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## CONSTITUTIONAL THEORY FOR CRIMINAL PROCEDURE: *DICKERSON, MIRANDA*, AND THE CONTINUING QUEST FOR BROAD-BUT-SHALLOW

DONALD A. DRIPPS\*

The very first paragraph of the Supreme Court's much-awaited decision in *Dickerson v. United States*<sup>1</sup> declares that *Miranda v. Arizona*,<sup>2</sup>

being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.<sup>3</sup>

One might suppose that such a simple reaffirmation of the status quo would call for little scholarly comment. In the context of constitutional criminal procedure in general, and of *Miranda* in particular, however, there is nothing simple about reaffirming the status quo.

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1. 530 U.S. 428 (2000).

2. 384 U.S. 436 (1966).

3. *Dickerson*, 530 U.S. at 432.

For a quarter of a century, some of the Court's cases have characterized *Miranda's* requirements as "not themselves rights protected by the Constitution" but instead as "measures to insure that the right against compulsory self-incrimination [is] protected."<sup>4</sup> More succinctly, *Miranda* was described as a mere "prophylactic rule."<sup>5</sup> The Fourth Circuit had concluded that, given this characterization of *Miranda* as prophylactic rather than constitutional, Title II of the 1968 Omnibus Crime Control and Safe Streets Act<sup>6</sup> (a congressional statute purporting to return to the pre-*Miranda* voluntariness test) was constitutional.<sup>7</sup> Complying with the statute, the court of appeals ruled that the district court should have admitted a statement obtained in violation of the *Miranda* rules.<sup>8</sup> The Supreme Court's *Dickerson* opinion rejected the Fourth Circuit's conclusion that *Miranda* was not a constitutional decision.<sup>9</sup> But the opinion did not repudiate prior cases admitting evidence derived from *Miranda* violations or allowing impeachment with *Miranda*-tainted statements, cases that were justified in large measure by the prophylactic-rules characterization.

*Miranda's* academic defenders had hoped that if the majority refused to overrule *Miranda*, the opinion might have restored the Warren Court's "original vision" of *Miranda* as a constitutional antidote to the per se compulsion attending custodial interrogation.<sup>10</sup> After *Dickerson* *Miranda* seems securely established in the constitutional order; the Court reaffirmed present law. But present law is itself unstable.

To take an example, in prior cases the Court has upheld the use of *Miranda*-tainted statements to impeach the testimony of defendants who elect to testify in their own defense.<sup>11</sup> Part of the

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4. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

5. *New York v. Quarles*, 467 U.S. 649, 657 (1984).

6. 18 U.S.C. § 3501 (1994).

7. *United States v. Dickerson*, 166 F.3d 667, 692 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000).

8. *Id.* at 695.

9. *Dickerson*, 530 U.S. at 432.

10. See Yale Kamisar, *Can (Did) Congress "Overrule" Miranda?*, 85 CORNELL L. REV. 883, 936-50 (2000) (arguing that the prophylactic-rules cases are inconsistent with *Miranda's* constitutional justification); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 140-88 (1998) (same).

11. *Oregon v. Hass*, 420 U.S. 714, 722-24 (1975) (statement obtained by continued questioning after suspect invoked *Miranda* rights admissible to impeach); *Harris v. New*

justification for this impeachment exception was the theory that *Miranda* announced prophylactic safeguards rather than constitutionally required safeguards.<sup>12</sup> In contrast, when a defendant testifies after giving clearly compelled testimony before a grand jury under an immunity order, the Court has refused to permit impeachment with the compelled testimony.<sup>13</sup> Thus if *Dickerson* takes the stand at his trial on remand, he can be impeached with the very statement that the Court has just suppressed on the ground that the interrogation violated a "constitutional rule" derived from the Fifth Amendment. In effect, the same statement might be deemed compelled and not compelled in the same case.

The Justices are aware of their own precedents. The fact that Chief Justice Rehnquist, for decades an implacable critic of *Miranda*,<sup>14</sup> wrote the majority opinion, is more than one of those rich ironies with which our constitutional history abounds. It is also a sure sign of a compromise opinion, intentionally written to say less rather than more, for the sake of achieving a strong majority on the narrow question of *Miranda*'s continued vitality.

*Dickerson* therefore qualifies as a "minimalist" opinion of the sort recently defended by Professor Cass Sunstein.<sup>15</sup> With many qualifications, Sunstein makes the case for judicial decisions that announce narrow rather than broad rules for the future, justified by particular considerations in the case at hand rather than by appeals to first principles or comprehensive general theories.<sup>16</sup> More

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York, 401 U.S. 222, 225-26 (1971) (statement obtained by custodial questioning absent adequate warning admissible to impeach).

12. In *Hass*, for instance, the majority opinion seems to distinguish *Miranda* violations from genuine constitutional violations by noting that "[t]here is no evidence or suggestion that *Hass*' statements ... were involuntary or coerced." *Hass*, 420 U.S. at 722.

13. *New Jersey v. Portash*, 440 U.S. 450, 459-60 (1979).

14. Then-Justice Rehnquist wrote the majority opinions in *Tucker* and *Hass*, and worked in the Justice Department office that seems to have originated the prophylactic-rules characterization of *Miranda* in a 1969 memorandum. See Lawrence Herman, *The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation*, 48 OHIO ST. L. J. 733, 738-39 n.44 (1987); Kamisar, *supra* note 10, at 925 n.217. *Dickerson* in all probability does not reflect any change in the Chief Justice's views of *Miranda*'s merits. See *Dickerson*, 530 U.S. at 443 ("Whether or not we would agree with *Miranda*'s reasoning and its resulting rule were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now.").

15. CASS R. SUNSTEIN, *ONE CASE AT A TIME* (1999).

16. *Id.*

succinctly, judicial opinions should minimize the *width* of the rules they announce, as well as the *depth* of the reasons they give.<sup>17</sup>

This description fits *Dickerson* exactly. Yet Professor Sunstein himself identifies *Miranda* as a case in which a wide rule might very well be justified.<sup>18</sup> Minimalism's virtues depend on the context. In this Article, I adopt Sunstein's distinction between minimalist and maximalist opinions—measured on the axes of width and depth—to analyze *Miranda*, *Dickerson* and criminal procedure doctrine more generally. The Article argues that, because of the volume of constitutional litigation in criminal cases and because of the demonstrable failure of legislatures to deal constructively with criminal procedure problems, width is a virtue rather than a vice in constitutional criminal procedure.

But width has a problem in criminal procedure. If a Supreme Court majority supports a wide ruling with a fully theorized opinion, such a deep justification will be intensely controversial. Rarely will a deep justification persuade a majority, and over time deep justifications that do win majority support are likely to lose it. At that point the rule may remain highly desirable from a policy standpoint but illegitimate from the standpoint of constitutional law. On the other hand, if a wide rule is maintained by a majority that does not accept a fully theorized account, the application of the rule in future cases will be arbitrary. Justices who adhere to a particular rule solely because *some rule* is required have no guide to interpreting the rule beyond maintaining its categorical form. Thus criminal procedure calls for wide rulings, but these may very well suffer from a legitimacy deficit and evoke subsequent inconsistent applications. Given the case for wide rules in criminal procedure cases, however, a return to case-by-case adjudication is highly unattractive. What criminal procedure needs is a legitimate doctrinal basis for broad rulings. Ideally, such a basis would command normative respect from various ideological perspectives, which would reduce both collective decision problems in future cases and the risk of hostile political reaction of the sort exemplified by Title II. What we are looking for, in other words, is a *shallow* justification for *wide* rules.

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17. *Id.*

18. *Id.* at 55.

This Article concludes by suggesting two such possibilities. First, if the Justices adopted a more scrupulous approach to *stare decisis* in criminal procedure cases, wide rules, once announced, might be sustainable even after their deep justifications have lost majority support. By scrupulous *stare decisis* I mean two distinct attitudes. The first is a willingness on the part of individual Justices not just to adhere to the narrow holdings of past cases, but also to accept their justifications, or devise and articulate a convincing alternative justification for them. The second is a readiness on the part of Supreme Court majorities to overrule outlying precedents. Although apparently in tension with one another, these two attitudes actually reflect both a common concern for pragmatic criminal procedure doctrine and a common recognition that the Court, not its constituent Justices, is the final authority on constitutional interpretation.

A second strategy proposes grounding criminal procedure rules in more general textual bases, such as the Fourth Amendment's reasonableness clause or the requirement of procedural fairness expressed by the due process clauses. The familiar procedural due process standard of *Mathews v. Eldridge*,<sup>19</sup> premised on instrumental reliability, supplies the doctrinal predicate for wide rules of minimally acceptable procedures in administrative entitlement cases.<sup>20</sup> Substantive due process, in the blandest and least controversial form, requires that deprivations of liberty be reasonable exercises of the police power. The Fourth Amendment cases have given that formulation somewhat more precision: restraints on liberty and invasions of privacy must be proportioned to the probability that crime will thereby be detected or prevented. Normatively these principles command very wide respect across a variety of ideological perspectives. So far as I know, no one favors unreliable procedures, or unreasonable restraints on liberty.

Yet in modern criminal cases, the Court has purported to limit due process inquiry so as to confine, for practical purposes, criminal procedure doctrine to the specific provisions in the Bill of Rights. If

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19. 424 U.S. 319 (1976).

20. See *id.* at 332-35 (depriving an entity of a property interest secured by an administrative entitlement statute requires due process procedures determined by the weight of the individual interest, the degree to which additional procedural safeguards would reduce the risk of error, and the cost of additional procedures).

my argument is correct, this turn is likely to perpetuate criminal procedure's current problems. The need to guide law enforcement agencies and lower courts in millions of future cases will push the Court in the direction of announcing bright-line rules, which can be tethered to the Bill of Rights only by intensely controversial doctrinal moves. Subsequent decisions by majorities that do not subscribe to the deep reasoning of prior cases will foster inconsistency and uncertainty in the law. Ingenious legalisms and the vigorous pruning of outlying precedents may palliate the situation, but in the end, doctrine and values must be brought into line with one another. If forced to choose between unstable rules very loosely based on the Bill of Rights, and stable rules firmly based on a constitutional commitment to fair trials and reasonable police practices, the balance of considerations inclines in favor of the latter.

If the choice between those alternatives is a close one, the choice between *any* likely set of broad rules and a regime of case-by-case adjudication is somewhat easier. The very factors that Professor Sunstein considers supportive of minimalism generally support wide rules in the criminal procedure context. It turns out that one's general approach to constitutional law—one's constitutional theory—may vary, without inconsistency, from one set of cases to another. Somewhat ironically then, a pragmatic approach rooted in skepticism about constitutional theory may very well foster not the death of theory, but a plurality of constitutional theories, each regulating an important but distinct domain.

## I. A THEORETICAL FRAMEWORK: MINIMALISM AND MAXIMALISM

A portion of Cass Sunstein's recent work, drawn together in the book *One Case at a Time*, has developed a defense of narrow judicial decisions supported by shallow, rather than deep, justifications.<sup>21</sup> In this account, a narrow decision is one that does not purport to determine the outcome of many future cases.<sup>22</sup> By contrast, a wide or broad ruling does purport to govern the outcome of many future

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21. SUNSTEIN, *supra* note 15.

22. *Id.* at 10-11.

cases.<sup>23</sup> A narrow ruling is highly contextualized; analogies to subsequent cases will be possible but not automatic.<sup>24</sup> Wide rulings take a more categorical form and identify as few facts as necessary and sufficient to determine the result.<sup>25</sup> Wide rulings thus have the flavor of legislation, although they emerge from the process of adjudication.

A shallow justification, according to Sunstein, appeals to a wide range of otherwise conflicting general political, moral, or jurisprudential perspectives.<sup>26</sup> Shallow justifications make possible "concrete judgments on particular cases, unaccompanied by abstract accounts about what accounts for those judgments."<sup>27</sup> When individuals with diverse abstract commitments agree on a particular result, we have a case of "incompletely theorized" agreement.<sup>28</sup> For example, "[p]eople who disagree on a great deal may agree that torture is unconstitutional, or that people deserve compensation for physical invasions of their property."<sup>29</sup>

This last quotation captures an important strain in Sunstein's minimalism. Virtually everyone who thinks about the subject agrees on a surprisingly extensive set of substantive conclusions about American constitutional law.<sup>30</sup> This core includes the propositions that torture and expropriation, for instance, are unconstitutional.<sup>31</sup> The core will change over time, but in any given case there is a broad field of common ground upon which constitutional arguments by analogy can be based.<sup>32</sup>

Sunstein argues that judges often should confine themselves to narrow rulings supported by shallow justifications, i.e., to "minimalist" decisions.<sup>33</sup> Judicial minimalism may promote a variety of weighty values. Minimalism encourages rather than terminates democratic political processes, and thereby reduces the

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 13-14.

27. *Id.* at 13 (emphasis omitted).

28. *Id.* at 13-14.

29. *Id.*

30. *Id.* at 63-68.

31. *Id.* at 66-67.

32. *Id.* at 63-68.

33. *Id.* at 3-72.



risk of a political backlash against the courts.<sup>34</sup> Minimalism also reduces the risk that the judges may be in error, because narrow rulings minimize future commitments, enabling a change of course in subsequent cases.<sup>35</sup> In addition, shallow justifications, tethered to the Constitution's common core of agreed-upon substantive commitments, enable people with strongly held but opposing abstract political, moral or jurisprudential positions to agree on the resolution of particular disputes.<sup>36</sup>

Sunstein scrupulously points out that minimalism is not always appropriate.<sup>37</sup> Minimalism may sometimes be *inevitable*, because it offers "the only possible route for a multimember tribunal, which may be incapable of bridging its many disagreements, and which may be able to converge only on a minimal ruling."<sup>38</sup> Even when a broader or deeper ruling is obtainable, however, the choice between judicial minimalism and maximalism is not automatic.<sup>39</sup>

Sunstein generalizes as follows:

[I]t is worthwhile to attempt a broad and deep solution (1) when judges have considerable confidence in the merits of that solution, (2) when the solution can reduce costly uncertainty for future courts and litigants, (3) when advance planning is important, and (4) when a maximalist approach will promote democratic goals either by creating the preconditions for democracy or by imposing good incentives on elected officials, incentives to which they are likely to be responsive. Minimalism becomes more attractive (1) when judges are proceeding in the midst of (constitutionally relevant) factual or moral uncertainty and rapidly changing circumstances, (2) when any solution seems likely to be confounded by future cases, (3) when the need for advance planning does not seem insistent, and (4) when the preconditions for democratic self-government are not at stake and democratic goals are not likely to be promoted by a rule-bound judgment.<sup>40</sup>

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34. *Id.* at 24-45.

35. *Id.* at 49-50.

36. *Id.* at 61-72.

37. *Id.* at 57-60.

38. *Id.* at 57.

39. *Id.*

40. *Id.*

Despite the apparent humility of this approach, it has considerable analytical power and normative appeal.

Sunstein's account accurately captures a great deal of the actual practice of constitutional law, providing a generalized account of elements that seem powerfully attractive in the work of prudent and careful jurists such as Justices Harlan, Stewart, and Kennedy. Although the theory of judicial minimalism is motivated by the desire to promote justice, it also respects the conventional constraints on constitutional interpretation, steering an elegant middle course between judicial activism and judicial abdication. It constructively addresses the implications of social choice theory for the work of the Court.

The next two sections compare and contrast *Miranda* and *Dickerson* in light of the categories used by Sunstein to delineate the minimalist/maximalist distinction. The comparison illuminates both cases in important ways, and substantiates the intuition that although *Dickerson's* holding is that *Miranda* remains the law, there is a world of difference between the two decisions.

## II. *MIRANDA'S* EXEMPLARY MAXIMALISM

### A. *The Road to Miranda*

By the early 1960s, the Supreme Court had decided more than thirty cases in which defendants challenged the admission of confessions at state trials.<sup>41</sup> The test applied in these cases demanded exclusion of "confessions which are involuntary, *i.e.*, the product of coercion, either physical or psychological."<sup>42</sup>

Lower courts, police officers, and commentators were never sure which focus of the test was more important—the subjective capacity of the suspect to resist police pressure, or the objective tendency of the police methods to cause a typical suspect to confess. Nor did the Court ever succeed in clarifying how much pressure amounted to "coercion." Although the Court did come to focus on certain

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41. Wilfred J. Ritz, *Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 WASH. & LEE L. REV. 35, 35-36 (1962).

42. *Rogers v. Richmond*, 365 U.S. 534, 540 (1961).

"hallmarks" of coercion, even physical violence to the suspect was never declared per se unconstitutional.<sup>43</sup>

The vagueness of the voluntariness standard had at least two unfortunate consequences. First, because the Supreme Court could review only a very few confessions cases—typically capital cases—enforcement of the voluntariness test was left largely to the state courts. This was not a very strong guarantee against police coercion. Second, the police themselves had neither the ability nor any incentive to comply with the voluntariness test.<sup>44</sup>

The voluntariness standard's defects are well illustrated by the 1961 decision in *Culombe v. Connecticut*.<sup>45</sup> Culombe was "a thirty-three-year-old mental defective of the moron class with an intelligence quotient of sixty-four and a mental age of nine to nine and a half years. He was wholly illiterate."<sup>46</sup> On a Saturday afternoon, Connecticut police asked Culombe if he would come to the station for questioning about a double murder; Culombe agreed. He soon asked for a lawyer, and was told that he could have a lawyer if he would name one; but the police knew that Culombe was illiterate and thus unable to use the telephone directory.<sup>47</sup>

On Saturday night the police formally arrested Culombe on suspicion of committing a felony. On Sunday the police added a breach of the peace charge. On both days police questioned the suspect, but the interrogation was not continuous, involved no physical violence or deprivation, and was confined to reasonable

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43. In *Watts v. Indiana*, 338 U.S. 49, 59-60 (1949) (Jackson, J., concurring and dissenting), Justice Jackson wrote that "[o]f course, no confession that has been obtained by any form of physical violence to the person is reliable and hence no conviction should rest upon one obtained in that manner." But the Court subsequently admitted confessions made after the police had physically struck or threatened the suspect. See *Stroble v. California*, 343 U.S. 181, 190-91 (1952) (holding that a confession was voluntary when the defendant was kicked and threatened with a blackjack one hour before questioning).

44. See Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313, 320 (1964):

As the law now stands the police have little to lose from interrogation. They can apply increasingly greater pressure until the suspect confesses. If the confession is admissible, well and good. If it is not, no harm has been done since the police wouldn't have been able to get the confession unless they had applied the pressure.

45. 367 U.S. 568 (1961).

46. *Id.* at 620 (footnote omitted).

47. *Id.* at 608-09.

times of the day. Culombe confessed to stealing some canned goods, but not to murder.<sup>48</sup>

Not until Tuesday did the police present Culombe to a court. He was charged only with breach of the peace; at the behest of the prosecution, the judge continued the case for a week and committed the suspect to custody until that time. Culombe was not heard by the court and counsel was not appointed. Not until Wednesday did Culombe confess to the murders.<sup>49</sup>

Justice Frankfurter wrote a sixty-seven page opinion, loaded with the ballast of ninety-seven footnotes. He surveyed the policy considerations that make confessions a difficult subject;<sup>50</sup> he reviewed the history of confessions in Anglo-American jurisprudence;<sup>51</sup> he canvassed the decided cases of the Court;<sup>52</sup> and then restated the process of applying the voluntariness standard.<sup>53</sup> After a minute examination of the record, he found it "clear" that Culombe's "will was broken Wednesday afternoon."<sup>54</sup>

Only Justice Stewart joined Frankfurter's opinion.<sup>55</sup> The other votes for reversal came from Warren, Douglas, Black, and Brennan, all of whom disagreed with much of what Frankfurter had said.<sup>56</sup> The Chief Justice, in an opinion made rather droll by his later performance in *Miranda*, denounced Frankfurter's "treatise" as an "advisory opinion"; in Warren's view, "the reasons which have compelled the Court to develop the law on a case-by-case approach, to declare legal principles only in the context of specific factual situations, and to avoid expounding more than is necessary for the decision of a given case are persuasive."<sup>57</sup>

In stark contrast, Justice Douglas, joined by Black, thought the case "a simple one" not because of the voluntariness rule, but because the Sixth and Fourteenth Amendment's right to counsel

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48. *Id.* at 609-18.

49. *Id.* at 611-15.

50. *Id.* at 570-87.

51. *Id.* at 587-98.

52. *Id.* at 598-602.

53. *Id.* at 603-06.

54. *Id.* at 634.

55. *Id.* at 568.

56. *Id.* at 635-36 (Warren, C.J., concurring); 637-41 (Douglas, J., concurring); 642 (Brennan, J., concurring).

57. *Id.* at 636 (Warren, C.J., concurring).

protected Culombe against questioning after he requested a lawyer.<sup>58</sup> Far from a fact-specific, case-by-case approach, the Douglas suggestion was that the Court should replace the due process analysis with a selective incorporation analysis that would require the availability of counsel during questioning in every case.<sup>59</sup> The Douglas position had been rejected by the Court in *Crooker v. California*,<sup>60</sup> and for a compelling reason. The "doctrine suggested by petitioner ... would effectively preclude police questioning—*fair as well as unfair*—until the accused was afforded opportunity to call his attorney."<sup>61</sup>

Justice Brennan agreed with only that portion of the Frankfurter opinion dealing with the specific facts of Culombe's case, implicitly agreeing with Warren.<sup>62</sup> Justice Harlan, joined by Clark and Whittaker, dissented; although he agreed with the generalizations in the Frankfurter opinion, Harlan thought those considerations led to the conclusion that Culombe's confession was voluntary.<sup>63</sup> As Warren tartly observed, this augured poorly for the project of clarifying the law of confessions.<sup>64</sup>

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58. *Id.* at 637 (Douglas, J., concurring).

59. *Id.*

60. 357 U.S. 433 (1958).

61. *Id.* at 441. Arguably the Court's decision in *Haynes v. Washington*, 373 U.S. 503, 513-15 (1963), holding a confession involuntary when the police refused the suspect contact with his wife, implicitly overruled *Crooker* even before *Miranda*. See Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REFORM 537, 569-75 (1990). On the other hand, in *Fare v. Michael C.*, 442 U.S. 707, 726-27 (1979), the Court held that a juvenile suspect's request to speak with his probation officer did not amount to an invocation of *Miranda* rights. *Michael C.* emphasized the *Miranda* decision's "perception" of counsel's "unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." *Michael C.*, 442 U.S. at 719. Arguably, then, absent *Miranda*, police refusal to permit consultation with counsel would not violate the due process voluntariness test.

62. *Culombe*, 367 U.S. at 641-42.

63. *Id.* at 642 (Harlan, J., dissenting).

64. *Id.* at 636 (Warren, C.J., concurring). The Chief Justice wrote:

The opinion was unquestionably written with the intention of clarifying these problems and of establishing a set of principles which could be easily applied in any coerced-confession situation. However, it is doubtful that such will be the result, for while three members of the Court agree to the general principles enunciated by the opinion, they construe those principles as requiring a result in this case exactly the opposite from that reached by the author of the opinion. This being true, it cannot be assumed that the lower courts and law enforcement agencies will receive better guidance from the treatise for which this case seems to have provided a vehicle.

Given the dismal failure of this determined effort to clarify the voluntariness standard, the Justices began to look for some alternative to the due process analysis. In 1963, *Gideon v. Wainwright*<sup>65</sup> incorporated the Sixth Amendment and required the appointment of counsel for indigent felony defendants in state courts.<sup>66</sup> The next year the Court, in an opinion susceptible to various interpretations, relied on the Sixth Amendment right-to-counsel to throw out a confession given by a suspect who was not coerced but who asked to consult his lawyer at the very time that the lawyer was asking the police for permission to see the client.<sup>67</sup> That same year the Court incorporated the Fifth Amendment privilege against self-incrimination into the Fourteenth Amendment's due process clause.<sup>68</sup> Legal doctrine suddenly offered a variety of new options for regulating police interrogation on a wholesale, rather than a retail, basis.

### *B. Miranda v. Arizona: When, and How, to Do Maximalism*

In the Autumn of 1965, the Justices and their law clerks waded through one hundred and fifty petitions for certiorari raising issues under *Escobedo*.<sup>69</sup> Four of the petitions were granted on November 22; a fifth petition was granted two weeks later.<sup>70</sup>

In two of the cases—*Miranda v. Arizona*<sup>71</sup> and *Vignera v. New York*<sup>72</sup>—the criminal defendant challenged state court rulings that put the burden of requesting counsel on the suspect. The Justices also chose to hear a federal case, *Westover v. United States*,<sup>73</sup> in

*Id.*

65. 372 U.S. 335 (1963).

66. *Id.* at 341-45.

67. *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964) (holding that Sixth Amendment right to counsel requires suppression of statements made by uncharged suspect who had become focus of police investigation who asked to see lawyer while lawyer was asking police for permission to see the suspect).

68. *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (holding that Fourteenth Amendment due process clause incorporates Fifth Amendment privilege against self-incrimination).

69. LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 103 (1983).

70. *Id.* at 103-05.

71. 401 P.2d 721 (Ariz. 1965), *rev'd*, 384 U.S. 436 (1966).

72. 207 N.E.2d 527 (N.Y. 1965) (mem.), *rev'd sub nom. Miranda v. Arizona*, 384 U.S. 436 (1966). For the facts, see the Supreme Court's opinion in *Miranda*, 384 U.S. at 493-94.

73. 342 F.2d 684 (9th Cir. 1965), *rev'd*, 384 U.S. 436 (1966).

which the defendant challenged confessions given to agents of the FBI.<sup>74</sup> The FBI enjoyed the prestige of the nation's most elite law enforcement agency; the warnings given by its agents were considered state of the art.<sup>75</sup> A fourth case, *Johnson v. New Jersey*,<sup>76</sup> raised the question of whether *Escobedo* applied retroactively. In the final case, *California v. Stewart*,<sup>77</sup> the state asked the Supreme Court to reinstate a conviction overturned by the California Supreme Court. In *Stewart*, neither party had introduced evidence to show that the suspect either had, or had not, been warned of the rights to silence and counsel.<sup>78</sup> The California court reversed the conviction, in effect placing upon the government the burden of proving that a confession was preceded by a warning of rights.<sup>79</sup>

This deliberate selection of representative cases as vehicles for the making of general policy was not quite unprecedented. The Court had done much the same thing in the trilogy of habeas corpus cases decided under the name of *Brown v. Allen*.<sup>80</sup> It would take this approach again in the 1975 term's death penalty cases.<sup>81</sup> Nonetheless, it was quite clear that in the 1966 confession cases, the Court was engaged in an extraordinary project: not just resolving some difficult cases, but establishing general rules to guide police and lower courts in handling confessions. Although adjudicatory in form, and styled as constitutional adjudication at that, the proceedings before the Court were in spirit not unlike those observed in an administrative rulemaking proceeding.

Certainly no administrative agency could have generated a more thorough or thoughtful survey of the confessions problem. The brief for *Miranda*, whom the police had not warned of a right to counsel,

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74. *Id.* at 686.

75. *Miranda*, 384 U.S. at 483-86.

76. 206 A.2d 737 (N.J. 1965), *rev'd*, 384 U.S. 719, 733 (1966) (holding that neither *Escobedo* nor *Miranda* applied to cases tried prior to the opinion in each case).

77. 400 P.2d 97 (Cal. 1965), *aff'd* 384 U.S. 436 (1966).

78. *Id.* at 100.

79. *Id.* at 103.

80. 344 U.S. 443 (1953).

81. *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding guided-discretion death penalty statute); *Proffitt v. Florida*, 428 U.S. 242 (1976) (same); *Jurek v. Texas*, 428 U.S. 262 (1976) (same); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (striking down mandatory death penalty for first-degree murder); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (same).

relied on the Sixth Amendment, arguing that *Escobedo* applied to suspects who had neither retained, nor requested, counsel.<sup>82</sup> Counsel for Westover, whom the FBI *had* warned, necessarily went further, and argued that the Sixth Amendment could only be satisfied by actual consultation with counsel.<sup>83</sup> Vignera's lawyer not only advanced the Sixth Amendment argument predicated on *Escobedo*, he also attacked the confession as the fruit of unlawful detention and urged the Court to enforce the *McNabb-Mallory* rule against the states under the authority of *Mapp*.<sup>84</sup>

In *Miranda*, the American Civil Liberties Union filed what is now one of the most famous briefs in the history of the Court. In it, Anthony Amsterdam and Paul Mishkin characterized the right to counsel at the interrogation stage as a means of enforcing the *Fifth Amendment* right to silence.<sup>85</sup> They quoted extensively from police interrogation manuals to support their claim that custodial interrogation is "inherently compelling."<sup>86</sup> Only the presence of counsel, they argued, could dispel the compulsion inherent in custodial questioning and so vindicate the Fifth Amendment privilege against self-incrimination.<sup>87</sup>

In the brief for the United States in the *Westover* case, the Department of Justice took the position that the Sixth Amendment did not apply until the commencement of formal proceedings.<sup>88</sup> The government explained *Escobedo* as a case of deliberate delay by the prosecution in filing formal charges—that is, as an attempt to circumvent the ruling in *Massiah*.<sup>89</sup> *Escobedo* accordingly deserved very limited application.

Like the ACLU, the United States argued that the relevant amendment was the Fifth; but in the view of the government, compulsion, just like coercion under the due process test, must be

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82. Brief for Petitioner at 30-35, *Miranda v. Arizona*, 384 U.S. 436 (1966) (No. 759).

83. Opening Brief for the Petitioner at 21-31, *Westover v. United States*, 342 F.2d 684 (9th Cir. 1965) (No. 761).

84. Brief for Petitioner at 9, 28, *Vignera v. New York*, 384 U.S. 436 (1966) (No. 760).

85. Brief of the American Civil Liberties Union, Amicus Curiae, at 5-31, *Miranda v. Arizona* 384 U.S. 436 (1966) (No. 759) [hereinafter ACLU Brief].

86. *Id.* at 13-20.

87. *Id.* at 22-31.

88. Brief for the United States at 38-42, *Westover v. United States*, 384 U.S. 436 (1966) (No. 761).

89. *Id.* at 38-42.



evident from the totality of the circumstances. In some cases, the United States maintained, the suspect need not even be warned of the right to remain silent.<sup>90</sup> As for a warning about the right to counsel, because the government denied any Sixth Amendment right to consult with counsel before the filing of a formal charge, unindicted suspects need not be warned about a right they did not possess.<sup>91</sup>

Both the United States,<sup>92</sup> and twenty-seven states that endorsed an amicus brief authored by Louis J. Lefkowitz and Telford Taylor,<sup>93</sup> urged the Court to await possible legislative action, especially in light of the American Law Institute's then-pending *Model Code of Pre-Arrest Procedure*.<sup>94</sup> Along similar lines, the National District Attorneys Association urged the Court to adopt an "advisory rule"—whatever rule the Court deemed wise, so long as it would not be enforced with the exclusionary sanction.<sup>95</sup> Arizona defended Miranda's conviction on the ground accepted by many lower courts—that *Escobedo* only forbade police frustration of the suspect's request for counsel, and did not affirmatively mandate advising the suspect of the right to consult an attorney.<sup>96</sup> All of the government parties stressed the importance of confessions to law enforcement, and the incompatibility of defense counsel's presence with successful interrogation.

Early in the oral arguments, it became clear that the heart of the controversy was the Fifth Amendment, not the Sixth.<sup>97</sup>

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90. *Id.* at 28-37.

91. *Id.* at 44.

92. *Id.* at 45.

93. Brief of the State of New York et al. at 35-39, *Miranda v. Arizona*, 384 U.S. 436 (1966) (No. 759).

94. *Id.*

95. Brief of Amicus Curiae National District Attorneys Association, at 21-26, *Miranda* (No. 759).

96. Brief for Respondent at 18-25, *Miranda* (No. 759).

97. The second Justice to interrupt John Flynn's argument for *Miranda* was Potter Stewart. This colloquy occurred:

MR. JUSTICE STEWART: What do you think is the result of the adversary process coming into being when this focusing takes place? What follows from that? Is there, then, a right to a lawyer?

MR. FLYNN: I think that the man at that time has the right to exercise, if he knows, and under the present state of the law in Arizona, if he is rich enough, and if he's educated enough to assert his Fifth Amendment right, and if he recognizes that he has a Fifth Amendment right to request counsel. But I

Justice Goldberg, the author of *Escobedo*, had resigned to represent the United States at the U.N.<sup>98</sup> His replacement, Abe Fortas, was a deep believer in the privilege against self-incrimination.<sup>99</sup> Perhaps the reason for the sea-change was this shift in judicial personalities; perhaps it was the force of the ACLU brief. No doubt these factors played their role, but it is certainly true that the right-to-counsel approach did not offer a satisfactory approach to the confessions problem.

The ultimate defect in the right-to-counsel approach in the confessions context is the same as it is in the line-up context; how is counsel supposed to "assist" the suspect during interrogation? Whatever answer is given presupposes some legal rights that counsel can assert on the suspect's behalf. The right to counsel, whether at trial or before, is derivative of other procedural safeguards. Counsel can never obtain more than the law allows; it follows that counsel is no more than a means to secure some other legal right.

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simply say that at that stage of the proceeding, under the facts and circumstances in *Miranda* of a man of limited education, of a man who certainly is mentally abnormal, who is certainly an indigent, that when that adversary process came into being that the police, at the very least, had an obligation to extend to this man not only his clear Fifth Amendment right, but to accord him the right of counsel.

MR. JUSTICE STEWART: I suppose, if you really mean what you say or what you gather from what the *Escobedo* decision says, the adversary process starts at that point, and every single protection of the Constitution then comes into being, does it not? You have to bring a jury in there, I suppose?

MR. FLYNN: No, Your Honor, I wouldn't bring a jury in. I simply would extend to the man those constitutional rights which the police, at that time, took away from him.

MR. JUSTICE STEWART: That's begging the question. My question is, what are those rights when the focusing begins? Are these all the panoply of rights guaranteed to the defendant in a criminal trial?

MR. FLYNN: I think the first right is the Fifth Amendment right: the right not to incriminate oneself; the right to know you have that right; and the right consult with counsel, at the very least, *in order that you can exercise the right* Your Honor.

Transcript of Oral Argument in *Miranda v. Arizona*, 384 U.S. 436 (1966) in 63 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT 849 (1975) (emphasis added).

98. BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT 583 (1983).

99. *Id.* at 584.

Thus the suspect's right to silence is logically prior to the right to counsel. Before *Malloy*, the state had the constitutional authority to check the privilege against self-incrimination at the door of the stationhouse.<sup>100</sup> But after *Malloy*, federal constitutional law forbade any state compulsion of incriminating statements.<sup>101</sup> Was police interrogation compulsion? If it was, could statements obtained by the police from suspects in custody ever be admitted into evidence? Remarkably, the Supreme Court answered both questions in the affirmative.<sup>102</sup>

The *Miranda* majority consisted of just five Justices—Douglas, Brennan, Black, Fortas, and Warren.<sup>103</sup> The Chief Justice assigned the opinion to himself, and delivered a true essay in constitutional policymaking. Police interrogation *in general*, Warren wrote, constitutes compulsion.<sup>104</sup> Therefore, the Fifth Amendment requires safeguards that mitigate the compulsion typical of police questioning; and the famous warning is the minimum safeguard consistent with the Fifth Amendment.<sup>105</sup>

To this day the *Miranda* opinion's treatment of the compulsion issue remains, well, compelling. Warren described the typical circumstances of custodial interrogation—the secret surroundings and the atmosphere of domination.<sup>106</sup> He followed this account with a devastatingly effective survey of the interrogation manuals—manuals still in use today.

Confession is obviously contrary to the immediate self-interest of the suspect. Why then do so many suspects confess? The manuals advise the police to create and maintain an environment of total "privacy" and to convey the impression that the questioning will continue for as long as it takes for the suspect to confess.<sup>107</sup> The officer should sympathize with the suspect and minimize the seriousness of the crime. "Good cop/bad cop" is played to heighten the suspect's anxiety while offering a sympathetic ear. The suspect can be confronted with made-up "evidence" to convince him that the

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100. *Twining v. New Jersey*, 211 U.S. 78, 99 (1908).

101. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

102. *Miranda v. Arizona*, 384 U.S. 436, 458 (1966).

103. SCHWARTZ, *supra* note 98, at 590.

104. *Miranda*, 384 U.S. at 458.

105. *Id.* at 467-68.

106. *Id.* at 461.

107. *Id.* at 449-50.

game is over and confession is his last chance for sympathetic treatment.<sup>108</sup>

Do these tactics amount to "compulsion" within the meaning of the privilege? Warren wrote that:

all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described [in the manuals] cannot be otherwise other than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.<sup>109</sup>

By way of comparison, a will drafted under circumstances similar to those of custodial questioning certainly would be held void for undue influence.<sup>110</sup>

What did police interrogation *in general* have to do with the cases for decision? Warren admitted that the records in the individual cases did not show "overt physical coercion or patent psychological ploys," but the "fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice."<sup>111</sup> In effect, compulsion is presumed from the facts of custody and questioning.

The *Miranda* Court described the famous warning as one way of dispelling the compulsion implicit in custodial questioning. "[W]e will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given."<sup>112</sup> Warning of the right to silence "at the time of interrogation is indispensable

108. *Id.* at 452.

109. *Id.* at 461.

110. *Id.* at 458 n.26 (quoting Arthur F. Sutherland, Jr., *Crime and Confession*, 79 HARV. L. REV. 21, 37 (1965)).

111. *Id.* at 457.

112. *Id.* at 468.

to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time."<sup>113</sup>

A police-administered warning of the right to silence, although necessary, was not sufficient. The suspect must have the right to consult with counsel; but even this was thought insufficient protection for the privilege. The suspect under *Miranda* has the right to not only counsel's advice, but to the presence of counsel during questioning.<sup>114</sup> As had been anticipated, given *Gideon*, the right to counsel did not depend on either an affirmative request<sup>115</sup> or the ability to pay.<sup>116</sup>

Thus far the *Miranda* opinion tracks the ACLU brief. But the Court would not take the final step. Amsterdam and Mishkin had argued that "*the Presence of Counsel is Required to Protect the Subject's Privilege Against Self-Incrimination.*"<sup>117</sup> In other words, the suspect must see a lawyer before making an admissible statement. But the Court ruled otherwise: "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver."<sup>118</sup>

Waiver must be executed "knowingly and intelligently."<sup>119</sup> Waiver was not to be "presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."<sup>120</sup> The government must carry the "heavy burden"<sup>121</sup> of proving waiver. But waiver there might be without the intervention of counsel for the suspect.

The *Miranda* Court's waiver doctrine is plainly at odds with the rest of the opinion. As Justice White demanded in dissent:

[I]f the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the Court ever accept his negative

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113. *Id.* at 469.

114. *Id.* at 469-70.

115. *Id.* at 470-71.

116. *Id.* at 472-73.

117. ACLU Brief, *supra* note 85, at 22 (emphasis added).

118. *Miranda*, 384 U.S. at 475.

119. *Id.*

120. *Id.*

121. *Id.*

answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?<sup>122</sup>

The majority made no answer.

The only explanation for the inconsistency in the *Miranda* rules is concern for effective law enforcement. The Court purported to deny that "society's need for interrogation outweighs the privilege."<sup>123</sup> Yet Warren took pains to argue that the new rules "should not constitute an undue interference with a proper system of law enforcement."<sup>124</sup> The *Miranda* rules closely resemble the contemporary practice of the FBI.<sup>125</sup> The effectiveness of the FBI was unquestioned, enabling Warren to argue that the FBI practice "can readily be emulated by state and local enforcement agencies."<sup>126</sup>

It now should be apparent that *Miranda* was a maximalist decision par excellence. On the dimension of width the opinion openly prescribes rules of general applicability to thousands of future cases. The dissenters emphasized this very point. There was no proof in the record, Justice Clark protested, that the police manuals cited by the Court were even taught, let alone applied, by the police departments involved in the cases *sub judice*.<sup>127</sup> Justice Harlan scoffed at "the Court's new code,"<sup>128</sup> and was nettlesome enough to cite Warren's now thoroughly embarrassing concurrence in *Culombe*.<sup>129</sup>

But *Culombe* itself is part of the justification for *Miranda*. The Court's turn to a wide rule was based on decades of failed experience with the case-by-case approach. The indeterminacy of the voluntariness test meant that police had no incentive not to press questioning until the suspect confessed. Who knows? However great the pressure, the courts might admit the statement. On the other hand, police attempting to comply with the test could never

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122. *Id.* at 536 (White, J., dissenting).

123. *Id.* at 479.

124. *Id.* at 481.

125. *Id.* at 483-86.

126. *Id.* at 486. Chief Justice Warren evidently relied greatly on the FBI practice during the Justices' deliberations, and this point weighed heavily with at least some of the Justices. SCHWARTZ, *supra* note 98, at 589.

127. *Miranda*, 384 U.S. at 499 (Clark, J., dissenting).

128. *Id.* at 516 (Harlan, J., dissenting).

129. *Id.* at 508 (Harlan, J., dissenting).

be sure that a court would accept their tactics, requiring retrial and perhaps the loss of a meritorious conviction. Given the volume of cases and the vagueness of the test, similarly situated defendants inevitably were treated differently.

The need for a wide ruling was made even more urgent by the confusion over the scope of *Escobedo*. Law enforcement agencies, not civil liberties groups, wanted to know the limits of permissible interrogation. Given the reversal of convictions as the remedy, the need for stable rules upon which the police could rely was acute.

In the course of this experience—and experience prior to joining the Court—the Justices had acquired a great deal of familiarity with the confessions problem. When the Court did decide to clarify the law, it undertook an exemplary process by reviewing a representative sample of cases and taking briefs from a wide variety of perspectives.

Finally, during these decades of experience, legislatures had not taken steps to deal with the interrogation issue. At the level of institutional competence, the *Miranda* Court could have considerable confidence in its knowledge about the problem, and very little confidence in legislative solutions. It was a textbook scenario for a maximalist decision.

Even so, the Court tried to stimulate, rather than short-circuit, the democratic process. The majority wrote that “the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation.”<sup>130</sup> The *Miranda* rules were only one alternative; Congress or state legislatures could provide for other systems, “so long as they are fully as effective”<sup>131</sup> in protecting the Fifth Amendment privilege.

The *Miranda* Court could not avoid a deeply controversial rationale. Although the case for clear rules in the confessions context is very strong, the precise content of those rules is open to reasonable debate. Given the absence of legislative efforts, the Court had little choice but to turn to the Constitution. Given the totality-of-the-circumstances approach embedded in the due process

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130. *Id.* at 490.

131. *Id.* As Professor Weisselberg has shown, based on an exchange of memos between Warren and Brennan, the language in *Miranda* about equally effective alternatives was not intended to support treating the warnings specifically approved in *Miranda* as less than constitutionally required. Weisselberg, *supra* note 10, at 123-25.

cases, the Court likewise had little choice but to turn to the Bill of Rights. And it could not turn to the Sixth Amendment without crippling law enforcement.

The reliance on the Fifth Amendment, therefore, makes a great deal of sense from a historical perspective. But the choice of the Fifth Amendment privilege as the basis for a broad ruling on confessions was necessarily unstable. Compulsion is not a self-defining idea,<sup>132</sup> and many thoughtful people believe that compelling confessions without brutality is justifiable.<sup>133</sup> Moreover, if custody is inherently coercive, it is hard to see how the suspect can make a voluntary waiver in a coercive environment. The Justices on the *Miranda* Court could count on widespread support for a broad rule, but they could not realistically have hoped for widespread support of so deep a rationale. There was, however, no apparent shallower alternative that could yield the needed wide rule.

### III. *DICKERSON* AS MINIMALISM

#### A. *The Cloud on Miranda: Why the Court Took the Case*

##### 1. *Title II*

During the 1960s, political opposition to the Court's criminal procedure rulings had grown increasingly intense. In 1965, President Johnson appointed a commission to study the crime problem and recommend legislation to combat it. The Commission

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132. Professor Sunstein himself seems to characterize the *Miranda* opinion as shallow. See SUNSTEIN, *supra* note 15, at 262 ("Notably, it is possible to imagine decisions that are shallow and broad; consider the *Miranda* rules, creating a virtual code of police behavior without resolving the deepest issues about the meaning of 'coercion.'"). Granted that *Miranda* did not subscribe to a specific philosophical account of compulsion, the holdings that custodial interrogation without safeguards constitutes compulsion per se, and that the suspect can make a voluntary waiver under the same custodial pressure, were and remain intensely controversial. It is possible that jurists entertaining diverse conceptions of compulsion can agree on the *Miranda* rules, but it is equally true that jurists accepting the same conception of compulsion may vigorously *disagree* about the *Miranda* rules. The justifying logic of the *Miranda* opinion has not secured the support of an overlapping consensus, as the elegantly evasive *Dickerson* opinion makes quite clear.

133. See, e.g., JEREMY BENTHAM, 5 RATIONALE OF JUDICIAL EVIDENCE 229 (1827); David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).



published its report in February of 1967.<sup>134</sup> The majority saw the causes of crime in social conditions, and the principal need in the law-enforcement area to be increasing the resources and improving the training available to police.<sup>135</sup> A minority saw the Supreme Court's recent decisions, *Miranda* foremost among them, as an aid to crime and a major obstacle to law enforcement.<sup>136</sup>

That same month the administration proposed a crime bill, generally incorporating the recommendations of the Commission.<sup>137</sup> Money was to be allocated to improve state and local law enforcement. The administration bill included no provision authorizing wiretapping or other electronic surveillance; nor did it include any provisions designed to modify, let alone overturn, *Miranda*.<sup>138</sup>

Both the House and Senate Judiciary Committees held hearings on crime in the Spring of 1967.<sup>139</sup> Members returning from the winter recess were keenly aware of an anticrime sentiment in the country. Street crime, riots, and antiwar protests were lumped together as a crisis in law-and-order.<sup>140</sup>

The House approved a version of the administration proposal on August 8, 1967.<sup>141</sup> In the Senate, however, conservatives, led by John McClellan and Sam Ervin (later to be lionized by liberals for his role in exposing the Watergate conspiracy), pushed a modified bill that directly attacked the Supreme Court's criminal procedure revolution.<sup>142</sup>

The bill reported out of the Senate Judiciary Committee provided that any confession voluntarily made would be admissible in federal court; a warning of rights or a demand for counsel were only factors to be considered under the voluntariness standard.<sup>143</sup> This provision

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134. The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967).

135. *See id.*

136. *See id.* at 303-07.

137. For the history of the bill that ultimately became the Omnibus Crime Control and Safe Streets Act of 1968, see ADAM BRECKENRIDGE, CONGRESS AGAINST THE COURT 39-94 (1970); Kamisar, *supra* note 10, at 887-909.

138. *See* BRECKENRIDGE, *supra* note 137, at 47-50.

139. *Id.* at 50-72.

140. *Id.* at 75-94.

141. *Id.* at 74.

142. *Id.* at 75-94.

143. *Id.* at 69-72.

flew in the face of *Miranda*. The bill at that point also included a provision eliminating the jurisdiction of federal courts to reverse state court criminal convictions because of the erroneous admission of a confession, as well as a section gutting federal habeas review of state convictions.<sup>144</sup>

The Senate debated the crime bill in May of 1968, in the wake of Martin Luther King's assassination and the riots that followed. Early in that month, Richard Nixon's campaign issued a major policy paper, "Toward Freedom from Fear," exploiting the crime issue and blaming the Court for "free[ing] patently guilty individuals on the basis of legal technicalities."<sup>145</sup> On the floor, a scant majority composed of fifty-two senators voted to delete the jurisdiction-stripping provision.<sup>146</sup> Only fifty-four voted to delete the habeas provision.<sup>147</sup> The bill was also amended to provide that the *Mallory* rule would not apply until the suspect had been in custody for six hours; and that even then, a confession might be received if the delay in presentment was "reasonable."<sup>148</sup>

The Senate bill went to the House, which had thus far deliberately rejected both wiretapping and direct attacks on the Court. Robert Kennedy was assassinated on June 5. On June 6, the House voted 369-17 to adopt the Senate bill, without a conference.<sup>149</sup> Lyndon Johnson, anxious to see his own crime program written into law, and aware of how the opposition party would use a veto in the coming campaign, signed the bill into law on June 19.

Whether its provisions were constitutional seems not to have mattered much to the proponents. Rather, they seemed to hope that the Justices themselves would either reverse *Miranda* or retire and be replaced by justices who would.<sup>150</sup> On June 26, President Johnson announced the resignation of Earl Warren as Chief Justice. *Miranda*, at that moment, stood as a four-to-four decision of the

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144. *Id.*

145. The Nixon paper is reprinted at 114 CONG. REC. 12,936-37 (1968).

146. *Id.* at 14,177.

147. *Id.* at 14,183.

148. *Id.* at 14,174.

149. *Id.* at 16,299-300. The assassination increased support for the bill, even though Robert Kennedy himself had opposed some of its provisions. See Kamisar, *supra* note 10, at 894 n.63.

150. *E.g.*, BRECKENRIDGE, *supra* note 137, at 66 (quoting Sen. McClellan).

Supreme Court, condemned in Congress, and the subject of bitter criticism in a presidential campaign in which Richard Nixon was widely favored. Nixon would prevail and appoint four Justices. Nonetheless *Miranda* lives, although until the *denouement* last term the issue was very much in doubt.

## 2. *The Reaction Continued: The "Prophylactic Rules" Cases*

Title II had no immediate impact on actual litigation because the Department of Justice did not ask courts to enforce the statute. Everyone simply assumed that while *Miranda* might be modified in light of a serious alternative, such as tape-recording interrogations or in-court questioning, only a constitutional amendment could reinstate the old voluntariness test as the exclusive limit on confessions. Nonetheless, a changed Supreme Court began to undermine *Miranda*.

In a sequence of cases decided in the 1970s, the new majority circumscribed the *Miranda* exclusionary rule. Statements obtained from unwarned suspects were admitted to impeach; so too were statements obtained from suspects who invoked their rights in response to the warnings. The Court took a generous view of the admissibility of the fruits of *Miranda* violations, such as the identity of a prosecution witness or a subsequent confession. The process began with *Harris v. New York*.<sup>151</sup> Viven Harris was charged with selling heroin to a New Rochelle police officer on two occasions, once on January 4 and once on January 7, 1966.<sup>152</sup> On

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151. 401 U.S. 222 (1971).

152. The discussion of the facts is based on the Supreme Court's opinion in *Harris*. In at least one respect the Court's opinion is clearly wrong. The Court said that Harris "ma[de] no claim that the statements made to the police were coerced or involuntary." *Id.* at 224. If Harris claimed that his statements were coerced as well as compelled, the case would have had to be remanded for a determination of the coercion issue. In fact, Harris did raise the coercion claim. Appellant's Brief for Certiorari, App. at 57, *Harris v. New York*, 401 U.S. 222 (1971) (No. 70-206) (stating to the trial judge that, to use statement to impeach, prosecution "has to lay a foundation and show that it was voluntarily made, under the law, and in conformity with the requirements as set up in the case of *Miranda v. Arizona*"). The petition for certiorari clearly sets up the due process claim, independently of the *Miranda* claim. See Appellant's Brief for Certiorari at 10, *Harris* (No. 70-206); see also Alan M. Dershowitz & John Hart Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198-99 (1971) (charging the majority with "at best, gross negligence" concerning the record). The charge is harsh, but my own review of the

January 7, he was arrested and interrogated, without being first apprised of any right to consult with appointed counsel.<sup>153</sup> From the police standpoint, there was no reason for such a warning, because *Miranda* had not yet been decided. In response to police questions, Harris said he had purchased heroin from a third party at the officer's direction and with money supplied by the officer.<sup>154</sup>

At trial, the government did not offer the statement into evidence, so no hearing was held on its admissibility.<sup>155</sup> Instead, the officer testified that Harris had sold him heroin on January 4 and 6.<sup>156</sup> The petitioner took the stand and testified that he had sold nothing to the officer on January 4, and only baking powder on January 6.<sup>157</sup> On cross-examination, the prosecutor, over defense objections, read the transcript of what Harris had said during the police questioning, and asked Harris if he remembered making the statements.<sup>158</sup>

The Supreme Court framed the issue as whether the Constitution permitted impeachment with statements obtained in violation of *Miranda*.<sup>159</sup> The *Miranda* opinion had spoken to this issue and indicated that statements obtained with the required warning and waiver could not be used for impeachment.<sup>160</sup> Moreover, unlike evidence obtained in violation of the Fourth Amendment, the Fifth Amendment condemns compelled self-incriminating testimony only when it might be used at a later trial of the witness. Thus the use in evidence seems to constitute a second violation of the Fifth Amendment, independent of the compulsion to speak in the first instance.

The Supreme Court nevertheless ruled that *Miranda*-tainted statements may be admitted to impeach. Chief Justice Burger's opinion reasoned that the passage from *Miranda* condemning the use of unwarned statements for impeachment "was not at all necessary to the Court's holding and cannot be regarded as

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record indicates that the charge is substantially justified.

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

154. *Id.* at 223.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 224.

160. *Miranda v. Arizona*, 384 U.S. 436, 476-77 (1966).

controlling."<sup>161</sup> Given the government's substantial interest in preventing perjury,<sup>162</sup> exclusion from the government case in chief would suffice to deter future *Miranda* violations, for the police cannot know in advance whether there will be a trial or whether the defendant will testify if there is one.<sup>163</sup>

The essence of *Miranda* is the proposition that statements obtained by custodial interrogation are presumed to be compelled in violation of the Fifth Amendment. The *Harris* majority did not overtly question this proposition. But as subsequent cases would confirm, these same Justices would not permit *any* use, for impeachment or otherwise, of a statement they regarded as genuinely compelled, whether by overbearing interrogation methods or by the threat of a contempt sanction. The *Harris* opinion's focus on deterrence thus implicitly undermined the constitutional foundation of *Miranda*.<sup>164</sup>

In *Mincey v. Arizona*<sup>165</sup> the Court held that statements obtained in violation of *Miranda* could not be used to impeach the defendant's testimony when those statements also ran afoul of the due process voluntariness test.<sup>166</sup> All four Justices in the *Harris* majority still serving joined the majority opinion. And in *New Jersey v. Portash*<sup>167</sup> Justice Stewart wrote a majority opinion, joined by Justice White, holding that testimony compelled under a grant of immunity might not be used even to impeach the testimony of the immunized witness at his subsequent criminal trial.<sup>168</sup>

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

162. *Id.* at 226. The Court went further explaining:

If, for example, an accused confessed fully to a homicide and led the police to the body of the victim under circumstances making his confession inadmissible, the petitioner would have us allow that accused to take the stand and blandly deny every fact disclosed to the police or discovered as a "fruit" of his confession, free from confrontation with his prior statements and acts.

*Id.* at 225 n.2.

163. *Id.* at 225.

164. See Arnold H. Loewy, *Police-Obtained Evidence And The Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 926 (1989) (tracing "illegitimate prophylactic rationale" to *Harris v. New York*).

165. 437 U.S. 385 (1978).

166. *Id.*

167. 440 U.S. 450 (1979).

168. Blackmun, joined by Chief Justice Burger, dissented on a procedural ground. After the trial court refused to grant Portash's motion to forbid impeachment with the immunized testimony, Portash elected not to testify. In Blackmun's view, the failure to testify deprived

The second case in which the Supreme Court has approved the admission of a statement tainted by a *Miranda* violation is *Oregon v. Hass*.<sup>169</sup> After receiving *Miranda* warnings, Hass asked for a lawyer.<sup>170</sup> The police, however, continued questioning, and the answers Hass gave were admitted at his trial to impeach his testimony.<sup>171</sup> Hass, unlike Harris, actually asserted his right to terminate questioning under *Miranda*. In such a case, the police have nothing to lose by questioning illegally; the impeachment exception gives them a positive incentive to do so. Nonetheless, in *Hass* the Burger Court again dismissed this incentive effect as "speculative" and permitted the impeachment.<sup>172</sup>

The Court adopted the "prophylactic rules" characterization to help justify admitting the fruits of a *Miranda* violation in *Michigan v. Tucker*.<sup>173</sup> Tucker was arrested for rape a few months before the Supreme Court's decision in *Miranda*.<sup>174</sup> The police advised him of the right to silence and to counsel, but did not advise him of his right to have counsel appointed if he were indigent.<sup>175</sup> Tucker told the police he understood the rights they had told him about and made a statement to the effect that he had been with one Henderson at the time of the rape.<sup>176</sup> When police interviewed Henderson, he told police that Tucker had left his company early enough to have committed the crime.<sup>177</sup> Henderson also told the police that he had seen Tucker the next day with scratches on his face and that Tucker had made some incriminating statements at that time.<sup>178</sup>

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the reviewing courts of a concrete factual context in which to examine the effect of impeachment with previously compelled testimony. See *id.* at 463-71 (Blackmun, J., dissenting). But neither of these two members of the *Harris* majority hinted that the *Portash* Court reached the wrong result.

169. 420 U.S. 714 (1975).

170. *Id.* at 715.

171. *Id.* at 716.

172. *Id.* at 723.

173. 417 U.S. 433 (1974).

174. *Id.* at 435.

175. *Id.*

176. *Id.* at 436.

177. *Id.*

178. *Id.*

The trial court suppressed Tucker's statements but not Henderson's testimony.<sup>179</sup> The Michigan courts affirmed the conviction, but a federal district judge granted Tucker's petition for habeas corpus.<sup>180</sup> The Sixth Circuit affirmed the district court, but the Supreme Court reversed, holding that Henderson's testimony was admissible.<sup>181</sup> In reaching this result, the Court relied partly on the good faith of the police and partly on the characterization of the *Miranda* rules as "not themselves rights protected by the Constitution."<sup>182</sup>

The Court took a similar tack in *Oregon v. Elstad*.<sup>183</sup> Elstad was suspected of burglary and arrested at his home in the presence of his mother. Without giving *Miranda* warnings the police questioned him briefly and he admitted that he had been present at the scene during the crime. An hour later, at the police station, Elstad received the *Miranda* warnings, waived them, and made a written confession. The Oregon courts suppressed both the initial admission and the subsequent confession.<sup>184</sup>

The Supreme Court reversed. The opinion rejected the analogy to Fourth Amendment fruits analysis in the context of successive admissions, but it did not hold that evidence derived from a *Miranda* violation is automatically admissible.<sup>185</sup> The Oregon court had in effect presumed that a tainted statement made a subsequent voluntary statement impossible for an extended period of time.<sup>186</sup> Then-Associate Justice Rehnquist wrote for the majority that "[w]e hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings."<sup>187</sup>

Whether an unwarned admission in fact undermines the voluntariness of a subsequent *Miranda* waiver is a question of fact. "As in any such inquiry, the finder of fact must examine the

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179. *Id.* at 437.

180. *Id.*

181. *Id.* at 438.

182. *Id.* at 444.

183. 470 U.S. 298 (1985).

184. *Id.* at 299.

185. *Id.* at 318.

186. *See State v. Elstad*, 658 P.2d 552, 554 (Or. 1983).

187. *Elstad*, 470 U.S. at 318.

surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements."<sup>188</sup> There was no evidence in *Elstad* that the police exploited the admission or otherwise pressured the suspect into waiving his rights at the station.

*Tucker* and *Elstad* stand in contrast to *Kastigar v. United States*,<sup>189</sup> which upheld the constitutionality of use-plus-fruits immunity for testimony compelled by formal process before a grand jury.<sup>190</sup> The *Kastigar* opinion clearly indicates that immunity would not be constitutional if evidence derived from compelled testimony were admissible.<sup>191</sup> Moreover, the Court has taken a broad approach to excluding the fruits of coerced confessions.<sup>192</sup>

Thus the characterization of *Miranda* as subconstitutional was a central part of the rationale in the impeachment and fruits cases. During this same time frame, the Court was holding that when self-incriminating testimony is clearly compelled—by formal process under an immunity order—the resulting statements may *not* be admitted to impeach and their fruits must be scrupulously excluded. Apparently “real” compulsion called for one exclusionary rule while *Miranda* called for something else.

Legal scholars have repeatedly pointed out that the prophylactic-rule characterization went far beyond justifying a narrow exclusionary rule in *Miranda* cases.<sup>193</sup> If the *Miranda* rules were not constitutionally required, and if the Court has no supervisory power over state courts, *Miranda* itself—which reversed a state

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188. *Id.*

189. 406 U.S. 441 (1972).

190. *Id.*

191. *See id.*

192. For a discussion of the tension with the coerced confession cases, see *Elstad*, 470 U.S. at 324-28 (Brennan, J., dissenting).

193. *See, e.g.,* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 218 (1993) (“The current situation is doctrinally unstable, with two lines of irreconcilable cases coexisting to give the Court a choice between allowing or disallowing the police to have the necessary tools for effective interrogation.”); Martin R. Gardner, *Section 1983 Actions Under Miranda: A Critical View of the Right to Avoid Interrogation*, 30 AM. CRIM. L. REV. 1277, 1291 (1993) (“*Harris*, *Tucker*, and *Quarles* have been roundly criticized as inconsistent with essential aspects of *Miranda*.”); Herman, *supra* note 14, at 740 (“Decisions such as *Tucker*, *Quarles*, and *Elstad* cut the doctrinal heart out of *Miranda*.”); Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 123 (“*Tucker* seems certainly to have laid the groundwork to overrule *Miranda*.”).



conviction—would be indefensible. Yet the Court never took the final plunge of overruling *Miranda*.

In 1977, in a case involving the rape and murder of a ten-year old girl on Christmas Eve, twenty-one states asked the Court to overrule *Miranda*.<sup>194</sup> The Court declined the invitation and reversed the conviction on Sixth Amendment grounds.<sup>195</sup> Shortly thereafter the Court breathed new life into *Miranda* by holding that once a suspect invokes the right to counsel, the fruits of subsequent questioning following an otherwise valid waiver must be suppressed.<sup>196</sup> Justice Stewart wrote the *Williams* opinion passing over the states' request that *Miranda* be overruled. Justice White wrote the *Edwards* opinion adopting a rigid bar on post-invocation reinterrogation. Prior to retirement, Justice Harlan voted to reverse a conviction on *Miranda* grounds, although he continued to criticize *Miranda* itself.<sup>197</sup> Thus by 1980, the three *Miranda* dissenters whose service on the Court extended into the 1970s had all, to a greater or lesser extent, reconciled themselves to the *Miranda* framework.

Nonetheless, the Court's opinions continued to characterize *Miranda* as not constitutionally required, most notably in the 1984 public safety exception case.<sup>198</sup> Yet the Court also continued to reverse state convictions on *Miranda* grounds, going so far as to hold that *Miranda* violations are cognizable on federal habeas corpus petitions by state prisoners.<sup>199</sup> Legal commentators who agree on little else agreed that something had to give; either the

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194. *Brewer v. Williams*, 430 U.S. 387 (1977). For the submission of the states, see Brief for Amici Curiae of Americans for Effective Law Enforcement, Inc., et al. at 1, *Williams*, 430 U.S. 387 (No. 74-1263).

195. *Williams*, 430 U.S. at 387.

196. *Edwards v. Arizona*, 451 U.S. 477 (1981).

197. See *Orozco v. Texas*, 394 U.S. 324, 327-28 (1969) (Harlan, J., concurring) (joining majority opinion reversing conviction on *Miranda* grounds but expressing continued disagreement with merits of *Miranda* doctrine).

198. *New York v. Quarles*, 467 U.S. 649 (1984) (recognizing public safety exception to *Miranda* when police in emergency situation question suspect about location of firearm in public place in immediate aftermath of chase).

199. See, e.g., *Thompson v. Keohane*, 516 U.S. 99 (1995) (reversing denial of state prisoner's petition for habeas based on *Miranda* violation because lower federal courts erroneously presumed state-court factual findings correct); *Withrow v. Williams*, 507 U.S. 680 (1993) (holding that *Miranda* violations are cognizable on federal habeas petitions by state prisoners).

Court should accept *Miranda*'s constitutional stature or the Court should get out of the business of reversing state convictions without constitutional authority for doing so.<sup>200</sup>

When the United States Attorney's office raised the statute before the district court in the *Dickerson* case, matters came to a head. The District Court refused to regard *Miranda* as overruled. The Justice Department reigned in the local office, but the Fourth Circuit nonetheless reached the Title II issue and held that the prophylactic-rules cases implicitly overruled *Miranda*.<sup>201</sup> The Fourth Circuit majority, over a temperate but extremely cogent dissent, simply ignored the state *Miranda* cases. The Justice Department, now in the posture of defending *Miranda*, supported the defendant's petition for certiorari. Once the Court granted the petition in December of 1999, court-watchers knew the hour had come. At long last the Court would have to either repudiate *Miranda*, repudiate the prophylactic-rule cases, or offer some ingenious reconciliation of the two lines of precedent. The Supreme Court of the United States, however, doesn't "have to" do anything, as the decision in *Dickerson* once again reminds us.

### *B. The Opinion and the Dissent*

Chief Justice Rehnquist's opinion squarely but sparsely disposed of the issue before the Court. The majority began by reviewing the history of the Due Process test and how the *Miranda* decision had created a Fifth Amendment limit in addition to the old voluntariness test. Agreeing with the court below that Title II was intended to repudiate, and was in fact inconsistent with, *Miranda*, the majority stated the issue as follows:

Because of the obvious conflict between our decision in *Miranda* and § 3501, we must address whether Congress has constitutional authority to thus supersede *Miranda*. If Congress has such authority, § 3501's totality-of-the-circumstances approach

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200. For example, Professor Grano, a prominent critic of *Miranda*, regards the prophylactic-rules cases and the state *Miranda* cases as "irreconcilable." Grano, *supra* note 193, at 218. Professor Herman, a prominent defender of *Miranda*, agrees that the prophylactic-rules cases "cut the doctrinal heart out of *Miranda*." Herman, *supra* note 14, at 740.

201. *United States v. Dickerson*, 166 F.3d 667, 695 (1999), *rev'd* 530 U.S. 428 (2000).

must prevail over *Miranda*'s requirement of warnings; if not, that section must yield to *Miranda*'s more specific requirements.<sup>202</sup>

The Chief Justice then resolved this issue in favor of *Miranda* and against the statute.

The majority placed primary emphasis on the application of the *Miranda* doctrine to the states.<sup>203</sup> The majority also relied on language in *Miranda*<sup>204</sup> and subsequent cases,<sup>205</sup> and on the *Miranda* Court's insistence that legislative alternatives to the *Miranda* warnings must be "at least as effective" at dispelling the inherent coercion of custodial interrogation.<sup>206</sup> The opinion repeatedly concludes that *Miranda* is indeed "a constitutional decision,"<sup>207</sup> "of constitutional origin,"<sup>208</sup> and "is constitutionally based."<sup>209</sup> Thus, unless *Miranda* were to be overruled, Title II must be struck down.

The majority was unwilling to overrule *Miranda*. "Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now."<sup>210</sup> *Miranda* has gone beyond mere precedent and "become embedded in routine police practice to the point where the warnings have become part of our national culture."<sup>211</sup>

As for the prophylactic-rules cases, the majority opines that they:

illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision.<sup>212</sup>

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202. *Dickerson*, 530 U.S. at 437.

203. *Id.* at 437-38.

204. *Id.*

205. *Id.* at 440 n.5.

206. *Id.* at 440.

207. *Id.*

208. *Id.* at 439 n.3.

209. *Id.* at 440.

210. *Id.* at 443.

211. *Id.*

212. *Id.* at 441.

The Chief Justice fails to point out that the *Miranda* majority indeed foresaw—and condemned—the use of unwarned statements for impeachment purposes.<sup>213</sup> Nor does he deign to notice the holding in *Portash* barring impeachment use of immunized grand jury testimony. Evidently unexplained, apparently arbitrary distinctions are, for the Chief Justice, “a normal part of constitutional law.”<sup>214</sup>

The *Dickerson* majority did attempt to explain *Elstad*<sup>215</sup> on the theory that “refusing to apply the traditional ‘fruits’ doctrine developed in Fourth Amendment cases ... simply recognizes the fact the unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.”<sup>216</sup> The Chief Justice must know, however, that the Fifth Amendment exclusionary rule for fruits under *Kastigar* is *more strict*, not more lax, than the Fourth Amendment exclusionary rule.<sup>217</sup> The difference between the Fourth Amendment and Fifth Amendment exclusionary rules cuts against, not in favor of, reconciling *Elstad* with *Miranda*, *Dickerson*, and *Kastigar*.

The Chief Justice’s decision to join the majority, the absence of concurring opinions, and the opinion’s greater overall concern for the Court’s authority relative to Congress than to the coherence of the Court-made law all point to a compromise decision. The apparent gist of that compromise is that the status quo will be maintained. The existing law, however, is regarded by virtually every informed observer as inconsistent and unprincipled.<sup>218</sup>

213. *Miranda v. Arizona*, 384 U.S. 436, 477 (1966) (“[S]tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.”).

214. *Dickerson*, 530 U.S. at 441.

215. See *supra* notes 183-88 and accompanying text.

216. *Dickerson*, 530 U.S. at 441.

217. Compare *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990) (excluding testimony of witnesses whose memories might have been refreshed by compelled testimony televised under an immunity order), with *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (admitting statements made 45 minutes after illegal detention when *Miranda* warnings and discovery of incriminating physical evidence took place between initiation of detention and time statements were made).

218. To cite but two of the most prominent examples, Yale Kamisar agrees with Geoffrey Stone that the prophylactic-rules cases are “flatly inconsistent” with *Miranda*. See Yale

Justice Scalia's dissenting opinion, joined by Justice Thomas, will be taken up in detail later in this Article. It is worth noting here, however, that the dissent accurately targets the majority's refusal to face up to the Court's inconsistent pronouncements about *Miranda*. In a particularly telling salvo, Justice Scalia notes that the *Dickerson* majority seems to give itself the power to declare constitutional rules that go beyond the Constitution, when the Court has denied Congress any such power despite the textual authority given to Congress by Section Five of the Fourteenth Amendment.<sup>219</sup>

### C. *Dickerson's Minimalism*

#### 1. *Width*

On the width dimension, the Chief Justice's opinion pointedly avoids calling the impeachment and fruits cases into question. Yet if *Miranda* is "based on the Constitution," and if the only apparent constitutional basis is the Fifth Amendment privilege, it would seem to follow that *Miranda* violations are violations of the Fifth Amendment. If *Miranda* violations are Fifth Amendment violations, then *Miranda*-tainted statements should not be admitted to impeach or permitted to yield admissible fruits.

Thus *Dickerson's* holding logically calls into question the holdings in *Harris*, *Hass*, *Tucker* and *Elstad*. But the opinion does not purport to repudiate those decisions, or to reconcile them with *Miranda's* reaffirmed constitutional stature. The Court has indeed left some things undecided.

Consider what might happen in *Dickerson's* case on remand. The district court suppressed *Dickerson's* statement on *Miranda* grounds, but refused to suppress a statement made by an accomplice named in *Dickerson's* confession.<sup>220</sup> This seems like a correct

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Kamisar, *On the Fruits of Miranda Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 945 n.66 (1995) ("I share Professor (now Provost) Stone's conclusion that the view that a violation of the Self-Incrimination Clause occurs only if a confession is 'involuntary' under pre-*Miranda* standards 'is an outright rejection of the core premises of *Miranda*' and 'is flatly inconsistent with the Court's declaration in *Miranda* that '[t]he requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege.'" (quoting Stone, *supra* note 193, at 118-19).

219. *Dickerson*, 530 U.S. at 450-51 (Scalia, J., dissenting).

220. See *United States v. Dickerson*, 166 F.3d 667, 676 (4th Cir. 1999), *rev'd* 530 U.S. 428

application of *Tucker*; indeed the district court relied on an even harsher fruits decision in which the Fourth Circuit held that derivative evidence will *never* be suppressed on *Miranda* grounds.<sup>221</sup> Surely on remand Dickerson would be within his rights to seek a reconsideration of this ruling, for if the Supreme Court's decision means that *Miranda* violations are Fifth Amendment violations, *Kastigar* applies rather than *Tucker*.<sup>222</sup> The Court's opinion in *Dickerson* invites this claim but gives no guidance as to how it should be resolved.

Suppose further that Dickerson goes to trial and elects to testify in his own defense. *Harris* squarely holds that his *Miranda*-tainted statement is admissible to impeach, but *Portash* holds that a genuinely compelled admission may not be used to impeach. If *Dickerson* equates *Miranda* violations with compelled testimony, *Portash* ought to apply rather than *Harris*. Again, the *Dickerson* opinion invites this claim but gives no guidance as to how it should be resolved.

If, in contrast, *Dickerson* leaves *Harris* and *Tucker* undisturbed, the prosecution will soon be making converse arguments in grand jury cases. Because *Dickerson* equates *Miranda* violations with compelled testimony, the argument would run, it follows that evidence derived from compelled testimony under an immunity order ought to be admissible under *Tucker* and *Elstad*. Likewise, a defendant's immunized grand jury testimony should be admissible to impeach under *Harris* and *Hass*.

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(2000) ("Although the district court suppressed the statement obtained in violation of *Miranda*, it nevertheless denied Dickerson's motion to suppress the evidence found as a result thereof, e.g., the statement made by Rochester identifying Dickerson as the getaway driver.").

221. *United States v. Elie*, 111 F.3d 1135, 1140-41 (4th Cir. 1997) (holding that the fruit of poisonous tree doctrine does not apply to *Miranda* violations).

222. The *Elie* opinion relies wholly on propositions that must be regarded as inoperative since the Supreme Court's decision in *Dickerson*:

Although the Supreme Court has not specifically rejected application of the "fruit of the poisonous tree" doctrine to physical evidence discovered as the result of a statement obtained in violation of *Miranda*, it is clear to us that the Court's reasoning in *Tucker* and *Elstad* compels that result. ... The holdings in *Tucker* and *Elstad* could not be any clearer: the "tainted fruits" analysis applies only when a defendant's constitutional rights have been infringed.... It is well established that the failure to deliver *Miranda* warnings is not itself a constitutional violation.

*Id.* at 1141-42 (footnotes and citations omitted).

Perhaps, as I have argued in a prior paper, foxy lawyer's arguments can square the impeachment and fruits cases in the *Miranda* and grand jury contexts even on the assumption that *Miranda* violations are Fifth Amendment violations.<sup>223</sup> Such arguments are not inevitable, but they are not impossible either. The *Dickerson* opinion, however, in true minimalist fashion, leaves all such considerations for another day.

## 2. Depth

If *Dickerson* in context should be seen as narrow, there can be no doubt whatsoever that the opinion is shallow. The majority never once addresses the thesis that custodial interrogation is tantamount to compulsion. The entire focus of the opinion is on precedent, about the shallowest justification in the domain of legal rhetoric. Almost everybody agrees on at least a limited form of *stare decisis*,<sup>224</sup> but the spillover effect of a decision based on precedent is minimal. Justice Stevens, who believes *Miranda* is correct on principle, can join the Chief Justice, who believes that *Miranda* is wrong on principle, in deciding not to overrule *Miranda* whatever its original merits. Still other Justices can spare themselves the labor of forming an opinion on *Miranda*'s merits by regarding the existing doctrine as too well-settled to be reconsidered.

Most importantly, the *Dickerson* opinion does not address the tension in the case law that brought the case before the Court in the first place. *Miranda* states "a constitutional rule,"<sup>225</sup> but the cases treating it as something less are "a normal part of constitutional law."<sup>226</sup> One can appreciate the skill with which the opinion evades

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223. Donald Dripps, *Is the Miranda Caselaw Really Inconsistent?*, 17 CONST. COMMENT 19 (2000).

224. See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 138-39 (1998) ("Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew."). There are skeptics of precedent in constitutional law. See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J. L. & PUB. POLY 23 (1994); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000), but thus far they include only academics characterized by exceptional originality of mind.

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

226. *Id.* at 441.

the issue without losing sight of the fact that the issue has indeed been evaded.

In a way, *Dickerson* and *Miranda* reflect a paradigmatic difference between the criminal procedure jurisprudence of the Warren Court on the one hand and the Burger and Rehnquist Courts on the other. At least with respect to the Fifth and Sixth Amendments, the Warren Court maximized and the Burger and Rehnquist Courts have minimized. The resulting body of doctrine is shot through with inconsistencies and arbitrary distinctions. Subsequent majorities have not repudiated the wide rulings and deep rationales of the Warren Court. They have not faithfully followed them either. Rather, floating majorities have qualified the broad rulings of the Warren Court according to ad hoc balances of competing interests. Coherence and consistency have suffered accordingly.

The next section locates the roots of this odd situation in the peculiar institutional context of criminal procedure. The high volume of constitutional cases and the absence of constructive legislative activity call for wide, rather than narrow, rulings. The justifications for such rulings, however, are problematic, based on controversial doctrinal, factual, and moral premises. A return to case-by-case adjudication is highly unattractive, but broad agreement on the content of bright-line rules is not forthcoming. What to do about the situation is a bit of a poser. But diagnosis comes first, prescription second.

#### IV. WIDTH AND DEPTH IN CRIMINAL PROCEDURE CASES

##### *A. The Case for Width in Criminal Procedure Doctrine*

Let us briefly recall Professor Sunstein's list of contextual factors that call for wide, rather than narrow, judicial rulings. When people need to rely on a legal rule in a large number of cases, when the elected branches of government are not likely to supply appropriate rules, and when the judges are relatively confident of their own policy preferences, the case for wide rulings is strongest. These contextual factors are the norm, not the exception, in criminal procedure cases.



On policy grounds, the case for general rules governing criminal procedure is overwhelming.<sup>227</sup> The volume of cases presenting constitutional issues, and the need to supply police and lower courts with reliable guidance, weigh strongly in the direction of rule-like opinions.<sup>228</sup> If police and lower courts can not tell what the law is, illegal searches, interrogations, and trial practices will take place needlessly, followed by the equally needless reversal of convictions thereby obtained.

In 1998, the most recent year for which statistics are available, there were more than fifteen *million* arrests in the United States.<sup>229</sup> In making these arrest decisions, law enforcement officers need to know the limits of their authority. If they exceed it, not only are the rights of citizens violated, but the sanction may be the exclusion of any evidence thereby discovered. In the millions of these arrests resulting in formal charges, prosecutors, defense lawyers, and trial judges need to know both the constitutional limits on the police and the constitutional requirements applicable to the trial process. Narrow, fact-bound rulings leave the actors in the criminal process without the guidance they need.

The case for clear rules to govern distinct categories of cases was made most prominently by Anthony Amsterdam and Wayne LaFave.<sup>230</sup> Professor LaFave has since articulated sensible principles for evaluating a proposed bright-line rule:

- (1) Does it have clear and certain boundaries, so that it in fact makes unnecessary case-by-case evaluation and adjudication?
- (2) Does it produce results approximating those which would be obtained *if* accurate case-by-case application of the underlying

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227. There is a large literature comparing and contrasting rules and standards. See, e.g., FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE* (1991); Colin Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). An early contribution focusing on rule-making by the police is KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969).

228. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis* 42 DUKE L.J. 557 (1992).

229. U.S. DEPT OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998* at 328 tbl. 4.1 (Kathleen Maguire et al. eds., 1999).

230. E.g., Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 378-91 (1974); Wayne LaFave, "Case by Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141.

principle were possible? (3) Is it responsible to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable? (4) Is it not readily subject to manipulation and abuse?<sup>231</sup>

The case for bright-line rules has been challenged by Albert Alschuler, Craig Bradley, and Chris Slobogin.<sup>232</sup> In one way or another, each questions the feasibility, rather than the desirability, of the LaFave criteria. The skeptics make some important points, but I believe the case for bright-line rules remains powerfully convincing.

Professor Alschuler argues that the Fourth Amendment posits a negligence-type standard that is largely irreducible. Therefore, "abandoning the judging of categories, courts should resume the judging of cases."<sup>233</sup> Whenever possible, reasonableness should be determined *ex ante* by neutral judges, but when Fourth Amendment claims are litigated *ex post* the courts should aim to inculcate basic Fourth Amendment norms, parable style, by case specific rulings.<sup>234</sup> On Alschuler's account, a comprehensive code of criminal procedure would be a disaster, even if written by legislatures or the police themselves, because the cases involve too many variables to be categorized coherently.

Professor Bradley makes the more modest claim that the *Supreme Court* is incapable of formulating comprehensive and comprehensible rules.<sup>235</sup> He vigorously defends rules, but insists that only an administrative agency could succeed in drafting them.<sup>236</sup>

Professor Slobogin takes the Alschuler view, but with an important, and in my view, critical, shift in emphasis. Slobogin emphasizes the indeterminacy of the probable cause and reasonable suspicion standards, fairly noting that these amorphous criteria are

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231. WAYNE LAFAYE, 3 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.1(c), at 446 (3d ed. 1996).

232. See CRAIG BRADLEY, *THE FAILURE OF THE CRIMINAL JUSTICE REVOLUTION* (1993); Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991).

233. Alschuler, *supra* note 232, at 288.

234. *Id.*

235. BRADLEY, *supra* note 232, at 5.

236. *Id.* at 144.

not rules at all but rather standards that are applied with something less than consistency.<sup>237</sup> Slobogin himself, however, seems to favor rules that specify the standard of suspicion required to justify particular categories of intrusion on individual liberty.<sup>238</sup>

We need to distinguish carefully the judicial capability to formulate clear rules from the content of those rules. Obviously a vague standard is better than a rule that clearly requires the wrong result in every case. Leaving the merits of the particular doctrines aside, I think the Supreme Court's decisions in *Miranda*, *New York v. Belton*,<sup>239</sup> and *Terry v. Ohio*<sup>240</sup> illustrate both the potential and the limit for formulating bright line rules in criminal procedure cases.

*Miranda* held that custody, together with interrogation, amounts to unconstitutional compulsion absent the warnings or other safeguards. Subsequent cases have clarified the concepts of custody, interrogation, waiver, invocation, and initiation, as well as defining exceptions for traffic stops, booking questions, and emergencies. There are some anomalies in these cases, but on the whole, the law of interrogation under *Miranda* is reasonably clear and generally well-understood by the police.<sup>241</sup>

Professor Bradley concedes that *Miranda* stands as an example of the Court formulating the sorts of rules he favors.<sup>242</sup> Now *Miranda* was an exceptional case, a self-conscious exercise in judicial lawmaking, based on long experience with the confessions problem, and illuminated by the facts of several cases, state and federal, taken from across the country. The Court should do more of that. Given the volume of criminal litigation, it should be as possible to consider several cases together in the Fourth and Sixth Amendment contexts as in the Fifth Amendment context. Better bright-line rules might have come from such a process than some of the ones the Court has produced. If the issue is stated as the

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237. Slobogin, *supra* note 232, at 72.

238. *Id.* at 74 n.237.

239. 453 U.S. 454 (1981).

240. 392 U.S. 1 (1968).

241. As the Chief Justice noted in *Dickerson*, "experience suggests that the totality-of-the-circumstances test, which § 3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

242. Craig Bradley & Joseph Hoffmann, *Public Perception, Justice, and the "Search for Truth" in Criminal Justice*, 69 S. CAL. L. REV. 1267, 1278 n.32 (1996).

capacity of the Court to formulate general rules that provide clear guidance to police, however, *Miranda* offers a powerful example of that very capacity.<sup>243</sup>

Perhaps *Miranda*'s success reflects the relative homogeneity of interrogation cases, in contrast to the more various and more dynamic context of Fourth Amendment issues. A useful comparison can therefore be made between *Miranda* and *New York v. Belton*,<sup>244</sup> which held that incident to the lawful arrest of an occupant of a motor vehicle, police may search both the arrested person and the passenger compartment of the vehicle (including any containers therein) without warrant or probable cause to search for evidence. Few of those enamored of *Miranda* favor *Belton*, and vice versa, but both cases announced rules that can (and are) followed in the vast bulk of actual cases.

Critics of *Belton*, beginning with Justice Brennan's dissent, and including both Professor Alschuler and Professor LaFave, have pointed out that the *Belton* rule left some uncertainties about the scope of search incident to the arrest of a vehicle occupant.<sup>245</sup> All rules leave some uncertainties—what H.L.A. Hart called the area of "open texture."<sup>246</sup> As Professor Alschuler points out, *Belton* does not determine the scope of a search incident to an arrest on board a cabin cruiser.<sup>247</sup> This is not a point that has caused much consternation among police or trial judges, because arrests on cabin cruisers are quite rare.

Experience has shown that the early critics overstated the residual uncertainties of the *Belton* rule. Apparently unanimous judicial authority holds that the search permitted under *Belton* extends to the areas of hatchbacks, campers and such that are accessible without leaving the passenger compartment of the vehicle, and to the glove compartment, whether locked or unlocked.<sup>248</sup> The cases are equally uniform in prohibiting search-

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243. Professor Alschuler, for example, finds *Miranda* clear enough to deliver a biting disparagement of the Burger Court's infidelities to that decision. See Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442 (1987).

244. 453 U.S. 454 (1981).

245. See *id.* at 470 (Brennan, J., dissenting); Alschuler, *supra* note 232 at 281-82; Wayne LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 326 (1982).

246. H.L.A. HART, *THE CONCEPT OF LAW*, ch. VII (1961).

247. Alschuler, *supra* note 232, at 286.

248. LAFAVE, *supra* note 232 § 7.1(c), at 451 n.86, 452 n.88 (3d ed. 1996).

incident-to-arrest of an automobile trunk that can be accessed only by leaving the vehicle, absent probable cause to search the trunk for evidence.<sup>249</sup> Respecting the time frame for executing the *Belton* search, Professor LaFave sensibly points out that "the fact that in almost all cases the search will be undertaken at the place of arrest is, as a practical matter, likely to overcome any problems as to temporal proximity."<sup>250</sup> *Belton* is overbroad and invites arrests made for the ulterior purpose of searching a car, but in the main it has provided a reasonably determinate rule.<sup>251</sup> Other rules might have been better and at least as clear, but *Belton* no less than *Miranda* illustrates the Court's capacity for formulating rules.

*Terry v. Ohio*<sup>252</sup> and its progeny, holding that the police may detain suspects briefly for investigation under the so-called "reasonable suspicion" standard, mark the limit of the desirability of doctrinal rules. As Professor Slobogin pointed out, the difficulty of articulating precise rules is much greater with respect to the quantum of suspicion required to justify police intrusion than with respect to when the police need a warrant or are required to administer the *Miranda* warning. Here the factual variations between cases become so pronounced that efforts at categorization are essentially counterfactual. Every datum known to the police alters the ex ante probability that a proposed search or arrest is justified, which makes standards preferable to rules in this context. *Terry* recognized as much, holding that in all cases within a definite category of police behavior—the stop for investigation—the police must satisfy a general standard. Like Professor Stuntz,<sup>253</sup> I am less skeptical about the determinacy of the probable cause and reasonable suspicion standards than Professor Slobogin; but no one would classify "probable cause" or "reasonable suspicion" as a rule rather than a standard.

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249. *Id.* at 451 n.86.

250. *Id.* at 448.

251. This is the conclusion of a survey of the cases conducted six years after the decision. See David M. Silk, Comment, *When Bright Lines Break Down: Limiting New York v. Belton*, 136 U. PA. L. REV. 281 (1987).

252. 392 U.S. 1 (1968). For general exegesis of the *Terry* doctrine, see WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT §§ 9.1-9.7 (3d ed. 1996).

253. See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 897 (1991) ("[I]n the ordinary case the probable cause standard is likely to be fairly predictable to those who must apply it.").

In the criminal procedure context, then, the volume of cases and the need for advance planning point in favor of wide rather than narrow rulings. An important part of minimalist theory, however, is respect for democratic processes. Even if wide rulings are desirable, it does not follow that they should come from courts rather than from legislatures.

Here again, however, the criminal procedure context stands minimalist theory on its head. American legislatures consistently have failed to address defects in the criminal process, even when they rise to crisis-level proportions. For example, when the *Miranda* Court invited Congress and the states to experiment with alternatives to traditional backroom police interrogation, Congress responded by adopting Title II, which stubbornly insisted on the traditional practice. To this day only two American jurisdictions, Alaska and Minnesota, require taping interrogations.<sup>254</sup> In both instances the state courts, rather than the state legislature, were the source of reform.

Legislatures across the United States have found billions of dollars for prisons,<sup>255</sup> but the support for indigent defense is shamefully inadequate.<sup>256</sup> No legislature has adopted reforms of police identification procedures, even though we have known since the 1930s that mistaken identification is the leading cause of false convictions.<sup>257</sup> Legislatures have not filled the voids created by

254. *Stephan v. State*, 711 P.2d 1156 (Alaska 1985) (due process clause of state constitution requires taping interrogation); *State v. Scales*, 518 N.W.2d 587 (Minn. 1994) (noting that under court's supervisory power warnings, waiver and interrogation must be recorded whenever practicable); *People v. Owens*, 713 N.Y.S.2d 452, 453 (N.Y. Sup. Ct. 2000) ("But in the fifteen years since the *Stephan* decision, the majority of other jurisdictions have declined to adopt a recording requirement."). Texas by statute requires that the suspect's waiver and statements be recorded, but does not require that the questioning itself be taped. See TEX. CRIM. PROC. CODE ANN. art. 38.22 (Vernon 1999).

255. See, e.g., Christopher M. Alexander, Note, *Indeterminate Sentencing: An Analysis of Sentencing in America*, 70 S. CAL. L. REV. 1717, 1740 (1997) ("New prison construction projects that are under way will cost this nation's taxpayers about \$6.8 billion.").

256. See, e.g., Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 245-51 (1997) (reviewing studies); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2063 ("[T]here is broad consensus that criminal defense systems are in 'a state of perpetual crisis.'").

257. See EDWIN M. BORCHARD, *CONVICTING THE INNOCENT* xiii (1932) ("Perhaps the major source of these tragic errors is identification of the accused by the victim of a crime of violence."); cf. Peter Neufeld, Esq. & Barry C. Scheck, Commentary, in EDWARD CONNORS ET AL., *CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA*

contemporary pro-government criminal procedure rulings. They have not, for instance, adopted statutory regulations of undercover operations, even though the Court has left such operations unregulated by the Fourth Amendment. They have not adopted statutory requirements for judicial warrants, or the preservation of exculpatory evidence, or plugged holes in the exclusionary rule, let alone delivered the effective tort remedy exclusionary rule critics have advocated for decades.

The record is not an accident, but the product of rational political incentives.<sup>258</sup> Almost everyone has an interest in controlling crime. Only young men, disproportionately black, are at significant risk of erroneous prosecution for garden-variety felonies. Abuses of police search and seizure or interrogation powers rarely fall upon middle-aged, middle-class citizens. When powerful interest groups are subject to the exercise of police powers that pale in comparison to what is visited on young black men luckless enough to reside in "a high crime area," things are different. The current protest against grand jury investigations is illustrative. But so long as the vast bulk of police and prosecutorial power targets the relatively powerless (and when will that ever be otherwise?), criminal procedure rules that limit public power will come from the courts or they will come from nowhere.

### *B. The Problem With Depth*

Thus far we have seen that, with criminal procedure in general and *Miranda* in particular, width is more likely to be a virtue than a vice in a criminal procedure ruling. But if width is desirable in

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EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xxviii, xxx (1996) ("Interestingly, in many respects the reasons for the conviction of the innocent in the DNA cases do not seem strikingly different than those cited by ... Borchard ...."). Promising reforms are possible. See Gina Kolata & Iver Peterson, *New Jersey Is Trying New Way For Witnesses to Say, "It's Him,"* N.Y. TIMES, July 21, 2001, at A1 (discussing new procedures adopted in New Jersey requiring sequential photo arrays administered by officers ignorant of suspect's identity). The New Jersey reforms were adopted by the State's Attorney General, not the legislature, over considerable opposition from the police.

258. See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice: or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1081 (1993) ("Legislatures undervalue the rights of the accused at both the investigatory and adjudicatory stages of the criminal process. This is not an historical accident but a predicable consequence of political incentives that appear to be of indefinite duration.").

criminal procedure doctrine, there is a serious problem with the dimension of depth. In a nutshell, the sort of undertheorized agreement likely in Supreme Court adjudication tends to undermine the legitimacy, and/or compromise the clarity, of bright-line rules. As a result, over time succeeding majorities are faced with the dilemma of following a deep justification contemporary justices do not accept, or compromising a broad rule even though contemporary justices agree that a broad rule is highly desirable.

Why are shallow justifications for broad rules in criminal procedure so problematic? First, the sheer volume of criminal procedure cases makes undertheorized agreement on particulars of very limited use. An overlapping consensus on Case 1 is all well and good. Very soon, however, another case will come along that will expose the fault lines in a coalition. (Remember those fifteen million arrests per year). If the Supreme Court resolves this second case, it will have to realign itself to reflect the competing abstract theories of the individual justices. If the Supreme Court declines to decide the second case, the lower courts will have to decide many such cases, either guessing about what the majority of the current Court would do, or following their own abstract principles wherever these may lead. Police in jurisdictions that have not decided Case 2 will have no guidance; both liberty and security may suffer as a result.

Second, because of legislative abdication, the courts must work under the aegis of the Constitution. Disagreement about constitutional interpretation is certainly predictable and probably salutary. Americans have never agreed about constitutional interpretation and it is not likely that they will anytime soon. Thus the turn to the courts—especially when federal courts supply the only regular and substantial regulation of state police who conduct most of the nation's law enforcement—means a turn to the Constitution and attending controversy.

Third, even if the Justices agreed on a single basic interpretive approach, the available doctrinal resources are not very clear. The institutional framework of modern criminal justice differs so greatly from that known to the authors of the Bill of Rights that, as Lawrence Lessig has argued, something akin to translation is required before the constitutional text is even relevant to modern



practice.<sup>259</sup> We know, for instance, the text of the Fifth Amendment, and we know that the self-incrimination privilege was designed to prevent the use of oaths and torture to extract confessions. What such a provision requires in the context of police interrogation is open to reasonable disagreement, given that the text is conclusory (what exactly is compulsion?) and history nonprescriptive. The Founders could not foresee professional civil police forces, systematic psychological interrogation tactics, or the diminished significance of oaths in a more secular age.

That legal materials such as these can (or should) control public policy for an indefinite future seems improbable. The translation metaphor is only that, a metaphor, not a methodology. Chapman's Homer is not Dryden's; Ciardi's Dante is not Pinsky's. And one is reminded of the old saw that translations are like lovers—the desirable ones are unfaithful and the faithful ones are undesirable.

Finally, the peculiar historical context of the criminal procedure revolution has forced legal doctrine into the mold of the Bill of Rights. The need for breadth effectively ruled out reliance on the Due Process Clause, because of the case-by-case approach to due process analysis adopted in *Betts v. Brady*.<sup>260</sup> But the Bill of Rights criminal procedure provisions are quite specific; they do not speak to many aspects of the modern process, such as identification procedures or undercover operations at all. And when they do speak to modern practice, as with the Fifth Amendment privilege, they do so with a particularity that requires embarrassing compromises of the sort struck by *Miranda*. The Fourth Amendment is an exception, but has been one only since the Court rejected the linkage between the Warrant Clause and the Reasonableness Clause. At that point the Fourth Amendment became banal (who could support unreasonable searches?) except for its institutional implications, i.e., that reasonableness would be determined by the federal courts, not the corner police officer.

We can perhaps now see a little more clearly why constitutional criminal procedure seems so full of contradictions and hypocrisy. There is general agreement on the need for broad rules, but there is general disagreement about the content of those rules. Historical circumstances compel courts announcing broad rules to adopt deep

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259. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993).

260. 316 U.S. 455 (1942).

justifications. Subsequent courts must choose between carrying forward a rationale they believe to be wrong, or compromising a rule they know to be necessary.

One could cite almost any decision in a modern criminal procedure casebook to illustrate this tension, but *Dickerson* will do quite nicely. An overlapping consensus agrees not to overrule *Miranda* and so coalesces around Chief Justice Rehnquist's artfully wooden opinion. Some Justices join because they think *Miranda*'s deep justification is correct; some agree because they know a broad rule is needed and there is no alternative broad rule that commands a majority; some agree out of respect for stare decisis, and so on. The majority, however, does not agree about the impeachment and fruits cases, because stare decisis points one way and *Miranda*'s deep justification points another.

So the impeachment and fruits issues go undecided. Police will continue to have an incentive to keep questioning after suspects invoke *Miranda*, because fruits and impeachment material may turn out to be valuable down the road. The lower courts will have to decide whether the specific holdings in *Harris*, *Hass*, *Tucker* and *Elstad* survive *Dickerson*'s recognition of *Miranda* as a "constitutional decision." Legislatures and state courts know no more now than before about what sort of alternatives might satisfy *Miranda*'s demand for procedural safeguards.

These are all significant costs of leaving things undecided, but let me dwell briefly on this last point. State courts in Alaska<sup>261</sup> and Minnesota<sup>262</sup> have required state police to tape record interrogations.<sup>263</sup> This is a major safeguard against both disregard of *Miranda* and against other forms of coercion.<sup>264</sup> In its brief in *Dickerson*, the Justice Department argued that law enforcement

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261. *Stephan v. State*, 711 P.2d 1156 (Alaska 1985) (ruling based on state constitution's due process clause).

262. *State v. Scales*, 518 N.W.2d 587 (Minn. 1994) (ruling based on court's supervisory power over administration of criminal justice).

263. Texas provides by statute that statements obtained through custodial interrogation are admissible only if there is an electronic recording memorializing the administration of warnings, a voluntary waiver, and the statement, but the statute does *not* require that the interrogation yielding the confession be similarly recorded. See TEX. CRIM. PROC. CODE ANN. art. 38.22 (Vernon 1999).

264. Recording is required by both the MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 130.4(3) (American Law Institute 1975) and UNIFORM RULES OF CRIMINAL PROCEDURE § 243(b), 10 U.L.A. 32 (Master ed. Supp. 1992).

can live with *Miranda*, but that the additional prophylactic rule of *Edwards v. Arizona*,<sup>265</sup> barring all further questioning after a suspect invokes the right to counsel, imposes an unwarranted burden on legitimate investigation.<sup>266</sup>

A strong argument could be made that a jurisdiction requiring tape recording should be let out from under the *Edwards* rule. The theory is that, having gone *beyond* the *Miranda* rules in an important respect, the state has done enough to dispel the inherent compulsion of custodial interrogation. If the police reapproached the suspect after a significant time interval, and tape-recorded a new admonition and valid waiver, the taping safeguard might be thought sufficient to justify relaxing the *Miranda* rules with respect to the consequences of invocation. The obvious incentive effect would be to encourage the states, and Congress, to move toward taping. They are unlikely to make that move without some sort of indication from the Court that there is something in it for the public interest.<sup>267</sup>

The *Dickerson* Court, however, was in no position to make any such invitation. To do that, it would need to agree on a deep justification of *Miranda*, either the original one or a new one. That agreement was absent. This is not surprising, as I have indicated above. But it is also costly, because it deprives all the other actors in the criminal justice process—legislatures, lower courts, police administrators, prosecutors, and defense counsel—of a stable understanding of the governing law.

## V. THE CONTINUING QUEST FOR BROAD-BUT-SHALLOW

If the argument presented so far is correct, the institutional context of criminal procedure doctrine—characterized by a high volume of cases, costly retrials as the dominant remedy, and legislative neglect—calls for relatively broad constitutional rulings.

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265. 451 U.S. 477 (1981).

266. Brief for the United States at 35, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525) ("While *Miranda* itself is generally workable, federal law enforcement agencies have encountered difficulties with some of the extensions of *Miranda* in *Edwards v. Arizona* ... and later cases.") (citation omitted).

267. See, e.g., *People v. Owens*, 713 N.Y.S.2d 452, 453 (Sup. Ct. 2000) ("But in the fifteen years since the *Stephan* decision, the majority of other jurisdictions have declined to adopt a recording requirement.").

When such rulings are supported only by a temporary overlapping consensus, however, rule of law values such as legitimacy, clarity, consistency, and neutrality are likely to suffer accordingly.

Commentators who agree on little else voice a common complaint about the fast-and-loose constitutional interpretation in the criminal procedure cases.<sup>268</sup> Many of the Justices voice the same complaint from time to time;<sup>269</sup> Justice Scalia voiced it again in the *Dickerson* dissent.<sup>270</sup> Yet the justices who decide criminal cases are no different than the justices who decide Separation of Powers cases or Takings Clause cases or First Amendment cases. The need for width, qualified by the problem of depth, helps to explain the

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268. Akhil Amar has voiced these concerns most vociferously, but even those who reject his prescriptions sympathize with his diagnosis. See Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1125 (1996) ("Like the Warren Court, the Burger and Rehnquist Courts have at times paid little heed to constitutional text, history, and structure and have mouthed rules one day only to ignore them the next."); Carol Steiker, *"First Principles" of Constitutional Criminal Procedure: A Mistake?*, 112 HARV. L. REV. 680, 682-683 (1999) (book review) (finding "Amar's critique of current doctrine often compelling"); George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1819 (1997) (book review) ("[T]he law of criminal procedure had become encrusted with doctrinal complexities that seemed to bear little or no relationship to the underlying constitutional rights.").

269. The usual litany of constitutional authority is text, history, and precedent. For examples of complaints that the Court has disregarded the text, see *Maryland v. Craig*, 497 U.S. 836, 861 (1990) (Scalia, J., dissenting) (arguing that majority's approval of child witnesses testifying on closed-circuit-television over confrontation-clause objection amounts to "subordination of explicit constitutional text to currently favored public policy"); *United States v. Leon*, 468 U.S. 897, 960 (1984) (Stevens, J., dissenting) (arguing that majority's good-faith exception for objectively reasonable reliance on warrants not supported by probable cause offends constitutional text). For complaints that the Court has disregarded history, see *Griffin v. Wisconsin*, 483 U.S. 868, 883 (1987) (Blackmun, J., dissenting) (suggesting majority's approval of warrantless search of probationer's home defies constitutional tradition); *Johnson v. Louisiana*, 406 U.S. 356, 381 (1972) (Douglas, J., dissenting) (noting where majority upholds nonunanimous jury verdicts convicting the defendants: "I dissent from this radical departure from American traditions."). For examples of complaints that the Court has disregarded precedent, see *Kirby v. Illinois*, 406 U.S. 682, 705 (1972) (White, J., dissenting) ("*United States v. Wade* and *Gilbert v. California* govern this case and compel reversal of the judgment below.") (citations omitted) (entirety of dissenting opinion); *Harris v. New York*, 401 U.S. 222, 230 (1971) (Brennan, J., dissenting) (arguing majority's approval of impeachment with statements obtained in violation of *Miranda* disregards precedent, and noting "[w]e settled this proposition in *Miranda*").

270. *Dickerson*, 530 U.S. at 465 (Scalia, J., dissenting) ("In imposing its Court-made code upon the States, the original opinion at least asserted that it was demanded by the Constitution. Today's decision does not pretend that it is—and yet still asserts the right to impose it against the will of the people's representatives in Congress.").

situation. Criminal procedure doctrine is disappointing because its institutional context is so challenging. Daunting—nay, depressing—as it is, this analysis has the ring of truth.

How might judges and scholars go about addressing the challenge? This Article concludes by considering three possible approaches. First, the Court might conclude that legitimacy deficits are intolerable and resort to case-by-case adjudication based solely on the constitutional text, with no intervening layer of judge-made doctrine. The *Dickerson* dissent points in this direction. I shall argue, however, that the case-by-case approach is as impractical as ever, and is liable to a legitimacy deficit of its own.

Alternatively, the Justices might simply tolerate legitimacy deficits. The *Dickerson* opinion rather openly takes this view, describing the inconsistencies in the case law as “normal.” One might defend this attitude by reference to research on collective-decision theory, which indicates that decisions by a collective body cannot guarantee transitive results. I shall argue, however, that even giving due account to the challenge posed by collective-decision theory, the *Dickerson* majority’s bland acquiescence in inconsistency deserves professional criticism.

More specifically, the Justices in *Dickerson* should have undertaken the common-law process of distinguishing, reconciling, and, when needed, overruling precedents. One might suppose that this is the obvious course, but the *Dickerson* majority simply refused to grapple with the *Miranda* case law. If the Court had undertaken the common-law process, it could have materially advanced rule-of-law values. There are different strategies for minimizing the inconsistencies in the cases. In the absence of any lead from the justices, the lower courts will have to undertake this process, guessing as best they can about what *Miranda*’s now-secure constitutional status does to the overall body of Fifth Amendment law.

But there are limits on what even the slyest lawyers can do by way of rationalizing cases. Ultimately, the institutional context of criminal procedure means that the Justices need to find a doctrinal predicate for broad rulings that can sustain a relatively shallow justification over time. Without that support, even heroic legalisms will not fully secure rule-of-law values. With that support, legalisms would rarely be needed to hold the law together.

It may be that the institutional context is overwhelming and palliative legalisms are all that can be hoped for. At least one doctrinal move, however, deserves consideration. There is widespread agreement on achieving instrumental reliability in the criminal process. There is no such agreement on the relative priority of public security and individual autonomy or dignity. A turn to due process adjudication, freed from the discredited case-by-case approach, might enable justices who disagree about much to agree on broad rules designed to prevent miscarriages of justice. In short, we should not despair about criminal procedure until the Court has given *Mathews v. Eldridge*<sup>271</sup> a fair trial in criminal cases.

### A. One Case at a Time?

Justice Scalia's dissent, which Justice Thomas joined, targets the majority's recognition of a "constitutional rule" prohibiting some practices that the Constitution itself permits. In Scalia's view, at least some statements given by suspects in custody who have not received *Miranda* warnings are not compelled within the meaning of the Fifth Amendment.<sup>272</sup> The majority, therefore, usurped the power to expand constitutional rights.<sup>273</sup> As Scalia points out in a particularly telling salvo, the Court has expressly denied Congress the power to expand constitutional rights, despite the textual empowerment of Congress contained in Section Five of the

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271. 424 U.S. 319 (1976).

272. Justice Scalia noted in *Dickerson*:

Moreover, history and precedent aside, the decision in *Miranda*, if read as an explication of what the Constitution requires, is preposterous. There is, for example, simply no basis in reason for concluding that a response to the very first question asked, by a suspect who already knows all of the rights described in the *Miranda* warning, is anything other than a volitional act.

*Dickerson*, 530 U.S. at 448-49 (Scalia, J., dissenting).

273. *Id.* at 456 (Scalia, J., dissenting) ("In my view, our continued application of the *Miranda* code to the States despite our consistent statements that running afoul of its dictates does not necessarily—or even usually—result in an actual constitutional violation, represents not the source of *Miranda*'s salvation but rather evidence of its ultimate illegitimacy.").

Fourteenth Amendment.<sup>274</sup> In a nutshell, Scalia accuses the majority of judicial legislation.

If the dissent accurately targets the legitimacy deficit attending the majority opinion, Justice Scalia manifestly failed to make a strong case for a return to case-by-case adjudication. The dissent has all the weaknesses of the *Miranda* dissents,<sup>275</sup> with far less excuse.<sup>276</sup> Decades of experience confirm that the police can comply

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274. *Id.* at 460 (Scalia, J., dissenting) ("The power with which the Court would endow itself under a 'prophylactic' justification for *Miranda* goes far beyond what it has permitted Congress to do under authority of that text.").

275. The obligatory citation is to Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966).

276. Experience has shown that *Miranda* does far less harm to law enforcement than the *Miranda* dissenters feared. Justice Harlan thought that *Miranda* would "heavily handicap questioning." *Miranda v. Arizona*, 384 U.S. 436, 517 (1966) (Harlan, J., dissenting). Justice White thought interrogation less coercive, and suspects more cunning, than appears to be the case, for he thought that the majority "not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel." *Id.* at 536 (White, J., dissenting). Current research, however, indicates that 80% of suspects waive rather than invoke *Miranda* rights. See Paul Cassell & Bret Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 858 (1996); Richard Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996). The 80% figure does not include noncustodial interviews in which the police need not administer the warnings, and the suspects who invoke their *Miranda* rights would be the suspects least likely to confess under questioning that complies with the due process test. Experience thus seems to lessen the strength of the *Miranda* dissents. See Brief for the United States at 32, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525) ("In our view, however, the cost of *Miranda*'s exclusionary rule does not so impede or undermine law enforcement that the overruling of *Miranda* is warranted. Rather, the judgment and experience of federal law enforcement agencies is that *Miranda* is workable in practice and serves several significant law enforcement objectives.").

There is extensive and contentious empirical research literature on *Miranda*'s consequences. See *id.* at 32 n.23 (citing studies). Even Paul Cassell, however, estimates *Miranda*'s social cost as the loss of convictions in 3.8% of all arrests. See Paul Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1061 (1998). This estimate is based on the assumptions that *Miranda* caused a 16% drop in the number of cases in which the suspect confesses, and that a confession is necessary to obtain a conviction in 24% of these cases. This in turn assumes, among other things, that (1) all persons who refuse to make an incriminating statement because of *Miranda* are, in fact, guilty; (2) that *Miranda* causes the loss of confessions randomly, i.e., that the police do not work more successfully to obtain waivers and statements in cases in which these appear to be necessary, or work harder to obtain evidence other than a confession when it is known that the suspect has invoked *Miranda*; (3) that the confession rate can be estimated consistently by different researchers at different times; and (4) that the police and suspects would return to 1965 behavior patterns if *Miranda* were overruled. In my view each of these assumptions is false; but the

with *Miranda* at acceptable cost. Given the volume of criminal cases, a return to the totality-of-the-circumstances approach would underenforce constitutional rights, deprive police and lower courts of needed guidance, generate extensive collateral litigation, foster inconsistent results, and require overruling precedent on a sweeping scale. Dewey-eyed academics are not the only people moved by the force of these concerns. They were sufficient to persuade both Chief Justice Rehnquist, who wrote the majority opinion, and Attorney General Reno, who signed off on the government brief, to reject a return to the case-by-case approach.

Justice Scalia seems blissfully unaware of the actual practice of police interrogation. The idea that people who will be shot if they try to leave are having a voluntary conversation with their captors is not intuitively obvious. And the more information that is added to the picture—how the police are trained to exploit guilt, fear, and ignorance by browbeating, lying about the facts of the case, and pretending sympathy—the less voluntary custodial interrogation looks.<sup>277</sup> Chief Justice Burger, for one, argued that police interrogation was *more* coercive than grand jury interrogation of a witness subject to the contempt sanction.<sup>278</sup>

On May 19, 1958, the Supreme Court decided two confessions cases under the voluntariness standard. In the first case, *Thomas v. Arizona*,<sup>279</sup> the defendant, who was black, was lassoed by a member of a posse, and apparently threatened with lynching before

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3.8% estimate, inflated as it is, is not the sort of cataclysm that *Miranda*'s contemporary critics feared.

277. See, e.g., Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L. & CRIMINOLOGY 21 (1961). The most obvious evidence that custodial interrogation is inherently coercive is the fact that the great majority of suspects waive their rights. Justice Scalia tries to distinguish "foolish" from "compelled" confessions. See *Dickerson*, 530 U.S. at 449 ("There is a world of difference, which the Court recognized under the traditional voluntariness test but ignored in *Miranda*, between compelling a suspect to incriminate himself and preventing him from foolishly doing so of his own accord."). I can believe that those suspected of crime are typically not rocket scientists, but I can't believe that eighty percent of them are complete fools. They waive their rights not because they are foolish but because the skillful exploitation of the custodial environment is indeed coercive.

278. See *United States v. Mandujano*, 425 U.S. 564, 579 (1976) ("[T]he compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.") (quoting *Miranda v. Arizona*, 384 U.S. 436, 461 (1966)) (alteration original in *Mandujano*).

279. 356 U.S. 390 (1958).



the sheriff intervened. The state trial court admitted a confession given twenty hours after the roping incident, but excluded two others, given both before and after the admissible statement, as "procured by threat of lynch."<sup>280</sup> A police officer testified that the sheriff had threatened to permit a lynching unless the defendant promised to confess, but the other witnesses denied that the sheriff had acted except as the suspect's protector.<sup>281</sup> Over four dissenting votes the Court found the confession voluntary.

The second case, *Payne v. Arkansas*,<sup>282</sup> also involved the threat of lynching. The sheriff admitted telling the suspect, who was black, that thirty or forty people wanted to get the suspect, but that the sheriff could keep them away if the suspect confessed.<sup>283</sup> Over two dissenting votes the Court found the resulting confession involuntary.

How many hours, one wonders, does it take for the coercive effect of near-lynching to dissipate, making the confession merely "foolish" rather than "compelled"? How effective was the totality-of-the-circumstances approach at deterring police misconduct, given that in both of these cases the police exploited threatened lynching to extract confessions? How many such cases went in favor of the state based on dubious police testimony about secret, backroom questioning? And how many times did the police, not knowing whether the next level of pressure would be ruled legal or illegal, chose to go over the edge because there was no percentage in restraint?

In *Davis v. North Carolina*,<sup>284</sup> decided under the voluntariness test two weeks after the Court handed down *Miranda*, the Court held involuntary a confession made after sixteen days of detention incommunicado, during which the suspect was questioned intermittently.<sup>285</sup> The Supreme Court, it is true, reversed, but it is worth noting how the voluntariness test worked *outside* the Supreme Court at that late date. The police did not feel the need to bring their prisoner before a court, or to enable representation by counsel, for more than two weeks. The trial judge admitted the confession,

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280. *Id.* at 400.

281. *Id.* at 402.

282. 356 U.S. 560 (1958).

283. *Id.* at 565.

284. 384 U.S. 737 (1966).

285. *Id.* at 738.

the state supreme court affirmed the trial court, and the lower federal courts denied the petition for a writ of habeas corpus. Two Justices of the Supreme Court (Clark and Harlan) would have held the confession voluntary.

Imagine trying to apply the voluntariness test today in tens of thousands of confessions cases. Police would always have an incentive to increase the pressure on a suspect, because even extreme methods would not render a confession inadmissible *per se*. On the other hand the police could never know for sure that their methods would survive judicial scrutiny. What would qualify as coerced in front of one judge could very well qualify as voluntary in front of another.

Case-by-case inquiry, pitting the defendant's testimony about the secret proceedings against that of the police, did very little to prevent compulsion as a practical matter. The turn to bright-line rules came only after numerous failed efforts to enforce the voluntariness requirement. This being the case, there is no clear legitimacy advantage to the case-by-case approach. If *Miranda* bars the introduction of at least some statements that were not compelled, the voluntariness approach would permit the introduction of at least some statements that were compelled.

*Miranda* did nothing more than interpret the self-incrimination privilege in light of the practice of police interrogation, a practice the framers could not have foreseen. If, as Professor Lessig argues, interpretation under these circumstances requires something akin to translation,<sup>286</sup> the translation in this case does not seem strained at all. As Professor Saltzburg has written:

The honest question that is never addressed by the *Miranda* dissenters is the following one: If the drafters of the fifth amendment's privilege against self-incrimination intended that, as long as the possibility of incrimination in a criminal case exists, no magistrate, judge or court of the United States could compel a person to answer questions—even though the person is given a lawyer, the proceedings are public and recorded and scrupulously fair—could they possibly have intended to permit other officials (police and prosecutors) to compel the same answers in secret sessions, most often unrecorded, without the suspect having counsel, and with no judicial protection against

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286. See Lessig, *supra* note 259, at 1165.

the nature and manner of questioning? Such an honest question deserves an honest answer; the answer is *Miranda*.<sup>287</sup>

Professor Lessig quite convincingly cites *Miranda* as an example of "fidelity in translation."<sup>288</sup>

From the perspective of legitimacy Justice Scalia's position has the further difficulty of requiring the overruling of a baker's dozen of the Court's prior cases.<sup>289</sup> Both Justice Scalia and Justice Thomas are in somewhat awkward positions respecting precedent. Justice Scalia would not reopen the incorporation question,<sup>290</sup> but *Malloy v. Hogan*<sup>291</sup> is only two years older than *Miranda* and far more obscure in both the public and the professional consciousness. Justice Thomas could not bring himself to part from precedent in the forfeiture cases, even when the facts might well have come out of Kafka.<sup>292</sup> No doubt the incorporation doctrine's utility in advancing the cause of religious liberty, and the forfeiture doctrine's utility in combating the drug trade are simply happy coincidences.

The considerations motivating the *Miranda* Court's turn to bright-line rules apply to criminal procedure issues generally. The volume of cases, the need to guide police and lower courts, and the absence of constructive legislative intervention are the norm, not

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287. Stephen A. Saltzburg, *Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat*, 26 WASHBURN L.J. 1, 14 (1986).

288. Lessig, *supra* note 259, at 1233-36.

289. In a dozen cases the Supreme Court has required the suppression of evidence or reversed a conviction on the exclusive basis of the *Miranda* doctrine. See *Thompson v. Keohane*, 516 U.S. 99 (1995); *Withrow v. Williams*, 507 U.S. 680 (1993); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *Arizona v. Roberson*, 486 U.S. 675 (1988); *Smith v. Illinois*, 469 U.S. 91 (1984); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Tague v. Louisiana*, 444 U.S. 469 (1980); *Orozco v. Texas*, 394 U.S. 324 (1969); *Miranda v. Arizona*, 384 U.S. 436 (1966); *California v. Stewart*, 400 P.2d 97 (Cal. 1965), *aff'd sub nom. Miranda v. Arizona*, 384 U.S. 436, 497-99 (1966); *People v. Vignera*, 207 N.E. 2d 527 (N.Y. 1965), *rev'd sub nom. Miranda v. Arizona*, 384 U.S. 436, 493-94 (1966). Given current Sixth Amendment law, overruling *Miranda* would also have required overruling *Escobedo v. Illinois*, 378 U.S. 478 (1964).

290. See *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 470 (1993) (Scalia, J., concurring) (approving "the proposition that the Due Process Clause of the Fourteenth Amendment, despite its textual limitation to procedure, incorporates certain substantive guarantees specified in the Bill of Rights").

291. 378 U.S. 1 (1964).

292. See *Bennis v. Michigan*, 516 U.S. 442, 453-55 (1996) (Thomas, J., concurring) (agreeing that precedent justified forfeiture of wife's interest in automobile in which husband employed prostitute notwithstanding apparent unfairness of result).

the exception, in the criminal procedure context. If these considerations exclude case-by-case approaches in favor of wide rulings, we must find ways to cope with the problems posed by deep justifications over time. In the next two sections, I consider two possible approaches: scrupulous stare decisis in criminal procedure cases, and a turn to reliability-based norms as the source of criminal procedure doctrine.

### *B. Common-Law Process, Constitutional Law Output?*

If the argument so far presented is correct, broad rulings in criminal procedure cases are highly desirable but problematic with respect to justification. Because justifications for wide constitutional rulings tend to run deep, broad rules are difficult to sustain over time. *Miranda* is a good example. The prophylactic-rules cases rejected *Miranda*'s deep justification in factually distinct cases. This, in turn, left *Miranda* itself eligible for overruling, but in the state *Miranda* cases, different majorities proceeded in accordance with *Miranda*'s original justification. Now the Court has reaffirmed *Miranda* without explicitly questioning the prophylactic-rules cases.

*Dickerson* makes no attempt to distinguish or repudiate *Tucker*. The Chief Justice wrote both *Tucker* and *Dickerson*.<sup>293</sup> *Dickerson* purports to distinguish *Elstad* but the attempt is patently unconvincing.<sup>294</sup> Justice Stevens dissented in *Elstad* but joined the majority in *Dickerson*.<sup>295</sup> Legal minds as formidable as these cannot possibly subscribe to the *Dickerson* opinion's feeble attempt to distinguish *Elstad*. Almost as if in a famous scene from *The Wizard of Oz*, we are solemnly enjoined to "pay no attention to those cases behind the curtain!"

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293. In *Tucker* Justice Rehnquist wrote 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." *Michigan v. Tucker*, 417 U.S. 433, 446 (1974). In *Dickerson* he wrote that *Miranda* "being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress," *Dickerson v. United States*, 530 U.S. 428, 428 (2000), "that *Miranda* is a constitutional decision," *id.* at 438, that "*Miranda* is of constitutional origin," *id.* at 439 n.3, that "*Miranda* is constitutionally based," *id.* at 440, and that "*Miranda* announced a constitutional rule that Congress may not supersede legislatively," *id.* at 444.

294. See *supra* notes 215-19 and accompanying text.

295. *Oregon v. Elstad*, 470 U.S. 298, 364 (1985) (Stevens, J., dissenting).

True, the precise issue before the Court was whether government agents are constitutionally obliged to give the warnings, not the scope of the exclusionary remedy. The steady flow of criminal cases, however, means that there is no easy way to avoid decision. For example, the district court resolved a fruits issue against *Dickerson*.<sup>296</sup> Simultaneous with the decision in *Dickerson*, the Court denied certiorari in a circuit court case denying qualified immunity to police who question suspects invoking their *Miranda* rights, a practice that apparently had become common due to the admissibility of derivative evidence and of tainted statements to impeach.<sup>297</sup> Now the lower courts must grapple with these issues in light of a *Miranda* opinion that secured the agreement of both Rehnquist and Stevens, who have hitherto expressed incompatible views.

The Court's opinion might have taken a more scrupulous attitude toward stare decisis, either by articulating some genuine distinctions between the impeachment or fruits cases and *Miranda*, or by expressly disapproving prior decisions that cannot be reconciled with *Miranda*'s reaffirmed constitutional stature. There are plausible arguments for reconciling the prophylactic-rules cases with the state *Miranda* cases. As Professor Weisselberg points out, in *Harris*, *Tucker*, and *Elstad*, the police violated *Miranda* in good faith.<sup>298</sup> The impeachment exception might be justified on other theories, such as the idea that the accused who takes the stand waives the privilege against self-incrimination.<sup>299</sup> Likewise, the fruits cases might be reconciled with *Kastigar* by focusing on the comparative haste and uncertainty of police investigations relative to grand jury investigations, and the corresponding difficulty of proving independent source or inevitable discovery in the *Miranda* context.<sup>300</sup> Alternatively, the *Dickerson* opinion could have directly repudiated the prophylactic-rules cases.

Instead, the Court clings obstinately to two lines of cases that were inconsistent enough to require granting certiorari in *Dickerson* in the first place. The decisions of a collective body are

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296. See *supra* notes 220-22 and accompanying text.

297. *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999), cert. denied, 530 U.S. 1261 (2000).

298. Weisselberg, *supra* note 10, at 153-62.

299. Dripps, *supra* note 223, at 27-34.

300. *Id.* at 38-40.

liable to inconsistency in a way that individual decisions are not. Collective-decision theory's impossibility theorem teaches that no un-rigged collective decision process can secure completely transitive results.<sup>301</sup> Thus there will be at least some occasions when a committee in a sequence of cases prefers outcome A to outcome B, outcome B to outcome C, and outcome C to outcome A.

Social choice theory does not, however, prove that intransitive collective preferences need be common, practically important, or unexplained by individual members of the committee. Indeed, with respect to both courts and legislatures, the most interesting question would appear to be why, given Arrow's Theorem, republican institutions do not produce manifestly incoherent decisions more often than they do.

With respect to courts, Professor Stearn has argued that legal conventions such as standing and stare decisis operate to reduce the predicted intransitivity of collective decisions.<sup>302</sup> It may turn out that institutional criticism of the Court as a body is justifiable, but that issue can be left unresolved for purposes of my present argument. Even if collective decision theory supplied an excuse for the Court as a body, it cannot immunize individual justices from the charge of inconsistency. The argument that follows suggests individual justices should adopt a more rigorous approach to stare decisis in criminal procedure cases. Such an approach would minimize both the frequency, and the consequences, of the sort of unjustified distinctions drawn in the *Miranda* cases.<sup>303</sup>

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301. For accessible discussions of Arrow's Theorem, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 38-42 (1991); Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 *IOWA L. REV.* 949 (1990). Both discussions focus on the application of the theorem to legislatures. The seminal contribution on the application of Arrow's Theorem to the Supreme Court is Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 *HARV. L. REV.* 802 (1982).

302. See Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 *CAL. L. REV.* 1309 (1995); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 *U. PA. L. REV.* 309 (1995).

303. There is an interesting debate in the social choice literature about the relative merits of issue voting and outcome voting. Appellate courts in the United States rely on outcome voting; that is to say, rather than take separate votes on each issue necessary for decision, the judges take a single vote on whether to affirm or reverse. The downside to outcome voting is that decisions need not resolve the issues clearly or consistently; the downside to issue voting is that defining the issues and selecting the order in which they are considered could have dramatic and arbitrary influences on the development of the law. Scrupulous stare decisis takes a middle course between issue and outcome voting. Outcome voting is

Typically a majority that agrees on a decision inconsistent with a prior decision will be composed of two factions. The first faction includes the dissenters from the prior decision, who continue to believe the first decision mistaken. Although in the minority in Case 1, the former dissenters are now reinforced by the vote or votes of those who believe that Case 2 is actually distinguishable from Case 1. If Case 1 was decided by a narrow majority, it can well be that in Case 2, seven or eight justices agree that Cases 1 and 2 should reach the same result, but the Court concludes that the two cases are distinguishable. Let us label the two factions the "idiosyncratic center" and "the unrepentant dissenters."

In *Dickerson*, for practical reasons, a majority did not want to return to case-by-case adjudication. Nonetheless, at least the Chief Justice presumably still disagrees with *Miranda*'s original justification. If at least two other justices in the *Dickerson* majority (as sheer speculation, say O'Connor and Kennedy) reject *Miranda*'s original justification but refuse to overrule *Miranda* itself because of stare decisis, no more than four justices would support *Miranda*'s original justification.

The situation is likely to get even messier because Justice Scalia announced in dissent that he will continue to vote his conscience in future *Miranda* cases.<sup>304</sup> If Justice Thomas, who joined Scalia's dissent,<sup>305</sup> follows suit, there will be two votes for the government in every *Miranda* case. One supposes that they will often enjoy the support of the Chief Justice, whose majority opinion labors so hard to avoid repudiating the prophylactic-rules cases. Only two more justices would be needed to rule in favor of admitting a disputed statement. We may thus see cases in which distinct majorities of the justices agree that the suspect was in custody, that the suspect

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retained, but resolutions of particular issues in prior cases are deemed controlling. This minimizes the incoherence risked by outcome voting, without risking the manipulation of the agenda that issue voting might invite. On issue voting and outcome voting, see Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743 (1992); John M. Rogers, "I Vote This Way Because I'm Wrong": *The Supreme Court Justice as Epimenides*, 79 KY. L. REV. 439 (1991); Colloquium, *Appellate Court Voting Rules*, 49 VAND. L.J. 993 (1996).

304. *Dickerson v. United States*, 530 U.S. 428, 465 (2000) (Scalia, J., dissenting) ("I dissent from today's decision, and, until § 3501 is repealed, will continue to apply it in all cases where there has been a sustainable finding that the defendant's confession was voluntary.").

305. See *id.* at 444.

was interrogated, that the suspect did not make a valid waiver, that *Miranda* remains good law and that the confession is nonetheless admissible.

Given the need for broad rulings in criminal procedure cases, it is especially important for justices to accept the justification of precedents with which they disagree. There is no way to prevent one or two justices from sincerely, but implausibly, seeing a distinction between similar cases. Scrupulous stare decisis, however, could avoid writing idiosyncratic distinctions into actual law. Unrepentant dissenters should confine themselves to critique, and wait for the day their views persuade a majority. Justice Harlan's opinion in *Orozco v. Texas*<sup>306</sup> takes the correct approach; his vote to join the majority in *Harris* does not.<sup>307</sup>

Consider, in this context, the fruits and impeachment cases. Surely not every justice in the majorities in *Harris*, *Tucker*, *Hass*, and *Elstad* believed that those decisions were really consistent with *Miranda*. While it may never be proven, it is likely that at least some of the justices in those majorities understood their votes as laying the groundwork for an eventual overruling of *Miranda*.<sup>308</sup> As a result, we now deal with major inconsistencies between the *Miranda* cases and the formal-compulsion Fifth Amendment cases, a tension that went far enough to persuade one Court of Appeals that *Miranda* itself was no longer good law.<sup>309</sup> If Chief Justice Burger, and Justices Rehnquist, Blackmun, White, Stewart and Harlan had followed *Miranda*'s doctrinal logic, they would have prevented the inconsistent development of the case law in the first place. A great deal of the criticism of the existing law therefore falls to prior votes by Justices accepting the prophylactic-rules characterization.

The obligation of individual Justices to follow precedents with which they disagree is supported by constitutional principle as well as by criminal justice pragmatism. A powerful argument can

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306. 394 U.S. 324 (1969).

307. See *supra* notes 151-64 and accompanying text.

308. Justice Brennan, who dissented from the prophylactic rules cases (*Tucker* excepted, where he concurred in the result on a retroactivity theory), suspected as much. See *Michigan v. Mosley*, 423 U.S. 96, 112 (1975) (Brennan, J., dissenting) ("Today's distortion of *Miranda*'s constitutional principals can be viewed only as yet another step in the erosion and, I suppose, ultimate overruling of *Miranda*'s enforcement of the privilege against self-incrimination.").

309. *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999).



be made that individual justices who continue to vote on the premise that prior decisions were wrong are engaging in civil disobedience rather than adjudication. The atypical institutional challenges in the criminal cases gives this jurisprudential claim a special pragmatic urgency, but it is a strong claim in its own right.

In its dealings with officials of the state governments and of the other branches of the national government, the Supreme Court maintains that the Court's decisions are the supreme law of the land. The claim that a single official, sincerely disagreeing with the Court's interpretation, may disregard that interpretation in favor of his own, was precisely the claim Governor Faubus made in *Cooper v. Aaron*.<sup>310</sup> The Court rejected that claim unanimously, and has not since called *Cooper* into question.<sup>311</sup> The *Dickerson* majority rejected the claim that the Congress, a coordinate branch of the federal government, might disregard the Court's interpretation of the Constitution.<sup>312</sup> Indeed, the Court has rejected that claim even when Congress acts pursuant to its textually-granted power under Section Five of the Fourteenth Amendment.<sup>313</sup>

The broad principle announced in *Cooper* is, of course, intensely controversial.<sup>314</sup> A strong tradition in both political history and contemporary scholarship defends the right of presidents and legislators to act on their independent interpretations of the Constitution, even when their interpretations conflict with established Supreme Court precedent.<sup>315</sup> On the other hand, the practical need for some final authority on constitutional interpretation, and the institutional advantages of the judiciary in playing that role, support the expansive position taken by the Court in *Cooper*.<sup>316</sup>

310. 358 U.S. 1 (1958).

311. See *United States v. Nixon*, 418 U.S. 683, 704 (1974) (noting that the Court is "ultimate interpreter of the Constitution") (quoting *Baker v. Carr*, 369 U.S. 186, 211); *Powell v. McCormick*, 395 U.S. 486, 549 (1969) (stating it is "the responsibility of this Court to act as the ultimate interpreter of the Constitution").

312. *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (noting "Congress may not legislatively supersede our decisions interpreting and applying the Constitution").

313. See *City of Boerne v. Flores*, 521 U.S. 507, 517-21 (1997).

314. See, e.g., Daniel A. Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 388-89 (1982) (reviewing criticism of *Cooper*).

315. For an exhaustive defense of coordinate review, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

316. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (offering an unqualified defense of *Cooper* and its assertion of judicial supremacy).

In any given case, the Supreme Court may be wrong (legally and/or morally) and the other official right (again legally and/or morally). As Professors Schauer and Alexander point out, if the law is to fulfill the settlement function, there must be a decision rule to govern such conflicts.<sup>317</sup> The location of interpretive finality can be guided only by institutional predictors of right decisions. This side of heaven, these predictors will sometimes assign interpretive finality to an institution entertaining a mistaken view. Realistically, the decision rule can only minimize, not eliminate, constitutional mistakes.

The argument for the content-independent authority of Supreme Court precedents vis-a-vis individual justices is stronger than the argument for judicial supremacy generally. In the first place, individual justices agreeing with the *Cooper* principle cannot reject the authority of precedents without unreasonable inconsistency. Whatever the theory on which the doctrine of judicial supremacy rests, no justice can consistently maintain judicial supremacy while regarding herself as unobligated by decisions of the Court.<sup>318</sup>

This is not to say that civil disobedience is never justified. Von Stauffenberg was a hero, not a wrongdoer. Justice Brennan signed the opinion in *Cooper*, but he might have concluded that other obligations had priority over his obligation to treat *Gregg* as the law.<sup>319</sup> Judicial civil disobedience, however, is especially difficult to

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317. *Id.* at 1377 (noting "[w]hen the Constitution is subject to multiple interpretations, a preconstitutional norm must referee among interpretations to decide what is to be done").

318. See Suzanna Sherry, *Justice O'Connor's Dilemma: The Baseline Question*, 39 WM. & MARY L. REV. 865, 892 (1998):

Although the Court has never squarely faced the question of whether its own decisions should be taken as a baseline by dissenting members, it has frequently reiterated the broader view that its decisions are the binding law of the land. Usually it does so in the course of chastising some rebellious state or federal official—or some recalcitrant lower federal court—for ignoring the Court's pronouncements. The language that the Court has used in this context tends to confirm the unitary nature of the Supreme Court, brushing off the views of individual Justices as largely irrelevant.

319. See William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 437 (1986): This kind of dissent, in which a judge persists in articulating a minority view of the law in case after case presenting the same issue, seeks to do more than simply offer an alternative analysis—that could be done in a single dissent and does not require repetition. Rather, this type of dissent constitutes a statement by the judge as an individual: "Here I draw the line." Of course, as a member of a court, one's general duty is to acquiesce in the rulings of that court and to take up the battle behind the court's new barricades. But it would be a great

defend. Judges, unlike ordinary citizens, swear an oath to uphold the law. Unlike ordinary citizens, they claim the obedience of others to their decisions on the basis of a general obligation to obey the law. They have the options of recusal, resignation, and concurrence-with-critique. One wonders how Justice Brennan would have dealt with lower court judges who subverted the Court's rulings in *Miranda* or *Roe v. Wade* by saying, "Here I draw the line."

Alternatively, a justice might reject *Cooper* and agree that all officials in all branches owe allegiance to the Constitution as each interprets it. Justice Scalia may well take this very view,<sup>320</sup> in which case his promised defiance of *Miranda* and *Dickerson* would not be a manifest inconsistency. My claim here, however, is that whatever the merits of the larger debate over *Cooper*, individual justices in criminal procedure cases ought to follow in good faith precedents they believe mistaken. This narrow claim draws its strength from the heightened importance of the settlement function with respect to judges, and the special importance of the settlement function in criminal procedure cases.

Consider, first, the difference between individual Article III judges, including Supreme Court Justices, and other public officials. Presidents and members of Congress have their own constitutional responsibilities, which sometimes call for constitutional interpretation. The case for coordinate review is strongest when officials in the political branches find it necessary to interpret the Constitution

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mistake to confuse this unquestioned duty to obey and respect the law with an imagined obligation to subsume entirely one's own views of constitutional imperatives to the views of the majority.

Justice Brennan certainly did not claim any moral advantage over lower court judges; he began his lecture *In Defense of Dissents* with fulsome praise of Mathew Tobriner. Nor do I readily imagine that great egalitarian claiming a moral advantage over a humble citizen called for jury duty in a capital case. What seems unjustified in Justice Brennan's explanation is the equation of a right to express a different view and a right to have that view alter the legal rights and liabilities of parties in litigation. A judge is of course free to follow precedent but file a concurring opinion criticizing that precedent. Justice Harlan did just that with respect to *Miranda* in *Orozco*. In a nutshell, Justice Brennan seems to be equating the unquestioned right of every person to express political dissent with the dubious right of an outvoted judge to influence the outcome of a lawsuit contrary to the governing law. Interestingly, the most plausible defense of the Brennan and Marshall death-penalty dissents takes the view that these dissenting votes actually followed the logic of *Gregg*, their expressed abolitionist justifications notwithstanding. See Jordan Steiker, *The Long Road Up From Barbarism: Thurgood Marshall and the Death Penalty*, 71 TEX. L. REV. 1131 (1993).

320. Cf. *Webster v. Doe*, 486 U.S. 592, 608 (1988) (Scalia, J., dissenting) ("[T]here are many governmental decisions that are not at all subject to judicial review.").

in the exercise of their own constitutional duties. Thus a legislator is thought free to vote against a bill she regards as unconstitutional, even though Supreme Court precedent holds that such a bill is constitutional. A president is thought to have a right to veto a bill under similar circumstances.

A plausible rejoinder might be made: voting against legislation that would promote the general welfare because of reservations about formal legality, which the courts have rejected, is both practically unheard of and gratuitously costly.<sup>321</sup> However that argument might be resolved, judges play a different role than the President and members of Congress. Judges act on the basis of debatable constitutional interpretations all the time. Indeed, unlike other officials, they do very little *except* make debatable legal interpretations. A Supreme Court Justice who views *Cooper* as inapplicable to herself logically takes the same view regarding lower court judges. How can a justice ask an appellate or district court judge to violate a solemn oath to uphold the Constitution?

Suppose a justice is sitting by designation on a circuit court panel. The case is governed by a Supreme Court decision from which this justice dissented. Is the justice free to disregard the precedent? If yes, are not her colleagues on the circuit court panel equally entitled to do so? If not, why is the justice obliged to follow precedent on circuit but not on the Supreme Court?

The settlement function of law is generally thought to require adherence to precedent by lower court judges. Interpretive autonomy could not be regulated by the threat of reversal. Trial judges can bend factual findings to reach the results each thinks constitutionally required in ways that are immune to appellate scrutiny. Appellate judges know the limits on the Supreme Court's docket very well. Interpretive anarchy in the judiciary would lead to something approaching genuine anarchy. Not only would similar cases be resolved differently, forum-shopping would become imperative, and uncertainty would make reliance problematic. Many of

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321. As a representative in Congress, James Madison argued that Congress had no constitutional power to charter a national bank. His view was later rejected by the Supreme Court. When, as President, he had to decide whether to veto a bill reauthorizing the bank, which experience in his view had proved to be in the public interest, he deferred to prevailing constitutional opinion and signed the bill. See DREW R. MCCOY, *THE LAST OF THE FATHERS: JAMES MADISON AND THE REPUBLICAN LEGACY* 81 (1989).

the constitutional interpretations that would flourish would be quite wrong as well.

Whatever the merits of the case for judicial supremacy generally, the case of an individual justice is closer to that of a lower court judge than it is to that of the president or a senator. Moreover, the settlement function of law is magnified by the institutional context of criminal procedure. If my analysis of the institutional context of criminal procedure is correct, individual justices should follow precedent *even if precedent is indeed erroneous*. Better a second-best rule consistently applied than a second-best rule erratically applied.

This account of scrupulous stare decisis is not in service to any particular ideological cause. The individual Justices who refused to follow *Gregg v. Georgia*<sup>322</sup> may well be right that the death penalty is immoral. They were certainly within their rights to criticize *Gregg* in the hope that a majority of their colleagues would one day hold capital punishment unconstitutional per se. But they were no more authorized by law to dissent from the imposition of the death penalty in a case free from error under *Gregg* and its progeny than a condemned prisoner was authorized by law to escape. Imagine the reception the convict would receive when he cites the opinions of Brennan, Marshall and Blackmun as authority for a jailbreak.

Perhaps capital punishment is a special case, unique in its moral gravity. If this is so, however, the correct approach for a justice unwilling to have blood on her hands is to recuse herself from capital cases. Let justices capable of following the law decide the case.<sup>323</sup> That, at least, seems to have been the Court's message to

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322. 428 U.S. 153 (1976).

323. The proposition that precedents count as law is of course a conclusion, not a justification. A necessary, if not sufficient, condition of that status is that they must, like statutes and the Constitution itself, be accepted widely as authoritative. See Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 630 (1987) ("In sum, one cannot imagine any normative theory of law [normative in the sense that the theory opposes conventionalist theories of law] in which the law of a particular society could be identified wholly independently of socially accepted practices."). The observation that constitutional law consists mostly of Supreme Court cases, however, has become a commonplace. See, e.g., Farber, *supra* note 314 (noting that acceptance of *Brown* and *Cooper* by many who disagreed with those decisions indicates that constitutional precedents are law, although where precedent fits in hierarchy of constitutional law is debatable); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988) (noting the fact that much constitutional doctrine is at odds with original understanding proves the precedent is source of constitutional law that may trump original understanding); Edward Rubin, *Politics, Doctrinal Coherence, and the Art of Treatise Writing*, 21 SEATTLE U.

those judges on the *lower* federal courts who blocked executions on less than compelling legal grounds.<sup>324</sup> It is also the message the Court consistently has sent to mere citizens called for jury duty who honestly express implacable moral opposition to a penalty the Court has found constitutional.<sup>325</sup>

The death penalty example is a telling one, because just as in the *Miranda* context, the unrepentant dissenters enabled the formation of majorities upholding inconsistent results. With two votes against the imposition of the death penalty under any circumstances, the defendant needed to convince only three of the seven remaining justices that the challenged sentence ran afoul of *Gregg* and its progeny. As a result, state capital punishment statutes were struck down both because they allowed too little, and because they allowed too much discretion.<sup>326</sup>

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L. REV. 837, 837 (1998) (review of CHEMERINKSY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (1997)) ("The common law character of constitutional law makes a treatise on the subject a necessity."); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877 (1996) (noting "when people interpret the Constitution, they rely not just on the text but also on the elaborate body of law that has developed, mostly through judicial decisions, over the years"). Even Akhil Amar, who surely qualifies as a "documentarian" rather than a "doctrinalist," acknowledges precedent as an exclusionary reason in constitutional law under certain circumstances. See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 78-89 (2000).

324. See Charles Fried, *Impudence*, 1992 SUP. CT. REV. 155.

325. See, e.g., *Buchanan v. Kentucky*, 483 U.S. 402, 407 n.6 (1987):

A "death-qualified" jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that would prevent or substantially impair the performance of [their] duties as [jurors] in accordance with [their] instructions and [their] oath.

The prosecutor may remove such potential jurors ....

(alterations in original) (citations omitted).

326. Compare *Sumner v. Shuman*, 483 U.S. 66 (1987) (six Justice majority, including Brennan and Marshall, holding that statute mandating death penalty for murder committed by prisoner serving life-without-parole is unconstitutional) and *Woodson v. North Carolina*, 428 U.S. 280 (1976) (five Justice majority, including Brennan and Marshall, holding mandatory death penalty statute unconstitutional), with *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (five Justice majority, including Brennan and Marshall, holding that death penalty jury must be allowed to consider any mitigating factor proffered by the defense) and *Lockett v. Ohio*, 438 U.S. 586 (1978) (four Justices concluding that state statute gives insufficient scope to consideration of mitigating circumstances; Justice Marshall concurring on ground that death penalty is per se unconstitutional; two other Justices concurring on yet other, but respective, grounds). The tension in the Eighth Amendment cases is generally agreed on, regardless of ideological attitudes toward the death penalty. See *Callins v. Collins*, 510 U.S. 1141, 1141-42 (1994) (Scalia, J., concurring in denial of certiorari) ("[T]his Court has attached to the imposition of the death penalty two quite incompatible sets of commands: the

The death penalty example is telling in another way as well. Continued dissent has been the exception, not the rule. Many prominent criminal procedure examples might be cited, including Justices White's majority opinion in *Edwards v. Arizona*<sup>327</sup> and Justice Harlan's concurring opinion in *Orozco v. Texas*,<sup>328</sup> both applying *Miranda*. Chief Justice Rehnquist's *Dickerson* opinion reflects the same respect for authority, although *Miranda* predates the Chief Justice's tenure on the Court. That only a few Justices have felt the need for repeated dissent in the especially troubling moral context of capital punishment does more to bolster than to weaken the argument for scrupulous stare decisis.<sup>329</sup>

If we add the need for broad rulings in the criminal context to the powerful case for treating majority decisions as binding individual justices, we have a compelling warrant against the Marshall/Brennan/Blackmun practice in the death cases and against the promised Scalia/Thomas practice in future *Miranda* cases. The clarity of the needed rules will be compromised, and like cases will be treated differently. The general duty of officers of the Republic to obey the Constitution as construed by the Court is given special urgency in the criminal context.

My claim is distinct from any claim that criminal procedure precedents deserve special deference from future Supreme Court majorities. Quite the reverse; given the volume of constitutional litigation involving criminal procedure questions, Supreme Court majorities should feel at least as free to overrule precedent in these cases as in others. The larger the corpus of precedents the more likely that inconsistent outliers will emerge over time. For

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sentencer's discretion to impose death must be closely confined, but the sentencer's discretion *not* to impose death (to extend mercy) must be unlimited.") (emphasis in original) (citations omitted); *id.* at 1149 (Blackmun, J., dissenting from the denial of certiorari) ("Experience has shown that the consistency and rationality promised in *Furman* are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness."); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 382 (1995) ("This dilemma between *Gregg*'s seeming insistence on channeling and *Woodson*'s seeming insistence on uncircumscribed consideration of mitigating evidence constitutes the central dilemma in post-*Furman* capital punishment law.").

327. 451 U.S. 477 (1981).

328. 394 U.S. 324 (1969).

329. Justice Brennan himself recognized a judge's "general duty ... to acquiesce in the rulings of that court" and equated this with an "unquestioned duty to obey and respect the law." Brennan, *supra* note 319, at 437.

that reason the Court should have a clear conscience about periodically cleaning house.

Views about the weight of the content-independent respect constitutional precedents deserve from succeeding majorities of the Supreme Court vary. Justice Brandeis famously argued that because constitutional decisions could not be changed by ordinary legislation, the Court should feel more willing to reconsider constitutional precedents than decisions that Congress or the states could modify by statute.<sup>330</sup> By now equally famous is the plurality view in *Planned Parenthood of Pennsylvania v. Casey*,<sup>331</sup> that especially prominent decisions inviting extensive reliance should not be overruled in the face of criticism that might be understood as an attack on the Court's independence.

The criminal procedure context generally calls for following the Brandeis approach. The Supreme Court makes a vast amount of quite quotidian law regulating the police and the criminal trial process. A few landmarks stand out; *Gideon* and *Miranda* most prominently. But in the main the Court has become, by the default of legislatures and the textual commands of the Constitution, the most important source of criminal procedure law. Given this institutional context, when a Supreme Court precedent loses majority support, conflicts with other decisions that retain majority support, and a case presenting the question comes properly before the Court, there should be a willingness to overrule openly rather than to put on the fig leaf of unconvincing distinctions.

In particular, after *Dickerson*, the decision in *Hass* seems egregious. In *Hass*, the suspect was warned but invoked his rights. A grand jury witness who did the same could be questioned further only under an immunity order. *Dickerson* holds that *Miranda* rests on the Fifth Amendment, the same provision at issue in *Portash*. Whatever distinctions may separate *Harris* (in which the defendant was not properly warned but never asserted his rights) from *Portash*, *Hass* and *Portash* seem far too similar to permit their inconsistent holdings to remain the law.

The members of the *Dickerson* majority, however, could not agree on a compromise rationale that reconciles the prophylactic-rules cases with *Miranda* and *Dickerson*. Evidently the individual

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330. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting).

331. 505 U.S. 833, 867 (1992) (plurality opinion).



Justices in the majority found living with a legitimacy deficit less objectionable than any theory that accepts both *Miranda* and the prophylactic-rules cases. As individuals, the Justices prefer to wait for a change in legal circumstances, a change of heart among some of their colleagues, or a change in the membership of the Court before reworking the *Miranda* caselaw generally.

This is the very sort of waiting game Professor Sunstein defends in other circumstances. But if my assessment of criminal procedure's institutional context is correct, police, suspects, lower courts, and legislatures must now pay a heavy price for continued uncertainty. What I have suggested here is that given the institutional context of criminal procedure, individual justices should adopt an especially scrupulous approach to stare decisis in this branch of constitutional law. On the one hand, individual justices should accept the justifying logic, as well as the precise holdings, of prior cases. On the other hand, when a result no longer commands majority support, the need for clarity and consistency counsels an open willingness to overrule. In a nutshell, the idea is that scrupulous stare decisis might supply the shallow justification for wide rules that have otherwise lost majority support for their deep justifications.

*Dickerson* and the death penalty cases indicate, however, that persuading individual justices to accept this approach to precedent is at best conjectural. That is why I have tried to connect the general point about *Cooper v. Aaron* and judicial supremacy to the unique institutional concerns of the criminal process. There is, I hasten to add, no higher authority to which one may appeal; I am not suggesting that unrepentant dissent is impeachable. I am suggesting that it conflicts with propositions about judicial supremacy to which most of the Justices continue to adhere, and that it is injurious to rule-of-law values.

One reason why individual Justices may adhere to views expressed in dissent is because the deep justifications called for by wide rulings generate intense controversy. In the next section I explore a different doctrinal strategy for identifying a shallow justification for wide criminal procedure rulings. This strategy involves basing wide criminal procedure rulings on more general textual foundations. The less particular the governing text, the greater the likelihood of securing agreement on both the rules, and

their rationale, from the widest possible spectrum of ideological positions. The final section explores this possibility.

### *C. Moving to More General Doctrinal Sources*

The contrast between *Belton* and *Miranda* is illuminating. Just like *Miranda*, *Belton* announces a broad rule supported by a controversial rationale.<sup>332</sup> But *Belton* has not generated the same controversy as *Miranda*. Nor can we explain the placid history of the *Belton* rule by the fact that it favors the prosecution. In the first place, *Belton* keeps the arresting officer out of the trunk, and so in some cases operates against the police. Conversely, *Miranda* sometimes benefits the police, as when a valid *Miranda* waiver counts heavily against a coercion claim. In the second place, *Miranda* is a popular decision. However much people generally want law and order, they are proud to live in a country where the police must warn arrested persons of their rights to silence and to counsel.

Nor does the explanation lie in *Belton*'s recency. *Belton* will turn twenty within a year, and only two Justices who sat on that case remain on the Court. It stands to reason that if polled as a matter of first impression, several members of the current court might question the validity of reading a padlocked diary found in a locked glove compartment at a time when the arrested driver was locked, handcuffed, in the back of a police cruiser. Yet *Belton* is not generally regarded as liable to a legitimacy deficit or as qualified by inconsistent precedents.

At least part of the explanation has to do with the generality of the Fourth Amendment. In *Miranda* the Court struck a not unreasonable compromise that requires a logic-defying reading of the much more specific text of the Fifth Amendment. If custody plus interrogation equals coercion, how can the suspect make a voluntary waiver? If custody does not equal compulsion per se, however, why is the answer to a single straightforward question suppressed in the absence of the warnings? The *Miranda* approach makes a certain amount of sense, but it is hard to derive such a compromise from the language of the Fifth Amendment.

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332. See *supra* notes 244-52 and accompanying text.

By contrast, the term "unreasonable searches and seizures" is conclusory. It does not forbid a specific practice, like compelling confessions. It forbids instead what the courts find unreasonable. Given the volume of criminal cases, it makes sense to express judgments about reasonableness in categorical, rule-like terms. And if that is so, it is easy to justify police compliance with a reasonable rule, even when the precise police conduct might be deemed unreasonable as a matter of case-by-case adjudication.

Imagine, for a moment, that *Miranda* were understood in Fourth Amendment terms. Custodial questioning, the theory might go, increases the burden of arrest, much as does a strip-search or prolonged detention without judicial authorization, both of which violate the Fourth Amendment even though there is probable cause for the arrest. Given the warnings, however, questioning becomes reasonable rather than unreasonable. Because modern Fourth Amendment doctrine concentrates on preventing police misconduct rather than protecting individual autonomy, cutting back on the *Miranda* exclusionary rule would be congruent with the Fourth Amendment exclusionary rule cases, although *Elstad* may have taken too generous a view of derivative evidence even from a Fourth Amendment perspective.

I am not trying to reinvent *Miranda*; it is too late for that. But I am suggesting that, given the pressing need for rules in the criminal procedure context, the Court should base bright-line rules on the most, rather than the least, general constitutional provision that applies. Rules based on the Fourth Amendment, for instance, will be both over- and under-inclusive; all rules are. But it is easier to classify over- and under-inclusion as legitimate, and to maintain a rule over time, when a compromise of some sort is clearly permitted by the constitutional text.

Consider the application of the *Mathews v. Eldridge*<sup>333</sup> test in administrative due process cases. Typically, in a particular context—welfare benefits, termination of public employment, public school discipline, and so on—the Court considers the benefits and burdens of additional procedural safeguards, and concludes on the basis of those factors that a particular process is (or is not) constitutionally adequate for that class of decisions.<sup>334</sup> Just as in the criminal

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333. 424 U.S. 319 (1976).

334. See, e.g., *id.*; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) (termination

context, in the administrative due process cases, the volume of disputes weighs heavily against case-by-case adjudication. Because due process requires procedural fairness—a highly general norm—it is much more plausible for the Court to announce the procedures required in all future public employment discharge cases, or public housing termination cases, or what have you. This is no more judicial legislation than *Miranda*, but since any judicial decision about how much process is enough will be arbitrary at the margins, there seems to be no legitimacy deficit attending the announcement of a general rule for future cases.

There is one other important feature about the *Mathews v. Eldridge* case law. There is widespread dispute about the precise mission of administrative procedure,<sup>335</sup> but on all accounts instrumental reliability is one important value the administrative process should promote. Once a decision based on instrumental reliability prescribes rules of procedure for future administrative cases, those rules are not likely to change with shifts in the membership of the Court. Reliability will be a very important desideratum no matter who the new justices turn out to be, and the cost of repeatedly fine-tuning the *Mathews* calculation will be obvious to them.

At the time *Miranda* was decided, the governing assumption was that due process adjudication meant case-by-case adjudication. That assumption is no longer valid. In both administrative cases and criminal cases, the Court commonly announces a generally-applicable rule founded on due process. Just as with the *Terry* standard under the Fourth Amendment, in some contexts standards are preferable to rules even given high case volumes. But it is entirely possible to derive rules of *Miranda*'s formal type from the

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of public employment); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* § 7.6.5, at 181 (1993) ("[T]he Court emphasized that in applying this three-part test the courts should not address the circumstances of the individual claiming due process, but the courts should instead consider the 'generality' of cases."); STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 705-06 (4th ed. 1999) (noting *Mathews* test usually applied on wholesale rather than retail basis, although exceptional cases require case-specific rulings on required procedures).

335. It has been argued, for example, that the focus on instrumental values in *Mathews v. Eldridge* fails to show appropriate respect for the dignity of individuals. See, e.g., Jerry Mashaw, *The Supreme Court's Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

Fourth Amendment's reasonableness clause,<sup>336</sup> or the due process clause.<sup>337</sup> The higher level of generality characteristic of these latter provisions would reduce the legitimacy deficit attending the promulgation of doctrine in terms of rules. It would also increase the chances that justices with various abstract political or jurisprudential theories could subscribe to the underlying justifications of rules previously announced. The current Court looks with skepticism on criminal procedure claims based on due process rather than on the Bill of Rights.<sup>338</sup> If the argument here advanced is persuasive, that skepticism should be reconsidered, at least when what is at issue is the doctrinal basis of a rule to govern many similar future cases.

### CONCLUSION

Just as with Sunstein's case for judicial minimalism, this argument in favor of wide but shallow rulings in criminal procedure is a matter of degree. Some contexts call for case-by-case adjudication even in the criminal context (prejudicial pretrial publicity claims, for example). Many others, however, prominently including custodial interrogation, are better served by a second-best rule consistently applied over time than by case-by-case adjudication aimed at doing precise justice in each case.

Wide rulings run into trouble on the dimension of depth. *Dickerson*, for instance, reaffirms *Miranda*, but the seven-Justice

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336. See, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (presumption that judicial determination of probable cause within 48 hours is reasonable, and that determination after 48 hours is unreasonable); *United States v. Ross*, 456 U.S. 798 (1982) (search of automobile supported by probable cause may, without authorization of warrant, extend to any container within vehicle that might contain the suspected evidence); *New York v. Belton*, 453 U.S. 454 (1981) (search incident to arrest of motorist may extend, without warrant or probable cause, to passenger compartment of vehicle and containers thereof).

337. See, e.g., *United States v. Bagley*, 473 U.S. 667 (1985) (upon timely specific request government must disclose exculpatory evidence in every case); *In re Winship*, 397 U.S. 358 (1970) (government must prove elements of crime beyond reasonable doubt in every criminal case).

338. See *Sacramento v. Lewis*, 523 U.S. 833 (1998) (free-standing due process claims in criminal procedure context disfavored; substantive due process violated only by practices that shock the conscience); *Medina v. California*, 505 U.S. 437 (1992) (refusing to apply *Mathews* test in criminal procedure context; criminal procedure will satisfy procedural due process unless it is an unreliable departure from tradition or is fundamentally unfair in operation).

majority clearly does not agree on a single justifying theory. So we will wait for the other shoe to drop, which in this case means seeing how the lower courts treat the fruits and impeachment exceptions now that *Miranda* is clearly established as a constitutional doctrine. Because there are so many confessions cases, the lower courts will not have the luxury of deferring that process. They can mechanically follow the inconsistent Supreme Court cases, or they can attempt a common-law type synthesis. Rule of law values counsel the latter approach, but the Supreme Court's opinion presents courts that attempt such a synthesis a daunting challenge.

What the lower courts clearly cannot do is reorient criminal procedure doctrine away from divisive ideals about autonomy and dignity, toward more modest but more widely accepted values such as instrumental reliability, which is to say, away from Bill of Rights particulars and toward due process generalizations. In the absence of some such reorientation, the need for rules will clash with important considerations of legitimacy, stability, and consistency. Given that any turn toward more general doctrinal foundations can come from only one source, *Dickerson* suggests that we will be living, rather than dealing, with this tension for the foreseeable future.