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COMMENTS

TAKING BACK MIRANDA: HOW SEIBERT AND PATANE CAN KEEP "QUESTION-FIRST" AND "OUTSIDE MIRANDA" INTERROGATION TACTICS IN CHECK

Paul G. Alvarez*

"While to the undiscerning eye interrogation seems to be a conversation, in fact it is a carefully orchestrated interaction which provides an ideal forum for suspect manipulation."

Aside from the right to freedom of speech, perhaps the most widely-recognized rights afforded to citizens in this country are those articulated in the landmark decision Miranda v. Arizona. At its most basic level, the Miranda Court held that police officers are required to inform a suspect of certain rights before any custodial interrogation begins. Failure to effectively warn the suspect of these rights will generally bar the admission of any statements obtained during the interrogation for purposes of guilt.

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2. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ").
3. 384 U.S. 436 (1966). Much of this recognition can undoubtedly be attributed to the abundance of "cop dramas" (and, even now, reality shows, such as "Cops") on television. See Cathy Young, Miranda Morass, REASON, Apr. 2000, at 54, 54, available at http://reason.com/0004/fe.cy.miranda.shtml.
4. Miranda, 384 U.S. at 478-79. Though the Miranda warnings exist in several forms, ranging from long-winded to terse, each version, regardless of its length, must have certain key elements as prescribed by Miranda: the suspect has the right to remain silent, the right to an attorney (appointed or retained), and that anything the suspect says may be used as evidence against him. See id. at 444; see also Steve Mount, The Miranda Warning, USCONSTITUTION.NET, at http://www.usconstitution.net/miranda.html (last modified June 13, 2005).
Rooted in the Fifth Amendment protection against self-incrimination, \textit{Miranda}’s holding was largely a response to the growing prevalence of abusive police interrogation tactics and the “inherently compelling pressures” that such stationhouse practices place upon an “individual’s will to resist and [which might] compel him to speak where he would not otherwise do so freely.” In reaching its decision, the \textit{Miranda} Court sought to provide a bright-line standard that would both protect the rights of the suspect in custody and give guidance to the police and courts in obtaining and ruling on the admissibility of evidence. However, later decisions undercut \textit{Miranda}’s aspirations. Though it has made recent attempts to clarify its \textit{Miranda} jurisprudence, the Court now appears more splintered on this issue than ever before.

Equally disturbing is the effect this lack of jurisprudential direction has had on a more practical front: law enforcement interrogation practices.

\begin{itemize}
  \item \textbf{6.} U.S. CONST. amend. V (“[N]or shall [any person] be compelled in any criminal case to be a witness against himself.”). While it is true that the \textit{Miranda} warnings are also founded upon the Sixth Amendment right to have assistance of counsel in a criminal proceeding, \textit{id.} amend. VI, any issues with regard to the right of counsel are beyond the scope of this Comment. Suffice to say, the right of a suspect to have counsel present in a criminal proceeding and custodial interrogation is not questioned here, and is considered a “given” for the purposes of this Comment’s analysis.
  \item \textbf{7.} \textit{Miranda}, 384 U.S. at 447-48, 467.
  \item \textbf{8.} Charles D. Weisselberg, \textit{Saving Miranda}, 84 CORNELL L. REV. 109, 113 (1998). Indeed, \textit{Miranda}’s holding was seen by its principal authors to be a minimum standard required by the Constitution, out of which fairer law enforcement practices would evolve. \textit{Id.} at 123-25.
  \item \textbf{9.} \textit{See, e.g.}, Harris v. New York, 401 U.S. 222, 225-26 (1971) (holding that testimonial evidence obtained without \textit{Miranda} warnings is admissible for purposes of impeachment); Michigan v. Tucker, 417 U.S. 433, 444 (1974) (explaining that \textit{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”); Oregon v. Hass, 420 U.S. 714, 714-15, 722 (1975) (extending the \textit{Harris} exception to apply when the suspect has been notified of and accepts his \textit{Miranda} rights, then requests a lawyer, but subsequently provides inculpatory information before the lawyer arrives); New York v. Quarles, 467 U.S. 649, 653-54 (1984) (reaffirming and extending \textit{Tucker}’s holding by classifying the \textit{Miranda} rules as merely “prophylactic”); Oregon v. Elstad, 470 U.S. 298, 317-18 (1985) (holding that a good faith failure by a police officer to administer \textit{Miranda} warnings to a suspect does not preclude admission of later-obtained inculpatory information from a second interview in which the suspect was properly advised of his rights).
  \item \textbf{10.} \textit{See, e.g.}, Dickerson v. United States, 530 U.S. 428, 437-38, 444 (2000) (reaffirming \textit{Miranda} as “a constitutional decision,” and overturning Congressional statute 18 U.S.C. § 3501 on grounds that Congress does not have the right to supersede the Court’s decisions that interpret and apply the Constitution).
  \item \textbf{11.} \textit{See discussion infra} Part II.
  \item \textbf{12.} \textit{See, e.g.}, Charles L. Weisselberg, \textit{In the Stationhouse After Dickerson}, 99 MICH. L. REV. 1121, 1121-22 (2001); Weisselberg, \textit{supra} note 8, at 132.
\end{itemize}
Specifically, the “one-two punch” of *Harris v. New York*\(^\text{13}\) and *Oregon v. Hass*,\(^\text{14}\) combined with the Court’s holdings in *Michigan v. Tucker*,\(^\text{15}\) *New York v. Quarles*,\(^\text{16}\) and *Oregon v. Elstad*,\(^\text{17}\) has paved the way for interrogation practices in which police officers make attempts to obtain confessions by deliberately disregarding the warnings prescribed in *Miranda*.\(^\text{18}\) While the Court has considered cases that have dealt peripherally with “outside *Miranda*” issues,\(^\text{19}\) its decisions have failed to address whether information obtained by a police officer’s deliberate violation of *Miranda* is admissible for impeachment purposes.\(^\text{20}\)

Given the Court’s uncertain direction in its recent *Miranda* jurisprudence and the continued prevalence of “outside *Miranda*” questioning, the issue of admissibility of evidence obtained by deliberate *Miranda* violations will not be easily resolved.\(^\text{21}\) However, the Court is not without a guiding light.\(^\text{22}\) The Supreme Court’s recent decisions in

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18. Weisselberg, *supra* note 8, at 133-37; *see also* Philipsborn, *supra* note 1, at 20. The two most prevalent violations of *Miranda* are the “outside *Miranda*” and “question-first” techniques. *Missouri v. Seibert*, 124 S. Ct. 2601, 2608-09 & 2609 n.2 (2004) (plurality opinion); Weisselberg, *supra* note 8, at 133-37; *see also* Philipsborn, *supra* note 1, at 20. As discussed by Professor Charles L. Weisselberg, “outside *Miranda*” questioning involves the police practice of giving the suspect his *Miranda* warnings and then deliberately refusing to respect the suspect’s Fifth Amendment rights once the warnings are given. Weisselberg, *supra* note 8, at 133-37. “Question-first” covers situations where police officers deliberately withhold giving *Miranda* warnings in an effort to obtain a confession; *Miranda* warnings are generally given to the suspect only after a confession is obtained. *Seibert*, 124 S. Ct. at 2608-09 & 2609 n.2 (plurality opinion). Though slightly different in technique, “outside *Miranda*” and “question-first” will be used interchangeably for the purposes of this Comment because each constitutes a deliberate police practice designed to circumvent or disregard *Miranda*. *See id.* at 2609 n.2 (plurality opinion) (recognizing that both “outside *Miranda*” and “question-first” are similar deliberate police interrogation practices that rely on the impeachment exception to *Miranda* created in *Harris* as a justification for deliberately disregarding *Miranda* during interrogation).
19. *See, e.g.*, *Seibert*, 124 S. Ct. at 2605 (denying admission of pre- and post-*Miranda* warning confessional statements when the warning is given near enough in time to an initial confession that it would fail to adequately inform the suspect of the substance of her *Miranda* rights); *Elstad*, 470 U.S. at 309 (admitting inculpatory information obtained after a police officer’s initial “simple failure to administer the [*Miranda*] warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect’s ability to exorcise his free will”); *Mincey v. Arizona*, 437 U.S. 385, 396-402 (1978) (holding that inculpatory evidence is inadmissible for any purpose in a criminal trial if deemed involuntary as a result of police misconduct).
20. *See discussion infra* Part I.
21. *See discussion infra* Part I.
22. *See discussion infra* Part III.
Missouri v. Seibert\textsuperscript{23} and United States v. Patane\textsuperscript{24} provide an ideal model for solving this problem. This Comment will examine the historical underpinnings of the constitutional protection against self-incrimination as it has evolved through case law, and culminated in \textit{Miranda}. It will then chronicle the various cases following \textit{Miranda} that have sought to clarify its holding, from the Court's first exception to the rule, through the Court's most recent decisions. Next, this Comment will demonstrate how the Court's holdings in many of these cases have called into question the constitutional underpinnings of the \textit{Miranda} requirements, and how this has ultimately created a loophole that allows police officers to engage in the startling practice of questioning "outside \textit{Miranda}" in order to obtain confessional statements from suspects for impeachment purposes at trial. In addition to addressing the growing prevalence of questioning "outside \textit{Miranda}," this Comment seeks to determine whether confessions obtained by deliberate violations of \textit{Miranda} may be used against a suspect at trial for impeachment purposes,\textsuperscript{25} or whether the use of such statements violates a suspect's constitutional protection against self-incrimination. The Comment argues that, in light of the Court's jurisprudence, all statements obtained "outside \textit{Miranda}" are inadmissible for \textit{any} purpose, including impeachment. Finally, this Comment proposes a solution that ensures that a suspect's constitutional rights will be protected during interrogation, while maintaining that justice be served.

\section*{I. Evolution of a Case, Constitutionally Rooted}

\subsection*{A. Digging in the Dirt: Uncovering \textit{Miranda}'s Roots}

Though it is typically considered a constitutional issue,\textsuperscript{26} the privilege against self-incrimination predates the enactment of the Constitution and the Bill of Rights.\textsuperscript{27} Though the Court initially used the Fifth

\begin{footnotes}
\textsuperscript{23} 124 S. Ct. 2601 (2004).
\textsuperscript{24} 124 S. Ct. 2620 (2004).
\textsuperscript{25} This, of course, presumes that such a confession could only be used against the defendant if she has decided to take the stand in her own defense. However, as this Comment hopes to elucidate, the act of holding the defendant to a statement made while in custody, but without being given her \textit{Miranda} warnings, substantially diminishes the defendant's rights to mount a complete defense as provided by the Constitution. \textit{See} discussion infra Parts II, III.
\textsuperscript{26} \textit{See supra} note 6 and accompanying text.
\textsuperscript{27} \textit{See} Miranda v. Arizona, 384 U.S. 436, 458 n.27 (1966) (observing the existence of the right against self-incrimination as far back as Biblical times). The majority opinion in \textit{Miranda} goes on to point out that this right ultimately gained popularity during the early 1600s when John Lilburn, an anti-Stuart, refused to take the Star Chamber Oath, which
\end{footnotes}
Amendment to govern cases involving police interrogation practices,\textsuperscript{28} in \textit{Brown v. Mississippi},\textsuperscript{29} the Court began to apply a test rooted in the Due Process Clause of the Fourteenth Amendment to these cases.\textsuperscript{30} Under this test, a court looks at the totality of the circumstances surrounding an interrogation, including the suspect's physical and mental condition, to determine whether or not a confession was made voluntarily.\textsuperscript{31}

While the Due Process voluntariness test controlled self-incrimination cases for nearly thirty years,\textsuperscript{32} some of the Justices became increasingly disenchanted with the effectiveness of the test in deterring abusive police practices during custodial interrogation.\textsuperscript{33} Their disillusionment with the Due Process voluntariness test is evidenced by their various attempts at quietly circumventing the test through case law.\textsuperscript{34} Beginning in 1964, would have forced Lilburn to answer all questions asked of him on any subject, presumably including questions regarding his guilt. \textit{Id.} at 458-59. Parliament's later abolition of the Star Chamber and its oath reflected a sea change in the attitude toward individual liberty in England that eventually found its way to the colonies in America. \textit{Id.} at 459. The colonists' embrace of this ideal naturally paved the way for the protection against self-incrimination to find its way into the Fifth Amendment. \textit{Id.}

28. See \textit{Bram v. United States}, 168 U.S. 532, 542 (1897). In \textit{Bram}, the defendant was arrested for allegedly murdering three boat passengers at sea. \textit{Id.} at 535-37. While in custody, Bram was taken into a police detective's office, stripped of his clothing and interrogated while both his clothing and his person were being searched. \textit{Id.} at 538. During this custodial interrogation, Bram made an inculpatory statement to the detective, which was used against him at trial by the prosecution. \textit{Id.} at 538-39. In overturning Bram's conviction, the Court held that the admission of an involuntary confession is a violation of the privilege against self-incrimination under the Fifth Amendment. \textit{Id.} at 542-43 (holding that, in light of the Fifth Amendment privilege against self-incrimination, a suspect's confession "must be free and voluntary: that is, [it] must not be extracted by any sort of threats or violence . . . nor by the exertion of any improper influence" (quoting 3 \textsc{Russell} on \textsc{crimes} 478 (6th ed. n.d.))).


30. \textit{Id.} at 286-87 (holding that a violation of a suspect's Fourteenth Amendment Due Process rights occurred when the trial court admitted into evidence a confession that had been obtained through torture and coercion by police officers). This test will hereinafter be referred to as the "Due Process voluntariness test."

31. Weisselberg, \textit{supra} note 8, at 113-14. As the Court has consistently held, statements considered to have been given involuntarily under the Due Process voluntariness test were deemed inadmissible at trial for any purpose. \textit{Id.}


33. Lawrence Herman, \textit{The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation}, 48 \textsc{Ohio St. L.J.} 733, 754-55 (1987).

34. See, \textit{e.g.}, Spano v. New York, 360 U.S. 315, 321-27 (1959) (continuing to apply the Due Process voluntariness test to post-indictment interrogation, but demonstrating that four concurring Justices viewed the test as a corollary to the Sixth Amendment right to counsel); Mallory v. United States, 354 U.S. 449, 452-55 (1957) (holding, together with \textit{McNabb v. United States}, 318 U.S. 332, 345 (1943), that a suspect's confession is inadmissible if the suspect is not presented before a magistrate without delay). It is
however, the Court began a more open retreat away from the Due Process voluntariness test, toward decisions that relied upon rights specifically guaranteed in the Bill of Rights.\(^{35}\)

**B. Miranda: A Lasting Stitch in the Fabric of the Law**

Three cases, *Malloy*,\(^{36}\) *Escobedo*,\(^{37}\) and *Massiah*,\(^{38}\) set the stage for *Miranda*.\(^{39}\) As stated in *Miranda*, the Court’s goal was ultimately to achieve a harmonious balance between an individual’s rights and protections under the Constitution and the government’s ability to effectively prosecute an individual who is guilty of committing a crime.\(^{40}\) In addition, the Court wanted to create a rule that would guide the police and courts ably in matters of admissibility of evidence in ways it felt the Due Process voluntariness test could not.\(^{41}\)

Building upon this, the *Miranda* Court announced a new test rooted in the Fifth Amendment privilege against self-incrimination that governed the admissibility of statements acquired during custodial interrogations.\(^{42}\)

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35. See, e.g., *Escobedo v. Illinois*, 378 U.S. 478, 484-85, 490-91 (1964) (expanding the Sixth Amendment right to counsel during post-indictment interrogation recognized in *Spano* to include pre-indictment interrogation); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (reversing a denial of a writ of habeas corpus on grounds that the Fourteenth Amendment guarantees a suspect the Fifth Amendment privilege against self-incrimination); *Massiah v. United States*, 377 U.S. 201, 204-07 (1964) (relying on the Court’s rationale in *Spano* to incorporate the Fifth Amendment privilege against self-incrimination on the states via the Sixth Amendment).

39. Weisselberg, *supra* note 8, at 116-17. While *Escobedo* had adhered to *Malloy*, the rationale in *Miranda* was also influenced in large part by an amicus brief to the Court by the American Civil Liberties Union, which argued that as the Sixth Amendment right to counsel was granted to suspects in the stationhouse by *Escobedo*, the Fifth Amendment right against self-incrimination was similarly applicable to those same in-custody suspects. See *id.* at 118-19.
40. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) ("All these policies point to one overriding thought: the constitutional foundation underlying the privilege [against self-incrimination] is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.")
41. See *supra* note 8 and accompanying text.
42. See *Miranda*, 384 U.S. at 467, 469. Though the Court saw its holding in *Miranda* as a means of curtailing the use of the Due Process voluntariness test to assess the admissibility of statements made during custodial interrogations, courts have continued to apply the Due Process test in other situations in and around the ambit of *Miranda*. See
In light of its detailed considerations of newer police interrogation techniques found in police training manuals, the Court found that "[e]ven without employing brutality . . . the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." Accordingly, it ordered a bright-line rule requiring police officers to inform suspects in custody of their rights under the Fifth and Sixth Amendments. Because police officers could potentially abuse their power when questioning suspects, the Court held that all interrogations must be preceded by a recitation of the suspect's Fifth Amendment rights in order to ensure that the suspect was informed sufficiently of his rights under the Constitution. The Court considered any statements taken after the suspect invoked his rights to be presumptively coerced.


43. Miranda, 384 U.S. at 448-55.
44. Id. at 455. Though its jurisprudence prior to Miranda had largely dealt with physical abuse and coercion to obtain testimony, the Court recognized that police interrogation techniques had become more complex, allowing them to exact a heavy toll on a suspect without having to resort to physical violence. Id. at 455-56.
45. See id. at 478-79. As Chief Justice Warren stated, "a warning is a clearcut fact. More important . . . a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." Id. at 469. Such language clearly indicates the Court's eagerness to move away from the uncertainty of the Due Process voluntariness test toward a more bright-line approach. See id. In creating this simple, bright-line rule, the Court placed significant emphasis on the fact that, since police interrogations are largely secretive in nature, courts are at a disadvantage in discovering what truly transpires in the interrogation room. Id. at 448. Indeed, the secretive nature of police interrogation continues even today, with some now calling for mandatory tape recording of all custodial interrogations. See, e.g., Christopher Slobogin, Taping Taping, 1 OHIO ST. J. CRIM. L. 309, 309 (2003) (arguing that, although only a handful of courts have found that a failure to tape record a custodial interrogation is objectionable, all police interrogations should be tape recorded under rights granted by the Constitution).
46. See Miranda, 384 U.S. at 475-76. By requiring police officers to undergo an additional procedure before interrogating a suspect, Miranda curtailed the seemingly-absolute power possessed by police in interrogation situations, and shifted the balance toward protecting the rights of individuals under suspicion. Weisselberg, supra note 8, at 125.
47. Miranda, 384 U.S. at 473-74.
In dissent, Justice Harlan argued that the holding in *Miranda* would only serve "to discourage any confession." In his opinion, the decision had no foundation in the Fifth Amendment, and was instead only relying on previous Sixth Amendment applications to justify applying the Fifth Amendment. Instead of deciding whether these violations fall under the Fifth Amendment, Justice Harlan argued that the Court should continue to use the common law voluntariness test under the Fourteenth Amendment Due Process Clause as a means of making such decisions. Under the Court's due process jurisprudence, he noted "the Court ha[d] developed an elaborate, sophisticated, and sensitive approach to admissibility of confessions" that was more encompassing, but less exacting than the *Miranda* majority's Fifth Amendment test.

C. Exceptions to Miranda's Bright-Line Rule

Beginning with the dissenters in *Miranda*, critics decried this decision as having thrown the balance too far toward the suspect, and too far away from the interests of ensuring effective law enforcement. Seemingly in direct response to this outcry, the Court took definitive steps toward tempering the bright-line rule of *Miranda*. In a series of five major cases over the twenty years following *Miranda*, the Court

48. *Id.* at 505 (Harlan, J., dissenting). Justice White also dissented for many of the same reasons as Justice Harlan. *Id.* at 526-45 (White, J., dissenting).
49. *Id.* at 510 (Harlan, J., dissenting).
50. *Id.* at 506-07 (Harlan, J., dissenting) (arguing that the Due Process voluntariness test is "a workable and effective means of dealing with confessions in a judicial manner").
51. *Id.* at 508, 511 (Harlan, J., dissenting). Justice Harlan further notes that there are proper police techniques that may involve some pressure on the suspect; the voluntary testimonial evidence obtained from these techniques would be admissible under the Fourteenth Amendment but excluded under the Fifth Amendment. See *id.* at 515 (Harlan, J., dissenting). Though he admitted that, under the Fourteenth Amendment Due Process voluntariness test, greater intrusions on a person would be allowed, Harlan was quick to point out that far greater intrusions on a person have been allowed by the courts once they have probable cause against a suspect, and that, by comparison, the peaceful interrogation of a suspect is not a huge intrusion on that suspect's rights. See *id.* at 517 (Harlan, J., dissenting).
52. *Id.* at 505 (Harlan, J., dissenting) (arguing that the Due Process voluntariness test already "provide[s] an adequate tool for coping with confessions"); *id.* at 526 (White, J., dissenting) (stating that *Miranda*'s holding "has no significant support in the history of the privilege or in the language of the Fifth Amendment").
53. See *id.* at 441 n.3 (citing a litany of anti-*Miranda* responses and amici briefs from various individuals in the law enforcement field, including police chiefs, district attorneys, and others).
54. See cases cited infra note 55.
slowly but deliberately chipped away at *Miranda*'s constitutional foundation, calling into question whether the warnings required by *Miranda* were constitutionally mandated or merely prophylactic measures taken to ensure that a suspect's constitutional rights were not infringed upon.

1. Harris and Hass: Rewriting the Rule for Impeachment

The first case that took affirmative steps in weakening the *Miranda* decision was *Harris v. New York*. In *Harris*, the Court confronted a case in which the defendant made potentially inculpatory statements to the police immediately following his arrest, but before he was given a complete recitation of his *Miranda* rights. Though it held that the statements could not be used against the defendant in the prosecutor's case-in-chief, the trial court determined that the statements could still be used against the defendant for impeachment purposes.

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57. *Quarles*, 467 U.S. at 653 ("[W]e believe that this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*.” (emphasis added)); see also *Tucker*, 417 U.S. at 445-46 ("[W]e have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege.” (emphasis added)).

Congress also made an attempt in 1968 to circumvent the *Miranda* warning requirement by passing a provision concerning the admissibility of confessions. 18 U.S.C. § 3501 (a) (2000). This provision stated that admissibility of a suspect's in-custody statements was dependent upon a trial judge's determination of whether the statement was voluntarily made. *Id.* In determining the voluntariness of the suspect's statement, the trial judge was instructed to take into consideration the circumstances surrounding the confession, including whether or not the suspect was advised of his right to remain silent, his right to an attorney, and that his statements could be used against him. *Id.* § 3501(b). However, the existence or absence of any of these factors was not determinative of the voluntariness of the statement. *Id.* It is this provision with which the Court took particular issue in *Dickerson*. See discussion infra Part I.D.


59. *Id.* at 223-24 (noting that the statements made after the defendant was apprised of his right to remain silent, but before he was advised of his right to an attorney could be used against him). In the initial case at bar at the Appellate Division of New York State, the record shows that the statements in question made by Harris were: (1) that Harris acted as an agent for an undercover police officer in obtaining narcotics on one day; and (2) that Harris obtained drugs from an unknown person outside of a bar and subsequently sold those drugs to the undercover officer who then arrested Harris. *People v. Harris*, 298 N.Y.S.2d 245, 247 (App. Div.), aff'd, 250 N.E.2d 349 (N.Y. 1969), aff'd sub nom. *Harris v. New York*, 401 U.S. 222 (1971). Though the defendant admitted that he gave these statements voluntarily, the trial court determined, and the assistant district attorney for the case conceded that, under *Miranda*, the statements could not be used against the defendant during the prosecution's case-in-chief. *Id.* at 246-48.

60. *Harris*, 298 N.Y.S.2d at 249.
After the case was affirmed on these grounds throughout the New York State court system, a five to four Supreme Court decision held that the use of these statements for impeaching the defendant was not unconstitutional. Relying on its previous decision in Walder v. United States, the Court held that Harris could not use his Fifth Amendment protections under Miranda as "a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." In opposition to this holding, Justice Brennan, joined by Justices Douglas and Marshall, wrote a blistering dissent which warned that the holding in Harris "seriously undermine[s]" the objective set forth in Miranda of ensuring that police interrogation practices do not violate a suspect's constitutional rights. In his opinion, impeaching the defendant with his own "partly-Mirandized" statements was unconstitutional because a statement used as direct proof of guilt and a statement used to impeach a witness's credibility are equally incriminating, and without distinction in the Constitution. Accordingly, since a statement obtained in violation of Miranda may not be used to prove the defendant's guilt under the Fifth Amendment, that same statement may not be used to impeach the defendant at trial. In closing his dissent, Justice Brennan

61. Harris, 250 N.E.2d at 350.
63. 347 U.S. 62 (1954). In Walder, the Court held in a Fourth Amendment case that, though a defendant has the right to be protected from having illegally obtained evidence used against him at trial, the defendant may not use that protection as "a shield against contradiction of his untruths." Id. at 63. Accordingly, the Court held (in very similar language to the Harris opinion) that "there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." Id. However, even by the Harris Court's own admission, Walder concerned the use of evidence to impeach matters collateral to the charge, whereas Harris involved using evidence to impeach the defendant's direct testimony. See Harris, 401 U.S. at 225; id. at 227-28 (Brennan, J., dissenting). Indeed, the Court's willingness to apply the impeachment exception to both direct and collateral matters was the major difference between the majority and dissent's disparate opinions. Compare id. at 225-26, with id. at 227-32 (Brennan, J., dissenting); see also infra notes 66-69 and accompanying text.
64. Harris, 401 U.S. at 226.
65. Id. Justice Black also dissented, but provided no opinion. See id. at 226.
66. Id. at 232 (Brennan, J., dissenting).
67. Id. at 231 (Brennan, J., dissenting) ("'An incriminating statement is as incriminating when used to impeach credibility as it is when used as direct proof of guilt and no constitutional distinction can legitimately be drawn.'" (quoting People v. Kulis, 221 N.E.2d 541, 543 (N.Y. 1966) (Keating, J., dissenting))).
68. Id. at 230-31 (Brennan, J., dissenting). Justice Brennan also focused intently on the damage the Harris holding would impose on a defendant's right to mount a defense. Id. at 229-31 (Brennan, J., dissenting). Using Walder to his own advantage, Brennan reminded the Court that:
portentously predicted that the holding in *Harris* would open doors not only to further attacks on *Miranda*, but more importantly to police practices that would attempt to circumvent *Miranda* in an effort to obtain statements from the defendant that could be used against him at trial if the defendant chose to testify in his own defense. As this Comment will reveal, Justice Brennan's predictions have proven accurate.

*Oregon v. Hass* built upon the *Harris* exception, and extended it to include situations in which the defendant initially was given a full recitation of his *Miranda* rights and accepted them, but later, after requesting an attorney (but before one could be provided for him) made incriminatory statements to the police officers who had detained him. In

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"the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief."

*Id.* at 228 (Brennan, J., dissenting) (quoting *Walder*, 347 U.S. at 65). Justice Brennan further argued that *Miranda* established the Fifth Amendment as a "constitutional specific[]" that guaranteed a defendant such rights to meet these accusations. *Id.* at 229 (Brennan, J., dissenting). Allowing the prosecution to use statements against the defendant, Brennan contended, would deny the defendant an "unfettered" choice when deciding to take the stand in his own defense. *Id.* at 230 (Brennan, J., dissenting); *see also* *Griffin v. California*, 380 U.S. 609, 613-15 (1965) (holding that, since the choice to testify on one's own behalf is a constitutional right, such a decision should be "unfettered").

69. *Harris*, 401 U.S. at 232 (Brennan, J., dissenting). Furthering his argument, Justice Brennan noted:

The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution.

*Id.* (Brennan, J., dissenting).

70. *See discussion infra* Parts IIA-B.


72. *Id.* at 714-15. Initially, the trial court ruled that any statements obtained after the defendant requested his attorney were inadmissible against him in the government's case-in-chief, but could still be used for impeachment of the defendant's testimony if he took the stand in his own defense. *Id.* at 716-17. However, the Oregon State Court of Appeals reversed, relying upon a pre-*Harris* case, *State v. Brewton*, 422 P.2d 581 (Or. 1967), which held that un-Mirandized statements could not be used against the defendant for impeachment purposes. *State v. Hass*, 510 P.2d 852, 855 (Or. Ct. App.), aff'd, 517 P.2d 671 (Or. 1973), rev'd sub nom. *Oregon v. Hass*, 420 U.S. 714 (1975). A closely divided Oregon Supreme Court affirmed this decision. *Hass*, 517 P.2d at 673 (4-3 decision) (noting that in situations where proper *Miranda* warnings are given, the police have nothing to lose and much to gain by continuing to interrogate).
reversing the Oregon Supreme Court's decision, the Court was much less divided on this issue than it had been in *Harris.*73

The majority, authored by Justice Blackmun, saw "no valid distinction to be made in the application of the principles of *Harris* to that case and to *Hass' case."74 Relying on *Harris*, the Court held that evidence deemed inadmissible by *Miranda* in the prosecution's case-in-chief is not completely barred from all uses by the government, in particular, for impeachment purposes.75 The Court went on to mention that it felt the purpose of the exclusionary aspect of *Miranda*’s holding,76 namely deterrence of police misconduct during interrogation, was adequately served by making the defendant’s statements inadmissible against him during the prosecution’s case-in-chief.77 To completely exclude the defendant’s statements in this case, even for impeachment purposes, would undo the "balance [that] was struck in *Harris*, [by] pervert[ing] the constitutional right [against self-incrimination] into a right to falsify . . . evidence from the defendant’s own mouth."78

In dissent, Justice Brennan, joined by Justice Marshall, continued to raise the objections he previously made in his dissenting opinion in *Harris.*79 However, the decision in *Hass*, Justice Brennan argued, went far beyond the decision in *Harris* in undermining the efficacy of the

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73. *Hass*, 420 U.S. at 714, 724 (voting 6-2 (Justice Douglas took no part in the decision) to reverse the Oregon Supreme Court’s ruling). It should be noted, however, that this decision is not necessarily demonstrative of an ideological shift in the Court’s jurisprudential approach to *Miranda*. Rather, even at a glance at the voting members of the Court between *Harris* and *Hass*, it is obvious that the addition of Justice Rehnquist to replace Justice Black (who dissented in *Harris*) and the fact that Justice Douglas (another *Harris* dissenter) did not take part in this decision at all were two major factors in the 6-2 outcome of the decision. See id.; *Harris*, 401 U.S. at 222, 226. Accordingly, it could be argued that, if Justice Black had been on the Court instead of Justice Rehnquist, and Justice Douglas had taken part in the decision itself, this decision very well may have been closer than it turned out to be.


75. Id.

76. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (holding that, after the necessary warnings are given, "the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. 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" (emphasis added)).

77. *Hass*, 420 U.S. at 722. This rationale echoes a similar rationale employed in the *Harris* opinion by the majority. See *Harris*, 401 U.S. at 224. But see infra notes 227-32 and accompanying text (discussing how the *Patane/Seibert* approach proposed in this Article provides a more effective deterrent to police misconduct during custodial interrogation than the mere exclusion of the statement during the prosecution’s case-in-chief under *Hass*).

78. *Hass*, 420 U.S. at 723.

79. Id. at 724-26 (Brennan, J., dissenting).
Miranda decision. After Harris, police may have had an incentive to administer the Miranda warnings in the hopes that any statements, voluntarily given, could be used by the prosecution in its case-in-chief against the defendant. By contrast, after Hass, Justice Brennan argued that there was no longer any incentive to administer the Miranda warnings because statements could be obtained and used against the defendant for impeachment purposes, even after a suspect requests an attorney.

2. Tucker and Quarles: Problems with Prophylactics

Only three years after Harris, but before Hass, the Court took what is, arguably, one of the biggest steps away from the Miranda holding in Michigan v. Tucker. In Tucker, the Court questioned whether failure to administer complete Miranda warnings infringed on the defendant's constitutional right against self-incrimination, or merely constituted a violation of "prophylactic rules developed to protect that right." In Tucker, the defendant was arrested on suspicion of rape and read each of his Miranda rights, except his right to have an attorney appointed for him if he could not afford one. During questioning, the defendant claimed he was with a third party, Henderson, at the time the crime was committed. Though the trial court excluded the defendant's statements from use in the prosecution's case-in-chief on the grounds that he did not receive complete Miranda warnings, the Court allowed the introduction of Henderson's statements at trial to prove Tucker's guilt.

80. Id. at 725 (Brennan, J., dissenting).
81. Id. (Brennan, J., dissenting).
82. Id. (Brennan, J., dissenting).
84. Id. at 439. It should be noted here that Tucker, though a Miranda decision, involved a great deal more than just the Miranda issue. See id. Weighing significantly on the Court's decision in this case was the fact that, though the trial occurred after Miranda was decided, the police officers' failure to administer the Miranda warnings occurred before the case was decided. Id. at 447. This complexity is also indicated by the fact that Justices Brennan and Marshall (traditional dissenters in cases that went against the methodology in Miranda) concurred in the judgment on the grounds that Miranda did not retroactively apply to interrogations before the ruling. Id. at 453 (Brennan, J., concurring in the judgment).
85. Id. at 435-36.
86. Id. at 436. When questioned by police as to the veracity of Tucker's statements, Henderson contradicted Tucker's claims and offered additional evidence that appeared to inculpate Tucker. Id. at 436-37. Specifically, Henderson told police that Tucker had been with him at one point in the day, but that they had parted company early in the day; the next day, they met up again, and Henderson noticed and commented upon scratch marks on Tucker's face. Id. at 436. In response, Tucker insinuated that he had had a rough sexual encounter with a woman the night before. Id. at 437.
87. Id. at 437.
Following the affirmation of his conviction by Michigan's court of appeals and state supreme court, Tucker appealed to the U.S. Supreme Court on the ground that his failure to receive adequate *Miranda* warnings barred the use of all evidence, including third party evidence, against him at trial. In affirming Tucker's conviction, the Court concluded that the police officer's failure to give complete *Miranda* warnings did not violate Tucker's Fifth Amendment privilege against self-incrimination. Instead, the Court determined that the officer only strayed from the "prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege," and not from a constitutional requirement.

Accepting the fact that the "pressures of law enforcement and the vagaries of human nature" make it impossible to achieve a perfect police investigation, the Court sought to ensure that the bright-line exclusionary rule in *Miranda* did not negate otherwise valid, good-faith efforts by police to obtain information from suspects. Accordingly, the Court employed a balancing test designed to determine the effect that judicial sanctions should have on the admissibility of evidence obtained when these warnings were not given in full. Applying the test to Tucker's case, the Court concluded that the evidence should not be barred based on the fact that there was no coercion in the case, that the police officer only inadvertently failed to give the defendant a complete reading of the *Miranda* rules, and that the interrogation occurred before the Court decided *Miranda*.

Building on Tucker's rationale that the *Miranda* warnings were merely prophylactic, the Court in *New York v. Quarles* considered the question of whether there are certain situations in which public safety considerations outweigh the necessity of giving *Miranda* warnings before

90. *Id.* at 444.
91. *Id.* at 445-46 (emphasis added).
92. *Id.* at 446.
93. *Id.* ("Before we penalize police error ... we must consider whether the sanction [of excluding use of the obtained statements] serves a valid and useful purpose.").
94. See *id.* at 445. Later in the decision, the Court further explained the test as balancing the societal interest in prosecuting criminals against the individual's protections under the Constitution. *Id.* at 450-51.
95. *Id.* at 445, 447. Additionally, the Court concluded that the trustworthiness of the statement in question was not in danger of being compromised since it was a third party statement not subject to the potentially coercive pressures of custodial interrogation. *Id.* at 449. Accordingly, the Court found no plausible link between the admissibility of a third party statement and failure to administer warnings to a defendant in custody. See *id.*
obtaining information from a suspect in custody.\textsuperscript{97} In \textit{Quarles}, upon apprehending the defendant, the police frisked him and, finding an empty gun holster, asked the defendant where the gun was located, to which he nodded toward the location where the police subsequently found the gun.\textsuperscript{98} In upholding the introduction of the defendant's statement at trial, the Court determined that, since the \textit{Miranda} warnings were merely a "'practical reinforcement' for the Fifth Amendment right"\textsuperscript{99} against self-incrimination, the Court only needed to consider whether or not, under the \textit{Tucker} balancing test, the police officer was justified in failing to administer these prophylactic \textit{Miranda} warnings to the defendant.\textsuperscript{100}

In this situation, the Court rationalized that the safety of the police officers and store customers demanded that the officers find the location

\textsuperscript{97} \textit{Id.} at 651.

\textsuperscript{98} \textit{Id.} at 652. According to the record, before apprehending the defendant, police were given information from a woman claiming she had recently been raped by a male fitting the defendant's description who had just entered a local supermarket. \textit{Id.} at 651-52. The woman also indicated that the man was armed with a gun. \textit{Id.} at 652. After entering the supermarket, one officer saw the defendant who, upon seeing the officer, immediately fled toward the rear of the store, where he was eventually arrested, frisked and questioned prior to being given \textit{Miranda} warnings. \textit{Id.} Based on these facts, it is interesting to note the potential Fourth Amendment issues presented in this case, particularly the fact that the search for the gun, being administered within the room in which the defendant was apprehended, is allowable under the search incident to arrest doctrine, as explained in \textit{Chimel v. California}, 395 U.S. 752 (1969), which gives officers the right to search the person and surrounding areas in the interest of officer safety, \textit{id.} at 763. Though the Court in \textit{Quarles} addressed the exigent circumstances aspect of the Fourth Amendment as it applied to the case, it did so only briefly in one footnote. \textit{Quarles}, 467 U.S. at 653 n.3. The Court eventually admitted the statement (for presumably similar reasons as would be justified under Fourth Amendment jurisprudence), but the Court's decision to consider the admissibility of the statement regarding the gun's location under the Fifth Amendment and \textit{Miranda}, instead of applying the Fourth Amendment, raises the question as to whether or not this decision was more about taking down \textit{Miranda}, and less about "public safety." See \textit{id.} at 684-85 (Marshall, J., dissenting) (questioning the true motives behind the majority's rationale in creating the "public safety" exception to \textit{Miranda}). But cf. \textit{id.} at 663-64 (O'Connor, J., concurring in the judgment in part, and dissenting in part) (claiming that the "public safety" exception to the \textit{Miranda} rule will create "a finespun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence").

\textsuperscript{99} \textit{Quarles}, 467 U.S. at 654 (quoting \textit{Tucker}, 417 U.S. at 444).

\textsuperscript{100} \textit{Id.} at 654-55. Also at issue in this case was whether or not the gun itself was inadmissible as a tainted fruit of the un-Mirandized statement. \textit{Id.} at 651. The trial court excluded both the statement under \textit{Miranda} and the gun under the fruit of the poisonous tree doctrine. \textit{Id.} However, since the Court determined that the statement was admissible, the Court ultimately concluded that the gun was also admissible. \textit{Id.} at 659-60; cf. \textit{id.} at 660 n.9 ("Because we hold that there is no violation of \textit{Miranda} in this case, we have no occasion to reach arguments . . . that the gun is admissible either because it is nontestimonial or because the police would inevitably have discovered it absent their questioning.").
of the gun before someone got hurt. Accordingly, the Court found that a "public safety" exception to the *Miranda* rule existed under which police officers could obtain information from the suspect without giving him the *Miranda* warnings. Though it conceded the potentially muddying effect its ruling would have on *Miranda* jurisprudence, the Court concluded that public safety concerns outweighed any incidental burden on police officers caused by applying this exception.

In his dissent, Justice Marshall scolded the majority for its failure to consider the facts of the case, and for departing from *Miranda*'s longstanding constitutional protection of a suspect's Fifth Amendment

101. *Id.* at 656-58. The Court recognized that, in apprehending a potentially armed suspect, police officers must act out of "instinctive[] and largely unverifiable motives" to protect themselves and obtain incriminating evidence from the suspect. *Id.* at 656.

102. *Id.* at 655-56. The Court held that such an exception clearly applied in situations where "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657.

103. *Id.* at 658-59. Though she ultimately agreed with the Court's decision to remand on the issue of the gun's admissibility as nontestimonial evidence, Justice O'Connor took strong issue with the majority opinion's decision in *Quarles* to stray from the foundation of *Miranda*. *Id.* at 660, 673-74 (O'Connor, J., concurring in the judgment in part and dissenting in part). Justice O'Connor expressed displeasure with the *Miranda* holding, but admitted that the Court did not amply justify its reasoning for departing from *Miranda*'s well-established reasoning. *Id.* at 660 (O'Connor, J., concurring in the judgment in part and dissenting in part). Justice O'Connor showed equal displeasure at the majority's almost brazen admission that its decision "lessen[ed] the desirable clarity" of the *Miranda* rule. *Id.* (O'Connor, J., concurring in the judgment in part and dissenting in part); see also *supra* note 98.

104. *Quarles*, 467 U.S. at 675 (Marshall, J., dissenting). With regard to the facts of the case, Justice Marshall posited that there could be very little, if any, threat to the public safety posed by the defendant in finding and using the gun because, at the time of the defendant's arrest, he was handcuffed and surrounded by four police officers. *See id.* at 674-76, 685 (Marshall, J., dissenting). Indeed, as Justice Marshall points out, at the time the defendant was asked where the gun was, "the arresting officers were sufficiently confident of their safety to put away their guns," and, based on the officers' own testimony, there was nothing about the situation to give the impression that any of the officers felt at all as if their safety was in jeopardy. *Id.* at 675-76 (Marshall, J., dissenting); cf. *id.* at 656-58 (Marshall, J., dissenting) (holding that the intent of the police officers is not considered in determining whether a threat to public safety sufficiently exists). Moreover, since the arresting officer "knew with a high degree of certainty that the defendant's gun" had been thrown within the immediate area of the arrest, Justice Marshall argued that the police could easily have diffused any potential threat to the public safety by cordoning off the area to search for the weapon. *Id.* at 676 (Marshall, J., dissenting). It appears here that Justice Marshall has almost opened the door to admission of the gun under the Court's decision in *Nix v. Williams*, 467 U.S. 431 (1983), which interpreted the Court's decision in *Wong Sun v. United States*, 371 U.S. 471 (1963), as allowing items that would inevitably have been found to be admitted into evidence, even if those items were discovered as a result of a constitutionally tainted investigation, see *Williams*, 467 U.S. at 431, 441-43.
rights against self-incrimination. Justice Marshall argued that the majority's rationale stemmed from a marked misunderstanding of the *Miranda* decision. He accused the majority of belittling *Miranda* into nothing more than a balancing act between the enhanced protection of Fifth Amendment rights and the cost to society of obtaining fewer criminal convictions as a result of excluded testimony. Such an interpretation, Justice Marshall contended, was fallacious because at no point did the majority in *Miranda* consider whether the costs to society outweighed the benefits of its ruling. Based on this misreading of *Miranda*, Justice Marshall concluded that the majority had reached a decision at direct odds with the *Miranda* decision itself.

3. Oregon v. Elstad: Pushing Forward, Back on *Miranda*

In *Oregon v. Elstad*, the Court faced the issue of whether an initial failure to read a defendant his *Miranda* rights, without more, affects the admissibility of subsequent statements made after the defendant was apprised of his rights. In addressing this issue, the Court first held that the "fruit of the poisonous tree" doctrine used in Fourth Amendment jurisprudence did not apply to *Miranda* violations. The Court explained that the Fourth Amendment proscriptions dealt with activities such as searches and seizures, the fruits of which are far more wide-reaching. The Fifth Amendment, by contrast, prohibited only compelled testimony, not failure to administer warnings. Such a failure was only a procedural violation of *Miranda*, whose exclusionary rule was, until *Elstad*, much broader than the Fifth Amendment's own.

106. *Id.* at 681 (Marshall, J., dissenting).
107. *Id.* (Marshall, J., dissenting).
108. *Id.* at 681-82 (Marshall, J., dissenting). Instead, Justice Marshall argued, the Court was only concerned with extending the Fifth Amendment protections into custodial interrogations. *Id.* at 682 (Marshall, J., dissenting).
109. *Id.* at 684 (Marshall, J., dissenting). Justice Marshall explained:
In fashioning its "public-safety" exception to *Miranda*, the majority makes no attempt to deal with the constitutional presumption established by that case. . . . Without establishing that interrogations concerning the public's safety are less likely to be coercive than other interrogations, the majority cannot endorse the "public-safety" exception and remain faithful to the logic of *Miranda* v. Arizona. *Id.* (Marshall, J., dissenting) (footnote omitted).
111. *Id.* at 300.
112. See *id.* at 306-07.
113. See *id.* at 306.
114. *Id.* at 306-07.
115. *Id.*
In upholding the admissibility of the post-warning statement for use in the prosecution's case-in-chief, the Court considered the innocence of the mistake made by the officer, and the fact that there was a degree of uncertainty surrounding the apprehension that inevitably caused some confusion for the arresting officers. The Court also took into consideration the difference in circumstances surrounding the statement obtained before the warning and after the warning. In the Court's mind, the fact that the pre-warned statement was deemed inadmissible at trial satisfied Miranda.

D. Attempting to Rekindle the Miranda Flame: Dickerson and Its Progeny

The ensuing uncertainty created by both the Court decisions and Congress has given critics of Miranda numerous reasons to call for its removal. This criticism reached its peak on the eve of Dickerson v. United States, with some critics believing that Miranda had finally seen its last days. Notwithstanding this criticism, Dickerson did not toll the death knell for Miranda.

In Dickerson, the Court considered a case from the Fourth Circuit in which the FBI arrested and interrogated the defendant, who was

116. Id. at 315-16. In addition, given that there was, at best, a "speculative and attenuated" causal connection between the two sets of questioning, and the fact that the defendant's later statements were made after he was fully informed and at the stationhouse, the Court concluded that the statement obtained after the Miranda warnings were voluntarily given and, therefore, admissible for use in the prosecution's case-in-chief. Id. at 313-16.
117. Id. at 314-15.
118. Id. at 317-18.
119. See, e.g., Brief of Court-Appointed Amicus Curiae Paul G. Cassell Urging Affirmance of the Judgment Below at *4-*28, Dickerson v. United States, 530 U.S. 428 (2000) (No. 99-5525), 2000 WL 272005 (arguing in favor of affirming the Fourth Circuit's holding in Dickerson that recognized Congress' authority to prescribe rules governing police interrogation practices); see also Young, supra note 3, at 54-56.
120. 530 U.S. 428 (2000).
121. See, e.g., Young, supra note 3, at 56.
122. Dickerson, 530 U.S. at 432 ("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.").
123. Id. Before his trial, the defendant moved to suppress a statement he made at the FBI's field office on the ground that he had not received a reading of his Miranda rights when he made the statement. Id. The federal district court granted the defendant's motion, and the government appealed to the Fourth Circuit. Id.; see also United States v. Dickerson, 971 F. Supp. 1023, 1023 (E.D. Va. 1997), rev'd, 166 F.3d 667 (4th Cir. 1999), rev'd, 530 U.S. 428 (2000).
indicted for bank robbery and conspiracy to commit robbery.124 Instead of trying this case under *Miranda*, the Fourth Circuit decided it under 18 U.S.C. § 3501, a statute passed shortly after *Miranda* was decided, but which had not previously been relied upon.125 Congress stated in § 3501 that the *sine qua non* of a statement's admissibility was whether or not the statement was voluntarily made.126

In reviewing the government's motion to deny suppression of the statement, the Fourth Circuit conceded that the defendant gave his statement without the benefit of *Miranda* warnings.127 However, the Fourth Circuit ultimately concluded that *Miranda* was not a constitutional case and that Congress, not the Court, could have the final determination of the rules surrounding the admissibility of statements at trial.128 Accordingly, the Fourth Circuit granted the government's motion to deny suppression of the statement because the evidence supported the conclusion that the statement was given voluntarily.129

In reviewing the Fourth Circuit's decision, the Court took great pains to assert *Miranda*'s constitutionality.130 According to the Court, *Miranda* is constitutional because the Court continuously applied its ruling to state court proceedings, even though the Court does not have state court supervisory power.131 The Court also held that, though there had been

124. *Dickerson*, 530 U.S. at 432. The defendant was also charged with use of a firearm in the course of committing a crime of violence; each violation was a federal violation under Title 18 of the United States Code. *Id.*

125. *Id.* In fact, § 3501 had been used so infrequently before *Dickerson* that Justice Scalia scolded both the Supreme Court and other courts for failing to apply §3501 to cases involving custodial interrogations. *See infra* note 139.

126. 18 U.S.C. § 3501(a) (2000). In § 3501, Congress eschewed the warning requirement set forth in *Miranda* in favor of a totality of the circumstances test in which no one element's existence or omission can determine whether the statement is made voluntarily. *Id.*

127. *See Dickerson*, 166 F.3d at 671 (noting that, although voluntary, the confession had been suppressed "because it was obtained in technical violation of *Miranda*").

128. *Id.* at 672.

129. *Id.* at 671.

130. *See Dickerson*, 530 U.S. at 438-44. In asserting *Miranda*'s constitutionality, the majority, via Justice Rehnquist, relied in great force upon a detailed and informative history of the admissibility of confessions against the suspect. *Id.* at 432-37.

131. *Id.* at 438. In addition, the majority noted, the language of the *Miranda* opinion itself repeatedly indicates that the majority believed it was creating a constitutional decision. *Id.* at 439-40 & 439 n.4 (quoting various passages from the *Miranda* holding which indicate the *Miranda* majority's understanding that it was addressing a "constitutional" issue); *see also id.* at 439 n.3 (noting that the constitutionality of *Miranda* is bolstered by the fact that the Court has allowed prisoners to bring forth alleged *Miranda* violations to the attention of federal courts in petitions for habeas corpus).
some major exceptions to Miranda, these exceptions did not erase Miranda’s constitutional basis. Thus, the exceptions to Miranda’s bright-line rule were merely a series of to-be-expected modifications that accompany general rules, which are as much rooted in the Constitution as the original parent ruling.

In soundly reversing the Fourth Circuit’s decision, a seven-Justice majority held that § 3501 was an attempt by Congress to overrule the Miranda decision. Given Miranda’s constitutional basis, Congress did not have the right to supersede its ruling; Congress could only prescribe procedures that were, at a minimum, as effective as the warnings themselves. The Court determined that, without a strict warning


133. Dickerson, 530 U.S. at 441. Rather, the Court pointed out, these exceptions demonstrate “not that Miranda is not a constitutional rule—but that no constitutional rule is immutable.” Id.

134. Id. Admittedly, even after Dickerson, the Court’s assertion of Miranda’s “constitutionality” leaves something to be desired. See Weisselberg, supra note 12, at 1131-34. As Professor Yale Kamisar pointed out in 2003, “[t]here also seems to be a consensus (one that I share) that what Dickerson reaffirmed was not the Miranda doctrine that burst on the scene in 1966, but Miranda with all the exceptions it has acquired since 1966 frozen in time.” Yale Kamisar, Weighing Poison Fruit, AM. LAWYER, Oct. 2003, at 65, 67. Though it claims that the decision is constitutionally based, the Court, for all intents and purposes, concedes that Miranda’s requirements are both constitutional and prophylactic (two terms with seemingly opposite meanings). See Dickerson, 530 U.S. at 437-38. Using such language as “we concede that there is language in some of our opinions that supports the view taken by [the Fourth Circuit],” that Miranda’s protections are not constitutionally required, certainly does little to reassert Miranda on its own two feet. Id. at 438. Nevertheless, by overturning 18 U.S.C. § 3501, Dickerson has shown in no uncertain terms the Court’s intention of keeping Miranda “on the books,” while still maintaining the validity of its progeny. See id. at 441.

135. Dickerson, 530 U.S. at 430, 436.

136. Dickerson, 530 U.S. at 441-42; see also id. at 437 (“The law in this area is clear . . . . Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution . . . . But Congress may not legislatively supersede our decisions interpreting and applying the Constitution.” (citations omitted)). The Dickerson majority concluded that, though the Miranda warnings were not intended to be a “constitutional straightjacket,” the Miranda Court only intended this statement to mean that the warnings were created as a minimum threshold of the protection of an individual’s Fifth Amendment rights. Id. at 440 n.6 (quoting United States v. Dickerson, 166 F.3d 667, 672 (4th Cir. 1999) (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)), rev’d, 530 U.S. 428). Therefore, Congress was free to change or replace the specifics of the warnings, so long as the procedures “were ‘at least as effective’ in” informing an individual of his continuing right to remain silent during police interrogation. Id. at 440 (quoting Miranda, 384 U.S. at 467).
requirement as prescribed in *Miranda*, § 3501 did not sufficiently meet the constitutional minimum established in that case.\(^{137}\)

In dissent, Justice Scalia made his distaste for the *Miranda* decision well-documented.\(^{138}\) Taking a textualist approach, Justice Scalia argued vociferously that the majority’s assertion of *Miranda*’s constitutionality was tenuous because, despite its use of constitutional rhetoric in upholding *Miranda*, the majority failed to demonstrate that the Constitution actually required the use of *Miranda* warnings.\(^{139}\) Moreover, Justice Scalia argued, the exceptions to *Miranda* indicate that the *Miranda* warnings are merely prophylactic procedures designed to

\(^{137}\) *Id.* at 442-43.

\(^{138}\) *See id.* at 444-65 (Scalia, J., dissenting). This is not the first time Scalia has been outspoken against *Miranda*. *See*, e.g., *Brogan v. United States*, 522 U.S. 398, 405 (1998) (“In the modern age of frequently dramatized ‘Miranda’ warnings, [it] is implausible [for a suspect to be unaware of his right to remain silent under *Miranda*].”); *Jaffee v. Redmond*, 518 U.S. 1, 19 (1996) (Scalia, J., dissenting) (arguing that the State is a “victim of . . . injustice” when confessions obtained without *Miranda* warnings are excluded at trial). However, Justice Scalia made his distaste for *Miranda* most well-known in *Davis v. United States*, 512 U.S. 452 (1994). In *Davis*, Justice Scalia chastised the Department of Justice for refusing to bring prosecutions invoking 18 U.S.C. § 3501 concerning admissibility of statements made during custodial interrogations. *See id.* at 463-64 (Scalia, J., concurring) (“In fact, with limited exceptions the provision has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago.”).

Justice Scalia did not stop there, adding:

Legal analysis of the admissibility of a confession without reference to [§ 3501] is equivalent to legal analysis of the admissibility of hearsay without consulting the Rules of Evidence; it is an unreal exercise. Yet as the Court observes, that is precisely what the United States has undertaken in this case . . . .

*The United States’ repeated refusal to invoke § 3501, combined with the courts’ traditional (albeit merely prudential) refusal to consider arguments not raised, has caused the federal judiciary to confront a host of “Miranda” issues that might be entirely irrelevant under federal law.* Worse still, it may have produced—during an era of intense national concern about the problem of runaway crime—the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. There is no excuse for this . . . .

The point is whether our continuing refusal to consider § 3501 is consistent with the Third Branch’s obligation to decide according to the law. I think it is not.

*Id.* at 463-65 (first emphasis added) (citations omitted).

\(^{139}\) *Dickerson*, 530 U.S. at 454 (Scalia, J., dissenting). Justice Scalia brazenly defied the majority when it failed to locate within the Constitution any provision that is violated by § 3501. *Id.* at 445 (Scalia, J., dissenting) (illustrating that both *Miranda* and § 3501 ultimately prevent the use of compelled, involuntary statements at trial). Bolstering his argument, Justice Scalia pointed out that the majority essentially conceded in its opinion that a police officer may fail to give warnings, and thus violate *Miranda*, without violating a suspect’s Fifth Amendment rights. *Id.* at 451 (Scalia, J., dissenting).
protection an individual's right against self-incrimination, and are not constitutionally required.  

Soon after Dickerson, the Court had two more opportunities to further interpret Miranda. Decided this past term, Missouri v. Seibert considered the admissibility of incriminating statements obtained as a result of "question-first" interrogation tactics. In considering the case on appeal, the Court acknowledged the emergence of, and potentially dangerous issues created by, "question-first" interrogation. In the

140. Id. at 450-51 (Scalia, J., dissenting). In calling for Miranda's removal, Justice Scalia reminded the Court that voluntariness is the constitutional standard of determining whether a statement is admissible against a defendant—not whether Miranda warnings were given. Id. at 464 (Scalia, J., dissenting). Though he admitted it is a celebrated decision, Justice Scalia argued that Miranda stands only as a demonstration of the Court's "power to impose extra-constitutional constraints upon Congress and the States." Id. at 465 (Scalia, J., dissenting).


142. Id. at 2605. According to the facts, the defendant was arrested on suspicion of murdering her physically disabled son by deliberately setting fire to their house while he was asleep inside. Id. at 2605-06. When the defendant was arrested, the arresting officer (Clinton) was under instruction from Officer Hanrahan to deliberately refrain from reading the defendant her Miranda rights. Id. at 2606. Once the defendant arrived at the stationhouse, Officer Hanrahan interrogated Seibert for approximately forty minutes without informing her of her rights. Id. During the course of the initial interrogation, Seibert confessed to the crime, after which she was left alone for approximately twenty minutes, until Officer Hanrahan reentered, informed the defendant of her Miranda rights and then, after obtaining a waiver from defendant of her rights, proceeded to take her "official" confession. Id.

143. Id. at 2607. At trial, the defendant sought to exclude both her pre- and post-warning statements. Id. at 2606. The trial court granted suppression of the pre-warning statements, but allowed admission of statements made after the warning on the ground that they were "voluntary." Id. at 2606-07. The Missouri Supreme Court reversed the decision because, given the proximity of the two interrogations, the post-warning confession was a product of the invalidly obtained pre-warning confession. Id. at 2606; see also State v. Seibert, 93 S.W.3d 700, 701 (Mo. 2002), aff'd sub nom. Missouri v. Seibert, 124 S. Ct. 2601 (2004). In the Missouri Supreme Court's mind, to allow an "end run" around Miranda by letting police officers take advantage of the exception created by the Harris decision by deliberately withholding a recitation of the Miranda warnings, would only serve to further encourage such a practice. Id. at 706-07. Undoubtedly, the Missouri Supreme Court felt, as this Comment argues, that the police already have such an advantage over the suspect during interrogation. See id. (explaining that these tactics deprive a defendant of knowingly waiving his Miranda rights). Interrogating a suspect by deliberately violating Miranda only serves to exacerbate this advantage. See infra notes 179-80 and accompanying text. Therefore, in this author's opinion, the Missouri Supreme Court's decision makes the most sense when read as an attempt to temper such a potentially Orwellian practice.

144. Seibert, 124 S. Ct. at 2608 (plurality opinion) (commenting on the practice of deliberately withholding Miranda warnings until after a confession is obtained as "a new challenge to Miranda" that has potentially nationwide reach); see also id. at 2608-09 & 2609 n.2 (plurality opinion) (noting a growing trend in police training manuals that advocate "question-first" tactics, in reliance upon the Court's decision in Harris, which
Court's mind, "question-first" interrogation tactics sought to render moot the effectiveness of the *Miranda* warnings by waiting to read a suspect her rights until after she has confessed.\(^4\) Accordingly, a plurality of Justices agreed that courts must determine whether it is objectively reasonable to conclude that the *Miranda* warnings effectively advised the suspect that she has a "real choice" about giving a potentially-incriminating and admissible statement to the police at the time the warnings were given.\(^4\) In affirming the Missouri Supreme Court's decision, the plurality concluded that, "[b]y any objective measure . . . it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content."\(^4\)

Concurring in the judgment, Justice Kennedy agreed that, under the conditions of the present case, the post-warning testimony was inadmissible, but ultimately felt that the plurality's objective reasonableness test was too broad.\(^4\) According to Justice Kennedy, the

allows for unwarned statements to be used against the suspect at trial for impeachment purposes).

\(^{145}\) *Id.* at 2610 (plurality opinion). Though it acknowledged that questioning "outside *Miranda*" was effective in eliciting confessions, the Court nonetheless declared that such a practice struck at the heart of the *Miranda* decision. *Id.* at 2610-11, 2613 (plurality opinion) ("[T]he question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted."); see also *id.* at 2614 (Kennedy, J., concurring in the judgment) (holding that the "question-first" technique "is designed to circumvent *Miranda*. It undermines the *Miranda* warning and obscures its meaning.").

\(^{146}\) *Id.* at 2610 (plurality opinion).

\(^{147}\) *Id.* (plurality opinion). In reaching this decision, the Court employed a two-part test to first determine whether or not the confessions were coerced, and if not, whether or not the warnings, if given, could have effectively served their purpose. *Id.* at 2613 (plurality opinion). In determining the efficacy of the warnings, the Court attempted to query even deeper. See *id.* at 2610 (plurality opinion) ("Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier?").

\(^{148}\) *Id.* at 2616 (Kennedy, J., concurring in the judgment). Instead, Justice Kennedy argued that the Court should follow the "balanced and pragmatic approach to enforcement of the *Miranda* warning" found in *Elstad*. *Id.* at 2615 (Kennedy, J., concurring in the judgment). In Justice Kennedy's opinion, following *Elstad* would allow the Court to distinguish between instances in which *Miranda* had been legitimately violated, and situations involving good faith failure by police officers to adhere to *Miranda*. *Id.* (Kennedy, J., concurring in the judgment) (arguing that, though testimony under the former category should rightfully be suppressed by the courts, to suppress a suspect's inculpatory testimony under this latter category of *Miranda* violation "would serve neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence" (alteration in original) (quoting *Oregon* v. *Elstad*, 470 U.S. 298, 308 (1985))).
Court's rationale in *Elstad* should determine the admissibility of post-warning statements, except in rare situations where "question-first" is used to deliberately circumvent the *Miranda* warning requirement, and the police rely on a suspect's pre-warned statement to obtain a post-warning statement.  

In her dissent, Justice O'Connor lauded the plurality's decision to reject an intent-based test, but argued that based on its decision in *Elstad*, the Court should have vacated the decision and remanded it to the Missouri courts to determine the voluntariness of the defendant's statements.

Decided on the same day as *Seibert, United States v. Patane* considered the question of whether or not the physical fruits of a defendant's unwarned, but voluntary statements may be used against the defendant at trial. In determining that the defendant's Glock pistol

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149. *Id.* at 2616. (Kennedy, J., concurring in the judgment) In these unique situations, Justice Kennedy would have the trial court focus on the circumstances surrounding the unwarned interrogation to determine admissibility. *Id.* at 2615 (Kennedy, J., concurring in the judgment). But cf. *id.* at 2617 (O'Connor, J., dissenting) (agreeing with the plurality's decision to reject Justice Kennedy's notion of an intent-based test on the ground that "[t]houghts kept inside a police officer's head cannot affect" whether or not a statement was voluntary). However, even if the requisite deliberate intent to undermine *Miranda* is found, Justice Kennedy intimated that a post-warning statement might nonetheless be deemed admissible if curative measures or circumstances are present. *Id.* at 2616 (Kennedy, J., concurring in the judgment) (indicating that a "substantial break in time and circumstances" between the pre-warned statement and *Miranda* warnings, or even an "additional warning that explains the likely inadmissibility of the prewarning custodial statement" would likely be sufficient curative measures that would "ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver").

150. *Id.* at 2617 (O'Connor, J., dissenting). Justice O'Connor also applauded the plurality for rejecting the "fruit of the poisonous tree" doctrine in *Miranda* cases. *Id.* (O'Connor, J., dissenting).

151. *Id.* at 2619-20 (O'Connor, J., dissenting). Interestingly enough, though Justice O'Connor requested that the Missouri courts consider the issue of admissibility of the defendant's statements, it appears plain that even Justice O'Connor (and the three Justices who joined in her dissent) was uncomfortable with the "question-first" tactic employed by the police department in this case. See *id.* (O'Connor, J., dissenting). Though she relied on *Elstad* as her reasoning for dissenting from the plurality, Justice O'Connor was careful to distinguish the facts of *Elstad* from *Seibert*. *Id.* (O'Connor, J., dissenting) ("Although I would leave this analysis for the Missouri courts to conduct on remand, I note that, unlike the officers in *Elstad*, Officer Hanrahan referred to Seibert's unwarned statement during the second part of the interrogation when she made a statement at odds with her unwarned confession.").

152. 124 S. Ct. 2620 (2004).

153. *Id.* at 2624. In this case, police officers sought out the defendant for violating a restraining order. *Id.* at 2624-25. The defendant had previously been arrested and was under the temporary restraining order as a result. *Id.* Before arresting the defendant, police officers were informed by the Bureau of Alcohol, Tobacco and Firearms (ATF) that the defendant was in possession of a Glock pistol. *Id.* at 2625. Upon his arrest, the police officers made an attempt to read the defendant his *Miranda* rights, but were
was admissible against him at trial, a plurality led by Justice Thomas held that the fruit of the poisonous tree doctrine does not apply to cases where a suspect is not read his *Miranda* rights. The Court's primary rationale was that the Fifth Amendment protection against self-incrimination largely concerns the suspect's own coerced testimonial evidence being used against him. The plurality considered this protection a "'fundamental trial right.'" Therefore, even if a police officer failed (accidentally or deliberately) to administer *Miranda* warnings to a suspect, a violation of the suspect's Fifth Amendment rights would not occur until those statements were used against him at trial. The non-testimonial fruits of those statements presumably are not subject to such coercive influences and therefore may be used against a suspect at trial.

Justice Kennedy, joined by Justice O'Connor, concurred in the judgment, agreeing with the plurality that the admission of non-testimonial fruits of the defendant's statement did not pose a risk of the defendant's statements being used against him at trial. However, they felt the plurality needlessly characterized the police officer's failure to give *Miranda* warnings as a non-constitutional violation. In dissent, Justice Souter took issue with the fact that the decision provided "an
important inducement” for interrogators to intentionally disregard *Miranda* altogether.\(^{161}\) Though he admitted that the inadmissibility of statements taken without *Miranda* warnings might come at the price of obtaining a conviction, Justice Souter contended that the protection of an individual’s Fifth Amendment rights was worth such a price.\(^{162}\)

**E. Miranda Morass Makes Mess for States**

Though the Court has not specifically decided whether a deliberate violation of a suspect’s rights under *Miranda* is constitutional,\(^{163}\) some state courts have weighed in on the subject.\(^{164}\) However, given the

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\(^{161}\) *Id.* (Souter, J., dissenting). In Justice Souter’s opinion, creating an “evidentiary benefit” of admissibility when an unwarned statement leads investigators to fruits of a confession would only serve to encourage those investigators to deliberately disregard *Miranda* altogether. *Id.* at 2631-32 (Souter, J., dissenting). Interestingly, Justice Souter also appeared to find the Court’s holding in *Patane* particularly bothersome in light of the fact that the Court decided *Seibert*, 124 S. Ct. 2601 (2004), on the same day, but reached a very different result. *See* *Patane*, 124 S. Ct. at 2632 (Souter, J., dissenting).

\(^{162}\) *Patane*, 124 S. Ct. at 2631-32.

\(^{163}\) *See* discussion *supra* Parts I.A-D. Indeed, based on the leaning of a majority of the Justices in *Seibert*, there is the distinct possibility that the Court may not wish to enter into a debate as to the specific, subjective intent of the police officer in deciding to withhold *Miranda* warnings. *See* *Seibert*, 124 S. Ct. at 2612 n.6 & 2614-17 (2004) (plurality opinion). This would not be the first time the Court has decided it did not want to delve into determinations of a police officer’s subjective intent. *See* Whren v. United States, 517 U.S. 806, 812-13, 819 (1996) (holding that, in a Fourth Amendment context, so long as probable cause exists to justify stopping a suspect for a potential violation of law, meaning that the police officer’s conduct is “objectively justifiable behavior,” a police officer’s subjective motive for stopping the suspect does not render such conduct a Fourth Amendment violation); Berkemer v. McCarty, 468 U.S. 420, 442 & n.35 (1984) (noting that a police officer’s subjective intent does not bear on whether a suspect is in custody for interrogation purposes).

\(^{164}\) *See*, e.g., People v. Neal, 72 P.3d 280, 286, 288-89 (Cal. 2003) (holding that, in light of the totality of the circumstances, testimony was involuntary under the Due Process voluntariness test when elicited from a suspect who was initially interrogated without being given *Miranda* warnings, then incarcerated overnight without food, water or access to a bathroom, and then woke up the next morning and confessed to the charges against him; consequently, the inculpatory statements were inadmissible at any point in the trial, including for impeachment purposes); People v. Peevy, 953 P.2d 1212, 1218-20, 1225-28 (Cal. 1998) (holding that the *Harris* exception allowing use of confessions for impeachment purposes applied to intentional violations of *Miranda* where the defendant had not claimed his confession was involuntary, but indicating in dieta that it would reconsider the holding of this case if evidence eventually showed that the practice of deliberately withholding *Miranda* rights was widespread); Jones v. State, 119 S.W.3d 766, 773-75, 782-83 (Tex. Crim. App. 2003) (holding it was error to admit a deliberately un-*Mirandized* written confession to additional crimes during the sentencing stage of a trial, but ultimately finding this error harmless in light of the vast amount of additional direct testimony corroborating the confessional statement), *cert. denied*, 124 S. Ct. 2836 (2004); State v. Knapp, 666 N.W.2d 881, 887, 892, 899-900, 903-05 (Wis. 2003), *vacated sub nom.* by, Wisconsin v. Knapp, 124 S. Ct. 2932 (2004) (vacating judgment and remanding to
inconsistency with which the Supreme Court has approached Miranda jurisprudence, it is no surprise that the states’ approaches to this issue are equally inconsistent. In light of this inconsistency, it is readily apparent that the Court can and should provide the states with guidance.

II. INADEQUATE EFFORTS AT CURBING DELIBERATE MIRANDA VIOLATIONS

A. “Outside Miranda” and “Question-First”: Problematic Byproducts of the Court’s Indecision

As Professor Charles D. Weisselberg points out, state and federal prosecutors, as well as police, are confused as to the status of Miranda jurisprudence and the limits of its strictures. Before the Court’s decision in Dickerson, there was an upswing in the practice of questioning “outside Miranda.” As a result, proponents of this practice began to inform police officers across the country that, notwithstanding their failure to give Miranda warnings, officers still could obtain

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165. See supra note 164.

166. Notwithstanding the notion held by true believers in federalism that states should be allowed to “experiment” with rules of criminal procedure at the state level, the Court has repeatedly shown its preference for creating a national standard for rules governing rights of individuals in the context of a criminal search, investigation, or prosecution. See, e.g., Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963) (holding that the Sixth Amendment right to counsel is obligatory in both federal and state courts via the Fourteenth Amendment Due Process Clause, and that, therefore, a defendant is guaranteed assistance of counsel in any criminal proceeding); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (“The Fourth Amendment’s right of privacy is enforceable against the states by the same sanction of exclusion as is used against the Federal Government.”).

167. See Weisselberg, supra note 12, at 1140-44, 1146, 1148-49, 1153-54; Weisselberg, supra note 8, at 132-40 (exploring various law enforcement training materials).

168. See supra note 144. Relying on the Court’s rationale in Harris, Tucker, Quarles and Elstad, which questioned the constitutionality of Miranda’s requirements, proponents of this new questioning technique argue that, because Miranda was merely a weak evidentiary rule and not a definitive constitutional rule, police officers and investigators who did not administer Miranda rights did not, thereby, violate the Constitution. See, e.g., Weisselberg, supra note 8, at 132-36.
information from the suspect for impeachment purposes. Though the Court's holding in Dickerson somewhat tempered the promotion of this view, the cases noted by the Seibert Court, as well as the facts of the Seibert case, indicate that the troubling practices of "question-first" and "outside Miranda" interrogations have not gone away.

B. Are Police Officers Free to Deliberately Disregard Miranda? Applying Professor Clymer's Cost-Benefit Approach

In his article, Professor Steven D. Clymer argues that the Court has reinforced a system of incentives for police officers to violate Miranda rules by only excluding the use of confessional statements against a defendant during the case-in-chief, while still allowing the confessions to be used for impeachment, instead of choosing to impose a much stricter affirmative duty on police officers to comply with Miranda. Professor Clymer posits that a police officer's decision to give or disregard Miranda warnings depends on the officer applying a simple cost-benefit analysis to his situation, as opposed to deciding whether to adhere to a constitutional requirement. Accordingly, "[i]f police [officers] are


172. Id. at 2606.

173. See supra notes 171-72. Indeed, as Professor Susan R. Klein points out, the current system has done little to eliminate incentives to deliberately violate Miranda. See Susan R. Klein, No Time for Silence, 81 TEX. L. REV. 1337, 1355-57 (2003) ("[E]ven in those cases where exclusion from the prosecutor's case-in-chief is a possibility, this remedy alone is plainly insufficient to persuade the police to obey Supreme Court commands.").

174. Clymer, supra note 170, at 503. Professor Clymer adds that, since Miranda is a rule of admissibility of evidence in court, Miranda violations can technically occur only if the evidence is used against the defendant at trial. See id. at 450 n.9. Accordingly, though admissibility of a suspect's statement depends in large part on the police officer's conduct during the custodial interrogation, it is impossible under the Court's current understanding of Miranda for a police officer to actually violate the defendant's privilege against self-incrimination. See id.

175. Id. at 451. Naturally, Professor Clymer's premise is founded on the assumption that getting a deliberately unwarned statement during custodial interrogation does not constitute a violation of an individual's Fifth Amendment privilege against self-incrimination. See id. at 449-51. Though an analysis of the relative merits of this premise is beyond the scope of this Comment, Professor Clymer's insights as to the cost-benefit analysis undertaken by police officers in choosing to adhere to or disregard Miranda are nonetheless useful in that they further demonstrate the fact that "question-first" and "outside Miranda" techniques are likely to continue. See discussion supra Part II.B; see also infra note 179 and accompanying text.
willing to suffer the exclusionary consequences," they can choose to ignore Miranda without fear of violating the Constitution.\textsuperscript{176}

Applying this cost-benefit analysis to "question-first" and "outside Miranda" techniques, Professor Clymer contends that if the officer believes the suspect is likely to invoke his right to remain silent if given a warning, then refraining from giving the Miranda warnings is advantageous because, at a minimum, if the suspect says nothing, he may nevertheless be impeached with his own pre-warning silence at trial.\textsuperscript{177} By the same token, if the officer is incorrect in his assumption, and the suspect chooses to talk, the evidence is still admissible to impeach the suspect should he take the stand and testify contrary to his unwarned statements.\textsuperscript{178} In Professor Clymer's assessment, until the Court either overrules Miranda or more firmly reestablishes its basis in the Fifth Amendment, police officers will continue to find ample incentive to deliberately violate Miranda during custodial interrogation.\textsuperscript{179}

\begin{itemize}
  \item \textsuperscript{176} Clymer, supra note 170, at 450. Professor Clymer claims police have every reason to question a suspect in custody before giving Miranda warnings, particularly in light of the Court's decisions in Harris and Hass concerning admissibility of evidence for impeachment purposes. Id. at 505-06. While there are certainly many instances in which the police officer would find it advantageous to comply with Miranda's requirements, Professor Clymer argues that the Court has created an equal amount of exceptional situations in which it is far more advantageous for police to completely disregard Miranda in order to obtain desired testimony; using statements obtained in violation of Miranda for impeachment purposes is one of these situations. Id. at 450-51. In addition, Professor Clymer points out other situations where it is advantageous for a police officer "to violate the Miranda rules: preservation of [a] suspect['s] postarrest silence for impeachment[,] taking unwarned statements and then 'curing' the violations." Id. at 451.
  \item \textsuperscript{177} Id. Professor Clymer aptly points out that the Miranda Court alluded in dictum to protecting a suspect's post-Miranda warning silence from use at trial against the suspect. See id. at 503. He also notes how the Court has faced this issue in its decisions since Miranda. See id. at 503-05; see also, e.g., Fletcher v. Weir 455 U.S. 603, 607 (1982) (holding that the prosecution could impeach the defendant's testimony with unwarned post-arrest silence); Jenkins v. Anderson, 447 U.S. 231, 238-41 (1980) (holding that the prosecution may use a defendant's pre-arrest, pre-warning silence to impeach his testimony at trial); Doyle v. Ohio, 426 U.S. 610, 619 (1976) (White, J., concurring in the judgment) (stating that "the use for impeachment purposes of [the defendant's] silence, at the time of arrest and after receiving Miranda warnings, violated the Due Process Clause of the Fourteenth Amendment").
  \item \textsuperscript{178} Clymer, supra note 170, at 506-07. In addition to the obvious benefit of ensuring that the defendant testifies truthfully, the threat of impeachment has the added potential effect of deterring the defendant from testifying at trial in his defense and, in some cases, from even going to trial at all. Id. at 506.
  \item \textsuperscript{179} Id. at 527-28. In addition, Professor Clymer points out that if the Court preserves Miranda as it is with its current exceptions, more pressure will be placed on suspects to answer questions, particularly if the police deliberately disregard Miranda during interrogation. Id. at 528. He notes:
  
  If police instead question [the suspect] without warnings or continue the interrogation despite his request to remain silent or consult counsel, he
C. Judicial Interrogation: The Amar-Lettow Approach

One approach to solving deliberate police violations of *Miranda* is proposed by Professors Akhil Reed Amar and Renée B. Lettow. Professors Amar and Lettow advocate creating a system of custodial interrogation in which suspects are questioned by judicial officers instead of police officers. Under such a proposal, a suspect would receive immunity at trial from use of testimony obtained at a pretrial hearing, but would not be protected from police using the testimony derivatively to search out other sources of information that might be used against him. While Amar and Lettow would not strictly prohibit stationhouse confessions altogether under their proposal, they contend that courts could severely limit the admissibility of confessions obtained during in-custody stationhouse questioning to statements “volunteered by a suspect in the presence of an on-duty defense lawyer or ombudsman in the police station.” Such a “strict regime,” Amar and Lettow argue, “would create powerful incentives to conduct interrogation before magistrates rather than in police stations.”

However, as Professor Yale Kamisar notes in his pointed rebuttal to Amar and Lettow’s article, the judicial officer interrogation proposal is riddled with flaws. First is the obvious unlikelihood that courts and/or legislatures would enact such a system of custodial interrogation.

reasonably may conclude that they have no regard for his rights or the laws governing custodial interrogation. That conclusion may generate fear that any refusal to comply with demands for answers may trigger lawless police retaliation. The realization that the promise of *Miranda* is false will make the police questioning more frightening and coercive.

*Id.* at 528-29.


181. *Id.* at 908-09.

182. *Id.* at 858-59, 898-901, 908-09, 926-27. Under this approach, a suspect would have an unqualified right to remain silent only until he had an attorney present or was brought in front of a judicial officer for the pretrial hearing; at this point, if the suspect decides to continue to remain silent, his silence can be used against him at trial. *Id.* at 909. In addition, under this approach the judicial officer could require the suspect to provide such information under pain of being held in contempt of court if they fail to testify. *Id.* at 898.

183. *Id.* at 908-09.

184. *Id.* at 909.


186. *Id.* at 932-33. Indeed, as the Court has previously held:

What makes a system adversarial rather than inquisitorial is not the presence of counsel . . . but rather, the presence of a judge [at trial] who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties . . .

Our system of justice is, and has always been, an inquisitorial one at the
Second, this approach severely limits a suspect's complete right to remain silent. Finally, this approach is ultimately not efficacious because a ban on all stationhouse confessions would be an even more intrusive exercise of judicial power than merely requiring *Miranda* warnings to be given and excluding (even all) statements obtained without the benefits of those warnings.

D. Civil Rights Actions: Another Incomplete Solution

In her article, Professor Susan R. Klein argues that the proper solution to deliberate *Miranda* violations lays either in limiting *Miranda*'s exceptions to unintentional violations, or in allowing suspects to bring a civil rights action against police officers who intentionally violate a suspect's *Miranda* rights during interrogation. Evaluating the efficacy of these two options, Professor Klein argues that civil rights actions are the best way to protect a suspect's Fifth Amendment rights against self-incrimination by deterring deliberate police misconduct during interrogation.

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187. Kamisar, *supra* note 185, at 934-35. First, under this approach, a suspect's right to remain silent cannot be complete if he can nonetheless be held in contempt for refusing to testify at pretrial hearing. *Id.* Moreover, if the suspect chooses to exercise this right to remain silent and his case goes to trial, his silence can be used against him. *Id.*

188. *Id.*

189. See Klein, *supra* note 173, at 1354. This is, of course, the option advocated by Justice Kennedy in his concurring opinion in *Seibert*, 124 S. Ct. 2601, 2615-16 (2004) (Kennedy, J., concurring in the judgment), a position that was rejected by both the plurality, *id.* at 2612 n.6 (plurality opinion), and the dissent, *id.* at 2617 (O'Connor, J., dissenting), in that case.

190. Klein, *supra* note 173, at 1354-55. It should be noted that civil rights actions are also a solution proposed by Professor Weisselberg in his article *In the Stationhouse After Dickerson*. Weisselberg, *supra* note 12, at 1158-63.

While there has been some indication from the courts that civil rights claims against officers for violations of *Miranda* are cognizable, the civil rights action approach has noticeable flaws. First, courts have been reluctant to find civil rights actions based solely on failure to administer *Miranda* warnings during interrogation. Instead, courts have only considered such actions in situations where police compelled a defendant's statements and subsequently used the statements against the defendant at trial. In dealing with these coercion cases, courts have had to refer to the Due Process voluntariness test to evaluate the claim, which is the very thing the Court hoped to move away from by instituting *Miranda* in the first place.

Secondly, as Professor Weisselberg (a backer of civil rights actions as a possible solution to this problem) notes, "it is difficult to conclude that the risk of civil rights liability . . . can alone transform interrogation practices." Few suspects whose *Miranda* rights are deliberately violated are likely to sue the police department. Moreover, there is some question as to whether the individual police officer would be held

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193. See infra notes 195-200 and accompanying text.
195. See, e.g., id. at 769 (plurality opinion) (refusing to find a civil rights violation on grounds that "mere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness"). Notwithstanding the fact that the *Miranda* Court deemed any statements obtained without the benefit of *Miranda* warnings to be presumptively coerced absent a showing by the state of a "knowing[] and intelligent[]" waiver of the suspect's *Miranda* rights, *Miranda v. Arizona*, 384 U.S. 436, 475 (1966), the Court's post-*Miranda* decisions have significantly diminished the effect of that holding and its tenets to the point where the bright-line requirements protecting a suspect's Fifth Amendment rights created in *Miranda* have been virtually discarded in favor of less rigid strictures, see discussion supra Part I.C. The erosion of the "knowing and intelligent" requirement can also be seen in the context of waiver of *Miranda* rights in *North Carolina v. Butler*, 441 U.S. 369, 374-76 (1979) (rejecting the notion that a waiver of *Miranda* rights has to be expressly waived in order to satisfy the "knowing and intelligent" requirement).
196. Weisselberg, supra note 12, at 1161 & n.211.
197. Id. at 1156.
198. Id. Two reasons for this, Professor Weisselberg states, are that: (1) given the suspects' alleged criminal nature, few will be seen as sympathetic claimants in the eyes of the jury; and (2) very little money damages are likely to be awarded even if a suspect wins his claim. Id.
personally liable in such a civil rights action, or whether the police department would indemnify him from such liability. 199

III. LOOKING BACK TO ACHIEVE FUTURE BALANCE

It is established in the Constitution that, warning or not, the right against self-incrimination is inviolate, and may not be abridged. 200 Miranda initially called for specific warnings to be provided to the suspect in order to ensure that those rights were respected, 201 but subsequent exceptions in the Court’s case law have eroded the rule over time. 202 Still, as Dickerson points out, the fact that Miranda has exceptions does not alter the fact that the warnings are deemed necessary by the Court. 203 Accordingly, statements obtained after a deliberate failure to adhere to Miranda should not be used against the defendant either at trial or for impeachment purposes. 204

A. Closing the Door on “Question-First” with Seibert

In Seibert, the Court provides an opportunity to close the door on the practice of “question-first” tactics. By objecting to the use of pre-warned confessions to bind the suspect into a statement during interrogation, the Court showed its unwillingness to hold a defendant to his pre-warned statements where doing so would effectively render the defendant’s constitutional rights moot. 205 And yet, it is important to note that the Court recognizes this protection within the confines of interrogation. 206 Surely, then, the Court would object on the same (or similar) grounds to using statements obtained by deliberate violations of Miranda against a suspect at trial for impeachment. For, even in the words of Justice Thomas (who, by his opinions, is clearly an outspoken critic of

199. Id. Professor Weisselberg sees civil rights actions under § 1983 as helping to alter police training conduct by discouraging deliberate violations of Miranda out of fear of defending repeated lawsuits. Id. However, even if civil rights actions affect police training on an individual level, Professor Weisselberg notes that the true effectiveness of these actions will not be realized until other, larger systemic changes in police culture take place. Id.

200. U.S. CONST. amend. V.
202. See discussion supra Part I.C.
204. While at first blush, this approach appears to be at odds with the Court’s decision in Harris, upon closer inspection, the proposal put forth in this Comment recognizes the necessity of obtaining truthful testimony from the defendant at trial pursuant to Harris, but asks courts to distinguish this case in light of the “fruits” doctrine espoused in Patane and Tucker. See discussion infra Parts III.A, III.C.
205. See supra notes 141-49 and accompanying text.
206. See supra notes 141-47 and accompanying text.
Miranda, the Fifth Amendment protection is, at the very least, "a fundamental trial right." To hold the defendant at trial to a statement obtained in deliberate violation of Miranda hinders the defendant's ability to mount a complete trial defense, which is a constitutional right if ever there was one. Echoing Justice Brennan's dissent in Harris, allowing the defendant to be bound by statements obtained from him before Miranda warnings are given would deprive the defendant of an "unfettered" opportunity to decide whether or not to testify on his own behalf at trial.

**B. Filling the Void: Harris Does Not Fit the Bill**

Though conventional wisdom would say that a witness's statements obtained by deliberate violations of Miranda would likely fall under the Harris exception and be admissible for impeachment, the rule in Harris and its progeny do not support such a contention. In Harris, while the Court was concerned with not giving a defendant an opportunity to lie in court by hiding behind a constitutional rule, the initial confession was voluntarily given under no false pretenses. By contrast, the issue of

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207. See, e.g., Chavez v. Martinez, 538 U.S. 760, 772 (2003) (plurality opinion) (holding that a mere failure to administer Miranda warnings did not justify a civil rights claim under 42 U.S.C. § 1983); Dickerson, 530 U.S. at 444-65 (Scalia, J., joined by Thomas, J., dissenting) (expressing grave doubts about the efficacy of Miranda).


209. See U.S. CONST. amends. V, VI. While the right to mount a complete defense has been recognized widely by the Court in its holdings, this argument is poignantly made in relation to a suspect's Fifth Amendment rights as shown in the Court's 1973 decision Schneckloth v. Bustamonte. 412 U.S. 218, 241 (1973) (citing Miranda as an example of the fact that "[a] strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial").


211. See id. at 224; see also, e.g., People v. Peevy, 953 P.2d 1212 (Cal. 1998) (holding that a defendant's statements were admissible for impeachment purposes even though he had requested his attorney and was interrogated after such a request was made). But cf. Henry v. Kernan, 177 F.3d 1152, 1156-58 (9th Cir. 1999) (holding a statement inadmissible for impeachment purposes in a habeas corpus hearing on the ground that, although no physical coercion was present, the statement was nonetheless coerced psychologically), amended by 197 F.3d 1021 (9th Cir. 1999); People v. Neal, 72 P.3d 280, 282 (Cal. 2003) (finding that statements obtained by deliberate withholding of recitation of Miranda rights deemed inadmissible for any purpose, including impeachment, because they were determined to be involuntary based on the facts).

212. See infra notes 214-15 and accompanying text.

213. Harris, 401 U.S. at 224. Additionally, as the dissent in Harris pointed out, the case the majority relied on was Walder v. United States, 347 U.S. 62 (1954), which dealt with the admissibility of testimony to impeach the defendant on matters collateral to the
admissibility of a defendant's statement by a *deliberate* violation of *Miranda* hinges on the fact that the inculpatory statements, though perhaps voluntary, are nonetheless given under circumstances that present the suspect with a distorted view of his Fifth Amendment rights.\(^{214}\)

Applying *Harris* to deliberate violations of *Miranda* would create a situation where a defendant could essentially make statements that "can and will be used against him" to impeach him later in the interrogation without understanding that he has a legitimate choice to remain silent.\(^{215}\)

Moreover, at trial, notwithstanding the legitimacy of the defendant's alibi, the defendant's unwarned statement will *still* be used against him, even if it is only for impeachment purposes.\(^{216}\) Thus, at trial, the weight of the defendant's alibi versus the pre-warned statement would be assessed by the jury.\(^{217}\) As a result, instead of having the Constitution protect and uphold the defendant's right against self-incrimination, the defendant's individual liberties rest in the hands of twelve individuals who might not only use these potentially inculpatory, unwarned statements against him for impeachment purposes, but also to ultimately determine his guilt.\(^{218}\) The Framers of the Constitution could not have

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[T]he reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. *Id.* (plurality opinion) (emphasis added). As previously discussed, the Court recognized in *Seibert* that this "question-first" technique is designed to circumvent *Miranda* and, accordingly, is employed not by mistake, but by design. *Id.* at 2615 (Kennedy, J., concurring in the judgment).

215. See *id.* at 2611 (plurality opinion).

216. *Harris*, 401 U.S. at 224.

217. See *FED. R. EVID.* 104(e).

218. See, e.g., Bruton v. United States, 391 U.S. 123, 135 (1968) (recognizing that there are situations in which a high risk exists that jurors will not follow the instructions given it by a court with regard to consideration of evidence); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 *EMORY L.J.* 135, 135-36 (1989) (noting that "[t]he ability of a jury to use evidence admitted under the Rule 404(b) exception for a proper purpose, at least in intent cases, is highly questionable . . .").

A brief look at the Federal Rules of Evidence provides additional evidence to support the notion that juries are ill-equipped to handle potentially damaging evidence, particularly when faced with the task of using the evidence solely for the purpose of impeachment, as opposed to determining guilt or innocence. See, e.g., *FED. R. EVID.* 403 ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair
possibly had in mind that an unknowledgeable and impressionable trier of fact misusing the rules of evidence would serve as the final constitutional safeguard of a suspect’s right to avoid self-incrimination.\textsuperscript{219}

\textbf{C. Patane Provides the Key}

As the majority in \textit{Miranda} recognized, it is important to achieve a balance between the state's interest in prosecuting criminals and the preservation of an individual's constitutional rights during interrogation.\textsuperscript{220} Combining the Court's holding in \textit{Patane}, concerning fruits of an interrogation, with the Court's rationale in \textit{Seibert}, regarding admissibility of confessional statements, provides such a balance in dealing with deliberate \textit{Miranda} violations.\textsuperscript{221}

Under the \textit{Patane/Seibert} approach,\textsuperscript{222} upon taking a suspect into custody, police officers must still give a suspect \textit{Miranda} warnings.\textsuperscript{223} However, if an officer deliberately engages in either "question-first" or "outside \textit{Miranda}" tactics during a custodial interrogation, under the \textit{Patane/Seibert} approach, the suspect's statements would be inadmissible
at trial for any purpose, including impeachment. Though the statements would be completely inadmissible at trial, under the Pataneseibert approach police officers would still be able to use the defendant’s statements to lead them to other fruits (be they witnesses or physical evidence), which, under Patane, would still be admissible at trial solely for impeachment purposes.

Unlike other attempts at solving this problem, the Pataneseibert approach is a more complete solution because it more effectively deters deliberate police misconduct during interrogation, and still upholds a suspect’s Fifth Amendment rights that Miranda originally sought to protect. The threat of complete inadmissibility at trial of a suspect’s statements under the Pataneseibert approach will create a deterrent to law enforcement officers seeking to obtain “trial worthy” evidence by deliberately violating Miranda. In addition, law enforcement members who do obtain confessions “outside Miranda” will have to spend their time and effort investigating the veracity of the statements, and obtaining the fruits of the confession to use at trial. The final deterrent effect of

224. While “question-first” and “outside Miranda” are the two types of deliberate Miranda violations tackled within the context of this Comment, the Pataneseibert approach is not intended to be limited to policing these specific practices. Rather, the Pataneseibert approach is meant to apply to any other potential interrogation technique that a police officer might be able to concoct to attempt to circumvent the Miranda requirements set forth by the Court.


226. See discussion supra Part II.

227. See infra notes 234-35 and accompanying text. Though, in some respects, this solution may appear similar to the approach put forth by Professors Amar & Lettow, see discussion supra Part II.C, the Pataneseibert approach is far more advantageous. First, the Pataneseibert approach is firmly rooted in the Court’s (admittedly somewhat jumbled) Miranda jurisprudence. See discussion supra Parts I.B-D, III.C. Second, because it keeps both the investigatory and interrogatory functions in the hands of the police, the Pataneseibert approach does not require a radical upheaval of the criminal justice system as seen in the Amar-Lettow approach, which effectively prohibits stationhouse interrogation by police officers. See discussion supra Part II.C.

228. In light of the Court’s rationale in Hass, which stated that the threat of inadmissibility of confessional statements during the prosecution’s case-in-chief created a sufficient deterrent effect on law enforcement officers from violating Miranda during interrogation, see Oregon v. Hass, 420 U.S. 714, 722 (1975), it is reasonable to assume that deeming an unwarned confession inadmissible during the case-in-chief and for impeachment purposes (a more stringent restriction on admissibility than under Harris and Hass) would have, at a minimum, the same deterrent effect, and would likely be even more of a deterrent, see supra text accompanying notes 72-78.

229. Even applying Professor Clymer’s cost-benefit analysis to the proposed system under the Pataneseibert approach, see discussion supra Part II.B, there seems to be little question that the amount of time and effort police officers would have to expend in order to obtain evidence admissible for the sole purpose of impeaching a defendant (should he even decide to take the stand) would be enormous when compared to the ease of simply informing the suspect of his rights under Miranda. The argument in favor of giving the
the *Patana/Seibert* approach on police misconduct is that, even if the fruits of the confession have been obtained, the prosecution may still only use the fruits against the defendant for impeachment purposes should he testify in a manner contradictory to his pre-warned statement. Likewise, because the prosecution may still use statements from third parties and evidence obtained by the defendant's confession against him (even if only for impeachment), a defendant continues to have little incentive to "roll the dice" in court by attempting to perjure himself.

Perhaps the ultimate benefit of the *Patana/Seibert* approach is that it stays true to *Miranda* and its progeny. It is not meant to supersede any of the previous decisions regarding impeachment. *Elstad* and *Harris* would still control in situations where a police officer obtains statements by an absent-minded, good faith failure to read *Miranda* warnings to the suspect. The *Patana/Seibert* approach, by comparison, serves to deter the practice of deliberately questioning a suspect with the "outside *Miranda" or "question first" techniques. By eliminating these and other suspect interrogation practices surrounding *Miranda*, the *Patana/Seibert* approach ensures what the *Miranda* Court held nearly forty years ago: in order to preserve a defendant's Fifth Amendment rights during police interrogation, a police officer must notify the suspect of his rights. Moreover, this approach helps maintain the sanctity of *Miranda* warnings is bolstered even further when considered in light of the fact that, by Justice Souter's own admission in *Seibert*, "giving the [*Miranda*] warnings and getting a waiver [from the suspect] has generally produced a virtual ticket of admissibility" of evidence obtained through stationhouse interrogation. *Missouri v. Seibert*, 124 S. Ct. 2601, 2608 (2004) (plurality opinion). Given the fact that eighty percent of suspects waive their *Miranda* rights once notified of them, the likelihood of obtaining admissible statements for use both at trial and for impeachment purposes is incredibly high. See Klein, *supra* note 173, at 1355-56; see also Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996). *But cf.* Amar & Lettow, *supra* note 180, at 922 n.286 (noting that "physical leads are often more important to law enforcement than getting statements for use in court").

230. *See supra* note 229 (discussing Professor Clymer's cost-benefit analysis as applied to situations under the *Patana/Seibert* approach); *see also* Harris v. New York, 401 U.S. 222, 224-26 (1971) (allowing admission of unwarned statements for impeachment purposes, even though such statements were inadmissible as substantive evidence under *Miranda*).

231. *See supra* note 169 and accompanying text.

232. *See discussion supra* Parts I.C.1, I.C.3. Naturally, the *Harris* exception would also apply to a factual situation in which good-faith, incomplete *Miranda* warnings were given. *See discussion supra* Part I.C.1. It is worth noting, however, that the *Patana/Seibert* approach would cover situations in which the *Miranda* warnings were given in a deliberately incomplete manner.

233. *See supra* note 224.

234. *See* *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966). An added benefit to the *Patana/Seibert* approach is that, since the suspect's inculpatory statements are not
our accusatorial system of criminal justice by requiring "that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth."\textsuperscript{235}

IV. CONCLUSION

The \textit{Miranda} theory created a bright-line rule designed to protect the rights of a suspect during police interrogation. Over time, however, subsequent cases created exceptions to \textit{Miranda} that diminished its effectiveness and called into question its very constitutionality. As a result of this uncertainty surrounding \textit{Miranda}, a disturbing practice of deliberate questioning "outside \textit{Miranda}" has developed. Although the Court has not dealt directly with the issue of whether the prosecution may use statements obtained "outside \textit{Miranda}" for impeachment purposes, an approach based on the Court's holdings in the Seibert and Patane cases provides an ideal solution to this issue.

\footnote{admissible at court for any purpose, courts no longer have to use the cumbersome Due Process voluntariness test to determine whether such statements were given voluntarily. See supra note 221.}

\textsuperscript{235} \textit{Miranda}, 384 U.S. at 460.