought *Dickerson*, and even the plurality opinions in *Chavez*, had spackled over the Court's deepest *Miranda* divisions, here, less than four years later, we have the old fissures, combined with some new ones, surfacing with a vengeance. This in a case that easily could have been decided as a rather narrow extension of, or refusal to extend, *Elstad*. It is difficult to know what to make of the three opinions in *Patane*.

The plurality is saying what Justices Scalia and Thomas have been saying in every *Miranda* case for at least a decade: the rule is a non-constitutionally-required, judge-made extension that we should extend no more. The Chief Justice's concurrence in that plurality opinion is nothing short of amazing, in light of his opinion in *Dickerson*. All we can say about the Chief Justice's place in the current debate about *Miranda* is that he accepts the textualist argument when it comes to putting a halt to expanding *Miranda*, but rejects that same argument when it comes to getting rid of *Miranda* entirely.

Similarly, the dissenters have stayed fairly consistent: *Miranda* was a constitutional decision, the warnings are constitutionally required, and fruit from unconstitutional police behavior (interrogating without the warnings) must be suppressed to deter that behavior. The only nuance from the dissenters is Justice Breyer's continued insistence that the police officer's good faith should be the only exception.

The separate concurrence by Justices O'Connor and Kennedy is, not surprisingly, the most difficult to gauge, precisely because that

116. *Id.* at 2632 (Souter, J., dissenting). As he said at the end of his dissent: "There is no way to read this case except as an unjustifiable invitation to law enforcement officers to flout *Miranda* when there may be physical evidence to be gained. The incentive is an odd one, coming from the Court on the same day it decides *Missouri v. Seibert, ante*." *Id.*

117. *Id.* at 2632-33 (Breyer, J., concurring).

concurrence straddles the elephant that has been living in the *Miranda* house since its inception. Some thought the elephant was gone after *Dickerson*, but it has cheerfully retaken its place smack in the middle of the self-incrimination living room with *Patane*. Are the *Miranda* warnings constitutionally required or not? As a technical matter, of course, Justices O'Connor and Kennedy are correct that the plurality's observations on this core issue were not necessary to the result in the case. By continuing to avoid this question, these two Justices can continue to avoid the underlying questions it suggests: Was *Miranda* itself correctly decided? In other words, does the Fifth Amendment compel the result in *Miranda*? Or is *Miranda* itself just another non-constitutional prophylaxis?

## VI. DIAGNOSIS

### *A. Confounding Self-Incrimination With Due Process*

We believe *Miranda's* most debilitating congenital defect is not its constitutional illegitimacy or its empirical failures, though those conditions are certainly disabling the patient and justify the continued restrictions imposed by a shifting five-Justice majority. Rather, we suggest that *Miranda's* most dangerous birth defect is its hopeless confounding of self-incrimination with due process, an ironic confounding indeed, because the whole *Miranda* construct was born of the Court's increasing skepticism about whether due process would be an effective tool to combat what it believed was a new, or at least newly unacceptable, strain of police overreaching.

Mongrelizing these two constitutional protections has become a substantial drag on the jurisprudence of confessions and has produced consistently dissonant opinions that have obscured their two very different policies. The Court seems confused about *Miranda* precisely because no consistent majority has ever fashioned a consensus about the interrelationship, or more to the point, the lack of a relationship, between self-incrimination and substantive due process.

Suppressing coerced confessions as a matter of traditional substantive due process advances two policies: maintaining the reliability of confessions and discouraging unacceptable police conduct. Both of these policies explain the reach, and the limitations, of the pre-*Miranda* law of coerced confessions. We can probably all agree that confessions extracted under torture tend not to be as reliable as voluntary confessions. On the other hand, precisely because we probably all agree about that, including those of us who

end up as jurors, a case could be made that if reliability were the only policy behind suppressing coerced confessions, the jury should still hear about the coerced confession and make its own mind up about reliability. Reliability alone does not explain the rule that coerced confessions must be suppressed.

Instead, due process, especially substantive due process, also protects the dignity of the individual.[118] Whether or not a statement is reliable, we simply cannot tolerate situations in which police extract coerced confessions from citizens in the hope that a jury might believe the confession notwithstanding the torture, or, more likely, in the hope that the torture will lead to other inculpatory evidence. So we suppress coerced confessions, and all the fruits of those confessions, under the Due Process Clause, quite apart from our sense of the reliability of such confessions.

As modern notions of "coercion" expanded beyond physical torture, the paths of these two distinct due process policies began to diverge. We recognize that extracting a confession by deceit, trickery or other kinds of police misconduct resulting in "involuntary" confessions, may not affect the reliability of those confessions, but we still suppress confessions in some of the most extreme cases because we do not want our police acting in these extreme ways.[119] The converse is also true: some kinds of police trickery, though not rising to the level of unacceptable police misconduct, may be of the type

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118. See *supra* text accompanying note 17.

119. For example, we might make the judgment that lying about forensic test results is conduct we will not tolerate from our police, and thus suppress confessions elicited by such misrepresentations, even though we do not believe that such confessions are particularly unreliable. After all, are innocent people, at least those blessed with average mental powers and whose mental condition at the time of the crime was not subverted by drugs or alcohol, really going to confess to a crime they did not commit just because the police say they have a DNA match? Yet most courts strike the balance in these kinds of cases toward reliability rather than toward the prevention of intolerable police misconduct irrespective of reliability, and admit confessions produced in such circumstances. *See, e.g.*, Lucero v. Kirby,133 F.3d 1299, 1311-12 (10th Cir. 1998) (confession admitted despite police lie about finding suspect's fingerprints at crime scene); Ledbetter v. Edwards, 35 F.3d 1062, 1068-70 (6th Cir. 1994) (same); People v. Thompson, 785 P.2d 857, 874-77 (Cal. 1990) (confession admitted despite police lies about fingerprints and DNA evidence); State v. Jones, 566 N.W.2d 317, 326 (Minn. 1997) (confession admitted despite police lies about having crime on surveillance video tape). Since the voluntariness inquiry is plenary, there are also cases in which courts have concluded that police misrepresentations about evidence, coupled with other factors, cross the boundary into involuntariness. *See, e.g.*, People v. Freeman, 668 P.2d 1371, 1379-80 (Colo. 1983) (misrepresentations about evidence, coupled with misrepresentations about potential punishment and use of "Mutt and Jeff" routine to alternately berate and reassure suspect, rendered confession involuntary). *See generally* Welsh S. White, *Police Trickery in Inducing Confessions*, 127 PENN. L. REV. 581 (1979) (suggesting that several widely used interrogation tactics should be prohibited because they create unacceptable risks that a suspect's Sixth Amendment rights will be violated and voluntariness compromised).

likely to produce a false confession. Such confessions we might also label "involuntary" under the due process clause and suppress.[120]

The Fifth Amendment's Self-Incrimination Clause serves very different purposes, however. Although we are prone to incant the self-incrimination privilege as a categorical good, its real place in the firmament of our criminal justice system is a matter of great controversy. Many commentators have complained that metaphor and slogans have often substituted for a comprehensive and critical examination of the true policies behind the privilege against self-incrimination.[121] Akhil Reed Amar and Renee Lettow have called it "a mandate in search of a meaning."[122] But few of the traditional, or even non-traditional, rationales for the privilege have much to do with the reliability of compelled testimony, at least once we move beyond the idea that the language of the clause is somehow limited to prohibiting torture.[123] Indeed, as mentioned above, the original meaning of "compulsion" in the Self-Incrimination Clause was simply that a defendant, unlike any other witness, could not be forced to testify under threat of contempt.[124] Yet we force other witnesses,

120. One example of this converse situation is when police lie about the seriousness of an offense. There is a continuum between police officers' general statements about punishment (or even mistakes driven by a lack of a nuanced understanding of the sentencing laws) and outright lies about potential punishment, and reasonable judges might disagree about whether lying about the law is necessarily intolerable police conduct in any given context. *Compare* State v. Stanislaw, 573 A.2d 286, 295 (Vt. 1990) (police told suspect arrested for providing liquor to a minor resulting in death, "it's not like being a real criminal"), *with* Nebraska v. Walker, 493 N.W.2d 329, 334-35 (Neb. 1992) (police told statutory rape suspect that it is not a crime if the victim consented). But when the lie might lead an innocent person to believe that the crime is not serious (or not even a crime), and therefore might lead an innocent person to confess, we might expect that the statements will be suppressed. It seems, however, that such confessions are routinely admitted, quite apart from the profundity of the legal misrepresentation. *See id.*; People v. Hill, 839 P.2d 984, 994-95 (Cal. 1992) (police never told defendant the crime he was suspected of committing carried possible death penalty); Douglas v. State, 481 N.E.2d 107, 111-12 (Ind. 1985) (misrepresentations about leniency and the place of incarceration); State v. Cooper, 217 N.W.2d 589, 592 (Iowa 1974) (police lied when they told suspect that victim was still alive); *see also* White, *supra* note 119, at 593-94 (discussing three concerns of admissibility: 1) the abhorrence of convictions based on unreliable confessions; 2) the feeling that police interrogation methods should not put an intolerable degree of pressure on a suspect; and 3) a belief that such practices should uphold the standards of fairness inherent in our justice system).

121. *See, e.g.*, Alschuler, *supra* note 10, at 2665 ("[T]he history of the privilege against self-incrimination seems to reveal the real tyranny of slogans."); John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1047, 1083-84 (1994) (discussing the historical error of assuming the slogan *nemo tenetur prodere seipsum* created the privilege against self-incrimination); Amar & Lettow, *supra* note 111, at 893 ("These phrases, however, are more like slogans that simply restate the rule than carefully considered rationales.").

122. Amar & Lettow, *supra* note 111, at 922.

123. *See infra* text accompanying note 126.

124. *See supra* note 10.

including eyewitnesses who would rather not give evidence, to testify all the time under threat of contempt, without worrying about whether the act of forcing them infects the reliability of their testimony. We even require witnesses who would otherwise have the right to invoke the privilege against self incrimination to testify when we grant them immunity.[125] Thus the Founders cannot have been worried about the reliability of compelled testimony.[126]

They certainly were not worried about police overreaching, for the same reasons. Judges—who might hold a criminal defendant in contempt for refusing to testify—seem to have been the Founders' original targets, not the police.

In the end, the original American justification for the privilege against self-incrimination seems almost tautological: we simply will not force criminal defendants to help the prosecution prove its case by requiring them to testify and face the so-called "cruel trilemma" of being jailed for refusing to testify, perjuring themselves, or confessing.[127]

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125. The immunity granted persons forced to testify need only be "use immunity," which protects the witness against the use of the testimony and its fruits; it need not be "transactional immunity," which would bar the witness from ever being prosecuted for the crime in question. This limitation on the scope of Fifth Amendment protection was established in Kastigar v. United States, 406 U.S. 441 (1972). The Court in *Kastigar* noted both the long history of immunity statutues as well as the fact that every state has such a statute. *Id.* at 445-47. The Court observed that these statutes "reflect the importance of testimony and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime." 406 U.S. at 446.

126. Actually, there is virtually nothing in the historical record—pre-ratification, post-ratification or in the ratification debates themselves—about the Founders' views of the Fifth Amendment's Self-Incrimination Clause, and that vacuum of information has been a large part of the paradox of self-incrimination. There were occasional mentions of individual state bans on self-incrimination, or the lack of such bans, in the context of prohibiting torture, but nothing that might explain, on the one hand, why the Founders chose language that on its face is clearly not limited to torture, or that would suggest, on the other hand, any deeper or more expansive rationales for the privilege. *See* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 429-32 (1968) (noting the lack of historical evidence from the time of the drafting of the Bill of Rights with regard to privilege against self-incrimination).

127. The "cruel trilemma" slogan was coined by Justice Goldberg in Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). We sympathize with critics who quite rightly point out that the cruel trilemma is really only "cruel" for guilty defendants, and who believe that the system's truth-finding function should trump any policy grounded in a kind of quaint notion of sportsmanship toward the guilty. *See, e.g.*, Ronald J. Allen & M. Kristin Mace, *The Self Incrimination Clause Explained and its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 245 (2004); Amar & Lettow, *supra* note 111, at 890.

Indeed, other Western democracies strike the balance in quite a different way. In England, when a suspect is arrested, the failure of the suspect to give an account to the police of certain suspicious circumstances, such as the suspect's presence near the scene of the crime or his possession of any object that may link him to the crime, can result in an adverse inference at trial. *See* Criminal Justice and Public Order Act, 1994, c. 33, §§ 34, 36, 37 (Eng.). Also, the caution given suspects in England is very different from the *Miranda* warnings. Suspects are

Whatever its purposes, the Self-Incrimination Clause seems to have nothing to do with the twin evils posed by coerced confessions—unreliability and police overreaching. It is therefore no surprise that until *Miranda*, those evils were addressed first under the common law and later under the Due Process Clause, two approaches whose inherent flexibility are perfectly matched, at least in theory, to gradually evolving standards of "coercion" and to the constantly morphing problem of police overreaching.[128]

By mixing up the truth-finding and anti-overreaching policies behind the Due Process Clause's traditional voluntariness inquiry with the decidedly truth-indifferent and overreaching-indifferent policies of the Self-Incrimination Clause, the *Miranda* Court created a hybrid with the worst aspects of both. Thus, in the fruits cases, the Court has drawn an astonishingly arbitrary line between, on the one hand, voluntary but un-Mirandized confessions, which it will suppress to deter police even though the confessions were not "coerced," and, on the other hand, all the fruits of those confessions, which apparently do not need to be suppressed. It turns out, in the strange world of *Miranda*, that suppressing the un-Mirandized statement itself, but not any of its fruits, applies just enough prophylaxis to protect the core privilege against self-incrimination. Likewise, in the cross-examination cases, suppressing un-Mirandized statements only in the prosecution's case in chief turns out to be just the right amount of prophylaxis; suppressing them for impeachment purposes is apparently unnecessary overkill that will unduly interfere with a truth-finding process that must accommodate a criminal defendant's incentive to lie on the witness stand.

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told: "You do not have to say anything. But it may harm your defence if you fail to mention when questioned something which you later rely on in court. Anything you do say may be given in evidence." ARCHBOLD CRIMINAL PLEADING, EVIDENCE AND PRACTICE 2004 § 15-295.

In civil law countries, defendants are expected to participate in their own trial. The trial begins with the presiding judge asking the defendant to respond to the charges, which will have been read or summarized by the state's attorney. While the defendant does not need to respond, and while there is in some countries a formal prohibition against the fact finders drawing adverse inferences from such a refusal, almost all defendants choose to give evidence in continental systems because of the realistic concern that such inferences will be drawn anyway. *See* William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial System on a Civil Law Foundation*, 17 YALE J. INT'L. L. 1, 7-10 (1992); Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PENN. L. REV. 506, 527 (1973)

But of course in the United States, the constitutional horse is out of that barn. Just as Professor Alschuler may lament that the Founders did not go far enough to protect the common law "right to remain silent," *see supra* note 10, others may lament that the Founders went too far. Neither lamentation helps very much in interpreting the Self-Incrimination Clause in a way that does justice to its words in a sensible and predictable manner.

128. *See supra* text accompanying notes 16-20.

*Miranda's* confounding of due process and self-incrimination may also have had drastically unintended consequences. As mentioned above, some commentators have argued that, because the Due Process Clause is a much more malleable and therefore more effective tool to regulate police conduct, *Miranda's* tie to the much less flexible Self-Incrimination Clause has left police interrogation largely unregulated.[129] As Professor Stuntz has so elegantly noted, "*Miranda* imposes only the slightest of costs on the police, and its existence may well forestall more serious, and more successful, regulation of police questioning."[130]

### *B. Disentangling Self-Incrimination from Due Process*

One way to understand all the *Miranda* exceptions is to disentangle *Miranda's* self-incrimination and due process strains. Indeed, most of the prophylactic cases make perfect sense if one thinks of them only as traditional due process cases, and ignores the inexplicable self-incrimination platform upon which they have been launched.

Does failing to give *Miranda* warnings make otherwise voluntary confessions less reliable? Of course not. Does failing to give *Miranda* warnings rise to the level of police misconduct we simply should not tolerate in a civilized society? Of course not. Thus, per *Harris*, it is perfectly appropriate to use un-Mirandized, but voluntary, statements to impeach defendants, especially to counter the evils of perjury. Per *Tucker* and *Elstad*, it is perfectly appropriate to admit fruits of an un-Mirandized, but voluntary, statement. Per *Quarles*, who would say police are violating due process when, by using entirely non-coercive questions, they try to find a loaded gun in a grocery store?[131]

*Chavez v. Martinez* is probably the best case to illustrate our point, because it explicitly involved both self-incrimination and due process claims. The plurality went out of its way (in dictum) to tell us that the "right to remain silent" created in *Miranda* is not really a constitutional right giving rise to a damage claim.[132] Again, in due

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129. *See supra* note 21.

130. Stuntz, *supra* note 21, at 976.

131. The perplexing disconnect of *Quarles* remains: creating a "public safety" exception was necessary only if the failure to give *Miranda* warnings is itself a constitutional violation. If we accept the view of the *Chavez* plurality that police have no positive constitutional obligation to Mirandize suspects, then they were free to ask Mr. Quarles where the gun was and quite free to eliminate the threat to public safety by removing the gun from the store, whether or not the gun gets admitted into evidence or gets suppressed.

132. Chavez v. Martinez, 530 U.S. 760, 773 (2003).

process terms, interrogating suspects without first Mirandizing them is not likely to lead to unreliable confessions and is also not the kind of police misconduct we want to discourage either with the cleaver of the exclusionary rule or the slightly more refined dagger of damage claims.

But the kind of substantive coercion that took place in *Chavez* is something we should not tolerate as a due process matter, for both of the traditional reasons. Confessions coerced by police who threaten to interfere with medical treatment are unacceptably unreliable, and, quite apart from their unreliability, few of us want to live in a society where police are permitted to behave in this way. Thus, in a different (majority) opinion, five Justices held that the facts in *Chavez* stated a claim for a substantive due process violation, though not a self-incrimination violation.

The two new cases are also completely sensible if viewed only as due process cases. In *Seibert*, the Court said, in effect, that the intentional two-step approach is intolerable police conduct, at least in a society that continues to pay lip service to the *Miranda* warnings. It is not that the two-step interrogation is unacceptably unreliable, although we concede that if the first statement has any stain of unreliability from the "inherently coercive" interrogative atmosphere, it may be marginally more difficult for the warnings to remove that stain after the suspect is locked into the first statement. But in a world where we pretend to believe that the mantra of the warnings will magically overcome an entire culture of police coercion, it seems strange to believe that those same warnings will not be able to unleash a suspect's ability to change his story from an inherently coerced inculpatory lie to the un-coerced exculpatory truth.

If reliability were actually at the heart of *Seibert*, we would have to believe that people are more "coerced" by their own need to be consistent than by the full coercive power of the entirety of the police apparatus. Even if that were true, such "self-coercion," as Justice O'Connor so pointedly observed, is simply not the kind of coercion forbidden by the Fifth Amendment.[133]

No, it seems *Seibert* is best explained as a case about intolerable police misconduct, though a special kind of intolerable police misconduct. Not the kind that impinges on the dignity of the individual—by torturing him, or tricking him or forcing him to testify—but rather the kind that impinges on the dignity of the Court as the final arbiter of constitutional principles. Justice Souter stated bluntly in the concluding paragraph of the plurality opinion: "Strategists dedicated to

133. *See supra* text accompanying notes 88-89.

draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress cannot do by statute."[134]

Due process also explains *Patane*. There simply is no due process distinction between tangible fruits and any other kind of fruits. It is the nature of the interrogation that matters, not the nature of the products from that interrogation. The way in which Mr. Patane was interrogated created no risk either of a false confession or of police overreaching. There was no trickery or other police misconduct to suggest that Mr. Patane did not really know he had a gun in his bedroom but was deceived into saying he did. And who could say that the interrogation in *Patane* was fundamentally unfair, where Mr. Patane interrupted the advisement by saying he knew all his rights,[135] and where the object of the interrogation was to remove a gun from the scene of a recurring domestic dispute?

## VII. PROGNOSIS

What does all of this mean for the long-term fate of *Miranda*? We agree with most post-*Dickerson* commentators that *Miranda* is here to stay for the foreseeable future, though our reasons for that prognosis differ from most.

We contend that, despite the self-incrimination veneer, these cases confirm that *Miranda's* limitations and extensions will continue to be driven by the very same two-part inquiry that animated traditional voluntariness: (1) is the statement likely to be unreliable (the answer to this is almost always "no" when we are talking only about the lack of warnings) and (2) does the police misconduct rise to the level of a substantive due process violation quite apart from any impact it might have on reliability? If the answer to either of these questions is "yes," then *Miranda* will be extended and the confession or secondary evidence will be suppressed; otherwise, the *Miranda* advisements will be labeled "prophylactic" and the confession or secondary evidence will not be suppressed.[136]

Of course, the current Court is unlikely ever to accept such a recasting of *Miranda* into this traditional kind of due process inquiry.

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134. Missouri v. Seibert, 124 S.Ct. 2601, 2613 (2004).

135. What if Mr. Patane had said, "You don't need to tell me my rights. I know all of them. Let *me* recite them for *you*," and he proceeded to do so, in perfect fashion? Would anyone but the most irrationally orthodox *Miranda* formalist suppress either the statement or the gun in that situation?

136. That is, we suggest that the Court has actually adopted, without admitting it, the suggestion of the *Miranda* critics who have argued that police interrogation should be regulated within the more flexible due process paradigm than under formalistic "extensions" and "limitations" of *Miranda*. *See supra* note 21.

First, and perhaps most important, profound disagreements remain among the Justices about whether the *Miranda* rule itself would survive such an analysis. That is, although several of them might agree that *Miranda* warnings do not increase the reliability of statements, they certainly would not agree about whether fundamental precepts of due process compel the warnings. That is the heart of the continuing public policy dispute about *Miranda*. That is also precisely why the *Miranda* majority had to use self-incrimination, and not due process, as its jumping off place. The seven Justices now committed, after *Dickerson*, to continuing the basic rule of *Miranda* are unlikely to agree to a re-justification of the rule that emphasizes its original lack of justification.

On the other hand, the *Miranda* opponents are just as unlikely to support such a recasting. Lowering the bar of substantive due process to encompass the requirement that custodial suspects be Mirandized would threaten all sorts of activist mischief,[137] a particularly unappealing prospect to Justices Scalia and Thomas, who have already expressed profound suspicion about expansive notions of substantive due process.[138]

The members of the Court thus remain locked in an increasingly bizarre kind of *Miranda* death grip, whose very origins—the confounding of self-incrimination and due process—assure both its continuing existence and its feebleness. We can be fairly certain that three of the current Justices will oppose any future expansions of *Miranda*, either directly or by way of shrinking its exceptions. We can also be fairly certain that three or four others will almost always do exactly the opposite—oppose any contraction of *Miranda*, either directly or by expanding its exceptions. As with many other issues, what Justices O'Connor and Kennedy decide to do within the limits of

137. For example, all custodial interrogations could be forbidden unless the suspect's lawyer were present. This is the so-called "strong" or "*Miranda*-plus" version of *Miranda* that many *Miranda* proponents touted in the early years. Lowering the substantive due process bar in this fashion could also wreak havoc on the law of search and seizure. For example, one can imagine the warning idea extended, by way of an invigorated notion of substantive due process, into the Fourth Amendment, so that all consensual police/citizen encounters must begin with a set of warnings, such as "We have no probable cause to arrest you, and no reasonable articulable suspicion to stop you. You are not obligated to talk to us, and are free to go at any time, but if you decide to leave we may take that into consideration in determining whether we then have a reasonable articulable suspicion to stop you." We can only shudder to think what such a Miranda-ization of the Fourth Amendment would do to the law of search and seizure.

138. *See supra* note 71.

these extremes will most likely drive the Court's self-incrimination law in the next several years.[139]

The Court's recent cases do not give doctrinal purists much hope. It seems clear that both the *Miranda* rule and its established exceptions are here to stay, plus or minus some small adjustments as outcomes in particular cases get compromised, as in *Seibert*. Despite some intriguing suggestions in Justice Kennedy's concurrence in *Seibert* that he may be staking out some new territory at the edge of a narrow bad faith exception—territory that might eventually attract enough votes for a movement in that direction—Justice O'Connor's strong dissent makes it clear that such a movement still has a long way to go.

Nearing its fortieth birthday, *Miranda* is no longer the quintessentially vigorous exercise of Warren Court judicial muscle. It is beginning to show its age, not just in its limited applications, but also its own sense of purpose. Yet it keeps on, oblivious to the fact that the same disease that keeps it weak also keeps it alive. We are most likely in the middle of an important, but very broad, transition in the theory of self-incrimination. Some day, the Court will probably reach a consensus about the meaning of the words in the Self-Incrimination Clause, and that consensus will drive either a return to original notions of testimonial compulsion (and an overruling of *Miranda*) or a complete cutting of the textual bonds (and an overruling of most or all of *Miranda's* exceptions). Until then, we can expect more false miracle cures and more premature obituaries.

139. Whether two major roadblocks to this movement have been removed with the death of Chief Justice Rehnquist and Justice O'Connor's retirement will depend, of course, on the Miranda jurisprudence of their successors.

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