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From Miranda to §3501 to Dickerson to... (Symposium: Miranda After Dickerson: The Future of Confession Law)

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FOREWORD:
FROM MIRANDA TO § 3501
TO DICKERSON TO ...*

Yale Kamisar**

Once the Court granted [certiorari in Dickerson] court-watchers knew the hour had come. At long last the Court would have to either repudiate Miranda, repudiate the prophylactic-rule cases [the cases viewing Miranda's requirements as not rights protected by the Constitution, but merely "prophylactic rules"] 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.

Donald Dripps

I. THE CONGRESSIONAL ASSAULT ON MIRANDA

On June 19, 1968, President Lyndon B. Johnson reluctantly signed the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter "the Crime Act" or "the Crime Bill"), a bill containing a provision known as § 3501 because of its designation under Title 18 of the United States Code.1 Section 3501 appeared to make the pre-Miranda...

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* These remarks are based on my Introduction to the Symposium, "Miranda after Dickerson: The Future of Confession Law," held at the University of Michigan Law School on November 17-18, 2000.

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2. See Statement by President Lyndon B. Johnson upon signing the Omnibus Crime Control and Safe Streets Act of 1968, 1 PUB PAPERS 725 (June 19, 1968) [hereinafter Statement by the President]; Max Frankel, President Signs Broad Crime Bill with Objections, N.Y. TIMES, June 20, 1968, at 1. The relevant portions of § 3501 read as follows:

§ 3501. Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

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v. Arizona\textsuperscript{3} "due process"-"totality of the circumstances"-"voluntariness" rule the sole test for the admissibility of confessions in federal prosecutions, thereby purporting to "overrule" by legislation the Supreme Court's most famous criminal procedure case.

In upholding § 3501, the U.S. Court of Appeals for the Fourth Circuit deemed it "important to note" that —

Congress did not completely abandon the central holding of Miranda, i.e., the four warnings are important safeguards in protecting the Fifth Amendment privilege against self-incrimination. Indeed, § 3501 specifically lists the Miranda warnings as factors that a district court

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\begin{enumerate}
\item The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession. . .

\item As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

President Johnson did not sign the Crime Bill until almost the last hour, finally concluding that it contained "more good than harm." Frankel, \textit{supra}; see also \textsc{Richard Harris, The Fear of Crime} 109-10 (1969). In signing the bill, the President pointed out that he had asked both the Attorney General and FBI Director to assure him that federal attorneys and agents would continue to give suspects "full and fair warning" of their constitutional rights. See Statement by the President, \textit{supra}; Frankel, \textit{supra}.

3. 384 U.S. 436 (1966). \textit{Miranda v. Arizona} held for the first time that the privilege against self-incrimination applies to the informal proceedings in the interrogation room (or other custodial situations) as well as to more formal proceedings such as those in a courtroom or before a congressional committee. Now that the privilege did apply to custodial police interrogation, the Court told us, in effect, that it was no longer acceptable for the police to question suspects as they had in the past — acting as if they had a right to an answer and leading suspects to believe that it would be so much the worse for them if they did not answer. Hence the need for \textit{either the Miranda warnings or other procedural safeguards that are "at least as effective."} 384 U.S. at 467; see also id. at 476, 490.

Although the \textit{Miranda} warnings are the best-known feature of the case, they are not the most important. As Professor Stephen Schulhofer has emphasized, \textit{Miranda} contains a series of holdings: (1) informal pressure to speak "can constitute 'compulsion' within the meaning of the Fifth Amendment"; (2) this element of informal compulsion is present in custodial interrogation; and (3) the now-familiar warnings (or some equally effective alternative) "are required to dispel the compelling pressure of custodial interrogation." Stephen J. Schulhofer, \textit{Reconsidering Miranda}, 54 U. CHI. L. REV. 435, 436 (1987). I share Professor Schulhofer's view (as expressed in this Symposium) that "the core of \textit{Miranda} is located in the first two steps." \textit{Id.; see also Stephen J. Schulhofer, Miranda, Dickerson and the Puzzling Persistence of Fifth Amendment Exceptionalism, 99 Mich. L. Rev.} 941, 951 (2001) [hereinafter Schulhofer, \textit{Puzzling Persistence}].
should consider when determining whether a confession was voluntarily given.4

The trouble with this analysis is that § 3501 does not require the police to issue any warnings to custodial suspects; the section only directs the trial judge to consider certain factors when determining the voluntariness of a confession. Moreover, although some of the factors listed in § 3501 may resemble the Miranda warnings to someone unfamiliar with the pre-Miranda confession cases, on a closer look they turn out to include only some of the many components of the pre-Miranda test.

Section 3501(b) does set forth various factors that the trial judge “shall take into consideration,” including whether or not the suspect has been advised of his rights, but goes on to say that “the presence or absence of any of [these] factors . . . need not be conclusive on the issue of the voluntariness of the confession.”5 The operative words are “take into consideration” and “factors.”

By the early 1960s, the voluntariness test, which had become “increasingly meticulous through the years,”6 also took into consideration such factors as whether the suspect had been advised of his rights.7 Thus, § 3501 added nothing to the pre-Miranda test for admitting confessions into evidence.8

How did § 3501 come about? Fred Graham, the Supreme Court correspondent for the New York Times at the time § 3501 was debated and enacted into law, furnishes some background: When the Crime Bill containing what was to become § 3501 reached the Senate floor, Graham reports, “it was immediately seen as a bald Congressional attempt to rap the Supreme Court’s knuckles over crime;” the bill’s provisions reflected “the sentiments of a committee that was dominated by Southern senators who had been nursing hurt feelings over the school desegregation decision of 1954 and who wanted to take it out on the Supreme Court over crime.”9 Another close student of the crime bill noted that during the Senate subcommittee hearings chaired by Senator John McClellan “the familiar claims of a direct connection between the enlargement of procedural requirements and a rising crime rate were paraded by a parade of district attorneys,

5. See supra note 2 (reprinting the text of § 3501).
police chiefs and other representatives of what might be called the "law enforcement lobby." 10

Where were the opponents of the proposal that became § 3501? When Senator Joseph Tydings, who led the opposition to the Crime Bill in the Senate, charged that not a single constitutional law or criminal procedure professor had been given an opportunity to testify before Senator McClellan's subcommittee on the desirability or constitutionality of the bill's anti-Miranda provision, 11 McClellan did not deny it. 12 As I have pointed out elsewhere:

The conspicuous absence of any law professors at the subcommittee hearings (or any defense lawyers or public defenders for that matter) could hardly be attributed to a lack of interest by those in academia. When asked by Senator Tydings to state their views on the desirability of § 3501 and other anti-Court provisions and on the power of Congress to enact them, 212 law professors (including twenty-four law school deans) from forty three law schools had responded. Most attacked the constitutionality of the anti-Miranda provision; not a single one defended it. 13


12. See id. Senator McClellan responded simply that every member of the Senate had been invited to testify and that somebody from Tydings's own state (the president of the Maryland district attorneys association) had also testified.


After noting that I "point to a 'conspicuous absence of any law professors at subcommittee hearings' as one reason for not crediting the Senate Judiciary Committee's report," Professor Cassell comments, with his usual wit, that while "many of us in the academy will find merit in Kamisar's suggestion that academics are vital to congressional deliberations, this is no requirement for crediting legislative findings." Paul G. Cassell, The Paths Not Taken: The Supreme Court's Failure in Dickerson, 99 MICH. L. REV. 898, 926 n.152 (2001). I am not suggesting that the presence of law professors at subcommittee hearings is "vital" in every case nor that the absence of any law professors at such hearings is "conspicuous" on every occasion. What I am saying is that the complete absence of law professors is conspicuous when (a) a bill raises a serious question about the constitutional power of Congress to legislate, in this instance in an area in which the Supreme Court has just issued a ruling, (b) many government officials have been invited to give their views on the need for and the constitutionality of the proposed legislation and all have testified in favor of the bill, and (c) more than 200 law professors have demonstrated their interest in the subject by expressing their views in writing to a member of the Senate.

I fail to see why much weight should be given to the testimony presented when the only people permitted to testify at the subcommittee hearings are those expected to advance the cause of the subcommittee's chairman. Moreover, as I have discussed elsewhere, see Kamisar, supra note 8, at 902-06, on those rare occasions when a witness who testified before McClellan's subcommittee said something that disappointed the chairman, the Senate Judiciary Committee Report either misrepresented that testimony or completely ignored it.

Professor Cassell would draw a distinction between Congress's legal determinations about the constitutionality of § 3501 and its factual determination about the underlying harm to law enforcement (a subject on which, Professor Cassell seems to suggest, the law professors had nothing important or useful to say). See Cassell, supra at 926 n.152. I do not believe this distinction holds up. In the first place, as an astute commentator has pointed out,
II. THE CONSTITUTIONAL STATUS OF MIRANDA

Although there was reason to think the Court might uphold the constitutionality of § 3501 when the Court finally addressed the issue in the year 2000 (because of the post-Warren Court’s characterizations of and comments about Miranda in the three decades since the case was decided), it is difficult to see how § 3501 could have passed constitutional muster had the Court decided its fate in 1968 or 1969. Indeed, I venture to say that at the time the Miranda opinion was handed down almost everyone who read it (including the dissenting Justices) understood that it was a constitutional decision — an interpretation of the Fifth Amendment privilege against self-incrimination.

As Justice White, who wrote a forceful dissent in Miranda, told the conference of state chief justices a year later:

Is the arrested suspect, alone with police in the stationhouse, being “compelled” to incriminate himself when he is interrogated without proper warnings? Reasonable men may differ about the answer to that question, but the question itself is a perfectly straightforward one under the Fifth Amendment and little different in kind from many others which arise under the Constitution and which must be decided by the courts.

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[What]ever its merits, [Miranda] is plainly a derivative of Malloy v. Hogan, applying the Fifth Amendment to the States, and Gideon v. Wainwright, which required counsel in most kinds of criminal cases. In terms of the function which the Court was performing, I see little difference between Miranda and the several other decisions, some old, some new, which have construed the Fifth Amendment in a manner in

"as a general matter, it can be said that the entire congressional debate [over the part of the Crime Bill containing § 3501] was notably devoid of anything but the most speculative assertion of facts" — a point any number of law professors could have developed. Robert A. Burt, Miranda and Title II: A Morganatic Marriage, 1969 SUP. CT. REV. 81, 126. Moreover, to the extent that Congress’s factual determinations were based on the claims and prophecies of law enforcement officials that Miranda was wreaking havoc, and would continue to do so, any number of law professors could have pointed out, for example, that this was most likely a temporary condition produced (and mistakenly so) by giving the Miranda doctrine limited retroactive effect.

As Fred Graham observed some time after § 3501 was enacted into law, by applying Miranda to all cases tried after the date of the decision, even though the police questioning had taken place and the confessions had been obtained before Miranda was decided, see Johnson v. New Jersey, 384 U.S. 719 (1966), the Court “gave the impression that Miranda had affected police interrogation far more than it actually had.” GRAHAM, supra note 8, at 184. Although, in the weeks immediately following Miranda, cases of self-confessed killers walking free were widely publicized, “[w]hat was . . . rarely made clear to the public was that [the] confessions [being tossed] out were only a relatively tiny, special group that were reached retroactively by the Miranda decision.” Id. at 184-85.
which it has never been construed before, or as in the case of Miranda, contrary to previous decisions of the Court and of other courts as well.\textsuperscript{14}

Justice White's remarks to the state chief justices may surprise some who remember how angry he seemed in his Miranda dissent. He was not too angry, however, to point out that the fact that "the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment ... does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment."\textsuperscript{15}

One need not dwell on Justice White's views about what might be called the legitimacy or the constitutional dimensions of Miranda. Chief Justice Warren's opinion for the Court in Miranda speaks for itself. And it speaks very quickly about the Fifth Amendment — it states on the very first page that, in the cases before the Court, "we deal with ... the necessity for procedures which assure that the individual is accorded the privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."\textsuperscript{16} Then it tells us on the third page that the Court granted certiorari "in order further to explore some facets of the problems of applying the privilege against self-incrimination to in-custody interrogation and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."\textsuperscript{17}

Forty-eight pages later, when bringing its opinion to a close, the Court observed that although "Congress and the States are free to develop their own safeguards, so long as they are fully as effective as [the Miranda warnings], the issues presented are of constitutional dimensions and must be determined by the courts."\textsuperscript{18} The Court continued:


\textsuperscript{15} \textit{Miranda}, 384 U.S. at 531 (White, J., joined by Harlan and Stewart, JJ., dissenting). Added White:

[What the Court] has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

\textit{Id.}

\textsuperscript{16} \textit{Id.} at 439.

\textsuperscript{17} \textit{Id.} at 441-42.

\textsuperscript{18} \textit{Id.} at 490.
As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when Escobedo was before us and it is our responsibility today. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.19

As is well known, the Miranda Court discussed constitutional principles generally for some fifty pages before concentrating on the facts of the four cases before it. When it finally addressed the specific facts of these cases, it began:

We turn now to these facts to consider the application to these cases of the constitutional principles discussed above. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.20

If there were any doubts about the constitutional status of Miranda, they were dispelled three years later in Orozco v. Texas,21 when a majority of the Court voted to throw out a confession because "obtain[ing] it in the absence of the required warnings was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in Miranda."22

In the 1970s, however, a new majority of the Supreme Court, led by a newly appointed Justice William Rehnquist, began kicking dirt at Miranda. In Michigan v. Tucker,23 in the course of holding admissible the testimony of a witness whose identity had been discovered by questioning the defendant in violation of Miranda, Justice Rehnquist, speaking for five members of the Court, maintained that the Miranda Court itself had recognized that the now-familiar warnings "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."24 Moreover, added Justice Rehnquist, the Miranda

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19. Id. at 490-91 (referring to Escobedo v. Illinois, 378 U.S. 478 (1964)).

20. 384 U.S. at 491 (emphasis added). The Miranda Court also compared and contrasted the decision it was handing down with the McNabb-Mallory rule, noting that because of the Federal Rules of Criminal Procedure and the effectuation of these rules in McNabb v. United States, 318 U.S. 332 (1943), and reaffirmed in Mallory v. United States, 354 U.S. 449 (1957), "we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations." 384 U.S. at 463 (emphasis added). The Court added, however, that "[t]hese supervisory rules . . . were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States." Id. (emphasis added).


22. Id. at 326.


24. Id. at 444. What the Miranda Court said, if one reads the language in context, was that the Miranda warnings were not necessarily required by the Constitution to neutralize "the inherent compulsions of the interrogation process as it is presently conducted," but that some procedural safeguards were required to do so, and "unless we are shown other
Court pointed out that the suggested safeguards — what the Tucker opinion called “the procedural rules” or the “prophylactic standards... laid down by the Court in Miranda” — “were not intended to ‘create a constitutional straightjacket,’ but rather to provide practical reinforcement for the right against compulsory self-incrimination.”

Justice Douglas, dissenting in Tucker, protested that Justice Rehnquist had taken language from Miranda out of context. Miranda does tell us that the now-familiar warnings need not be given, observed Douglas, but if — and only if — equally effective alternative safeguards are in place — and “[t]here is no contention here that other means were adopted.”

Justice Douglas, then in his thirty-fifth year on the Court, reminded his younger colleague:

The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis. We held the “requirement of warnings and waiver of rights [to be] fundamental with respect to the Fifth Amendment privilege,” and without so holding we would have been powerless to reverse Miranda’s conviction.

procedures [safeguards other than the Miranda warnings] which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards [the Miranda warnings] must be observed.” 384 U.S. at 467.

25. 417 U.S. at 444-46.

26. Id. at 444. What the Miranda Court said, if one reads the language in context, was that the Constitution does not require “any particular solution for the inherent compulsions of the interrogation process,” 384 U.S. at 467, but it does require some solution, because “when an individual is taken into custody [and] subjected to questioning, the privilege against self-incrimination is jeopardized,” id. at 478. In this setting, therefore, the Constitution does require some procedure safeguards to be employed — the warnings or something equally effective. See id. at 478-79.

Ironically, the language from the Miranda opinion that Tucker and subsequent cases building on Tucker used to disparage and to deconstitutionalize Miranda was inserted at the suggestion of Justice Brennan, who thought that Congress and the States should be allowed “latitude to devise other means (if they can) which might also create an interrogation climate which has the similar effect [of the Miranda warnings] of preventing the fettering of a person’s own will.” Letter from Justice William J. Brennan to Chief Justice Earl Warren 3 (May 11, 1966) (on file with author). Justice Brennan made clear his belief that in the absence of equally effective alternative safeguards the Miranda warnings were required. See id. at 9. For a discussion of, and substantial extracts from, Justice Brennan’s letter to the Chief Justice, see Charles D. Weisselberg, Saving Miranda, 84 CORNELL L. REV. 109, 123-25 (1998). I am indebted to Professor Weisselberg for first calling the Brennan letter to my attention.

27. See 417 U.S. at 462-63; see also supra notes 23, 25.

28. 417 U.S. at 463.

29. Id. at 462-63. A decade later, Justice Stevens made a similar point in his dissent in Oregon v. Elstad — a case in which the Court declined to apply the “fruit of the poisonous tree” doctrine to a second confession obtained from a defendant whose Miranda rights had not been honored the first time. 470 U.S. 298 (1985). Protesting the majority’s “ambivalence” about whether the use of a statement obtained by questioning an unwarned custodial suspect is a “constitutional violation,” Justice Stevens observed:
Despite Justice Douglas's forceful dissent, the mischievous language in *Tucker* did not go away. Indeed, it became quite significant. In such cases as *New York v. Quarles* (recognizing a "public safety" exception to the *Miranda* warnings) and *Oregon v. Elstad* (declining to apply the "fruit of the poisonous tree" doctrine to a second statement elicited from a suspect whose first statement had been obtained in violation of *Miranda*), the Court built on the language in the *Tucker* opinion and reiterated *Tucker*'s way of looking at, and thinking about, *Miranda*.

As Stephen Schulhofer points out in this Symposium, *Tucker* and its progeny spoke as if, in the police interrogation setting (but not other settings), "real compulsion" within the meaning of the Fifth Amendment Self-Incrimination Clause "required precisely what the *Miranda* Court had held unnecessary, the stringent 'breaking the will' type of coercion that would be sufficient to render a confession involuntary in traditional Fourteenth Amendment terms." As a result of *Tucker* and its progeny, a successful defense of § 3501 (the statute that purported to make the pre-*Miranda* "voluntariness" test the sole basis for the admissibility of a confession in a federal prosecution) — a defense that seemed hopeless at the time the statute was enacted — now seemed a real possibility.

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This Court's power to require state courts to exclude probative self-incriminating statements rests entirely on the premise that the use of such evidence violates the Federal Constitution. The same constitutional analysis applies whether the custodial interrogation is actually coercive or irrebuttably presumed to be coercive. If the Court does not accept that premise, it must regard the holding in the *Miranda* case itself, as well as all of the federal jurisprudence that has evolved from that decision, as nothing more than an illegitimate exercise of raw judicial power.

*Id.* at 370-71.


32. Schulhofer, *Puzzling Persistence*, supra note 3, at 949-50. Professor Schulhofer continues:

We will probably never know whether Justice Rehnquist realized, as he wrote *Tucker*, that he was draining Fifth Amendment compulsion of its distinctive content, or whether verbal similarities between compulsion and coercion by "breaking the will" simply obscured for him the traditional distinction between Fifth and Fourteenth Amendment requirements. Either way, *Tucker* and subsequent cases echoing its language accomplished a world-class conceptual counter-revolution.

*Miranda* had brought Fifth Amendment standards into the stationhouse under the expressly stated assumption that those standards provided more protection than the traditional Fourteenth Amendment voluntariness requirement. Fifth Amendment requirements do "sweep more broadly" than those of the Fourteenth, and it was precisely for that reason that incorporation was, in its day, so controversial. Starting with *Tucker*, the Court took the teeth out of incorporation by asserting that compulsion meant nothing more than involuntariness after all.

*Id.* at 950.

33. In the opening footnote to his article in this Symposium, Professor Cassell suggests, ever so gently, that I may have been trying to mislead him when I said that I "'wasn't sure'
What happened in *Dickerson*? Early in his opinion for the Court, Chief Justice Rehnquist pointed out that since "Congress may not legislatively supersede our decisions interpreting and applying the Constitution," the case "turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority . . . in the absence of congressional direction." Then, to the surprise of many, the Chief Justice quickly dismissed the way some majorities of the Court — and Rehnquist himself — had talked about *Miranda* in the past. The arguments for viewing *Miranda* as a constitutional decision, he now concluded, were quite strong — almost overwhelming. "[F]irst and foremost," the Chief Justice told us, "is that both *Miranda* and two of its companion cases applied the rule to proceedings in state courts." Moreover, since then we have "consistently applied" the rule to the states and it is plain that "we do not hold a supervisory power over the courts of the several States."

For another thing, the Chief Justice reminded us, "the *Miranda* opinion itself" begins and ends by telling us that the Court is establishing constitutional standards. In addition, "the majority opinion is replete with statements indicating that the majority thought it was announcing a constitutional rule."

What about the language in *Miranda* informing us that the decision "in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have that effect" — language that then-Justice Rehnquist had used to downgrade and deconstitutionalize *Miranda*? The Chief Justice now tells us, in a

what the Supreme Court would do" if it were to address the constitutionality of § 3501. Cassell, supra note 13, at 898. After the Tucker-line of cases, however, I wasn't sure.

When I spoke at Cornell Law School about the forthcoming *Dickerson* case three months before the case was decided, I said it was "too close to call." CORNELL LAW FORUM July 2000, at 15. I thought a 5-4 decision striking down § 3501 was the most that I could hope for. On the basis of her opinion for the Court in *Oregon v. Elstad*, and her powerful dissent in *Withrow v. Williams*, 507 U.S. 680 (1993), I doubted that Justice O'Connor would vote to invalidate § 3501. And I certainly never considered the possibility that Chief Justice Rehnquist would!

34. *Dickerson*, 120 S. Ct. at 2326 (2000).
35. *Id.* at 2332.
36. *Id.* at 2333.
37. "We disagree with the Court of Appeals' conclusion [that the *Miranda* protections are not constitutionally required], although we concede that there is some language in some of our opinions that supports the view taken by that court." *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 2333-34.
41. *Id.* at 2334. The dissenting Justices, it might be added, thought so too. See supra notes 14-15 and accompanying text.
42. 384 U.S. at 467.
43. See supra notes 25-27 and accompanying text.
footnote, that “a review of our opinion in Miranda” reveals that this language only means that the Constitution does not require the specific safeguards set forth in Miranda or any other particular procedure, not that it does not require some safeguard beyond the totality-of-circumstances test “that is effective in securing Fifth Amendment rights.”

It is not an exaggeration to say that the Chief Justice’s opinion in Dickerson, written a quarter-century after he wrote the opinion of the Court in Tucker, reads almost as if he recently reread Justice Douglas’s dissent in Tucker and, on further reflection, decided that Douglas was right after all. Indeed, the Chief Justice’s comments in Dickerson read almost as if he recently reread the Miranda opinion itself and discovered facts about Miranda and its companion cases and language in the Miranda opinion that he had not noticed before.

III. WHY DID CHIEF JUSTICE REHNQUIST COME TO THE RESCUE OF MIRANDA?

Why did the Chief Justice perform what appears to be a remarkable turnaround? I have asked many law professors about this and received a number of answers.

An explanation commonly offered is that when he realized that six members of the Court were prepared to reaffirm Miranda, the Chief Justice decided to vote with the majority so that he could assign the opinion to himself rather then let it go to someone like Justice John Paul Stevens, probably the strongest champion of Miranda on the Court. (A number of those who subscribe to this view doubt very much that the Chief Justice would have voted in favor of Miranda if the vote had been 4-4, rather than 6-2.)

All this, of course, is speculation. For all we know, Justice Sandra Day O’Connor and Justice Anthony Kennedy, probably the two least enthusiastic supporters of Miranda in the Dickerson majority, were unable to make up their minds and Rehnquist persuaded them to vote to strike down § 3501. Why would the Chief Justice have done that? He may have decided that the best resolution of Dickerson would be a compromise, one that “reaffirmed” Miranda’s constitutional status (thereby invalidating the federal statute that purported to overrule it), but preserved all the qualifications and exceptions the much-criticized case had acquired over three decades.

44. Dickerson, 120 S. Ct. at 2334 n.6 (emphasis added).
45. See Dripps, supra note 1, at 3, 36 (on file with author).
46. I think it plain that the Chief Justice was talking about how various cases had reduced the adverse impact of Miranda on law enforcement when he noted that “our subsequent cases have reduced the impact of the rule on legitimate law enforcement,” 120 S. Ct. at 2336. For a helpful discussion of the different ways in which Miranda has been riddled
Why wouldn't the Chief Justice, a strong and persistent critic of *Miranda*, leap at the chance to eradicate the centerpiece of the so-called Warren Court revolution in American criminal procedure? Why would he be interested in a compromise? Perhaps he was interested in assuming an increasingly large leadership role as Chief Justice, as opposed to his more partisan days as Associate Justice, and perhaps he arrived at the conclusion that it was too late in the day to overturn *Miranda*. Perhaps he realized that, in the year 2000, getting rid of the nation's most famous criminal procedure case would have caused more harm than good.

For one thing, more than three decades of *Miranda* jurisprudence would have been wiped out. (As dissenting Justice Antonin Scalia pointed out in *Dickerson*, in the thirty-four years since *Miranda* has been handed down, “this Court has been called upon to decide nearly 60 cases involving a host of *Miranda* issues.” Why erase all this case law when *Miranda* had been so weakened by various limitations and qualifications and the police had “adapted” to its requirements so


47. Professor Craig Bradley, a former Rehnquist clerk and a close student of Rehnquist's work, did not find the Chief Justice's vote in *Dickerson* unexpected. He points out, *inter alia*, that in *Dickerson* Rehnquist "show[ed] the kind of leadership [of the Court] that he has long admired in previous chief justices." Craig Bradley, *Behind the Dickerson Decision*, TRIAL, Oct. 2000, at 80. Rehnquist, adds Bradley, especially had Chief Justice Charles Evans Hughes in mind because he was “willing to modify his own opinions to hold or increase his majority.”

A number of law professors with whom I have spoken believe that if he had still been an Associate Justice at the time *Dickerson* was decided, Rehnquist would have dissented — even though he was aware that six other members of the Court were voting to reaffirm *Miranda*.

48. 120 S. Ct. at 2347 (Scalia, J., joined by Thomas, J., dissenting).

49. Not all of the blame for *Miranda*’s inadequacies should be placed on the Burger or Rehnquist Courts. Several Symposium participants have noted that once a suspect waives his rights, *Miranda* has virtually nothing to say about — and thus imposes few, if any meaningful restraints on — post-waiver police interrogation methods. See Richard A. Leo, *Questioning the Relevance of Miranda in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1015 (2001); William J. Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975, 989-90 (2001); Welsh S. White, *Miranda’s Failure to Restrain Pernicious Interrogation Practices*, 99 MICH. L. REV. 1211, 1213, 1217, 1246 (2001). Professor White goes so far as to say that “its failure to identify and to prohibit (or even to promote the identification and prohibition of) pernicious interrogation practices” is “*Miranda*’s most significant limitation.” *Id.* at 1220-21. But who is to blame for this significant limitation?

Professor White suggests that the Burger and Rehnquist Courts are. See *id.* at 1217, 1219-20. I would attribute most of the blame to the *Miranda* Court itself. To be sure, the post-Warren Court could have interpreted *Miranda* to prohibit various post-waiver interrogation techniques along the lines suggested by Professor White, see Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581-90, 599-600, 628-29 (1979) (noting that certain interrogation tactics that distort or undermine or vitiate the effect of the *Miranda* warnings should be absolutely prohibited), but the *Miranda* Court could have, and should have, done so itself. *Miranda* seems to contemplate only two situations: (a) the suspect who asserts his rights, causing the police to leave; (b) the suspect who waives his rights and then confesses to the crime. What about scenario (c): the suspect who waives his
that law enforcement officials could now live with it quite comfortably? As Richard Leo, a close student of modern police interrogation techniques, sums up the current situation in this Symposium: "Once feared to be the equivalent of sand in the machinery of criminal justice, *Miranda* has now become a standard part of the machine."^{51}

For another thing, there was reason to believe that overturning *Miranda* would have caused a good deal of confusion. It would have been no small feat to figure out what combination of circumstances satisfied the ever-changing voluntariness test in the twenty-first century. Nor would it have been easy to know exactly how the police should respond when persons *not warned* of their "rights" asserted what they thought were their rights on their own initiative or asked the police what rights, if any, they had.^{52}

rights and expresses a willingness to talk, but persists in denying any involvement in the crime? May the police then display apparent sympathy? Tell the suspect he might as well confess because there is so much evidence against him? Subject him to a hostile, short-tempered interrogator and then turn him over to a friendly, gentle one? Or does *Miranda*’s prohibition against police cajoling and deception in obtaining a waiver of rights, see 384 U.S. at 476, apply to post-waiver police interrogation as well? *Miranda* does not say.

As Laurie Magid points out in this Symposium, although the *Miranda* Court discussed and "cast a disapproving look" at various police interrogation techniques, it did not forbid them. Laurie Magid, *Deceptive Police Interrogation Practices: How Far Is Too Far?*, 99 Mich. L. Rev. 1168, 1209 (2001). Instead, it provided suspects with a new form of protection. *Id.* at 1175; see also Sheldon H. Eilen & Arthur Rosett, *Protections for the Suspect under Miranda v. Arizona*, 67 Colum. L. Rev. 645, 667-68 (1967). Since the post-Warren Court "has repeatedly declined the opportunity to place any specific limits on the use of deception during interrogation," Magid, *supra*, at 1176, "the 'current constitutional doctrine... by and large, has acquiesced in, if not affirmatively sanctioned, police deception during the investigative phase.' The lower federal courts and state courts have interpreted the Supreme Court's decisions to find that almost no type of deception renders a confession per se involuntary." Magid, *supra*, at 1177 (quoting Christopher Slobogin, *Deceit, Pretext and Trickery: Investigative Lies by the Police*, 76 Or. L. Rev. 775, 777 (1997)).

^{50} See Leo, *supra* note 49, at 1017-21; Richard Leo and Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 Minn. L. Rev. 397 (1999). For example, the police elicit waivers in the "overwhelming majority" of cases, Leo, *supra* note 49, at 1012, and once a suspect waives his rights and submits to interrogation, "*Miranda* offers very little, if any, meaningful protection," *id.* at 1015. Although suspects who agree to talk to the police may still cut off questioning at any time, "they almost never call a halt to questioning or invoke their right to have the assistance of counsel." Stuntz, *supra* note 49, at 977; see also *id.* at 988.

It should be noted that suspects with criminal records "appear disproportionately likely to invoke their rights and terminate interrogation." Leo, *supra* note 49, at 1009-10. This supports Professor Stuntz’s argument that "the suspects who need *Miranda’s* protection least are the ones who use it most." Stuntz, *supra* note 49, at 999.

^{51} Leo, *supra* note 49, at 1027.

^{52} For example, suppose in a *Miranda*-less world that a custodial suspect were to ask the police whether she had to answer their questions or whether the police had a right to an answer? How should the police respond? As I have suggested elsewhere, a good argument may be made that, as it had evolved by the time of *Miranda*, the due process-voluntariness test would have barred the use of any statements made by a suspect who had been told that she must answer police questions or that the police had a right to an answer. See Yale
Moreover, the Chief Justice may have been aware that “[a] finding that the police have properly informed the suspect of his Miranda rights . . . often has the effect of minimizing or eliminating the scrutiny applied to post-waiver interrogation practices.” In *Dickerson*, the Court did recall an observation it had made a decade and a half earlier — one supported by a very recent survey of lower court decisions — that “[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was “compelled” despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.”

Finally, Chief Justice Rehnquist may have regarded *Dickerson* as an occasion for the Court to maintain its power against Congress. As Professor Craig Bradley recently observed:

> [F]or the Supreme Court to overrule *Miranda* itself is one thing; to stand by while Congress does this is quite another. In *Dickerson*, the majority sent a strong message to Congress: Stay off our turf!

IV. WHY WERE THERE NO CONCURRING OPINIONS IN *DICKERSON*?

This still does not explain why none of the other Justices who made up the 7-2 majority wrote a concurring opinion. Why, for example, did Justice Stevens, who had written a strong dissent in *Oregon v. Elstad*, defending the constitutional status of *Miranda*, not write separately in *Dickerson*, urging the Court to overturn, or at least re-examine, *Elstad*, now that the premise of the case — *Miranda* is not a constitutional ruling — no longer seemed operative? Why, to take...
another example, did Justice Ruth Bader Ginsburg or Justice David Souter not write a separate opinion urging the Court to overturn, or at least reconsider, cases holding that a defendant who takes the stand in his own defense can be impeached by statements taken from him in violation of *Miranda* — even statements obtained from him after he asserts his right to counsel.  

I share George Thomas’s observation in this Symposium that *Harris v. New York*, the first impeachment case and “the very first case in which the Court departed from *Miranda’s* bright line,” may be “[t]he best example of the disconnect between *Miranda* and the Fifth Amendment.” As the Court made clear some years after *Harris*, neither testimony given by a person in response to a grant of immunity (*New Jersey v. Portash*) nor statements that are “involuntary” or “coerced” in the pre-*Miranda* sense (*Mincey v. Arizona*) can be used for impeachment purposes. *Harris*, *Portash*, and *Mincey* seemed to draw a distinct line between statements that are not really, but only presumptively, compelled (*Miranda* violations) and those that are actually compelled or compelled “in its most pristine form” (*Portash*) or compelled within the meaning of the pre-*Miranda* voluntariness test (*Mincy*). Now that *Dickerson* is on the books, how can statements obtained in violation of *Miranda* be regarded as any less unconstitutional than statements that violate traditional “voluntariness” standards?  

I suspect that if one of the concurring opinions I have suggested had in fact been written, it would have provoked one or more of the other members of the 7-2 majority (especially Justice O’Connor, author of the majority opinion in *Elstad*) to have written separately in response — and the 7-2 majority would have splintered badly. Even though the Chief Justice wrote a rather flat opinion, there is a good deal to be said (especially if one is in favor of *Miranda*) for an opinion reaffirming *Miranda* written by one of the most police-oriented Justices in Supreme Court history — particularly when that opinion is written such that six other members of the Court are willing to sign on.

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61. Id. at 1089.  
63. 437 U.S. 385 (1978). In *Hass*, the Court noted that “[t]here is no evidence or suggestion” that the defendant’s statements “were involuntary or coerced.” 420 U.S. at 722.  
64. See Thomas, supra note 60, at 1089. As Professor Thomas notes, almost everyone reads *Portash* as “sett[iing] the question of whether statements taken in violation of *Miranda* are compelled under the Fifth Amendment — they are not.” Id. at 1089.
I venture to say, however, that defense lawyers will soon discover that the Chief Justice wrote an opinion reaffirming *Miranda* as it has been shaped (some, including me, would say misshaped) in the past three decades. What has been reaffirmed, at least as far as the Chief Justice is concerned, is not the *Miranda* doctrine as it burst onto the scene in 1966, but *Miranda* with all its exceptions attached — or, as Laurie Magid described it in a recent conversation with me, *Miranda* with all its exceptions “frozen in time.”

Encouraged by *Dickerson*, defense lawyers will try hard to restore *Miranda* to its original vigor. But they are likely to discover that, although *Dickerson* seemingly repudiated the premises on which some *Miranda*-debilitating decisions are based, the exceptions to *Miranda* are going to remain in place. They are also likely to discover that language in *Dickerson* that does not seem very significant at the moment will take on considerable importance.

I am afraid that lawyers trying to reinvigorate *Miranda* will be reminded that, what the Chief Justice calls “the sort of modifications represented by [the] cases [interpreting *Miranda* narrowly]” — what some, including me, would call cases drawing distinctions between

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65. The scope of some of these exceptions, however, is unclear and may plausibly be limited. Take, for example, the “impeachment exception” to *Miranda*. See supra notes 61-64 and accompanying text. Although the California Supreme Court ruled otherwise in *People v. Peevy*, 953 P.2d 1212 (Cal.), cert. denied, 525 U.S. 1042 (1998), a good argument can be made, especially after *Dickerson*, that at the very least a statement obtained in violation of *Miranda* cannot be used for impeachment purposes if taken in deliberate violation of *Miranda*. See the discussion of *Peevy*, *Dickerson* and other cases in Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 Mich. L. Rev. 1121, 1126-34 (2001). See also Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 Mich. L. Rev. 1030, 1061-63 (2001) (suggesting that the Court ought to limit its *Miranda* exceptions to unintentional violations).

Consider, too, *Oregon v. Elstad*, discussed supra note 32, which permits the use of at least some “fruits” of *Miranda* violations. Although *Miranda*’s friends on the Court probably will be unable to overturn *Elstad*, now that *Dickerson* is on the books they may be able to persuade a majority to read the *Elstad* exception fairly narrowly.

For one thing, the failure to advise Mr. Elstad of his *Miranda* rights seemed inadvertent. If, for example, Elstad had asserted his right to counsel at his first meeting with the police and the police had refused to honor that right, the result might have been different. (At one point in her opinion for the Court, Justice O’Connor distinguished the situation in *Elstad* from cases where suspects’ invocation of their rights “were flatly ignored while police subjected them to continued interrogation.” Oregon v. Elstad, 470 U.S. 298, 313 n.3 (1985).)

Moreover, in *Elstad* the “fruit of the poisonous tree” was a second confession and in *Tucker* it was the testimony of a witness. As dissenting Justice Brennan pointed out in *Elstad*, the majority “relies heavily on individual ‘volition’ as an insulating factor . . . [a factor] altogether missing in the context of inanimate evidence.” Id. at 347 n.29.

The Court has never addressed explicitly whether physical or nontestimonial evidence derived from a *Miranda* violation is admissible. Nevertheless, the Court came very close to saying as much in *Elstad*, id. at 308, and ever since *Elstad* was decided “federal and state courts have almost uniformly ruled that the prosecution can introduce nontestimonial fruits of a *Miranda* violation in a criminal trial.” David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 Ohio St. L.J. 805, 835-36 (1992).

66. *Dickerson*, 120 S. Ct. at 2335.
Miranda violations and "real" constitutional violations that no longer seem defensible after Dickerson — are, to quote the Chief Justice's opinion in Dickerson again, "as much a normal part of constitutional law as the original decision."68

Defense lawyers will also be reminded, to quote the Chief Justice's opinion in Dickerson one more time:

[O]ur subsequent cases [those applying Miranda begrudgingly] have reduced the [adverse] impact of the Miranda rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements [as opposed to evidence brought to light as a result of these improperly obtained statements] may not be used as evidence in the prosecution's case in chief [as opposed to its use on cross-examination if the defendant has the audacity to take the stand in his own defense].69

As already indicated, I believe that the various exceptions imposed on Miranda have made it a much less formidable rule than the Warren Court contemplated. The possibility cannot be ruled out, however, that the significant number of "exceptions" Miranda has endured is a principal reason why it is still alive at the ripe age of thirty-five.

V. WHY WAS THE MAJORITY OPINION IN DICKERSON SO FLAT?

I applaud the Dickerson Court's invalidation of § 3501, but I must admit that I was taken aback by the Court's opinion. I usually discount criticism of a case when made by losing counsel, but this time I am sympathetic when Paul Cassell complains that "the skimpy, jerry-built opinion" handed down by the Dickerson Court "leaves [current] Miranda doctrine incoherent."70

Another Symposium participant, Susan Klein, puts it even more strongly. Although she likes the decision in Dickerson, striking down § 3501, she calls the opinion of the Court "in a word, terrible."71 She maintains that the Court "breached its duty to provide a justification for Miranda or Dickerson and squandered an opportunity to rationalize contradictory case law regarding Miranda's exceptions."72 For example, the Chief Justice's attempt to explain why the "fruit-of-the-poisonous-tree" doctrine developed in Fourth Amendment cases

68. 120 S. Ct. at 2335.
69. Id. at 2336.
70. Cassell, supra note 13, at 902.
71. Id. at 901. As the Dickerson Court noted, "[b]ecause no party to the underlying litigation argued in favor of § 3501's constitutionality in this Court," the Court appointed Professor Cassell to defend the statute. 120 S. Ct. at 2335 n.7.
72. Klein, supra note 65, at 1071.
73. Id.
does not apply to Miranda violations — "unreasonable searches under the Fourth Amendment are different from unwarned interrogations under the Fifth Amendment" — "comes dangerously close to being a non sequitur."

Many of this Symposium's participants have said unkind things about the quality of Chief Justice Rehnquist's Dickerson opinion and many others undoubtedly will say similar unkind things about it elsewhere. How is the Chief Justice likely to react to such criticism? By taking it in stride.

I have no doubt that there are some Justices who are interested in, and concerned about, how they are regarded by law professors (and how they will be viewed by future law professors). But I know of no evidence that Rehnquist is one of them. In Dickerson I imagine his thinking might have gone along these lines:

I have seven votes — a larger majority than almost anyone expected. Moreover, there are no concurring opinions which means

74. 120 S. Ct. at 2334.
75. Klein, supra note 65, at 1073. Professor Klein adds:

As Justice Scalia pointed out in his dissent, since it is not clear on the face of the Fourth Amendment that evidence obtained in violation of the Fourth Amendment must be excluded from trial, whereas it is clear from the face of the Fifth Amendment that compelled confessions must be excluded, if anything the argument for excluding fruits of Self-Incrimination Clause violations is considerably stronger.

Id. at 1073 n.195. I believe Professor Klein’s strong criticism of Chief Justice Rehnquist’s opinion in Dickerson is well deserved. The fact that the Chief Justice made a feeble attempt to reconcile Elstad with the “constitutionalized” Miranda doctrine does not mean, however, that no plausible explanations exist. Professor Klein herself suggests that Elstad and most other exceptions to Miranda may be reconciled with Miranda’s constitutional status on the ground that these exceptions “involved a good faith or unintentional violation of the prophylactic rule, coupled with particularly high costs for implementing the rule,” id. at 1061. Elsewhere in this Symposium, Professor Strauss observes:

Whatever one thinks of the holding in Elstad [declining to apply the fruit of the poisonous tree doctrine to Miranda violations, at least to certain violations], there is nothing inconsistent, in principle, between this approach and the view that Miranda is required by the Self-Incrimination Clause. Miranda is required by the Self-Incrimination Clause because that Clause has to be implemented in some way; any method of implementation will strike some balance of advantages and disadvantages; and Miranda strikes the best balance in the circumstances presented by that case. In different circumstances, such as in Elstad (or Quarters, or Tucker), a different balance might be best.

To make the comparison to the First Amendment once again, the constitutional rules governing defamation of public officials are different from the rules governing defamation of private individuals, which are in turn different from the rules governing defamation that addresses no subject of public interest. These differences do not mean that the rule of New York Times v. Sullivan is not a constitutional rule. They just mean that the constitutional rule that applies in one set of circumstances might have to altered when different circumstances arise — a wholly unremarkable proposition. . . .

It may be that the Court struck the wrong balance in Elstad . . . (or, for that matter, in Miranda itself). But the fact that the Court refined the balance it struck in Miranda, when cases presenting different circumstances arose, has no bearing on the constitutional status or legitimacy of that decision.

the large majority speaks with a single voice (mine), which is important in high-profile cases such as this one. To be sure, Justice Scalia has taken a number of robust swings at me and not a few would say he has landed some hard blows. But the exuberance he exhibits in his dissent is likely to diminish his effectiveness. Moreover, I have picked up Miranda’s strongest supporters on the Court as well as both of the perennial “swing votes” (O’Connor and Kennedy, JJ.). On the other hand, only one member of the Court (Thomas, J.) has joined Justice Scalia’s dissent. If I try to respond to all of Justice Scalia’s arguments I may say something that would lead one or more members of my 7-2 majority to break away and write a separate concurring opinion. The same result may follow if I try too hard to reconcile what I have said today with what I have said (and some members of my majority have said) about Miranda in the past three decades. All things considered, more or less ignoring Justice Scalia’s forceful dissent is the better part of valor. I have written a “compromise opinion” and such opinions rarely, if ever, win any awards for excellence. So be it. The important thing is that six other members of the Court are willing to sign it. I have achieved my objective. I have struck down § 3501 and “reaffirmed” Miranda (but not the Miranda the Warren Court thought it had produced). I do not deny that my opinion has a few loose ends. Nor do I deny that it leaves a good deal unsaid. Again, so be it. Let the professors figure it out.

Well, we have quite a few professors in this Symposium, so let us proceed . . .

76. I have written another article that discusses Justice Scalia’s dissenting opinion at great length. See Yale Kamisar, Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson, 33 ARIZ. ST. L.J. 387, 401-25 (2001).

77. “The fact that Chief Justice Rehnquist, for decades an implacable critic of Miranda, wrote the majority opinion in Dickerson,” observes Professor Don Dripps, is “a sure sign of a compromise opinion, intentionally written to say less rather than more, for the sake of achieving a strong majority on the narrow question of Miranda’s continued vitality.” Dripps, supra note 1, at 3 (on file with author).