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## ***Miranda's* Near Death Experience: Reflections on the Occasion of *Miranda's* Fiftieth Anniversary**

Eugene R. Milhizer

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## ***Miranda's* Near Death Experience: Reflections on the Occasion of *Miranda's* Fiftieth Anniversary**

### **Cover Page Footnote**

Dean Emeritus and Professor of Law, Ave Maria School of Law. Dean Emeritus Milhizer served as President/Acting President and Dean/Acting Dean of Ave Maria School of Law from 2008–2014. The author would like to thank his research assistant, Emily Dhanens, for her outstanding work in the preparation of this article.

*MIRANDA*'S NEAR DEATH EXPERIENCE:  
REFLECTIONS ON THE OCCASION OF *MIRANDA*'S  
FIFTIETH ANNIVERSARY

*Eugene R. Milhizer*<sup>+</sup>

I. THE PRELUDE TO <i>MIRANDA</i> .....	579
II. THE <i>MIRANDA</i> DECISION.....	582
III. THE REACTION TO <i>MIRANDA</i> .....	588
IV. <i>MIRANDA</i> SURVIVES.....	601
V. <i>MIRANDA</i> 'S NEXT FIFTY YEARS.....	608

“As I waited I thought that there’s nothing like a confession to make one look mad; and that of all confessions a written one is the most detrimental all round. Never confess! Never, never!”<sup>1</sup>

“Reports of my death have been greatly exaggerated.”<sup>2</sup>

June 13, 2016, marks the fiftieth anniversary of the Supreme Court’s landmark decision in *Miranda v. Arizona*.<sup>3</sup> *Miranda* is among the rare cases that has transcended the legal profession and become a fixture in popular culture. *Time Magazine* ranked *Miranda* as the third most controversial Supreme Court case in U.S. history, trailing behind only *Brown v. Board of Education*<sup>4</sup> and *Roe v. Wade*.<sup>5</sup> *Miranda* has become a favorite subject for cartoonists of all stripes—recurring characters include philandering husbands, recalcitrant children, and

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1. JOSEPH CONRAD, CHANCE (1913), as reprinted in OXFORD DICTIONARY OF QUOTATIONS 240, ¶ 12 (Elizabeth Knowles ed., 6th ed., 2004).

2. The quotation is attributed to Mark Twain. The actual quotation is, “The report of my death was an exaggeration.” Mark Twain, NEW YORK JOURNAL, June 2, 1897, as reprinted in OXFORD DICTIONARY OF QUOTATIONS, *supra* note 1, at 803, ¶ 29.

3. 384 U.S. 436 (1966).

4. 347 U.S. 483 (1954).

5. 410 U.S. 113 (1973). *Time*’s list of the top ten most controversial cases is rounded out by *Citizens United v. FEC*, 558 U.S. 310 (2010); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bush v. Gore*, 531 U.S. 98 (2000); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Scott v. Sandford*, 60 U.S. 393 (1856); and *Marbury v. Madison*, 5 U.S. 137 (1803). See *Top 10 Controversial Supreme Court Cases*, TIME (Dec. 13, 2010), <http://content.time.com/time/specials/packages/completelist/0,29569,2036448,00.html>; see also Alexandra Silver, *The Supremes: Miranda v. Arizona*, TIME (Dec. 13, 2010), [http://content.time.com/time/specials/packages/article/0,28804,2036448\\_2036452\\_2036453,00.html](http://content.time.com/time/specials/packages/article/0,28804,2036448_2036452_2036453,00.html) (listing *Miranda v. Arizona* as the third most controversial Supreme Court case of all time).

mimes<sup>6</sup>—and it is common fare for movies and television shows.<sup>7</sup> Indeed, *Miranda* may be the only criminal case to have morphed into a verb—to “Mirandize.”<sup>8</sup>

The *Miranda* decision has likewise provoked strong reactions within the legal community. Professor Henry Abraham wrote that *Miranda* “must rank as the most bitterly criticized, most contentious, and most diversely analyzed criminal procedure decision by the Warren Court.”<sup>9</sup> Professor Yale Kamisar, a noted *Miranda* defender, observed *Miranda* is “one of the most praised, most maligned—and probably one of the most misunderstood—U.S. Supreme Court cases in American history.”<sup>10</sup> Professor Joseph Grano, one of *Miranda*’s harshest critics, called the opinion “exceedingly atypical.”<sup>11</sup> Perhaps no other criminal justice decision by the Court has been as polarizing.

As *Miranda* approaches its golden years, it has become pervasive and unremarkable. At least two generations of Americans have grown up with *Miranda* and have never been exposed to any other dominant approach for determining the admissibility of criminal confessions. *Miranda* has achieved almost universal acquiescence, if not approval—an inevitability that evokes neither praise nor criticism, but rather passive acceptance. Like the DMV and the weather, *Miranda* has become an established fact of life because a better alternative is no longer imagined nor seems realistically possible.

The present-day nonchalance toward *Miranda* can obscure and misportray its divisive and embattled past. The truth is the *Miranda* decision was under constant and serious attack for decades. Indeed, there once was a time when it

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6. A personal favorite is a cartoon depicting a flight attendant who incorporates *Miranda* warnings into a pre-flight safety briefing. See *Airline Security, Miranda Warnings. Christmas Bomber*, DANZIGER CARTOONS (Feb. 18, 2010), <http://www.danzigercartoons.com/cartoons/february-18-2010-airline-security-miranda-warning-chrsitmas-bomber>.

7. A recent example of a comedic treatment of the *Miranda* warnings can be found in the movie “21 Jump Street.” Ericcartel, *21 Jump Street—Channing Tatum Miranda Rights Scene*, YOUTUBE (July 6, 2012), <https://www.youtube.com/watch?v=T45aF1NLMYMMor>.

8. See Definition of *Mirandize*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/Mirandize> (last visited Feb. 17, 2017) (defining “Mirandize” as a transitive verb meaning “to recite the *Miranda* warnings to (a person under arrest)”). The only somewhat similar example that comes to mind is how Judge Robert Bork’s last name became a verb, as in “he was *Borked*.” See Definition of *Bork*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/Bork> (last visited Feb. 17, 2017) (defining “Bork” as “to attack or defeat (a nominee or candidate for public office) unfairly through an organized campaign of harsh public criticism or vilification”).

9. See HENRY J. ABRAHAM, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 125 (4th ed. 1982).

10. See Yale Kamisar, *Miranda’s Reprieve*, ABA J. (Jun. 23, 2006, 1:06 PM), [http://www.abajournal.com/magazine/article/mirandas\\_reprieve/](http://www.abajournal.com/magazine/article/mirandas_reprieve/).

11. See JOSEPH D. GRANO, *CONFESSIONS, TRUTH, AND THE LAW* 173 (1993).

appeared likely, even certain, that *Miranda* would be overruled.<sup>12</sup> *Miranda*'s fiftieth anniversary offers an opportunity to reflect upon its controversial origins and circuitous journey, revisit its near demise, and contemplate its current status and import.

#### I. THE PRELUDE TO *MIRANDA*

Before *Miranda*, criminal confession jurisprudence in America traced its origins to the English common law.<sup>13</sup> By the 1960s, the admissibility of a confession turned on whether it was deemed to be involuntarily obtained; that is, whether a suspect's free will was so likely to have been overborn by undue police pressure that any incriminating statements made by the suspect would be excluded from evidence.<sup>14</sup> The courts applied a totality-of-the-circumstances approach, in which they considered all of the relevant facts relating to the questioning of the suspect, including the suspect's traits and background, the conditions of the interrogation, and the actions of the police, in light of broader values implicated by the use of confessions to prove guilt.<sup>15</sup> If the police were found to have gone too far, the confession would be declared involuntary and suppressed at the suspect's trial.<sup>16</sup>

The defense bar and many academics criticized the traditional involuntariness approach. They complained that it was necessarily ad hoc and case specific, and thus the involuntariness approach failed to provide meaningful standards for the

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12. See Victor Li, *50-year Story of the Miranda Warning Has the Twists of a Cop Show*, ABA J. (Aug. 1, 2016, 4:30 AM), [http://www.abajournal.com/magazine/article/miranda\\_warning\\_history/](http://www.abajournal.com/magazine/article/miranda_warning_history/).

13. At common law, coerced confessions were excluded from evidence because of a fear they were untrustworthy. By the eighteenth century, it was established that "a confession forced from the mind by flattery of hope, or the torture of fear, comes in so questionable a shape when it is to be considered as evidence of guilt, that no credit ought to be given to it; and therefore it is rejected." *Rex v. Warickshall*, (1783) 168 Eng. Rep. 235 (K.B.). This was the standard of review employed by the Supreme Court beginning with *Brown v. Mississippi*, 297 U.S. 278 (1936) (holding confessions must be excluded where the defendants were whipped until they agreed to confess as officers dictated). Over time, the involuntariness of the confession itself became the basis for its exclusion, "irrespective of any attempt to measure its influence to cause a false confession." 3 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 825 (James H. Chadbourne rev. ed. 1970).

14. See *Spano v. New York*, 360 U.S. 315, 319–20, 323 (1959) (holding a post-indictment confession, obtained by police with the intent of securing a statement that could be used to convict the suspect, violated due process because the suspect's will was overborne by official pressure, fatigue, and false sympathy); *Ashcraft v. Tennessee*, 322 U.S. 143, 153–54 (1944) (holding a confession obtained from a suspect, after 36 consecutive hours of incommunicado questioning, was so "inherently coercive" as to be presumptively involuntary and compelled).

15. See *Blackburn v. Alabama*, 361 U.S. 199, 206–08 (1960) (explaining that involuntariness is a "convenient shorthand" for "a complex of values" relating to the constitutionality of a confession); *Stein v. New York*, 346 U.S. 156, 185 (1953) ("The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.").

16. See *supra* note 14 and accompanying text.

police or guidance for courts in future cases.<sup>17</sup> Moreover, they argued that it was largely ineffective in protecting the constitutional rights of criminal suspects, especially when naive or under-educated arrestees were subjected to the increasingly sophisticated and psychologically-based methods of interrogation now used by law enforcement.<sup>18</sup> More broadly, civil libertarians viewed the traditional involuntariness approach as part of a larger, unjust regime that denied defendants and criminal suspects the capacity to effectively exercise their constitutional rights.<sup>19</sup>

If the customary approach to constitutional protections was the malady, then the Warren Court intended to dispense the cure. From 1953 to 1969, Earl Warren presided as Chief Justice of the U.S. Supreme Court.<sup>20</sup> Under Warren's leadership, the Court aggressively tackled a wide range of controversial matters, announcing landmark decisions that addressed racial segregation and

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17. See Yale Kamisar, Gates, "Probable Cause," "Good Faith," and Beyond, 69 IOWA L. REV. 551, 570 (1984) (observing that under the traditional involuntariness test, "[a]lmost everything was relevant, but almost nothing was decisive"). As one observer put it,

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

Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 102-03 (footnotes omitted).

18. See David L. Sterling, *Police Interrogation and the Psychology of Confession*, 14 J. PUB. L. 25, 37-39, 46 (1965) (observing that "if the American police manuals are examined, there is a striking similarity between their recommendations and Russian and Chinese interrogation techniques"); Yale Kamisar, *A Dissent From the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 62 (1966) (contending that the protections afforded by the traditional involuntariness approach "were largely 'illusory'").

19. See Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1425 (1985) (observing that a majority of the Court viewed confessions "darkly as the product of police coercion"). See generally LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 14-17 (1983) (describing generally the negative attitudes of civil libertarians during the 1950s and 1960s toward police practices and the obtaining of confessions and some initiatives intended to address this).

20. *Earl Warren*, UNITED STATES HISTORY, <http://www.u-s-history.com/pages/h3834.html> (last visited Feb. 17, 2017). Before joining the Court, Earl Warren had never been a judge, and his background was largely political in nature. *Id.* Early in his career, Warren was a District Attorney and then Attorney General of California. *Id.* He later became a three-term governor of California and ran unsuccessfully for vice president on the Dewey ticket in 1948. *Id.* In 1952, Warren played a key role in securing the Republican presidential nomination for Dwight D. Eisenhower; in return, Eisenhower promised Warren an appointment to the Supreme Court when a vacancy occurred. *Id.* Warren was appointed as Chief Justice in 1953, when Chief Justice Fred Vinson unexpectedly died. *Id.* When Eisenhower appointed Warren to the Court, he said that Warren "represents the kind of political, economic, and social thinking that I believe we need on the Supreme Court . . . he has a national name for integrity, uprightness, and courage that, again, I believe we need on the Court." *Id.* Years later, Eisenhower called his appointment of Warren "[t]he biggest damned-fool mistake I ever made." *Id.*

discrimination,<sup>21</sup> voting redistricting and malapportionment,<sup>22</sup> free speech,<sup>23</sup> and the free exercise of religion.<sup>24</sup> The Warren Court also focused on the criminal justice system, deciding issues relating to the basis and scope of searches and seizures,<sup>25</sup> discovery,<sup>26</sup> incorporating and applying federal constitutional protections at state trials,<sup>27</sup> and criminal punishment.<sup>28</sup>

Promoting the availability and assistance of defense counsel was of special importance to the Warren Court. Beginning in 1963, the Court announced three

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21. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding laws prohibiting interracial marriages unconstitutional); *Gomillion v. Lightfoot*, 364 U.S. 339, 346–48 (1960) (holding that electoral district boundaries disenfranchised black voters); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (ordering the desegregation of District of Columbia public schools); *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (holding state laws establishing separate public schools for black and white students unconstitutional).

22. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 558–59 (1964) (holding that state legislative districts had to be roughly equal in population, basing the decision on the principle of “one person, one vote”); *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964) (requiring each state to draw its U.S. Congressional districts so that they are approximately equal in population); *Baker v. Carr*, 369 U.S. 186, 199–200 (1962) (holding federal courts may intervene and decide redistricting issues).

23. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (holding that the government cannot punish inflammatory speech unless that speech is directed to inciting, and is likely to incite, imminent lawless action); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (establishing the actual malice standard that has to be met before press reports about public officials can be considered to be defamation and libel); *Yates v. United States*, 354 U.S. 298, 318–19 (1957) (holding that the First Amendment protected radical and reactionary speech).

24. See *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963) (holding that the Free Exercise Clause of the First Amendment required the government demonstrate both a compelling interest and that the law in question is narrowly tailored before denying unemployment compensation to someone who was fired because her job requirements substantially conflicted with her religion).

25. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 28–30 (1968) (holding that the Fourth Amendment prohibition on unreasonable searches and seizures is not violated when a police officer stops a suspect on the street and frisks him without probable cause to arrest if the officer has a reasonable suspicion that the person has committed, is committing, or is about to commit a crime and has a reasonable belief that the person “may be armed and presently dangerous”); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (finding that the intrusion on justifiable expectations of privacy was the basis for determining whether a search under the Fourth Amendment had occurred).

26. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the withholding of exculpatory evidence violates due process “where the evidence is material either to guilt or to punishment”).

27. See *Malloy v. Hogan*, 378 U.S. 1, 9 (1964) (holding that the Fifth Amendment privilege against compulsory self-incrimination is a fundamental right applicable to the states through the Fourteenth Amendment); *Ker v. California*, 374 U.S. 23, 30 (1963) (holding that the Fourth Amendment protections against unreasonable searches and seizures are incorporated through the Fourteenth Amendment and applied to the states); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (holding that the Fourth Amendment exclusionary rule is a fundamental right applicable to the states through the Fourteenth Amendment).

28. See, e.g., *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (striking down a California law that criminalized being addicted to narcotics); *Trop v. Dulles*, 356 U.S. 86, 103 (1958) (holding it unconstitutional for the government to revoke the citizenship of a U.S. citizen as a punishment).

important decisions concerning the right to counsel.<sup>29</sup> First, in *Gideon v. Wainwright*,<sup>30</sup> the Court held that states are required under the Fourteenth Amendment<sup>31</sup> to provide counsel to represent defendants in criminal cases who are unable to afford to pay for their own attorneys.<sup>32</sup> A year later, in *Escobedo v. Illinois*,<sup>33</sup> the Court ruled that the Sixth Amendment<sup>34</sup> is violated when police question a custodial suspect who is the focus of their investigation in the absence of counsel if the suspect has requested counsel.<sup>35</sup> These decisions demonstrated the Warren Court's willingness to depart, even radically, from past practices to protect the rights of criminal suspects, and further signaled the Court's belief that it still had more work to do. The Court's next project—the third decision in the trilogy of major right-to-counsel cases—would address the expansion of the Fifth Amendment<sup>36</sup> protections. *Miranda* would become the vehicle to accomplish this objective.<sup>37</sup>

## II. THE *MIRANDA* DECISION

In the early morning hours of March 3, 1963, Ernesto Miranda abducted, raped, and robbed a young woman as she walked toward her home in Phoenix,

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29. The Warren Court issued several other notable decisions relating to the right to counsel, including *Malloy*, 378 U.S. at 9 (holding the Fifth Amendment privilege against compulsory self-incrimination is a fundamental right applicable to the states through the Fourteenth Amendment); and *Massiah v. United States*, 377 U.S. 201, 204–05 (1964) (holding that the government may not deliberately elicit statements from a person under indictment in the absence of counsel).

30. 372 U.S. 335 (1963).

31. U.S. CONST. amend. XIV.

32. *Gideon*, 372 U.S. at 343.

33. 378 U.S. 478 (1964).

34. U.S. CONST. amend. VI.

35. *Escobedo*, 378 U.S. at 490–91. Perhaps *Escobedo*'s most enduring significance is that it foreshadowed *Miranda* insofar as it reflected the Warren Court's negative attitudes regarding police interrogations and confessions thereby obtained to prove guilt. See Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 666 (1986) (reviewing FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* (3d ed. 1986)).

36. U.S. CONST. amend. V.

37. Some commentators have speculated that the *Miranda* rights warning and waiver protocols were not the ultimate objective of the Warren Court. Rather, the Court was moving toward an end game in which custodial interrogation would be permitted only in the presence of a lawyer. See OTIS H. STEPHENS, JR., *THE SUPREME COURT AND CONFESSIONS OF GUILT* 205 (1973). They speculate that the Court approached its ultimate objective incrementally, going as far as it could as fast as it could at the time. See Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 12 (1995) [hereinafter *Kamisar I*] (contending that critics who complain that *Miranda* did not go far enough “do not seem to appreciate the fact that in 1966 the Court was barely able to go as far as it did”). As a result of the firestorm that followed the *Miranda* decision, coupled with later changes in the Court's membership, the final objective of requiring the presence of counsel at all times during custodial interrogation, if it was ever actually intended by the Warren Court, was never realized.



Arizona.<sup>38</sup> A few days later, Miranda was arrested by police and, without the assistance of counsel, was placed in a lineup and interrogated.<sup>39</sup> After a short while, Miranda confessed to these and other, unrelated crimes.<sup>40</sup> It was not until after Miranda made his confession that he was first advised of his rights, including his Fifth Amendment right to counsel.<sup>41</sup> Miranda's confession was later admitted at his trial over his objection, and he was convicted.<sup>42</sup> Miranda appealed the admissibility of his confession to no avail in the lower courts,<sup>43</sup> and, losing there, sought certiorari in the Supreme Court.<sup>44</sup>

At about the same time, the Warren Court was actively looking to grant certiorari in confession cases as a means for further expanding a criminal suspect's right to counsel.<sup>45</sup> The Court eventually settled on Miranda's case and three others, in part because the facts of those four cases seemed less inflammatory than those in many of the other suitable cases, which often involved brutal murders or child victims.<sup>46</sup>

Miranda's attorneys, John Flynn and John Frank, argued over whether to focus primarily on an alleged denial of their client's Fifth Amendment or Sixth Amendment right to counsel.<sup>47</sup> Accordingly, the lawyers hedged their bets and prepared to argue both theories.<sup>48</sup> At oral argument, Flynn took his cue from the Justices' questioning and concentrated on a Fifth Amendment theory for reversal.<sup>49</sup>

Ultimately, in a 5–4 vote, Warren announced the Court's decision in *Miranda v. Arizona*.<sup>50</sup> The Court held that statements stemming from custodial interrogation cannot be admitted at trial unless the prosecution demonstrates the use of safeguards securing the privilege against self-incrimination.<sup>51</sup> The Court

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38. See BAKER, *supra* note 19, at 3–5.

39. *Id.* at 12–13.

40. *Id.* at 13.

41. *Id.* at 13–14. An investigating detective later explained that Miranda “was not knowledgeable about his rights. He was an ex-convict . . . and had been through the routine before.” *Id.* at 13.

42. *Id.* at 22–23.

43. *Id.* at 24–25, 49.

44. *Id.* at 60.

45. *Id.* at 100–02.

46. *Id.* at 103–06.

47. *Id.* at 72.

48. *Id.* at 72, 82, 132, 136.

49. *Id.* at 137–38.

50. 384 U.S. 436 (1966). Joining Warren in the majority were Justices Black, Douglas, Brennan and the most recent addition to the Court, Justice Abe Fortas. See *Facts and Case Summary—Miranda v. Arizona*, U.S. COURTS, <http://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-miranda-v-arizona> (last visited Feb. 17, 2017); *Abe Fortas Biography*, BIOGRAPHY (Apr. 2, 2014), <http://www.biography.com/people/abe-fortas-9299311> (noting that Justice Fortas was appointed to the court in 1965).

51. See *Miranda*, 384 U.S. at 492–93.

directed that in the absence of other safeguards, custodial interrogation is not permitted unless police first give the suspect four specified warnings,<sup>52</sup> and then obtain from the suspect a knowing, intelligent, and voluntary waiver of these rights.<sup>53</sup>

In the majority's view, *Miranda* accomplished several important objectives.<sup>54</sup> It afforded Fifth Amendment protections to criminal suspects at the pretrial stage.<sup>55</sup> It ensured that a suspect's waiver of Fifth Amendment rights would be knowing, intelligent, and voluntary.<sup>56</sup> It assisted suspects in avoiding incommunicado interrogations by police, and it helped them deal with modern psychological ploys used by law enforcement to obtain confessions.<sup>57</sup> It recognized that compulsion was an inevitable attribute of custodial interrogation and that rights warnings were needed to address this compulsion.<sup>58</sup> And, it established bright-line standards that could be comprehensively and consistently

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52. *Id.* at 478–79 (“He 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.”).

53. *Id.* at 444 (“The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.”). The *Miranda* decision gave birth to the cottage industry of producing rights warning cards and their widespread use by police and others who administer *Miranda* rights. See BAKER, *supra* note 19, at 177–78. It is little known that during his hiatus from serving prison terms, Ernesto Miranda would sell autographed rights warning cards outside the Phoenix courthouse for a nominal sum. See LIZ SONNEBORN, *MIRANDA V. ARIZONA: RIGHTS OF THE ACCUSED (SUPREME COURT CASES THROUGH PRIMARY SOURCES)* 53 (2003).

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

55. See *Miranda*, 384 U.S. at 467 (“Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves.”).

56. See *id.* at 479 (“After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights . . . . But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.”).

57. See *id.* at 457–58 (arguing that safeguards are necessary during incommunicado interrogations because, during those interrogations, police officers place suspects in an unfamiliar and menacing environment to compel suspects to self-incriminate).

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

applied by police and enforced by the courts. Civil libertarians applauded the Warren Court for its *Miranda* decision.<sup>59</sup>

The Court left open the possibility that Congress and the States could develop alternatives to the *Miranda* warnings when it explained,

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, *unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.*<sup>60</sup>

Given all of the Court's ambitious objectives, however, it seems clear that the above-quoted language was not an invitation for Congress or the States to replace the *Miranda* warnings with a recycled variation of the traditional involuntariness test. Although such an approach might be adequate to ensure that a confession was actually voluntary, it would remain vulnerable to the same criticisms that were leveled against the traditional involuntariness test that *Miranda* was meant to replace. More importantly, this approach would fail to demonstrate in a systematic and consistent fashion that suspects were effectively apprised of, and properly waived, their Fifth Amendment rights before being subjected to custodial interrogation. Any acceptable alternative to the *Miranda* warnings would seemingly have to satisfy these prerequisites. Accordingly, permitted alternatives might include requiring an attorney be present anytime a suspect is subjected to custodial interrogation or making a video record of the rights warning and waiver.<sup>61</sup> They might even involve enhancing the rights warning itself with advisements about the offense of which the suspect is

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59. See Richard Carelli, *Court Upholds Miranda: Police Must Read Rights to Suspects*, ATHENS BANNER-HERALD (June 27, 2000) [http://onlineathens.com/stories/062700/new\\_0627000005.shtml#WH1e687543Q](http://onlineathens.com/stories/062700/new_0627000005.shtml#WH1e687543Q) ("Steven Shapiro of the American Civil Liberties Union praised the [C]ourt for upholding the *Miranda* ruling, which he called 'an emblem of fairness.'"); see also BAKER, *supra* note 19, at 61–63 (reporting that Robert J. Corcoran, an American Civil Liberties Union (ACLU) volunteer at the organization's Phoenix office, represented *Miranda* at the U.S. Supreme Court, and the ACLU covered out-of-pocket expenses for *Miranda*'s attorneys).

60. *Miranda*, 384 U.S. at 467 (emphasis added).

61. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963); *Escobedo v. Illinois*, 378 U.S. 478, 487–88 (1964); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 268–69 (1996).

accused<sup>62</sup> or collateral consequences of making a statement, such as deportation and the loss of a security clearance.<sup>63</sup> On the other hand, the clear import of the above-quoted passage was that any attempt merely to return to the pre-*Miranda* status quo would be summarily rejected.

Two additional points about the *Miranda* decision deserve special emphasis. First, the Court unmistakably characterized the *Miranda* warnings requirement to be of constitutional dimension rather than being merely a court-made rule.<sup>64</sup> To this end, near the beginning of the *Miranda* opinion, Warren wrote about the need “for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.”<sup>65</sup> Warren continued that the Court granted certiorari in *Miranda* “in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.”<sup>66</sup> Later in the opinion, Warren noted that although “Congress and the States [were] free to develop their own safeguards for the privilege, so long as they [were] fully as effective as” the *Miranda* warnings, “the issues presented [were] of constitutional dimensions and must be determined by the courts.”<sup>67</sup> Warren then explained:

As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when *Escobedo* was before us and it is our responsibility today. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.<sup>68</sup>

Perhaps most telling is that when the Court turned to the custodial interrogation of Ernesto Miranda, it “concluded that statements were obtained from the defendant under circumstances that *did not meet constitutional standards for protection of the privilege.*”<sup>69</sup>

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62. See 10 U.S.C. § 831(b) (2012) (also known as Article 31(b) of the Uniform Code of Military Justice, which provides that “[n]o person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation”).

63. Scott W. Howe, *Moving Beyond Miranda: Concessions for Confessions*, 110 NW. U. L. REV. 905, 916 (2016); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699–700 n.16 (2002).

64. See *Miranda*, 384 U.S. at 490–91.

65. See *id.* at 439.

66. *Id.* at 441–42.

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

68. *Id.* at 490–91 (alteration in original).

69. *Id.* at 491 (emphasis added); see also Yale Kamisar, Foreword, *From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 883 (2001) [hereinafter Kamisar II] (“I venture to say that at the time the *Miranda* opinion was handed down almost everyone who read it (including the dissenting Justices) understood that it was a constitutional decision—an interpretation of the Fifth Amendment privilege against self-incrimination.”) (alteration in original).

The Warren Court reiterated in subsequent cases that the *Miranda* requirements were derived from the Fifth Amendment rather than the Court's own rule-making authority. In *Mathis v. United States*,<sup>70</sup> the Court reminded us that "[its] opinion [in *Miranda*] stated at some length the constitutional reasons why one in custody who is interrogated by officers about matters that might tend to incriminate him is entitled to be warned."<sup>71</sup> In *Orozco v. Texas*,<sup>72</sup> the Court excluded a confession because the use of an admission "obtained in the absence of the required warnings was a flat violation of the *Self-Incrimination Clause of the Fifth Amendment* as construed in *Miranda*."<sup>73</sup> A fair reading of *Miranda*, *Mathis*, and *Orozco* leaves little doubt that the *Miranda* warnings requirements were constitutional in character, at least in the minds of the Justices who joined in the *Miranda* majority opinion.<sup>74</sup>

Second, the Court signaled that it would be strongly disinclined to recognize exceptions and limitations to its newly minted *Miranda* rights warnings requirement. In particular, Warren explicitly anticipated and ruled out the possibility of an impeachment exception to the *Miranda* warnings when he cautioned,

The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner . . . . [S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial . . . . These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.<sup>75</sup>

Further, even assuming the Court would allow for the possibility of some exceptions or limitations to the *Miranda* requirements, they would have to be supported by an especially compelling showing and would be only sparingly recognized because the warnings themselves were constitutionally based. A lesser basis would not justify departing from *Miranda*'s dictates because it would be insufficient to justify the denial of constitutional protections.<sup>76</sup> By any measure, the Court intended, through *Miranda*, to break from tradition and

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70. 391 U.S. 1 (1968).

71. *Id.* at 3 (emphasis added).

72. 394 U.S. 324 (1969).

73. *Id.* at 326.

74. Professor Yale Kamisar argues that Justice White, a stern *Miranda* dissenter, likewise understood that *Miranda* was a constitutional decision as reflected by remarks he made after the decision had been announced. See Kamisar II, *supra* note 69, at 883–84 (quoting remarks made by Justice White after *Miranda* had been decided).

75. *Miranda v. Arizona*, 384 U.S. 436, 476–77 (1966).

76. See, e.g., *Steagald v. United States*, 451 U.S. 204, 223 (1981) (observing that practical problems cannot outweigh the constitutional requirement for a search warrant).

mandate new and comprehensive police practices that would surely disrupt the status quo.<sup>77</sup>

### III. THE REACTION TO *MIRANDA*

The overwhelming public reaction to *Miranda* was loud, swift, and highly critical. For example, Jacob Fuchsberg, a former president of the American Trial Lawyers Association, feared that “[t]he Supreme Court’s decision in [*Miranda*] virtually put[] an end to the effective use of confessions.”<sup>78</sup> Professor Fred Inbau shared “a concern on the part of law enforcement officers—and an understandable concern—that whatever they [said] to a suspect by way of *Miranda* requirements might later be considered inadequate by a judge or appellate court.”<sup>79</sup> Professor Ed Quevedo recalled that the *Miranda* decision seemed to mark “the end of the world as we know it if you were reading the papers. . . . People thought it would lead to lawlessness, police would be handcuffed; we wouldn’t be able to investigate crimes, we couldn’t punish perpetrators.”<sup>80</sup>

Public attitudes toward *Miranda* are vividly reflected in polling data. “[A] Harris poll conducted a few months after the [*Miranda*] opinion found that 57 percent of respondents thought it ‘wrong,’ with only 30 percent calling it ‘right.’”<sup>81</sup> A 1968 Gallup Poll taken shortly after *Miranda* revealed that sixty-three percent of the public felt that courts were too soft on criminals.<sup>82</sup> These results stood in stark contrast to a Gallup Poll that preceded *Miranda*, which indicated that only forty-eight percent of the public believed that courts had been too lenient.<sup>83</sup> The anti-*Miranda* sentiments were further bolstered by crime statistics, which purportedly indicated that in the years immediately preceding *Miranda*, the population of the United States had grown about ten percent while

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77. See Fred E. Inbau, *Over-Reaction—The Mischief of Miranda v. Arizona*, 89 J. CRIM. L. & CRIMINOLOGY 1449, 1460 (1999) (noting that before *Miranda* was decided, “the highest courts of over thirty states, and one federal circuit court of appeals, had held that there was no constitutional requirement that criminal suspects be warned of their self-incrimination privilege prior to police interrogation”) (footnotes omitted).

78. *Miranda Decision Said to End the Effective Use of Confessions*, N.Y. TIMES (Aug. 21, 1966), <http://76307797.weebly.com/public-reaction.html>. In his dissenting opinion in *Miranda*, Justice Harlan warned, “the Court [was] taking a real risk with society’s welfare in imposing its new regime on the country.” *Miranda*, 384 U.S. at 517 (Harlan, J., dissenting).

79. Inbau, *supra* note 77, at 1451 (alteration in original).

80. *Miranda v. Arizona: Rebalancing Rights and Responsibilities*, WEEBLY, <http://76307797.weebly.com/public-reaction.html> (last visited Feb. 17, 2017).

81. Bruce Peabody, *Fifty Years Later, the Miranda Decision Hasn’t Accomplished What the Supreme Court Intended*, WASH. POST (June 13, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/13/your-miranda-rights-are-50-years-old-today-heres-how-that-decision-has-aged/?wpisrc=nl\\_politics&wpm=1](https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/13/your-miranda-rights-are-50-years-old-today-heres-how-that-decision-has-aged/?wpisrc=nl_politics&wpm=1).

82. See Kenneth C. Stephan, Comment, *Title II of the Omnibus Crime Bill: A Study of the Interaction of Law and Politics*, 48 NEB. L. REV. 193, 217 (1968) (citing Fred P. Graham, *Congress Tries to Curb the Court*, N.Y. TIMES, April 28, 1968, § E, at 12).

83. *Id.*

crime had risen a staggering 88 percent.<sup>84</sup> Against this backdrop, the Warren Court was cast by many as being lax on crime, solicitous of criminals, and disinterested in victims.<sup>85</sup> More to the point, the Court's *Miranda* decision was blamed for promoting lawlessness, hamstringing police, and reducing the number of confessions obtained while increasing the likelihood of acquitting the guilty.<sup>86</sup>

The force of the public opposition to *Miranda* was matched by the tenor of the dissenting Justices' rhetoric. For example, Justice White, a *Miranda* dissenter, complained that "[t]he obvious underpinning of the Court's decision [was] a deep-seated distrust of all confessions."<sup>87</sup> White explained that "the not so subtle overtone of the opinion [is] that it is inherently wrong for the police to gather evidence from the accused himself."<sup>88</sup> He contended that the Court's holding had "no significant support in the history of the privilege or in the language the Fifth Amendment."<sup>89</sup> White concluded that there was,

every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.<sup>90</sup>

Justice Harlan, who also dissented in *Miranda*, argued that the requirement for *Miranda* warnings was unnecessary because "the Due Process Clauses [of the Fifth and Fourteenth Amendments] provide an adequate tool for coping with confessions."<sup>91</sup> Harlan warned that "the thrust of the new [*Miranda*] rules [was] to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all."<sup>92</sup>

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84. See Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 899 (2000) [hereinafter Kamisar III] (citing *Toward Freedom from Fear*, a position paper on crime by presidential candidate Richard Nixon, dated May 8, 1968, and set forth at 114 CONG. REC. 12,936–39 (1968)).

85. See *id.* at 894–95. Emblematic of this is a prominent cartoon depicting a driver, labeled "The Criminal," speeding away in a car, labeled "Our Criminal Justice System," from a jilted hitchhiker, labeled "The Victim." Charles Brooks, BIRMINGHAM NEWS, <http://www.historytunes.com/images/cartoons/46-1.png> (last visited Feb. 17, 2017).

86. See Kamisar III, *supra* note 84, at 894–95 (noting that newspapers and legislators across the country accused the Warren Court of "'coddling criminals,' 'handcuffing police,' and otherwise undermining 'law and order'"); see also Stephan, *supra* note 82, at 217–18 (observing that although it is a non-sequitur in the classic sense, it was politically effective to blame the Court for increasing crime rates).

87. *Miranda v. Arizona*, 384 U.S. 436, 537 (White, J., dissenting).

88. *Id.* at 538 (White, J., dissenting) (alteration in original).

89. *Id.* at 526 (White, J., dissenting).

90. *Id.* at 542 (White, J., dissenting).

91. *Id.* at 505 (Harlan, J., dissenting) (alteration in original).

92. *Id.* (Harlan, J., dissenting) (alteration in original).

It was against this backdrop that Richard Nixon ran as the Republican nominee for President in 1968. According to historian Rick Perlstein, “Nixon reestablished himself as a figure of destiny by speaking to people’s craving for order.”<sup>93</sup> Targeting the Warren Court and its *Miranda* decision, Nixon tapped into public anger and fear by making “law and order” a central platform in his run for the White House.<sup>94</sup> Liva Baker, who wrote perhaps the defining book about the *Miranda* case and its relation to politics and crime, explained that “[t]he centerpiece of [Nixon’s] law and order campaign . . . was the American judiciary and in particular the [J]ustices of the United States Supreme Court.”<sup>95</sup> During his acceptance speech for his party’s nomination for president at the Republican National Convention, Nixon promised voters, “[w]e shall re-establish freedom from fear in America so that America can take the lead in re-establishing freedom from fear in the world.”<sup>96</sup> Nixon continued,

And tonight, it is time for some honest talk about the problem of order in the United States. Let us always respect, as I do, our courts and those who serve on them. But let us also recognize that some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country and we must act to restore that balance.<sup>97</sup>

Candidate Nixon later took aim at *Miranda* by name in a position paper on crime entitled *Toward Freedom from Fear*.<sup>98</sup> In the paper, Nixon urged Congress to pass a bill that would overturn *Escobedo* and *Miranda* and restore the voluntariness test in order to “redress the imbalance” caused by these decisions and respond to the harm suffered by “the peace forces in our society.”<sup>99</sup> Nixon argued that “[a]mong the contributing factors to [a sharp increase in street crime] are the decisions of a majority of one of the United States Supreme Court.”<sup>100</sup> He contended,

The *Miranda* and *Escobedo* decisions of the high court have had the effect of seriously hampering the peace forces in our society and strengthening the criminal forces.

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93. Stephen Smith & Kate Ellis, Richard Nixon—*Campaign '68*, AMERICAN PUBLIC MEDIA, <http://americanradioworks.publicradio.org/features/campaign68/b1.html> (last visited Feb. 17, 2017).

94. *Id.*

95. BAKER, *supra* note 19, at 245 (alteration in original).

96. Richard Nixon, *Address Accepting the Presidential Nomination at the Republican National Convention in Miami Beach, Florida*, THE AMERICAN PRESIDENCY PROJECT (Aug. 8, 1968), <http://www.presidency.ucsb.edu/ws/?pid=25968>.

97. *Id.*

98. See 114 CONG. REC. 12,936–39 (1968).

99. *Id.* at 12,937.

100. *Id.*



From the point of view of the peace forces, the cumulative [effect of] these decisions has been to very nearly rule out the “confession” as an effective and major tool in prosecution and law enforcement.

....

From the point of view of the criminal forces, the cumulative impact of these decisions has been to set free patently guilty individuals on the basis of legal technicalities.

....

The tragic lesson of guilty men walking free from hundreds of courtrooms across the country has not been lost on the criminal community.<sup>101</sup>

To help accomplish his objective of restoring law and order and correcting the extravagances of the Warren Court, Nixon pledged to appoint strict constructionists to the Court if he was elected President.<sup>102</sup> With regard to judicial appointments, Nixon explained in his position paper, “I think [the Warren Court’s criminal procedure decisions] point up a genuine need—a need for future Presidents to include in their appointments to the United States Supreme Court men who are thoroughly experienced and versed in the criminal laws of the land.”<sup>103</sup>

Nixon’s law and order message resonated with voters. He carried 32 states and garnered more than 300 electoral votes in the three-way 1968 presidential election.<sup>104</sup> When Chief Justice Warren retired from the Court in 1969,<sup>105</sup> Nixon had the opportunity to make good on his campaign promises and satisfy *Miranda*’s many opponents, including those who were involved in a rather spirited movement to impeach Warren because of *Miranda* and other decisions rendered by the Court under his leadership.<sup>106</sup>

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101. *Id.* (alteration in original).

102. *Richard Nixon Biography*, BIOGRAPHY (Nov. 13, 2014), <http://www.biography.com/people/richard-nixon-9424076#synopsis>.

103. 114 CONG. REC. 12,938 (1968).

104. See John Woolley & Gerhard Peters, *Election of 1968*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/showelection.php?year=1968> (last visited Feb. 18, 2017). Hubert Humphrey, the Democratic candidate, received 191 electoral votes, and George Wallace, a third-party candidate, received 45 electoral votes. *Id.*

105. When Warren announced his retirement in June 1968, Johnson nominated Associate Justice Abe Fortas to replace him as Chief Justice. Fortas was a member of the *Miranda* majority. For senators who were opposed to the *Miranda* decision, Fortas’ nomination provided the first opportunity to register their disenchantment via a planned filibuster. Fortas’ nomination could not get past a procedural cloture vote to end debate, and thus it was ultimately withdrawn by Johnson. See Charles Babington, *Filibuster Precedent? Democrats Point to ‘68 and Fortas*, WASH. POST (Mar. 18, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A45149-2005Mar17.html>.

106. The Court’s decision in *Brown v. Board of Education*, which held that state laws establishing separate public schools for black and white students was unconstitutional, was also a major impetus for the impeach Warren sentiment. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954). For a sampling of images of billboards and fliers urging the impeachment of Warren,

Nixon found his ideal candidate for Chief Justice in Warren Burger, who was himself an outspoken critic of *Miranda*. Before his appointment to the Supreme Court, Burger was a frequent lecturer at law schools and bar associations, where he routinely criticized exclusionary rules in general and *Miranda* in particular. In a now famous commencement speech delivered at Ripon College in 1967, Burger said,

[Other countries] do not consider it necessary to use a device like our Fifth Amendment, under which an accused person may not be required to testify. They go swiftly, efficiently and directly to the question of whether the accused is guilty. No nation on earth goes to such lengths or takes such pains to provide safeguards as we do, once an accused person is called before the bar of justice and until his case is completed.<sup>107</sup>

Burger's approach to criminal justice, and in particular his objections to *Miranda* and exclusionary rules, found favor with presidential candidate Nixon.

[I]n August 1967, Nixon had read in *U.S. News & World Report* excerpts from Warren Burger's commencement speech given at Ripon College in Ripon, Wisconsin. He had been impressed with what Burger said about the administration of American criminal justice. His adaptation of the jurist's ideas to his own speeches for the 1968 presidential campaign held significance, of course, for the immediate future; it was also the beginning of a deeper association between the two men . . . .<sup>108</sup>

President Nixon was inaugurated the thirty-seventh President of the United States on January 20, 1969.<sup>109</sup> In March of that year, Burger, serving on the United States Court of Appeals for the District of Columbia, wrote a stinging

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one need only Google search the term "impeach Warren." Although less extreme than those supporting Warren's impeachment, several noteworthy individuals and organizations, including Judge Learned Hand of the Second Circuit Court of Appeals, the American Bar Association, and the National Association of Attorneys General, "all had gone on record, with varying degrees of credibility, as disapproving the role assumed in recent years by the U.S. Supreme Court." See BAKER, *supra* note 19, at 27; see also *Earl Warren*, HISTORY, <http://www.history.com/topics/earl-warren> (last visited Feb. 19, 2017).

107. See Ace Toscano, *Warren Burger (September 17, 1907 – June 25, 1995)*, THE CHIEF JUSTICES, [http://www.edu.aceswebworld.com/warren\\_burger.html](http://www.edu.aceswebworld.com/warren_burger.html) (last visited Feb. 19, 2017) (alteration in original).

108. See BAKER, *supra* note 19, at 245; see also Lee Huebner, *The Checkers Speech After 60 Years*, THE ATLANTIC (Sept. 22, 2012), <http://www.theatlantic.com/politics/archive/2012/09/the-checkers-speech-after-60-years/262172/> (observing that Burger likely first came to Nixon's attention when he sent a letter of support to Nixon during the 1952 Fund Crisis).

109. Chief Justice Warren administered the oath of office. See John Woolley & Gerhard Peters, *Richard Nixon: Oath of Office Administered by Chief Justice Earl Warren*, THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=77405> (last visited Feb. 19, 2017).

dissent in *Frazier v. United States*.<sup>110</sup> In *Frazier*, the majority of a three-judge panel of the D.C. Circuit, citing *Miranda*, returned the case to the district court below to determine unanswered questions about the voluntariness of the defendant's confession.<sup>111</sup> Burger vehemently disagreed, complaining that,

[t]he seeming anxiety of judges to protect every accused person from every consequence of his voluntary utterances is giving rise to myriad rules, sub-rules, variations and exceptions which even the most alert and sophisticated lawyers and judges are taxed to follow. Each time judges add nuances to these "rules" we make it less likely that any police officer will be able to follow the guidelines we lay down. We are approaching the predicament of the centipede on the flypaper—each time one leg is placed to give support for relief of a leg already "stuck," another becomes captive and soon all are securely immobilized. Like the hapless centipede on the flypaper, our efforts to extricate ourselves from this self-imposed dilemma will, if we keep it up, soon have all of us immobilized. We are well on our way to forbidding *any* utterance of an accused to be used against him unless it is made in open court. Guilt or innocence becomes irrelevant in the criminal trial as we flounder in a morass of artificial rules poorly conceived and often impossible of application.<sup>112</sup>

The *Frazier* decision, as Liva Baker noted, "was reported in the local press, which was received in quantity at the White House and in which attention was focused not on the details of either the case or the decision but on Judge Burger's rousing dissent."<sup>113</sup>

On June 3, 1969, Nixon nominated Burger to serve as Chief Justice of the U.S. Supreme Court.<sup>114</sup> Six days later, following a three-hour debate, the Senate confirmed Burger by a vote of seventy-four to three.<sup>115</sup>

Three years later, Nixon further reshaped the Supreme Court, now the Burger Court, with the appointment of William Rehnquist as an Associate Justice.<sup>116</sup> Like Burger, Rehnquist was a strong and consistent opponent of the *Miranda* decision.<sup>117</sup> When Nixon considered whether to name Rehnquist to the Court, he was surely mindful of a memorandum Rehnquist had prepared for the Nixon

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110. 419 F.2d 1161, 1171–76 (D.C. Cir. 1969) (Burger, J., concurring in part and dissenting in part).

111. *Id.* at 1169.

112. *Id.* at 1176 (Burger, J., concurring in part and dissenting in part).

113. See BAKER, *supra* note 19, at 275–76.

114. *Id.* at 282.

115. *Id.* at 284. It has been reported that Nixon also considered Associate Justice Potter Stewart, also a *Miranda* dissenter, for appointment as Chief Justice. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* 16 (1979).

116. *William Rehnquist Biography*, BIOGRAPHY (Nov. 19, 2014), [www.biography.com/people/william-rehnquist-9454479](http://www.biography.com/people/william-rehnquist-9454479).

117. See Kamisar, *supra* note 10.

Justice Department a few years earlier while Rehnquist was serving as an assistant attorney general in charge of the Office of Legal Counsel.<sup>118</sup> In the memorandum, Rehnquist was critical of the *Miranda* decision, arguing,

The past decade has witnessed a dramatic change in the interpretation given by the Supreme Court of the United States to the constitutional rights of criminal defendants. Limitations both drastic and novel have been placed on the use by both the state and federal governments of pre-trial statements of the defendants . . . .<sup>119</sup>

Elsewhere in the memorandum, Rehnquist wrote,

The impact of *Miranda* and its progeny on the practices of law enforcement officials is far-reaching. The Court is now committed to the proposition that relevant, competent, un-coerced statements of the defendant will not be admissible at his trial unless an elaborate set of warnings be given which is very likely to have the effect of preventing a defendant from making any statement at all.<sup>120</sup>

The Burger Court, now fortified by Rehnquist—and later succeeded by the Rehnquist Court—had *Miranda* squarely in its sites. Although many observers expected the newly constituted Court to overrule *Miranda*,<sup>121</sup> it instead announced several decisions that preserved *Miranda* in name but undermined its constitutional status, thereby limiting its application and import. In the first of these cases, *Harris v. New York*,<sup>122</sup> the Court per Burger established an impeachment exception to *Miranda*, holding that a statement taken in violation of the *Miranda* warnings can be used to impeach the credibility of a defendant's

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118. See *id.* Professor Kamisar recounts,

On April 1, 1969, when he had been assistant attorney general in charge of the Office of Legal Counsel for fewer than 90 days, Rehnquist sent a memorandum to John Dean (of Watergate fame), who was then the associate deputy attorney general. The memorandum charged that “there is reason to believe” the Warren court had tilted the scales of justice too far in favor of criminal suspects. Rehnquist recommended that the president appoint a national commission “to determine whether the overriding public interest in law enforcement requires a constitutional amendment.”

*Id.*

119. Memorandum from William H. Rehnquist to John W. Dean, III, re: Constitutional Decisions Relating to Criminal Law 1 (Apr. 1, 1969), as quoted in Yale Kamisar, *Dickerson v. United States: The Case That Disappointed Miranda's Critics—and Then Its Supporters* 8 (Univ. of San Diego Pub. Law and Legal Theory Research Paper Series, Paper No. 33, 2005), [http://digital.sandiego.edu/lwps\\_public/art33](http://digital.sandiego.edu/lwps_public/art33).

120. *Id.*

121. See *BAKER*, *supra* note 19, at 396; see also Kamisar I, *supra* note 37, at 13 (observing that with the departure of Earl Warren and other “liberal” members of his Court, “almost all Court watchers expected the so-called Burger Court to treat *Miranda* unkindly”); David Sonenshein, *Miranda and the Burger Court: Trends and Countertrends*, 13 *LOY. U. CHI. L.J.* 405, 407 (1982) (arguing that the Burger “Court resolved to redress the perceived imbalance in favor of criminal defendants over the police by narrowing the scope of the original holding” in *Miranda*).

122. 401 U.S. 222 (1971).

direct testimony at trial.<sup>123</sup> This result was directly at odds with *Miranda* itself, in which the Warren Court in dicta had rejected the idea of an impeachment exception.<sup>124</sup> The Burger Court disagreed with this in *Harris*, reasoning that the costs of suppressing the defendant's confession and thereby facilitating perjury outweighed the marginal benefits of suppression, which were limited to any additional deterrence of police misconduct that might be achieved by suppressing an unwarned statement for impeachment purposes.<sup>125</sup> *Harris* clearly signaled that the Burger Court would evaluate the need for *Miranda* warnings in a new and less favorable fashion, one that was unabashedly utilitarian and not constitutionally based.

Two years after *Harris*, the Court per Rehnquist, in *Michigan v. Tucker*,<sup>126</sup> announced that *Miranda*'s remedy of suppressing confessions did not always apply to derivative evidence, deeming admissible the testimony of a witness whose identity had been discovered as a result of questioning the defendant without providing him with a complete set of *Miranda* warnings.<sup>127</sup> Later still, in *New York v. Quarles*,<sup>128</sup> the Court per Rehnquist recognized a public safety exception to the *Miranda* warnings protocols.<sup>129</sup> Finally, in *Oregon v. Elstad*,<sup>130</sup> in an opinion authored by Justice Sandra Day O'Connor and joined by Rehnquist, the Court held that a statement made by a suspect after a proper recitation of *Miranda* warnings and a waiver thereof is normally admissible even when the suspect previously made an unwarned statement.<sup>131</sup>

In these cases, and others, the Court exercised its authority to rewrite *Miranda* in the same manner to lawmakers who exercised their prerogative to amend legislation they had drafted earlier. Recall that the Warren Court instructed, in *Miranda* and subsequent decisions, that the *Miranda* warnings were of constitutional dimension; that is, they originated with the Fifth Amendment.<sup>132</sup> The Burger Court disagreed that *Miranda* possessed such an elevated status. Rehnquist in particular redefined *Miranda*'s pedigree, calling the warnings

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123. *Id.* at 226. Burger wrote the majority opinion in *Harris*, which was decided before Justice Rehnquist joined the Court the following year. *See id.* at 222; *see also* Kamisar, *supra* note 10.

124. *See* *Miranda v. Arizona*, 384 U.S. at 436, 476–77 (1966); *see also supra* note 77 and accompanying text. With regard to *Miranda*'s comments about a possible impeachment exception, the *Harris* Court explained, "Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling." *Harris*, 401 U.S. at 224 (alteration in original).

125. *Harris*, 401 U.S. at 225–26.

126. 417 U.S. 433 (1974).

127. *Id.* at 450–52.

128. 467 U.S. 649 (1984).

129. *Id.* at 655–56.

130. 470 U.S. 298 (1985).

131. *Id.* at 318.

132. *See* *Miranda v. Arizona* 384 U.S. 436, 439 (1966); *see also* *Orozco v. Texas*, 394 U.S. 324, 326 (1969).

requirement a Court-created, prophylactic rule rather than a constitutional necessity.<sup>133</sup> Rehnquist explained for the majority in *Tucker* that the *Miranda* warnings “were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.”<sup>134</sup> As the Court later instructed in *Elstad*, “The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.”<sup>135</sup>

Rehnquist’s reductionist characterization of *Miranda* had significant consequences.<sup>136</sup> If the Court, rather than the Fifth Amendment, was now deemed to be the source of the need to administer *Miranda* warnings, then it follows that the Court had absolute authority to alter the contours of the *Miranda* requirements, diminish their significance, and subordinate their application. It was *Miranda*’s lesser status as a Court-made directive that allowed Rehnquist to conclude in *Quarles*, for example, that a “concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*.”<sup>137</sup>

Congress launched a second front against *Miranda* shortly after the decision was announced. The Omnibus Crime Control and Safe Streets Act of 1968<sup>138</sup> was passed with overwhelming majorities in both houses.<sup>139</sup> The legislation

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133. See *Davis v. United States*, 512 U.S. 452, 457 (1994) (describing the *Miranda* warning as a “series of recommended ‘procedural safeguards’” (quoting *Michigan v. Tucker*, 417 U.S. 433, 443–44 (1974))); see also *Withrow v. Williams*, 507 U.S. 680, 690 (1993) (highlighting that “*Miranda*’s safeguards are not constitutional in character”); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (instructing that “[t]he prophylactic *Miranda* warnings are ‘not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected’” (quoting *Tucker*, 417 U.S. at 444)); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (explaining that “prohibition on further questioning—like other aspects of *Miranda*—is not itself required by the Fifth Amendment’s prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose”); *New York v. Quarles*, 467 U.S. 649, 654 (1984) (observing that it is well established that the *Miranda* warnings are “not themselves rights protected by the Constitution” (quoting *Tucker*, 417 U.S. at 444)); *Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (referring to “prophylactic *Miranda* procedures”).

134. *Tucker*, 417 U.S. at 444.

135. *Elstad*, 470 U.S. at 306; accord *Williams*, 507 U.S. at 690–91.

136. The Rehnquist Court re-characterized *Miranda* in another important way. Recall a basic premise of the Warren Court’s *Miranda* decision that compulsion was an inevitable attribute of custodial interrogation, and that rights warnings were needed to address this compulsion. See *Miranda*, 384 U.S. at 467. The Rehnquist Court later concluded instead that a confession could be obtained in violation of the *Miranda* warnings requirement and nevertheless be voluntary. See *Elstad*, 470 U.S. at 314–15.

137. *Quarles*, 467 U.S. at 653.

138. 18 U.S.C. § 3501 (1968).

139. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 239 (1968). The Senate passed the bill by a vote of 72–4. See RICHARD HARRIS, THE FEAR OF CRIME 98 (1969). The House thereafter voted 317–60 against a conference and then 369–17 in

included a provision known as § 3501,<sup>140</sup> which was designed to overrule *Miranda* and replace its warnings requirement with a case-by-case determination of voluntariness based on a totality-of-the-circumstances test.<sup>141</sup> Under § 3501, *Miranda* warnings would retain some relevance but would no longer be dispositive.<sup>142</sup> Section 3501 essentially sought to return the criminal justice system to the pre-*Miranda* traditional involuntariness approach to confessions.

The provision “was immediately seen as a bald Congressional attempt to rap the Supreme Court’s knuckles over crime.”<sup>143</sup> Supporters of § 3501 countered that the legislation was needed to address “a direct connection between the enlargement of procedural requirements and a rising crime rate”<sup>144</sup> Another plausible impetus for the legislation was that Congress assumed the bill,

would inevitably reach the Supreme Court for constitutional adjudication [and thus it would] force the Supreme Court to re-examine its holding in *Miranda* and possibly reverse that decision. It is possible that this course was taken in anticipation of personnel changes on the Court which might alter the original five to four alignment of the *Miranda* Court.<sup>145</sup>

Regardless of the underlying motivations for the legislation, the rhetoric by Senate proponents of § 3501, and thus opponents of *Miranda*, was passionate and sometimes vitriolic.<sup>146</sup> For example, Senator John McClellan of Arkansas,

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favor of accepting the Senate version in toto. ADAM CARLYLE BRECKENRIDGE, CONGRESS AGAINST THE COURTS 94 (1970).

140. 18 U.S.C. § 3501 (1968).

141. *Id.* § 3501(a)-(b). On the issue of voluntariness, the trial judge can consider the following:

(1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment; (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession; (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him; (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

*Id.* § 3501(b) (alteration in original).

142. *Id.*

143. FRED P. GRAHAM, THE SELF-INFLICTED WOUND 319 (1970).

144. OTIS H. STEPHENS, JR. THE SUPREME COURT AND CONFESSIONS OF GUILT 141 (1973); see Inbau, *supra* note 77, at 1463–64 (urging the Court to modify its approach to confessions per *Miranda* so that it is consistent with § 3501).

145. Stephan, *supra* note 82, at 218 (alteration in original).

146. Besides the rhetoric of the senators themselves,

An impressive list of law enforcement officers, district attorneys, and judges testified before the Senate Judiciary Committee, alleging the deleterious effects of the *Miranda* and *Mallory* decisions and urging congressional action of a remedial nature. The testimony was supplemented by scores of letters and newspaper clippings blaming Supreme Court decisions for the rising crime rate.

who chaired the Senate subcommittee hearings on the crime bill, said during the debate on the provision,

[I]f this confessions provision is defeated, the law-breaker will be the beneficiary, and he will be further encouraged and reassured that he can continue a life of crime and depredations profitably with impunity and without punishment . . . . [If § 3501 is defeated,] every gangster and overlord of the underworld; . . . every murderer, rapist, robber . . . will have cause to rejoice and celebrate.

Whereas, if it is defeated, the safety of decent people will be placed in greater jeopardy and every innocent, law-abiding . . . citizen in this land will have cause to weep and despair.<sup>147</sup>

McClellan's criticism of *Miranda* even extended to hyperbole about how the *Miranda* decision might someday intrude upon the sanctity of the American family:

Under the Court's logic in the *Miranda* case, the day may come when a parent cannot ask his child about any harm the child has committed upon his mother without the parent giving him a warning that anything the child says may be used against him. Should fathers and mothers be required [to give the *Miranda* warnings] before they ask a child about an act that may be criminal . . . ?<sup>148</sup>

Senator Sam Ervin of North Carolina, a respected constitutional expert who later gained fame as Chairman of the Senate Watergate Committee,<sup>149</sup> was likewise outspoken in his support for § 3501 and thus his opposition to *Miranda*. Ervin said,

If you believe that the people of the United States should be ruled by a judicial oligarchy composed of five Supreme Court Justices rather than by the Constitution of the United States, you ought to vote against [the bill]. If you believe that self-confessed murderers, rapists, robbers, arsonists, burglars, and thieves ought to go unpunished, you ought to vote against [the bill] . . . . But if you believe . . . that enough

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*Id.* at 216–17 (footnote omitted).

147. See 114 CONG. REC. 14,155 (1968) (alteration in original) (statement of Sen. McClellan). McClellan also argued:

Today, why should a policeman go out and risk his life to catch a known murderer or criminal who is armed with a gun, when the Supreme Court will find some small technicality . . . to find a way to turn that murderer or criminal loose and then, [in its decisions] attack the officer who risked his life and reflect upon his integrity, by inferring that we cannot trust a policeman to do right . . . . That is their attitude.

114 CONG. REC. 13,839 (1968) (alteration in original) (statement of Sen. McClellan).

148. 114 CONG. REC. 13,847 (1968) (alteration in original) (statement of Sen. McClellan). Of course, McClellan's rhetoric is misplaced. The Fifth Amendment protects against Government misconduct. It does not pertain to parent-child interactions.

149. See *Revisiting Watergate*, WASH. POST, <http://www.washingtonpost.com/wp-srv/onpolitics/watergate/sam.html> (last visited Feb. 19, 2017) (briefly discussing Ervin's role in the Senate Watergate Committee).



has been done for those who murder and rape and rob, and that something ought to be done for those who do not wish to be murdered or raped or robbed, then you should vote for [the bill].<sup>150</sup>

Section 3501 was reluctantly signed into law by President Johnson before he departed office.<sup>151</sup> The Justice Department, however, steadfastly refused to enforce or assert the provision through succeeding administrations, including the Nixon Administration that followed directly after Johnson's.<sup>152</sup> Because of the moratorium resulting from the Justice Department's active and unwavering policy to avoid invoking § 3501,<sup>153</sup> its constitutionality remained largely

150. 114 CONG. REC. 14,155 (1968) (alteration in original) (statement of Sen. Ervin).

151. Max Frankel, *President Signs Broad Crime Bill, With Objections*, N.Y. TIMES, June 20, 1968, at 1. Johnson was no fan of § 3501. He signed the Crime Bill unenthusiastically, at the last hour, concluding that it contained "more good than [harm]." *Id.*

152. See *The Clinton Justice Department's Refusal to Enforce the Law on Voluntary Confessions: Hearing Before the Subcomm. On Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 122 (1999). The Department of Justice took the position that unless the Court overrules *Miranda*, "the United States is not free to urge the lower courts" to "rely on Section 3501." *Id.* (Memorandum from James K. Robinson, acting Assistant Attorney General in 1999). Also noted was that "[t]he Department has not yet decided whether it would ask the Supreme Court in an appropriate case to overrule or modify *Miranda*." *Id.* at 123 (Memorandum from John C. Keeney, acting Assistant Attorney General in 1997). See also Eric D. Miller, Comment, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1034–35 (1998) (noting that Attorney General Ramsey Clark instructed U.S. Attorneys not to admit confessions into evidence unless they comported with *Miranda*); Andrew B. Loewenstein, Note, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351, 357–62 (2001) (discussing the Justice Department's refusal to enforce § 3501, and that under the Clinton administration, the Department of Justice remained steadfastly opposed to enforcing § 3501).

153. The principle reason § 3501 was untested in the courts is because the Justice Department went to great lengths to avoid invoking it. As the Fourth Circuit noted, in the intervening years after *Miranda* was decided and before *Dickerson*,

career federal prosecutors have tried to invoke § 3501 in [the Fourth Circuit] only to be overruled by the Department of Justice. In March of 1997, for example, the U.S. Attorney's Office in Alexandria, Virginia, appealed the suppression of a statement that the district court found was obtained in technical violation of *Miranda*. See *United States v. Sullivan*, 138 F.3d 126 (4th Cir. 1998). In its brief, the U.S. Attorney's Office urged this Court to reverse the district court on the basis of § 3501. The Department of Justice, however, ordered the U.S. Attorney's Office to withdraw its brief. In its place, a brief without any reference to § 3501 was filed. As a result, the Washington Legal Foundation and U.S. Senators Jeff Sessions, Jon Kyl, John Ashcroft, and Strom Thurmond, filed an amicus brief urging this Court to consider the admissibility of Sullivan's confession under § 3501. Because [the Fourth Circuit Court] ultimately concluded that Sullivan was not in custody for *Miranda* purposes when the incriminating statements were made, [it] had no occasion to address the applicability of § 3501.

*United States v. Dickerson*, 166 F.3d 667, 682 (4th Cir. 1999) (alteration in original) (footnote omitted), *rev'd*, 530 U.S. 428 (2000). The Justice Department similarly refused to invoke § 3501 at the Ninth Circuit Court of Appeals.

In *United States v. Cheely*, 21 F.3d 914 (9th Cir. 1994), the Ninth Circuit suppressed an incriminating statement that was obtained in technical violation of *Edwards*. *Id.* at 923. Although the Government did not petition for rehearing, the Ninth Circuit *sua sponte* asked the parties whether the case merited rehearing en banc. See *Cheely v. United*

untested for decades before the courts,<sup>154</sup> and it was never considered on the merits by the Supreme Court.<sup>155</sup> *Miranda*, albeit weakened by the Burger and Rehnquist Courts, still survived as the law of the land.

It was not until 2000, in *Dickerson v. United States*,<sup>156</sup> that § 3501 was fully and finally considered by the Supreme Court. The district court in *Dickerson* suppressed the defendant's statement because, although it was voluntary in the traditional sense, it was taken in violation of *Miranda*.<sup>157</sup> This decision was reversed by the Fourth Circuit Court of Appeals, which held that the defendant's statement was admissible under § 3501.<sup>158</sup> By affirming the constitutionality of

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*States*, 92-30257 (9th Cir. May 25, 1994) (unpublished order). Curiously, the Justice Department filed a memorandum opposing further review. One week later, the Supreme Court in *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L.Ed.2d 362 (1994), would bring § 3501 to the attention of the legal community. In response, a career federal prosecutor sent a letter to the Ninth Circuit apprising them of the Court's decision in *Davis*. Later that same day, Solicitor General Drew Days withdrew the earlier letter and replaced it with a letter that downplayed the relevance of *Davis* to the issues at hand. Notwithstanding the letter from the Solicitor General, the Ninth Circuit "called for supplemental briefing from the parties as to the effect *Davis* might have on our conclusion" to suppress the statements in question. *United States v. Cheely*, 36 F.3d 1439, 1448 (9th Cir. 1994). Although Justice filed a supplemental brief, it nevertheless failed to even argue the applicability of § 3501. Upon reconsideration, the Ninth Circuit still suppressed the statement.

*Id.* at 698 n.15.

154. See generally Paul G. Cassell, *The Statue that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175, 217-18 (1999) (discussing the absence of judicial review of § 3501). Indeed, federal courts of any kind had squarely dealt with § 3501 only twice before *Dickerson* was decided. See *United States v. Crocker*, 510 F.2d 1129, 1138 (10th Cir. 1975) (holding that the trial court did not err when it applied § 3501 in concluding the defendant's confession was voluntary); *United States v. Rivas-Lopez*, 988 F. Supp. 1424, 1435-36 (D. Utah 1977) (holding that § 3501 is constitutional and thus its analysis is the proper standard to determine admissibility of defendants' statements).

155. *Dickerson*, 166 F.3d at 681. Justice Scalia, in a concurring opinion in *Davis v. United States*, 512 U.S. 452 (1994), questioned whether the Department of Justice's failure to invoke § 3501 was "consistent with the Executive's obligation to 'take Care that the Laws be faithfully executed.'" *Id.* at 465 (Scalia, J., concurring) (quoting U.S. CONST. art. II, § 3).

156. 530 U.S. 428 (2000).

157. *Id.* at 432. The Fourth Circuit Court below reached the same conclusion that the defendant's statement was voluntary. See *Dickerson*, 166 F.3d at 695 ("Although the district court specifically found that Dickerson's confession was voluntary for purposes of the Fifth Amendment, it nevertheless suppressed the confession because it was obtained in technical violation of *Miranda*.").

158. *Dickerson*, 166 F.3d at 695. The way in which the issue involving § 3501 was presented to and then addressed by the Fourth Circuit Court was rather convoluted. At the district court below, the government did not assert § 3501 as a basis for admitting Dickerson's confession. *Id.* at 672. When the government lost at the district court (in a memorandum opinion) and the confession was suppressed, it requested reconsideration by the district court, this time asserting compliance with § 3501 as a basis for reconsideration. *Id.* at 675-76. The district court denied the motion for reconsideration. See *United States v. Dickerson*, 971 F. Supp. 1023, 1023 (E.D. Va. 1997). The government then appealed the district court's decision to the Fourth Circuit. *Dickerson*, 166 F.3d at 677. Section 3501 was not, however, briefed by the government at the Fourth Circuit

§ 3501, the Fourth Circuit necessarily concluded that Congress had the authority to overrule *Miranda* and restore the traditional voluntariness test.<sup>159</sup> As the Fourth Circuit explained in its *Dickerson* decision,

Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting § 3501. As a consequence, § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court.<sup>160</sup>

The Fourth Circuit noted in *Dickerson* that *Miranda* retained some significance under § 3501.

Congress did not completely abandon the central holding of *Miranda*, *i.e.*, the four warnings are important safeguards in protecting the Fifth Amendment privilege against self-incrimination. Indeed, § 3501 specifically lists the *Miranda* warnings as factors that a district court should consider when determining whether a confession was voluntarily given.<sup>161</sup>

The *Miranda* decision, in the words of former Supreme Court Justice Arthur Goldberg, now found itself “twisting slowly in the wind.”<sup>162</sup> At last, the stage was fully set for the Rehnquist Court to pass judgment on *Miranda*'s continued viability.

#### IV. *MIRANDA* SURVIVES

When the Supreme Court granted certiorari in *Dickerson* in 1999,<sup>163</sup> it seemed as if *Miranda*'s day of reckoning would soon arrive. In the words of Professor Donald Dripps,

Once the Court granted [certiorari in *Dickerson*], court-watchers knew the hour had come. At long last the Court would have to either repudiate *Miranda*, repudiate the prophylactic-rule cases, or offer some ingenious reconciliation of the two lines of precedent.<sup>164</sup>

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as a basis for reversal. Judge Karen Williams, writing for the two-judge majority at the Fourth Circuit, considered § 3501 *sua sponte*, explaining that the government's decision to forego invoking § 3501 did not prevent the court from addressing the constitutionality of the statute. *Id.* at 683; *see* Singleton v. Wulff, 428 U.S. 106, 121 (1976) (stating that the issues to be determined are within the discretion of the courts of appeals). *See generally* Carlisle v. United States, 517 U.S. 416, 421–23 (1996) (discussing the extent to which the district courts have the power to act *sua sponte*).

159. *See Dickerson*, 166 F.3d at 671.

160. *Id.*

161. *Id.* at 686–87.

162. *See* Arthur J. Goldberg, *Escobedo and Miranda Revisited*, 18 AKRON L. REV. 177, 182 (1985).

163. *Dickerson v. United States*, 528 U.S. 1045 (1999).

164. *See* Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 33 (2001) (alteration in original).

Many predicted *Miranda*'s demise because of all that had happened over the previous thirty-five years since it was decided.<sup>165</sup> The 5–4 Supreme Court decision in *Miranda* was widely unpopular. Congress had swiftly and overwhelmingly passed § 3501, which overruled *Miranda*.<sup>166</sup> The legislation was signed by the President and upheld by the Fourth Circuit. Years later, when the statute finally reached the Supreme Court for its consideration, that Court had been significantly reconstituted as a more conservative body led by a Chief Justice who was a longtime critic of *Miranda*.<sup>167</sup> Indeed, the fate of § 3501, and, thus, *Miranda* would be decided by a majority of Justices who joined together in a multi-decade project of diminishing *Miranda*'s status and influence. It was the perfect storm. All three branches of government and the public seemed aligned against *Miranda*, and all the pieces were now in place for the Court to deliver the coup de grace.<sup>168</sup>

But a funny thing happened on the way to the guillotine. The Supreme Court in *Dickerson* instead struck down § 3501 and thereby ensured *Miranda*'s continued vitality.<sup>169</sup> More surprisingly, it did so by an overwhelming 7–2 vote.<sup>170</sup> Most surprisingly, Chief Justice Rehnquist wrote the majority opinion.<sup>171</sup>

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

In *Miranda v. Arizona*, we held that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence. In the wake of that decision, Congress enacted 18 U.S.C. § 3501, which in essence laid down a rule that the

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165. See GARY L. STUART, *MIRANDA: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT* 167–68 (2004) (noting that before *Dickerson*, many thought the Court would overrule *Miranda*).

166. Lucian Paul Sbarra, Note, *Wiping the Dust Off of an Old Statute: United States v. Dickerson Eliminates the Miranda Warnings*, 35 WAKE FOREST L. REV. 481, 481–82 (2000).

167. See Dripps, *supra* note 164, at 3.

168. See Sbarra, *supra* note 166, at 497 (contending that “the interplay between the Department of Justice's repeated failure to § 3501 and the Supreme Court's limits on the *Miranda* rule provided the fuel for the *Dickerson* court to pronounce § 3501 as constitutional and to eradicate the necessity for the *Miranda* warnings”). On the other hand, some commentators were optimistic that *Miranda* would survive *Dickerson*. See STUART, *supra* note 165, at 112–14.

169. *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

170. *Id.* at 430.

171. *Id.* at 431. The oral argument at the Supreme Court in the *Dickerson* case was somewhat irregular. Of course, counsel representing *Dickerson* did not argue in support of § 3501. Consistent with its past policies, the Justice Department likewise did not defend the constitutionality of the statute. Accordingly, the Court appointed Professor Paul Cassell to serve as an amicus and argue in defense of § 3501. Cassell, a former Rehnquist clerk, was no doubt selected for this task because he was a prominent and longtime critic of *Miranda*. See generally Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1058–59 (1998); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084, 1085 (1996); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 390 (1996) [hereinafter Cassell I].

admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.<sup>172</sup>

Regardless of whether one approves of the result in *Dickerson*, there is general agreement that Rehnquist's majority opinion was tepid and uninspiring. The criticism is fair, as his opinion reads more like a compromise report of a divided committee than the principled expression of a scholarly jurist.<sup>173</sup> Professor Paul Cassell called Rehnquist's opinion in *Dickerson* "skimpy" and "jerry-built."<sup>174</sup> Professor Yale Kamisar described it as "rather flat."<sup>175</sup> Professor Susan Klein said the opinion was "in a word, terrible."<sup>176</sup> Professor Donald Dripps complained it was "intentionally written to say less rather than more."<sup>177</sup> Critiques aside, however, the more remarkable feature of Rehnquist's opinion in *Dickerson* is not its lackluster quality but rather its surprising result, that is, *Miranda*'s reprieve.

The question begs to be asked: why would "Rehnquist, for decades an implacable critic of *Miranda*,"<sup>178</sup> ride to its rescue in *Dickerson*? The most widely accepted, albeit speculative, explanation is that because Rehnquist did not have the votes to overrule *Miranda*, he decided to join the majority and minimize damage.<sup>179</sup> The theory goes like this: if Rehnquist had stayed true to his beliefs and instead voted with the dissenting Justices in *Dickerson*, Justice John Paul Stevens, perhaps the strongest proponent of *Miranda* who was then on the Court, would have likely written the majority opinion.<sup>180</sup> Fearing this, Rehnquist joined the pro-*Miranda* majority in *Dickerson* so he could assign the case to himself and thus block Stevens from attempting to resurrect *Miranda* to the elevated status it had enjoyed under the Warren Court.<sup>181</sup> In particular,

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172. *Dickerson*, 530 U.S. at 431–32 (citation omitted).

173. *See id.* at 438–39.

174. Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in Dickerson*, 99 MICH. L. REV. 898, 902 (2001) [hereinafter Cassell II].

175. Kamisar II, *supra* note 69, at 893.

176. Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1071 (2001).

177. Dripps, *supra* note 164, at 3.

178. *Id.*

179. *See* STUART, *supra* note 165, at 122–23.

180. When the Chief Justice dissents, the writing of the majority opinion is assigned by the Senior Justice among those voting in the majority. *See Supreme Court Procedures*, UNITED STATES COURTS, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited Feb. 20, 2017). In the case of *Dickerson*, this would have been Stevens.

181. *See* STUART, *supra* note 165, at 122–23.

Rehnquist could have been concerned that if Stevens used *Dickerson* to re-establish *Miranda*'s constitutional standing, this would set the stage for the Court in the future to undo the various exceptions and limitations to *Miranda* instituted over the years under Burger's and Rehnquist's leadership. Consistent with this reasoning, if the split among the Justices had instead been 4–4, rather than 6–2, in opposition to § 3501, Rehnquist would have joined the other side and authored an opinion striking down *Miranda*. Because Rehnquist did not have the votes needed to overrule *Miranda*, he opted instead to join the majority and preserve a diminished *Miranda* rather than voting with the dissent and thereby risking the resuscitation of an invigorated *Miranda*.

There are other possible, albeit speculative, explanations for Rehnquist's actions in *Dickerson*. Rehnquist could have regarded *Dickerson* as an opportunity for the Court to assert and maintain its power vis-à-vis Congress, which made no secret of its intent to overrule *Miranda* through § 3501. Professor Craig Bradley, a former Rehnquist clerk, wrote about *Dickerson*, “for the Supreme Court to overrule *Miranda* itself is one thing, to stand by while Congress does this is quite another. In *Dickerson*, the majority, which included O'Connor, sent a strong message to Congress: Stay off our turf!”<sup>182</sup>

Professors Michael Dorf and Barry Friedman were just as emphatic when proposing the explanation that,

[Section 3501] was a slap at the Court, and if any Court was likely to slap back, it was [the *Dickerson* Court]. For the Court that in recent years has given us [various decisions] favoring its own power at the expense of Congress, [§] 3501 was a gnat that ran into the windshield of whatever it was that *Miranda* held.<sup>183</sup>

This theory may also explain the surprising consensus of opinion reflected in an overwhelming 7–2 vote in *Dickerson* without any concurring opinions. It could well be that Rehnquist and most of his colleagues endeavored to form as united a front as possible because they were directly confronting Congress by striking down § 3501. There is precedent for the Court seeking broad internal consensus when opposing a co-equal branch of the government. In *Nixon v. United States*,<sup>184</sup> for example, the Court found itself in an adversarial posture vis-à-vis the President in deciding whether the “Watergate tapes” were privileged.<sup>185</sup> There, the Court decided the issue against the President's interests

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182. See Craig Bradley, Supreme Court Review *Behind the Dickerson Decision*, TRIAL, Oct. 2000, at 80.

183. Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61, 72 (alteration in original) (footnotes omitted).

184. 418 U.S. 683 (1974). In *Nixon*, the Court held that tapes of Nixon's conversations were not privileged and had to be released, concluding that there is no “absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.” *Id.* at 706. Ironically, it was Burger who delivered the Court's unanimous opinion in *Nixon*, joined by among others Justices Blackman and Powell, who were also Nixon appointees.

185. *Id.* at 687–90.

by an 8–0 vote.<sup>186</sup> It has been widely reported that the Justices worked together to arrive at a unanimous decision as Nixon had earlier said that he would comply with a “definitive order” by the Court, which, some speculated, signaled he might defy a split decision.<sup>187</sup> In *Dickerson*, Rehnquist and six other Justices may have likewise joined together to forge a united front when asserting the Court’s authority over Congress on matters of constitutional interpretation and application.<sup>188</sup>

Closely related to the imperative to defend the Court’s turf could have been Rehnquist’s desire to assume a strong leadership role as the Chief Justice. Rehnquist could advance this objective by assembling a decisive majority in *Dickerson*, even if this meant authoring an uninspired consensus opinion that required him to subordinate his personal views that he had more freely expressed as an Associate Justice.<sup>189</sup> This reasoning may help explain the 7–2 vote to strike down the statute without any concurring or separate opinions. Rehnquist may have persuaded Justices Sandra Day O’Connor and Anthony Kennedy, seemingly the swing votes in *Dickerson*,<sup>190</sup> to join a compromise opinion preserving a diminished *Miranda* without writing separately in exchange for Stevens, an enthusiastic supporter of *Miranda*, to do the same. Justice Antonin Scalia, joined by Justice Clarence Thomas, delivered a broadside dissent in *Dickerson* that most observers agree scored points at the majority’s expense.<sup>191</sup> However, Rehnquist’s opinion barely acknowledges, let alone fully addresses, Scalia’s dissent. The absence of a forceful response to the dissenting Justices could reflect that Rehnquist was less concerned about engaging issues and garnering scholarly approval than he was about forming and leading a unified seven-Justice majority.<sup>192</sup>

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186. *Id.* at 707; see STANLEY I. KUTLER, *THE WARS OF WATERGATE: THE LAST CRISIS OF RICHARD NIXON* 508 (1990) (explaining that Rehnquist, then an Associate Justice, recused himself from the case because of his past association with the Nixon administration).

187. Bruce Kauffman, *The United States v. Nixon: A Unanimous Supreme Court Decision*, HISTORY LESSONS (Jul. 28, 2012), <http://historylessons.net/the-united-states-v-nixon-a-unanimous-supreme-court-decision> (observing that “before the trial began[,] Nixon had said he would abide by ‘a definitive order’ by the [C]ourt, which most [J]ustices took to mean that if they produced a split decision, Nixon might defy the ruling. Therefore, even though the [J]ustices were divided on many issues, they voted unanimously to impress upon Nixon that the [C]ourt must be obeyed.”).

188. See *Dickerson v. United States*, 530 U.S. 428, 430 (2000). Years earlier under Warren’s leadership, the Court worked together to forge a unanimous decision in *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (holding unconstitutional state laws establishing separate public schools for black and white students). Unanimity was assigned great importance by the Court in *Brown*, as it anticipated resistance to court-ordered desegregation, especially in some of the Southern states. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798–803 (2007) (Stevens, J., dissenting).

189. See Cassell II, *supra* note 174, at 900.

190. See Dripps, *supra* note 164, at 62.

191. See *Dickerson*, 530 U.S. at 444–65 (Scalia, J., dissenting); Dorf & Friedman, *supra* note 183, at 69–70.

192. In the words of Professor Dripps,

Also, Rehnquist and the *Dickerson* majority may have preserved a diminished *Miranda* because of a fear of the unknown. If the Court had instead affirmed § 3501 and thereby struck down *Miranda*, this would have essentially re-established the traditional involuntariness test for the admissibility of confessions, at least in federal trials. This, in turn, would have reignited the same complaints about the old involuntariness approach, including that it failed to provide adequate standards and was largely ineffective in protecting suspects against excesses by the police. Moreover, states would not have to follow suit and could instead establish their own requirements for custodial interrogation as long as they provided at least as much protection as afforded by the Fifth Amendment as implemented via § 3501.<sup>193</sup> While some states would surely adopt an approach that replicated § 3501, others would likely opt to retain the *Miranda* warnings requirements<sup>194</sup> or establish different standards. The result would be an undesirable and complicated hodgepodge of rules and protections that would vary from jurisdiction to jurisdiction.

Beyond all of this, it is uncertain how a pre-*Miranda* approach to custodial interrogation would actually be applied to 21st Century America in which public acceptance of the *Miranda* warning requirements has dramatically grown; police, prosecutors, and defense counsel have for decades adjusted their procedures and structured their roles to account for *Miranda* and its

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The fact that Chief Justice Rehnquist, for decades an implacable critic of *Miranda*, wrote the majority opinion, is more than one of those rich ironies with which our constitutional history abounds. It is also a sure sign of a compromise opinion, intentionally written to say less rather than more, for the sake of achieving a strong majority on the narrow question of *Miranda*'s continued vitality.

Dripps, *supra* note 164, at 3.

193. See, e.g., *State v. Knapp*, 666 N.W.2d 881, 897 (Wis. 2003) (holding that physical evidence obtained as a direct result of an intentional violation of *Miranda* warnings is deemed to be inadmissible under Article I, Section 8 of the Wisconsin Constitution, even though such evidence would be admissible under *United States v. Patane*, 542 U.S. 630 (2004)); see generally *Brigham City v. Stuart*, 547 U.S. 398, 409 (2006) (Stevens, J., concurring) (observing that “[f]ederal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires”); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489 (1977) (discussing how state constitutions can afford greater protection of individual rights than the Federal Constitution).

194. The states would be free to retain the *Miranda* warnings and waiver requirements as a matter of state law, either via the state constitution or state statute. For example, in *Illinois v. Gates*, 462 U.S. 213 (1983), the Court adopted for the federal system a broad, totality-of-the-circumstances analysis for evaluating the reliability of information provided by an informant. *Id.* at 214. *Gates* replaced the more rigorous approach required by *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). *Gates*, 462 U.S. at 238–39. Although forty-five states and the District of Columbia have adopted the *Gates* approach, six states continue to adhere to the prior and more rigorous standards provided by *Aguilar* and *Spinelli*. See Sean C. Monaghan, *Gates v. Aguilar-Spinelli Test*, CRIMINAL PROCEDURES: CASES, STATUTES, & EXECUTIVE MATERIALS, [http://users.wfu.edu/wrightrf/Aspen-Students/statesurveys\\_aguilarspinelli.htm](http://users.wfu.edu/wrightrf/Aspen-Students/statesurveys_aguilarspinelli.htm) (last visited Feb. 20, 2017).



requirements.<sup>195</sup> Recall that opinion polls taken before and shortly after the *Miranda* decision reflected that the public strongly opposed *Miranda*, and the Court's role in establishing warning requirements.<sup>196</sup> Years later, in a later poll taken shortly after the *Dickerson* decision, an overwhelming ninety-four percent of Americans said the police should inform suspects of their constitutional rights before questioning them.<sup>197</sup> Over time, the public came to endorse *Miranda*.

Finally, there is no doubt *Miranda* had some beneficial effect of curbing excesses by the police when seeking confessions from criminal suspects. If the *Miranda* warnings were no longer required, the Court may have feared that police might backslide. And, because *Miranda* became so widely known and deeply engrained in the broader culture, many criminal suspects subjected to custodial interrogation would no doubt ask police about their "*Miranda* rights" even if *Miranda* had been overruled.<sup>198</sup> How should the police properly respond to these questions in a post-*Miranda* world? Rehnquist and other Justices may have reasoned that if the Court is going to overrule the most famous criminal procedure case in American history, it should at least be relatively confident *Miranda* would be replaced by a uniform approach for interrogating suspects that is readily capable of a prompt, effective, and uncomplicated implementation and use. Perhaps the Court declined to overrule *Miranda* for no other reason but for the doubt that these objectives could be painlessly accomplished and the uncertainty of the unintended consequences that would follow its demise.

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195. My guess is that some states would retain the requirement for *Miranda* warnings or an equivalent approach via legislation or rules of criminal procedure. Regardless, it is likely that most jurisdictions and police departments would routinely continue to administer *Miranda* warnings as a matter of practice and procedure. As noted later in this article, over the years, police have successfully adjusted to *Miranda* and the warnings requirements without measurably reducing the likelihood of obtaining a confession. See *infra* notes 208–212, and accompanying text. In most cases under § 3501, prosecutors would likely resort to a totality-of-the-circumstances test for admissibility of a confession only when there was a defect or omission of the *Miranda* warnings. On the other hand, a minority of jurisdictions would probably dispense with *Miranda* warnings and return to pre-*Miranda* interrogation practices, at least initially, but some of these may later return to administering the warnings if confessions were being suppressed by judges at a higher rate.

196. Bruce Peabody, *Fifty Years Later, the Miranda Decision Hasn't Accomplished What the Supreme Court Intended*, WASH. POST (June 13, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/13/your-miranda-rights-are-50-years-old-today-heres-how-that-decision-has-aged/?wpisrc=nl\\_politics&wpmm=1](https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/13/your-miranda-rights-are-50-years-old-today-heres-how-that-decision-has-aged/?wpisrc=nl_politics&wpmm=1).

197. *Supreme Court's Miranda Decision*, GALLUP (June 27, 2000), <http://www.gallup.com/poll/2779/supreme-courts-miranda-decision.aspx>. At the same time, the public was about evenly divided over whether confessions obtained without informing defendants of their rights should be admissible in trial, with forty-five percent saying they should be while forty-nine percent responding that they should not be. *Id.*

198. See *id.*

V. *MIRANDA*'S NEXT FIFTY YEARS

Any hopes that *Dickerson* signaled the rebirth of an invigorated *Miranda* were quickly dashed. In *United States v. Patane*,<sup>199</sup> decided in 2004, a detective questioned a suspect about a pistol he allegedly possessed without first complying with the *Miranda* warnings and waiver requirements.<sup>200</sup> The suspect told the detective where to find the pistol, which the detective then seized.<sup>201</sup> Relying heavily on pre-*Dickerson* cases, the Court barred the use of the statement itself but allowed the pistol to be introduced into evidence.<sup>202</sup> A majority of the Court, including Rehnquist, seemed to attach no significance to the fact that *Dickerson*, per Rehnquist, stated a few years earlier that *Miranda* “announc[ed] a constitutional rule.”<sup>203</sup> *Patane* makes clear that although *Dickerson* preserved *Miranda*, it did so in its pre-*Dickerson*, diminished form.

The *Miranda* we know today—that is, the post-*Dickerson* and post-*Patane* version of it—is far different than the *Miranda* of fifty years ago. In its early years, *Miranda* was countercultural and destabilizing.<sup>204</sup> Over time, it became mainstream. This ossification is not unlike that experienced by a long-haired rock star from the 1960s whom parents despised, the Federal Communications Commission (FCC) fined, and overflowing stadium crowds cheered. Decades later, we find that the same rock icon, now worn and battle-scarred, enjoys a high Q rating, appears in nostalgic minivan commercials, and headlines county fairs. *Miranda*, like a middle-aged former rock star, has entered into its sedate, golden years.

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199. 542 U.S. 630 (2004).

200. *Id.* at 635.

201. *Id.*

202. *Id.* at 633. The Court specifically instructed that “nothing in *Dickerson*, including its characterization of *Miranda* as announcing a constitutional rule, changes” any of the prior limitations or exceptions to the warning requirements. *Id.* at 640 (citation omitted).

203. *Dickerson v. United States*, 530 U.S. 428, 440 (2000) (alteration in original).

204. See Stephan, *supra* note 82, at 217–18; see also Kamisar III, *supra* note 84, at 894–95.

Indeed, *Miranda* has become universally accepted and even preferred.<sup>205</sup> Police have become comfortable with the need to provide *Miranda* warnings.<sup>206</sup> By now all active law enforcement officers have grown up exclusively with *Miranda* and have been trained to comply with its requirements.<sup>207</sup> *Miranda* is comparatively easy for police to follow. It provides clear guidance to law enforcement for securing a rights waiver and imposes no other serious impediments upon their efforts to obtain confessions.<sup>208</sup> Since *Dickerson*, the Court has seriously rebuked the police in *Miranda*'s name only once, when they deliberately sought to exploit the required warnings through a carefully planned process so as to undermine Fifth Amendment protections.<sup>209</sup> Although *Miranda* imposes some absolute requirements upon the police, these are clearly defined and can be readily satisfied with little difficulty.<sup>210</sup> After decades of practice

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205. This is not to suggest that the substantive criticism of the *Miranda* decision has been convincingly addressed or universally rejected. But although many of these critiques remain relevant, they are no longer regularly voiced. See Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2667–69, 2672 (1994); see also Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1086 (1994) (arguing that *Miranda* lacks both historical and textual support); Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1433–35, 1441–43 (1985) (arguing that (a) the traditional involuntary test was adequate and thus the *Miranda* protocols were unnecessary and irrational, and (b) that *Miranda* is anti-confession and misguidedly seeks to level the playing field between criminal suspects and the police); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 871–72 (1996); Richard H. Seeburger & R. Stanton Wettick, Jr., *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 26 (1967) (arguing, with the support of data, that *Miranda* is injurious to law enforcement); Cassell I, *supra* note 171, at 418, 438–40; Milhizer, *supra* note 58, at 39–48 (arguing that *Miranda*'s reliance on psychological theory to justify the need for rights warnings is problematic.); Eugene R. Milhizer, *Confessions After Connolly: An Evidentiary Solution for Excluding Unreliable Confessions*, 81 TEMP. L. REV. 1, 27 (2008) (arguing that “*Miranda* represents a veritable triumph of quasi voluntariness over reliability, i.e., not the voluntariness of a *confession* itself but rather the voluntariness of the *Miranda* waiver that permits custodial interrogation that can lead to a *confession*”); YALE KAMISAR, *POLICE INTERROGATIONS AND CONFESSIONS: ESSAYS IN LAW AND POLICY* 86–87 (1980) (observing that “a cogent criticism of the old ‘voluntariness’ test also applies to *Miranda*,” i.e., that because the critical events occur in secrecy the admissibility of the confession will be determined by the outcome of a “swearing contest” in court).

206. Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1011–12 (2001).

207. See *Berkemer v. McCarty*, 468 U.S. 420, 434 (1984).

208. See Leo, *supra* note 206, at 1015; see also Welsh S. White, *Miranda's Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1213, 1217, 1246 (2001) (noting that *Miranda* imposes few, if any, meaningful restraints on post-waiver police interrogation methods).

209. See, e.g., *Missouri v. Seibert*, 542 U.S. 600, 616–18 (2004) (holding that if the deliberate two-step strategy (i.e., obtaining a second confession after *Miranda* warnings as a continuation of a previously unwarned confession) has been used, post-warning statements that are related to the substance of pre-warning statements must be excluded unless curative measures are taken before the post-warning statement is made).

210. See Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 510 (1996) [hereinafter Schulhofer]; see

honed by trial and error, the police have expertly incorporated *Miranda* warnings into their interrogation procedures without unduly compromising their ultimate objective of obtaining admissible confessions.<sup>211</sup> The *Miranda* decision has even been praised by law enforcement authorities because it has “provided an opportunity to professionalize the police.”<sup>212</sup>

Prosecutors have come to like *Miranda*. When the police have obtained a waiver of *Miranda* rights, as they frequently do,<sup>213</sup> the corresponding confession is almost always bulletproof from defense attack. *Miranda* can be said “to liberate the police,”<sup>214</sup> and thus help prosecutors because compliance with the warnings protocols substantially reduces the likelihood that a court will conclude that the interrogation process was coercive under the traditional involuntariness approach.<sup>215</sup> A properly executed and signed *Miranda* rights waiver certificate is, for all practical purposes, often the beginning and the end of a motion to suppress a confession.<sup>216</sup> Over time, *Miranda* has become as much a sword for the prosecution as it is a shield for criminal suspects.<sup>217</sup>

Of course, defense counsel also support *Miranda*. Even with all of its faults and shortcomings, the *Miranda* warning requirements provide superior protection to criminal suspects as compared to the traditional voluntariness

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also Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 456–57 (1987) [hereinafter Schulhofer I] (arguing that *Miranda* has had little impact on law enforcement’s ability to obtain confessions). Further, as the forensic sciences have advanced, the need for confessions to obtain convictions has correspondingly diminished.

211. See LAWRENCE S. WRIGHTSMAN & MARY L. PITMAN, *THE MIRANDA RULING: ITS PAST, PRESENT, AND FUTURE* 139–41, 144, 147–50 (2010) (observing that police have an extensive repertoire of ploys to cause suspects to confess, including flattery and ingratiation, veiled threats, and deception.).

212. See Yale Kamisar, *Landmark Ruling’s Had No Detrimental Effect*, BOSTON GLOBE, Feb. 1, 1987, at A27, as quoted in Schulhofer I, *supra* note 210, at 458 n.59; see also Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 268 nn. 13–15, 272 (1996) (finding, based on the observation of 122 interrogations and examination of 60 videotapes of interrogations in police departments operating in three urban areas with populations ranging from about 116,000 to 372,000, that approximately 78% of suspects waived their *Miranda* rights); see also Cassell & Hayman, *supra* note 205, at 859–60 (concluding, based on the examination of 129 interrogations conducted with Salt Lake County, Utah, that approximately 84% of suspects waived their *Miranda* rights).

213. Cassell & Hayman, *supra* note 205, at 859 (noting that 83.7% of suspects waive their *Miranda* rights).

214. Schulhofer I, *supra* note 210, at 454.

215. See *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) (“[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.”).

216. See *McCarty*, 468 U.S. at 430.

217. See STUART, *supra* note 165, at 101 (observing that “as of 1988, less than 1 percent of all American criminal cases had been dismissed because of ‘unwarned’ confessions. And only a fraction of that 1 percent was dismissed for noncompliance with *Miranda*.”); see also Schulhofer, *supra* note 210, at 502 (explaining that “[f]or all practical purposes, *Miranda*’s empirically detectable harm to law enforcement shrinks virtually to zero”).

approach.<sup>218</sup> The obligation to give *Miranda* warnings and obtain a waiver can curb many possible police excesses, and it allows for the systematic involvement of defense counsel during the investigatory stage of trial.

For all these reasons, *Miranda*'s next fifty years thus seem far more secure than its first five decades. No organized or motivated anti-*Miranda* constituency still exists. *Miranda* is no longer polarizing, threatening, counter-cultural, or extreme. It has instead become an unassuming fact of life that imposes only modest requirements on law enforcement, which are easily and routinely satisfied. As Professor Leo put it, "Once feared to be the equivalent of sand in the machinery of criminal justice, *Miranda* has now become a standard part of the machine."<sup>219</sup>

This is the final and perhaps greatest irony of *Miranda*'s circuitous legal and political journey. When *Miranda* burst onto the scene, it was revolutionary and destabilizing. It was bold and threatening. In its original form, it was too big to succeed. Fifty years later, after being relentlessly eroded and diminished, *Miranda* has become widely accepted,<sup>220</sup> rather innocuous and seemingly indispensable. In its reduced state, *Miranda* has become too big to fail.<sup>221</sup>

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218. See STUART, *supra* note 165, at 103–04.

219. See Leo, *supra* note 206, at 1027.

220. See *supra* note 197 and accompanying text.

221. There is likewise a final irony in the personal story of Ernesto Miranda. After being released on parole for his last criminal convictions, Miranda frequented a seedy area of Phoenix known as the Deuce section. In a bar located in Deuce section on the evening of January 31, 1976, Miranda was involved in a dispute about cheating during a card game. The argument turned violent and ended when one of the card players stabbed Miranda to death. Although the perpetrator evaded the police, his alleged accomplice was arrested and taken to the stationhouse for questioning. As was now required by the Supreme Court, the officers first advised the suspect of his *Miranda* warnings. The suspect declined to waive his rights and answer questions, and therefore was ultimately released because of a lack of evidence. See BAKER, *supra* note 19, at 408–09. It thus seems quite likely that those responsible for Miranda's death avoided conviction because of the protections afforded to them by the rights warning and waiver protocols bearing their victim's name.

