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NOTE -- United States v. Dickerson: Will It Be the Proverbial Straw That Breaks Miranda's Back?

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NOTE

UNITED STATES V. DICKERSON: WILL IT BE THE PROVERBIAL STRAW THAT BREAKS MIRANDA'S BACK?

INTRODUCTION

*You have the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to consult with an attorney and to have your attorney present during questioning, if you cannot afford an attorney, one will be appointed for you.*¹

These words are common-place in American society; no less than a modern American custom. One can scarcely argue that television and movies have not aggrandized and made more familiar to the general citizenry the contents of the warnings which police must give when “reading you your rights.” The custom finds its origin in the United States Supreme Court case, *Miranda v. Arizona*,² where the Court established strict guidelines for police to follow when taking a criminal suspect into custody for questioning.³ *Miranda* is a landmark case and its holding encompasses what has now become the infamous Miranda Rights.⁴ These rights consist of a set of mandatory warnings that must be given to all persons placed in custody and interrogated by police.⁵ Since the *Miranda* decision, however, many courts have whittled away much of the protective shield that was seemingly intended by the Justices in 1966.⁶

1. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

2. *Id.*

3. *See id.*

4. *See id.* In fact, one attorney recounted that his mother sent him a copy of the news article reporting the death of Ernesto Miranda in a bar room brawl in Arizona. His mother's comment written at the bottom said: “Charlie, isn't it a shame that someone would do this to him after all he has done for us?” Charles H. Whitebread, *San Diego Bar Bri Lecture* (June 19, 1999).

5. *See id.* at 436.

6. *See Davis v. United States*, 512 U.S. 452, (1994) (holding that if a suspect's request for an attorney is ambiguous or equivocal, the officers have no duty to cease interrogation); *see also Oregon v. Hass*, 420 U.S. 714 (1975) (holding that a statement taken after the police fail to honor suspect's invocation of the right to an attorney may be used for impeachment purposes); *Harris v. New York*, 401 U.S. 222 (1971) (holding that a statement taken without proper Miranda warnings can be used to impeach); *People v. Peevy*, 17 Cal. 4th 1184 (1998), *cert. denied*, 119 S. Ct. 595 (1998) (No. 98-6125) (concluding that a statement taken in purposeful and calculated violation of Miranda Rights is nevertheless admissible for impeach-

The most recent case narrowing *Miranda* is *United States v. Dickerson*.⁷ After a lengthy analysis, the Fourth Circuit Court of Appeals concluded that 18 U.S.C.A. Section 3501⁸ controls the admissibility of confessions in federal courts, preempting the judicially created *Miranda* doctrine.⁹ Section 3501 aims at doing away with *Miranda's* irrebuttable presumption—a presumption making confessions inadmissible when obtained without the proscribed set of warnings.¹⁰ In place of *Miranda's* irrebuttable presumption, is a much broader test that allows a judge to weigh five factors when determining whether it is appropriate for a particular confession to be admitted as evidence of guilt.¹¹

At present, the rule in the Fourth Circuit regarding the admissibility of custodial interrogations is the common law voluntariness rule enunciated in Section 3501.¹² The rule states that if a confession is given voluntarily, then it is admissible as evidence of guilt in the prosecutor's case-in-chief.¹³ In truth, the voluntariness test involves a "totality of the circumstances" analysis.¹⁴ The entire issue of admissibility rests in the hands of the reviewing judge, but the absence of any factor is not conclusive on the issue of voluntariness.¹⁵

Thus, *Miranda* and Section 3501 are complete polar opposites of one another. *Miranda* provides a bright-line rule that confessions obtained absent

ment purposes).

7. *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), cert. granted, 1999 WL 593195 (Dec. 6, 1999) (No. 99-5525).

8. 18 U.S.C.A. § 3501 (West 1985). Two years after *Miranda* was decided, a disgruntled Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968 that included § 3501.

9. See *Dickerson*, 166 F.3d at 672.

10. See *id.* at 687.

11. 18 U.S.C.A. § 3501(b). Section 3501 provides in relevant part:

Admissibility of confessions:

(b) 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.*

Id. (emphasis added).

12. See *Dickerson*, 166 F.3d at 672.

13. See 18 U.S.C.A. § 3501(a).

14. See *id.* § 3501(b).

15. See *id.*

the proscribed warnings are *per se* inadmissible.¹⁶ Section 3501, on the other hand, abolishes *Miranda's* irrebuttable presumption and adopts the common law "totality of the circumstances" approach.¹⁷

The Supreme Court's decision to review the *Dickerson* case brings great anticipation.¹⁸ At stake are issues that have been debated in American jurisprudence for over three decades concerning which rule of law governs custodial interrogations—Section 3501 or *Miranda*.¹⁹ Although reluctant to address the conflict between *Miranda* and Section 3501 in the past,²⁰ the Fourth Circuit's holding in *Dickerson* required the Supreme Court to grant certiorari, in order to put an end to this lengthy debate.²¹

Miranda is still a viable doctrine and maintains the relevant standard by which a person's Fifth Amendment right against compelled self-incrimination is safeguarded.²² This note²³ will discuss both doctrines, but

16. See generally *Miranda v. Arizona* 384 U.S. 436 (1966).

17. See *Dickerson*, 166 F.3d at 687. The Senate Report noted that *Miranda* "is the case to which the bill is directly addressed." 1968 U.S.C.C.A.N. at 2112. Furthermore, the legislative history describes that section 3501's specific purpose was to vitiate *Miranda's* irrebuttable presumption in favor of the voluntariness approach. See *id.*

18. The issues are viewed as so important, that in a recent front page article, written before the Court granted certiorari, it was reported that the Supreme Court was expected to take the matter up for review, and that the announcement might come as early as October, 1999. See Richard Carelli, *Miranda Warning Heads for Crucial High Court Airing*, S.D. UNION TRIB., July 22, 1999, at A1. Consistent with the articles forecast the Court did grant certiorari.

19. See generally Alfredo Garcia, *Is Miranda Dead, Was It Overruled, Or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461 (1998); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987); Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishing Small Social Costs*, 90 NW. U.L. REV. 500 (1996); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U.L. REV. 1084 (1996); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U.L. REV. 387 (1996).

20. In 1994, the Supreme Court side-stepped the conflict between *Miranda* and § 3501 because a majority of the Court felt constrained, due to prudential limitations on the Court, from deciding the case on an issue not raised at the lower level. See *Davis v. United States*, 512 U.S. 452 (1994).

21. See *Dickerson*, 166 F.3d at 677, cert. granted, 1999 WL 593195 (Dec. 6, 1999) (No. 99-5525).

22. See U.S. CONST. amend. V. The Fifth Amendment reads in its entirety as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

23. This note will not address the issue of whether Congress can or cannot validly overrule a judicially created rule through legislative enactment, that is the subject for a different article. Yet, it has been said that, "Congress has the power to overrule judicially created rules

will conclude that the *Miranda* doctrine should prevail over the voluntariness rule in Section 3501. Because the Section 3501 test depends on judicial discretion, the chances for inconsistent application poses a threat of heightened confusion in the area of custodial interrogation.²⁴ Furthermore, earlier Supreme Court decisions have appropriately narrowed the scope of *Miranda*,²⁵ while other, more recent opinions have reaffirmed the *Miranda* doctrine.²⁶ For these reasons the Supreme Court should hold that the Section 3501 test provides too much potential for unjust results. Therefore, the Court should invalidate Section 3501 and specifically reaffirm *Miranda*.

This Note is divided into three main parts. Part I discusses *Dickerson*, and will first focus on the Fourth Circuit's appraisal of *sua sponte* review.²⁷ It will be argued that the Fourth Circuit was justified, and even correct, in dealing with the Section 3501 issue even though it was not raised at the lower level. The discussion will then turn to the *Dickerson* court's analysis supporting a return to the common law voluntariness rule. Part II begins by setting forth the history and holding of *Miranda*. It also includes a discussion of the *Miranda* procedures and why the Court concluded strict procedures are necessary. Part III presents the subsequent line of cases that properly narrow the holding in *Miranda*, as well as the recent Supreme Court cases that reaffirm it, thus allowing *Miranda* to continue as a viable standard. Part IV presents the conclusion that continued support of the *Miranda* Rights, is the wiser course for the Supreme Court to follow.

I. THE *DICKERSON* DECISION

A. *The Need for Sua Sponte Review*

Since its enactment over thirty years ago, Section 3501 has been of little consequence because of the Government's failure to invoke its provisions and the judiciary's continued promotion of *Miranda*.²⁸ This statement cer-

of evidence and procedure that are not required by the Constitution." *Dickerson*, 166 F.3d at 672 (citing *Carlisle v. United States*, 517 U.S. 416, 426 (1996); *Palermo v. United States*, 360 U.S. 343, 345-48 (1959)). "Thus, whether Congress has the authority to enact § 3501 turns on whether the rule set forth by the Supreme Court in *Miranda* is required by the Constitution." *Dickerson*, 166 F.3d at 672.

24. Because of its ambiguity and "its subtle mixture of factual and legal elements," the "voluntariness" test "virtually invited [trial judges] to give weight to their subjective preferences" and "discouraged review even by the most conscientious appellate judges." Stephen J. Schulhofer, *Confession and the Court*, 79 MICH. L. REV. 865, 869-70 (1981).

25. See *supra* note 6.

26. See *Withrow v. Williams*, 507 U.S. 680, 694 (1993) (reaffirming *Miranda*'s bright-line test over the "totality of the circumstances" approach in *habeas corpus* cases); *Minnick v. Mississippi*, 498 U.S. 146 (1990) (reaffirming the rule in *Miranda* and specifically holding that once a request for counsel has been made all interrogation must cease, and cannot be re-initiated without the presence of counsel).

27. *Sua Sponte* is defined as "of his or its own will or motion; voluntarily; without prompting or suggestion." BLACK'S LAW DICTIONARY 1424 (6th ed. 1990).

28. See Eric D. Miller, *Should Courts Consider 18 USC § 3501 Sua Sponte?*, 65 U. CHI.

tainly begs the question: Why is the Government failing to enforce a duly enacted statute of Congress? One commentator suggests two reasons why the Department of Justice acts so cautiously regarding Section 3501's enforcement.²⁹ First, government lawyers are apt to feel that *Miranda's* bright-line rules provide clearer guidelines for police to follow than does section 3501's "totality of the circumstances" provision.³⁰ Second, the Government may have doubts as to the constitutionality of Section 3501. They may therefore be hesitant to risk reversal of a criminal conviction in a case where the statute was relied on.³¹ These two reasons may explain why the Department of Justice is slow to enforce the statute. It does not, however, adequately explain why the Department of Justice will not itself ask the Supreme Court to clarify whether Section 3501 is the appropriate standard to use when determining the admissibility of a confession.³²

Ironically, in a fairly critical concurring opinion in *Davis v. United States*,³³ Justice Scalia stated, "[t]his is not the first case in which the United States has declined to invoke Section 3501 before us, nor even the first case in which that failure has been called to its attention."³⁴ Even though he recognized the need to resolve the conflict between *Miranda* and Section 3501, Justice Scalia agreed that invoking Section 3501 was improper in that case because of prudential limitations on the Court.³⁵ Presumably, the Section

L. REV. 1029 (1998) (concluding that it is necessary for courts to consider the issue *sua sponte*).

29. See *id.* at 1036-37.

30. See *id.* This point was further confirmed during an interview with one of San Diego's City Attorneys, Elmer Heaps. Mr. Heaps stated that he would always proceed under *Miranda* because the clear lines under that rule helps the prosecutor fulfill "his sacred duty to see that fairness and justice are accomplished, regardless of whether that means no conviction." Interview with Elmer Heaps, San Diego Prosecuting Attorney's Office, in San Diego, Cal. (July 27, 1999).

31. See Lyndon B. Johnson, *Statement by the President Upon Signing the Omnibus Crime Control and Safe Streets Act of 1968* in 1 PRES. PUB. PAPERS 725-28 (1968-69). President Johnson wrote to Senator Mansfield, recommending that the Senator "not encumbe[r] the legislation with provisions raising grave constitutional questions." 114 Cong. Rec. S12450 (May 9, 1968) (statement of Senator Mansfield).

32. See Letter from John C. Keeney, *Acting Assistant Attorney General*, to all United States Attorneys and all Criminal Division Section Chiefs (Nov. 6, 1997) (noting that "[t]he Department has not yet decided whether it would ask the Supreme Court in an appropriate case to overrule or modify *Miranda*." (citing *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), cert. granted, 1999 WL 593195 (Dec. 6, 1999) ((No. 99-5525) & n.16) [hereinafter Letter from Keeney]).

33. 512 U.S. 452, 462-65 (1994).

34. *Id.* at 463.

35. See *id.* at 464. Justice Scalia argued that because the limitation is based on prudential concerns, there are times when it is appropriate and necessary to consider issues not briefed by counsel. See *id.* Prudential constraints act as limitations on the Supreme Court's powers of review. For example, mootness is a doctrine that requires there to be a justiciable claim during the entire pendency of the case.

The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy

3501 issue in *Davis* was moot because it was not raised at the lower level, thereby placing it beyond the Supreme Court's powers of review.³⁶ Justice Scalia concluded in *Davis*, however, that the Court would have to consider the implication of Section 3501 the next time the statute applied to the facts of a case.³⁷

The Fourth Circuit did in *Dickerson* what the Supreme Court was unwilling to do in *Davis*. Thus, it is clear the Fourth Circuit considered Justice Scalia's concurring opinion in *Davis* an invitation. The *Dickerson* Court refused to ignore the Section 3501 issue simply because the prosecution had not raised it as a basis for admissibility.³⁸ The *Dickerson* Court unreservedly pointed out the only reason Section 3501 was not raised was because the U.S. Attorney's Office was forbidden from doing so by the Department of Justice.³⁹ Janet Reno, the United States Attorney General, acting pursuant to 2 U.S.C.A. Section 288,⁴⁰ informed Congress that the Department of Justice was unwilling to defend the constitutionality of Section 3501.⁴¹ In a somewhat irritated tone, the *Dickerson* Court responded by stating, "[f]ortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it."⁴²

The historical backdrop of Section 3501's limited use suggests that strong political opposition, and skepticism from practitioners, are among the

admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 59-66 (5th ed. 1995).

36. Although the *Davis* Court did not specifically address the issue of mootness, it is implied in Justice Scalia's concurring opinion when he states, "it is proper, given the Government's failure to raise the point, to render judgement without taking account of § 3501." *Davis*, 512 U.S. at 464.

37. See *id.* Justice Scalia continued by commenting, "[b]ut I will no longer be open to the argument that this Court should continue to ignore the commands of § 3501 simply because the Executive declines to insist that we observe them." *Id.*

38. See *United States v. Dickerson*, 166 F.3d 667, 672 (4th Cir. 1999), cert. granted, 1999 WL 593195 (Dec. 6, 1999) (No. 995525).

39. See Letter from Keeney, *supra* note 32 (forbidding "federal prosecutors [from] rely[ing] on the voluntariness provision of Section 3501.") *Id.*

40. 2 U.S.C.A. § 288k (West 1997). Section 288k reads in part as follows:

(b) The Attorney General shall notify the Counsel with respect to any proceeding in which the United States is a party of any determination by the Attorney General or Solicitor General not to appeal any court decision affecting the constitutionality of an Act or joint resolution of Congress within such time as will enable the Senate to direct the Counsel to intervene as a party in such proceeding pursuant to section 288e of this title.

Id.

41. See *Dickerson*, 166 F.3d at 682.

42. *Id.* at 672 (citing *United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 445-48 (1993)).

causes for its neglect. Beginning with President Lyndon Johnson, who signed the Omnibus Crime Control and Safe Streets Act of 1968 into law, every administration since has done little, if anything, to enforce this legislative enactment.⁴³ In fact, Attorney General Ramsey Clark gave instructions to all U.S. Attorneys to rely only on confessions obtained in compliance with *Miranda*.⁴⁴ In light of all this, the *Dickerson* Court was correct for reviewing the issue *sua sponte* because without such bold judicial action it is conceivable that this conflict might continue for many more years to come.

The danger in allowing this split among the circuits to prevail is that law enforcement agents will be using two different rules when conducting custodial interrogations. Differences will be jurisdictional and will depend on the prevailing law of the agent's jurisdiction. Although this may not cause much confusion for law enforcement agents, confusion will exist for the people of the United States. The people of the United States have a justified expectation that the laws under which they are governed remain uniform and consistent.⁴⁵ This does not mean that once a law is enacted it can never be changed or modified. Rather, it simply means that in certain crucial areas of the law, of which custodial interrogation is one, there must be one rule so confusion is minimized.⁴⁶

Thus, in spite of the fact that the Executive branch may have legitimate reasons for not enforcing the statute over rules crafted by the Supreme Court, there is equal justification for the judicial activism engaged in by the *Dickerson* Court when it reviewed Section 3501 *sua sponte*.⁴⁷ The Fourth Circuit declared that it was not under the same prudential constraints as the Supreme Court, thereby allowing an inferior court to take up the issue *sua sponte*.⁴⁸ By doing so, the *Dickerson* Court eliminated the prudential concerns that troubled the majority in *Davis*, and made it possible for the Supreme Court to squarely address the application of Section 3501 in light of *Miranda*.

B. The History of the Common Law Rule

At early common law, confessions were admitted into evidence without

43. See Miller, *supra* note 28, at 1033-35. President Lyndon Johnson declared a belief that the statute could be interpreted in harmony with the Constitution and assured that federal practices would "continue to conform to the Constitution." *Id.*

44. See Daniel Gandara, *Admissibility of Confessions in Federal Prosecutions*, 63 GEORGETOWN L.J. 305, 311-12 (1974).

45. See U.S. CONST. art. IV, § 2, cl. 1, reads as follows: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.*

46. It is recognized that from state to state there will be some differences in the law. For example, the Community Property system prevails in only a handful of states. Nevertheless, in criminal matters, where the consequences are so dire, there must be a national, uniform rule of law respecting the rights of suspected criminals.

47. See *Dickerson*, 166 F.3d at 682.

48. See *id.* at 683.

any restrictions whatsoever.⁴⁹ This rationale persisted, perhaps because the general and prevailing sentiment was that confessions were considered indispensable items of evidence—often characterized as the best evidence of guilt.⁵⁰ But, as early in English jurisprudence as 1783, judicial sentiment changed regarding confessions because of the questionable techniques employed to secure some confessions.⁵¹ The sentiment was that confessions induced by threats or actual torture were considered unreliable and, therefore, were rendered inadmissible at trial.⁵² After these protective changes were added to the early English doctrine, the rule, simply stated, allowed the use of a confession so long as it was obtained voluntarily.⁵³ The English common law doctrine remained fairly static and was specifically adopted into American jurisprudence in the 1884 case, *Hopt v. Utah*.⁵⁴ Yet, thirteen years later, in *Bram v. United States*,⁵⁵ the Supreme Court announced for the first time that the Fifth Amendment provision guarding against compelled self-incrimination required confessions to be made voluntarily.⁵⁶ This was a critical juncture in the evolution of confession law in the United States. The holding in *Bram* gave constitutional bite to the idea that police must operate within certain parameters when trying to exact a confession from a suspected criminal.⁵⁷

The Supreme Court again augmented the American version of the voluntariness doctrine when it relied on the Due Process Clause of the Fifth Amendment in *Brown v. Mississippi*.⁵⁸ Through its holding in *Brown*, the Supreme Court gave further support to the idea that Constitutional dimensions abound in the area of government-conducted interrogations.⁵⁹ Thereafter, and with little variance for nearly 180 years, the rule prior to *Miranda*, governing the admissibility of confessions, was that confessions voluntarily made were admissible as evidence of guilt.⁶⁰ The *Miranda* decision created a

49. See generally *Developments in the Law—Confessions*, 79 HARV. L. REV. 935 (1966). At early common law, evidence of torture did not change whether the confession could be admitted into evidence. See *id.* at 954.

50. See S. REP. NO. 10 97, reprinted in 1968 U.S.C.C.A.N. at 2124.

51. See *The King v. Rudd*, 168 Eng. Rep. 160 (K.B. 1783) (holding that confessions “forced from the mind by the flattery of hope, or by the torture of fear,” ought to be discredited). *Id.*

52. See *id.*

53. See *Regina v. Garner*, 169 Eng. Rep. 267 (Ct. Crim. App. 1848); *Regina v. Baldry*, 169 Eng. Rep. 568 (Ct. Crim. App. 1852).

54. 110 U.S. 574, 584-85 (1884) (holding that a confession is reliable and, therefore, admissible if not secured by threat or promise).

55. 168 U.S. 537 (1884).

56. See *id.*

57. See *id.* at 574.

58. 297 U.S. 278 (1936).

59. In *Miranda*, this constitutional dimension surrounding custodial interrogations and confessions became the critical basis of the Court’s analysis, and upon which its holding rests. See *Miranda v. Arizona*, 384 U.S. 436, 459-60 (1966).

60. See *Davis v. United States*, 512 U.S. 452, 464 (1994) (noting that prior to *Miranda*,

bright-line rule for determining the trustworthiness of confessions and their ultimate admissibility.⁶¹

C. A Proposed Return to the Voluntariness Test

When Congress enacted Section 3501 as part of the Omnibus Crime Control and Safe Streets Act of 1968, it was clear that its intent was to overrule *Miranda*.⁶² The legislative committee responsible for the bill became convinced that, “the rigid and inflexible requirements of the majority opinion in the *Miranda* case are unreasonable, unrealistic, and extremely harmful to law enforcement.”⁶³ The Honorable Alexander Holtzoff, U.S. district judge for the District of Columbia, testified that strict adherence to *Miranda*’s proscribed warnings creates severe impediments to effective law enforcement efforts.⁶⁴ As enacted, the statute provides in pertinent part that “a confession . . . shall be admissible in evidence if it is voluntarily given.”⁶⁵ On its face, Section 3501 seems to comport with the ideals of *Miranda*—that protecting against compelled confessions is of tantamount importance.⁶⁶ Yet, the real danger of Section 3501 lies within subsection (b) of the statute, which sets forth the test for determining whether or not a confession was made voluntarily.⁶⁷ The test is a “totality of the circumstances” approach conducted by the court, which weighs the following five factors: (1) the amount of time that transpired between arrest and arraignment; (2) whether the suspect understood the nature of the alleged offense; (3) whether the suspect was advised of the right to remain silent and that anything said would be used against him; (4) whether the suspect was advised prior to question-

“voluntariness vel non was the touchstone of admissibility of confessions”) *Id.*

61. See generally Susan R. Klein, *Miranda Deconstitutionalized: When The Self-Incrimination Clause And The Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 419 (1994).

62. See S REP. NO. 1097, reprinted in 1968 U.S.C.C.A.N. at 2112, 2141.

63. *Id.* at 2132.

No matter how much money is spent for upgrading police departments, for modern equipment, for research and other purposes encompassed in title I, crime will not be effectively abated so long as criminals who have voluntarily confessed their crimes are released on mere technicalities. The traditional right of the people to have their prosecuting attorneys place in evidence before juries the voluntary confessions and incriminating statements made by defendants simply must be restored.

Id. at 2123.

64. See *id.* at 2130.

65. 18 U.S.C.A. § 3501(a).

66. See *Miranda*, 384 U.S. at 442. “These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured ‘for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it.’” *Id.* (quoting *Cohens v. Commonwealth of Virginia*, 19 U.S. 264 (1821)).

67. See 18 U.S.C.A. § 3501(b); see also Schulhofer, *supra* note 24, at 869-70, and accompanying text.

ing of the right to consult with counsel; and (5) whether the suspect was without counsel during questioning.⁶⁸

One might recant by asking, "What's wrong with this test?" Admittedly, the answer would have to be "nothing." Except, at the end of subsection (b), the court is instructed that "[t]he presence or absence of any of the above-mentioned factors to be taken into consideration . . . need not be conclusive on the issue of voluntariness of the confession."⁶⁹ So now the question becomes: How many factors must be present? Or, how many of the factors can be missing and the confession still be considered voluntary? There is no clear answer. However, *Dickerson* represents an example of a situation where no warnings were given prior to the time when the incriminating statements were made,⁷⁰ and the confession was nonetheless deemed voluntary under the Section 3501 test.⁷¹

Indeed, the Supreme Court has already recognized the allusiveness of the voluntariness test. Justice O'Connor in, *Miller v. Fenton*, noted that "[t]he voluntariness rubric has been variously condemned as 'useless,' 'perplexing,' and 'legal "double-talk."⁷² At the very least, Section 3501 rests on notably tenuous ground.

II. THE *MIRANDA* DECISION

A. *The History and Holding*

When *Miranda* was decided in the mid 1960s, America was experiencing a renewed interest in civil rights. The citizenry expected big changes politically, economically, and legally.⁷³ Many of those expectations were realized by the passage of the Civil Rights Act of 1964.⁷⁴ Amid this era of

68. See 18 U.S.C.A. § 3501(b).

69. *Id.*

70. See *United States v. Dickerson*, 166 F.3d at 675. There was some controversy over whether *Dickerson* was read his rights before or after making his statement to Special Agent Lawlor and Detective Durkin. The district court questioned the credibility of Special Agent Lawlor and found that "Dickerson was not advised of his *Miranda* rights until after he had completed his statement to the government." *Id.* at 676.

71. See *id.* at 692-93. However, at least one district court has already seized on the ruling in *Dickerson*. See *United States v. Tapia-Mendoza*, 41 F. Supp. 2d 1250, 1256-57 (C.D. Utah, March 10, 1999) (agreeing with *Dickerson* and holding that § 3501 is the applicable rule to use when determining the admissibility of a confession).

72. *Miller v. Fenton*, 474 U.S. 104 (1985).

73. See Garcia, *supra* note 19, at 456-69 (commenting on the fact that many legal commentators do not pay enough attention to the social conditions that were prevalent during the *Miranda* era. He further argues that this aspect of the analysis is crucial to understanding how the Warren Court justified its holding in *Miranda*).

74. Civil Rights Act of 1964, Pub. L. No. 88-352 [hereinafter Civil Rights]; see also 42 U.S.C. § 1983 (1994), which was amended in 1979, but is derived from act of April 20, 1871, ch. 22, § 1, 17 Stat. 13. The 1979 amended statute reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be

intense social change, reports of police corruption and brutality towards criminal suspects were commonplace when *Miranda* was decided.⁷⁵ During the course of its *Miranda* opinion, the Supreme Court exposed the findings of both the Wickersham Commission⁷⁶ and the Commission on Civil Rights.⁷⁷ It engaged in an in-depth, nationwide examination of general law enforcement practices surrounding custodial interrogations.⁷⁸ Much of what was brought to light concerning custodial interrogations was not merely condoned by law enforcement agencies. Instead, it was formally adopted and taught to officers by these agencies, with the intent to exact greater results during the course of an interrogation.⁷⁹ Thus, in response to the apparent abuses occurring within the confines of police station interrogation rooms, the Supreme Court held “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”⁸⁰ Seeing that police were not afraid to use a myriad of abusive physical and psychological tactics to secure confessions,⁸¹ the court proscribed a set of specific warnings. The purpose of the warnings is to apprise a suspect of his rights while, at the same time, setting certain fixed parameters for law enforcement agents to follow in the per-

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

75. See *Miranda v. Arizona*, 384 U.S. 436, 446 (1966) (citing *People v. Portelli*, 15 N.Y.2d 235 (1965) (finding the police brutally beat, and placed lighted cigarette butts on the back of a witness to secure an incriminating statement against a third party suspect)).

76. See *id.* at 447 (citing IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931)). The Wickersham Report was the product of a Presidential Commission created in the early 1930s, which reported its findings of police brutality and questionable interrogation practices directly to Congress.

77. See *id.* (citing 1961 Comm’n on Civil Rights Rep., Justice, pt. 5, 17). In 1961, the Commission on Civil Rights found evidence that police were still using physical force to secure confessions. It discovered incidents of brutal physical beating, use of cigarette butts, extended incarceration in conjunction with deprivation of food, and many other deplorable practices. See *id.*

78. See *id.* at 448-49. The court reviewed police manuals which outlined various tactics and procedures used generally around the country. In addition, the court noted that the texts professedly contained the most enlightened and effective means known to improve the success of interrogations and increase the likelihood of obtaining a confession. See *id.*

79. See *id.* at 457. “It was clear, to the majority at least, that all these tactics were employed “for no other purpose than to subjugate the individual to the will of his examiner.” *Id.*

80. *Id.* at 444.

81. See *id.* at 448 (citing *Chambers v. State of Florida*, 309 U.S. 227). Modernly, however, the more common form of abuse is psychological. “The blood of the accused is not the only hallmark of an unconstitutional inquisition.” Civil Rights, *supra* note 74.

formance of their duties.⁸²

The safeguards enunciated by the court were and remain: (1) that the suspect has the right to remain silent, (2) that anything said can and will be used against the suspect in court, (3) that the suspect has the right to consult with an attorney before questioning, and to have him present during questioning, and (4) that the suspect has the right to have an attorney appointed if the suspect cannot afford an attorney.⁸³ Relying on precedent,⁸⁴ the Court reaffirmed that the basis for its holding was fashioned on constitutional grounds.⁸⁵ For this basis of constitutional authority, the court relied on the Fifth Amendment Privilege, which provides that no person should be forced to testify against himself.⁸⁶ The Court was concerned with the potential for suspects undergoing custodial interrogation to feel compelled to make statements as a result of the inherent pressure of the interrogation environment.⁸⁷ The *Miranda* Court specifically discussed several coercive interrogation techniques.⁸⁸ First, the interrogator engages the suspect by sympathizing with him.⁸⁹ For instance, the interrogator may begin by suggesting that the suspect certainly did not go looking for trouble, but was merely trying to protect himself.⁹⁰ This tactic normally evokes some statement that the prosecutor can use to negate a self-defense theory.⁹¹ Second, is the "Mutt and Jeff" routine.⁹² This is the bad cop, good cop play-acting technique.⁹³ The bad cop

82. One commentator has stated that, based on his years of experience as an F.B.I. instructor, he believes it is essential to law enforcement that clear guidelines be established for officers to follow. See Charles H. Whitebread, *The Burger Court's Counter-Revolution In Criminal Procedure*, 24 WASHBURN L.J. 471 (1985).

83. See *Miranda*, 384 U.S. at 468-71.

84. See *Escobedo v. State of Illinois*, 378 U.S. 478 (1964). The holding in *Escobedo* solidified the constitutionality of the right against self-incrimination and the right to an attorney, even though the holding was based on a Sixth Amendment analysis, as opposed to the Fifth Amendment analysis in *Miranda*.

85. See *Miranda*, 384 U.S. at 459-60.

86. See U.S. CONST. amend. V. "No person shall be held to answer for a capital, or otherwise infamous crime. . . nor shall be compelled in any criminal case to be witness against himself . . ." *Id.* (emphasis added).

87. See *Miranda*, 384 U.S. at 456 & n.24. In 1964, a Negro man of limited intelligence confessed to two brutal murders and a rape, which he did not commit. After learning of this, the prosecutor was reported as saying, "Call it what you want 'brain-washing, hypnosis, fright.' They made him give an untrue confession." N.Y. TIMES, Jan. 28, 1965, at 1. A more recent illustration of the abuses during interrogations occurred in *United State v. Van Metre* 150 F.3d 339 (4th Cir. 1998). In this case the defendant was held and interrogated for the better part of fifty-five hours before being arraigned. The confession was held to be admissible under the voluntariness test of § 3501 because the length of time between arrest and arraignment is only one factor to be considered. See *id.* at 348-49. This is exactly the type of a case that illustrates the potential for abuse under the § 3501 test.

88. See *Miranda*, 384 U.S. at 451-53.

89. See *id.* at 451-52.

90. See *id.*

91. See *id.*

92. See *id.* at 452.

93. See *id.*

acts irate and vocally suggests that he will do whatever it takes to get information to put the suspect away for life.⁹⁴ When the bad cop leaves the room, good cop says he will call off bad cop if suspect will cooperate.⁹⁵ This ploy also normally evokes some statement through creating a false trust in the good cop. Third, is good old trickery.⁹⁶ The most effective technique is the “reverse line-up.”⁹⁷ Here, a coached witness points out the suspect in a staged line-up, thereby implicating him in some fictional crime.⁹⁸ Normally the suspect will confess to the immediate crime to avoid being wrongfully associated with the made-up crime.⁹⁹

Even though the *Miranda* Court painstakingly discussed the evils of custodial interrogations, it is important to point out that it did not eliminate the usefulness of all statements made while in the presence of police. In fact, statements made after a defendant, “knowingly and intelligently waive[s] the privilege against self-incrimination and his right to retained or appointed counsel,” remain valid confessions.¹⁰⁰ But in order to waive one’s rights “knowingly and intelligently” it is essential that the *Miranda* warnings first be administered.¹⁰¹ The Court reasoned that regardless of the suspect’s education or background, the warnings are indispensable in order to assure the suspect knows those rights can be exercised immediately.¹⁰² Thus, if a suspect makes a valid waiver and then voluntarily confesses, the confession can be used without suffering the barring constraints imposed by the self-incrimination clause of the Fifth Amendment.¹⁰³

Likewise, the Court made clear that its holding does not force upon police the duty to become deaf when a confession is truly volunteered.¹⁰⁴ Rather, the holding creates and places well defined constraints on law enforcement agents seeking to initiate the confessional.¹⁰⁵ If a suspect initiates a

94. *See id.*

95. *See id.*

96. *See id.* at 453.

97. *See id.*

98. *See id.*

99. *See id.*

100. *Id.* at 475.

101. Explicit in the majority’s opinion is the need for the suspect to be advised of his rights if a valid waiver is to be established. Without the warnings, it is arguable that a knowing and intelligent waiver did not, nor could not take place. *See id.* at 469.

102. *See id.*

103. The Court conceded that confessions are an integral part of law enforcement and statements given freely and voluntarily will continue to be admissible evidence. *See id.* at 478.

104. For example, if a person walks into a police station and begins telling officers that he committed a crime, officers are not duty-bound to stop the person from speaking until the required warnings are administered. *See id.* The reason for this departure from the requirements of *Miranda* is that the confession is instigated by the defendant and given outside police custody. *See id.* It needs to be clear that *Miranda* applies to conversations initiated by the police and forced upon a suspect through police custody. *See id.*

105. *See id.*

conversation with a police officer there is no need for the *Miranda* warnings because the suspect is either not in custody, not being interrogated, or both.¹⁰⁶

B. *The Miranda Procedures*

The *Miranda* Court was fearful that its proscribed warnings would become nothing more than "empty formalities."¹⁰⁷ The Court recognized that the police could simply administer the warnings and then continue the interrogation outside the supervision of the suspect's attorney.¹⁰⁸ Therefore, in an effort to combat that fear, the Court provided clear-cut procedures for law enforcement agents to follow when apprehending a suspect for interrogation purposes.¹⁰⁹ First and foremost, the warnings must be given to everyone undergoing custodial interrogation.¹¹⁰ Any presumption regarding whether the suspect knows his rights is impermissible.¹¹¹

Warnings must precede the custodial interrogation in order to assure that a person can intelligently invoke the privilege.¹¹² If at any time a person invokes his right to remain silent, the police must honor that right by immediately ceasing all interrogation.¹¹³ The Court reasoned that if a statement is given after the suspect has invoked the right to remain silent, such a statement can only be the result of police compulsion.¹¹⁴ Thus, it must be held inadmissible.¹¹⁵

Likewise, if the suspect invokes the right to consult an attorney, this right must also be honored immediately.¹¹⁶ No further questioning can take place until the suspect's attorney is present.¹¹⁷ Such a requirement accomplishes two goals: (1) the suspect can give an honest account of his story because he will be more relaxed when accompanied by counsel; and (2) the presence of counsel will tend to diminish threats of duress or use of compel-

106. *See id.*

107. *Id.* at 466.

108. *See id.*

109. The Court did not rule out other alternatives. It left open for the States and Congress to adopt reforms that would assure an equal level of protection as those which it proposed, by way of its holding in *Miranda*. *See id.* at 467.

110. It is pure speculation to engage in an *ex post facto* assessment of the accused's level of knowledge or economic wherewithal, because the rights are too important and the warnings too simple not to be given to everyone. *See id.* at 469.

111. *See id.*

112. *See id.*

113. It has been held that after a suspect invokes his right to remain silent the police nonetheless can recommence questioning later. *See Michigan v. Mosely*, 423 U.S. 96 (1975) (holding that a two hour break between questioning did not violate *Miranda*, when the suspect was re-administered the warnings before questioning commenced).

114. *See Miranda*, 384 U.S. at 474.

115. *See id.* at 474, 476.

116. *See id.* at 474.

117. *See id.*

ling police tactics.¹¹⁸ In the event the attorney's presence does not satisfy these goals, the attorney can simply testify about any unlawful tactics used by the police.¹¹⁹

III. SUBSEQUENT AND APPROPRIATE NARROWING OF *MIRANDA*

A. *Harris, Hass, and Progeny Provide for Limited Use Through Impeachment*

While *Dickerson* is not alone in its attack on *Miranda*, it is the latest clear pronouncement of a growing trend in the area of custodial interrogation law; a trend with its aim on significantly narrowing or altogether eliminating *Miranda*. But ironically, the leading case fueling the controversy is the Supreme Court's own case, *Harris v. New York*.¹²⁰ There, the Court held that statements obtained in violation of the required *Miranda* warnings, while inadmissible in the prosecution's case-in-chief, are admissible for impeaching the defendant during cross-examination.¹²¹

The *Harris* Court refused to construe *Miranda* broadly.¹²² It reasoned that the constitutional privilege against self-incrimination, which *Miranda* was intended to protect, was not intended to provide a shield for the accused to hide behind when attempting to give perjurious testimony on the stand.¹²³ In other words, the accused should not be permitted to use *Miranda* as a sword during pre-trial motions to suppress illegally obtained statements, and thereafter be allowed to commit perjury knowing the statements have been suppressed.¹²⁴ Furthermore, the deterrent effect, which the *Miranda* ruling was intended to impose on police with respect to unlawfully obtained statements, is adequately satisfied by applying the exclusionary rule to bar the use of those statements from the prosecutor's case-in-chief.¹²⁵

The Supreme Court continued this line of reasoning in *Oregon v. Hass*.¹²⁶ *Hass* represents a case where the police openly violated *Miranda* by refusing to allow the suspect to call his attorney after the warnings were administered and the suspect made a specific request for counsel.¹²⁷ Nevertheless, the confession was held admissible for impeachment purposes.¹²⁸ The

118. *See id.* at 466.

119. *See id.* at 470.

120. 401 U.S. 222 (1971).

121. *See id.* at 226.

122. *See id.* at 226 n.2.

123. The Court agreed it was onerous to simply allow unlawfully obtained statements into evidence, but it was equally onerous to disallow use of a prior statement and allow the commission of perjury. *See id.* (citing *Walder v. United States*, 347 U.S. 62 (1954)).

124. *See id.*

125. *See id.*

126. *See Oregon v. Hass*, 420 U.S. 714, 723 (1975).

127. *See id.* at 715-16. After being read his rights, defendant realized he "was in a lot of trouble," and requested that he be able to call an attorney. *Id.* at 715.

128. The Court recognized that its holding might provide an incentive for police to

Harris and *Hass* rationale correctly safeguards constitutional rights, but does not allow the defendant to lie his way out of a conviction.

B. The Supreme Court's Reaffirmation of *Miranda*

In 1993, the Supreme Court showed its continued support of the *Miranda* doctrine, in *Withrow v. Williams*.¹²⁹ Justice Souter, stated that “[p]rophylactic” though it may be, in protecting a defendant’s Fifth Amendment privilege against self-incrimination, *Miranda* safeguards ‘a fundamental trial right.’¹³⁰ The issue in *Williams* centered around whether the rule in, *Stone v. Powell*,¹³¹ was applicable to federal habeas corpus actions.¹³² The *Stone* rule states that “when a State has given a full and fair chance to litigate a Fourth Amendment claim, federal habeas review is not available, to a state prisoner alleging that his conviction rests on evidence obtained through an unconstitutional search or seizure.”¹³³

The Supreme Court disagreed that the *Stone* rule should apply to all federal habeas review actions.¹³⁴ The Court concluded that unless the prosecution can establish that warnings were given and that a waiver occurred, the subsequent use of confessions in violation of *Miranda* deprives the suspect of his right to a fair trial.¹³⁵

Similarly, in *Minnick v. Mississippi*, the Supreme Court, again, placed its stamp of approval on the *Miranda* doctrine.¹³⁶ Before being questioned by two F.B.I. agents, Minnick was read the familiar *Miranda* rights. Minnick later requested an attorney, and at that point the interrogation stopped.¹³⁷

openly defy *Miranda*’s requirements, but the Court dismissed this potentiality as being purely a “speculative” concern. *Id.* Based on similar reasoning, the California Supreme Court recently held that purposeful violation of the *Miranda* warnings does not render statements obtained by police inadmissible for impeachment purposes. *See People v. Peevy*, 17 Cal. 4th 1184, 1196 (1998).

129. 507 U.S. 680 (1993). The defendant in this case was charged and later convicted of two counts of first-degree murder and possession of a firearm during the commission of a felony. The sentence was two concurrent life sentences. Defendant argued that his rights were violated because he was not administered the *Miranda* warnings until forty minutes after he had made incriminating statements. *See id.* at 684.

130. *Id.* at 691 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)).

131. 428 U.S. 465 (1976).

132. *See Withrow v. Williams*, 507 U.S. 680, 682-83 (1993).

133. *Id.* at 682. The Supreme Court concluded that the costs of applying the exclusionary rule in cases involving collateral review outweighed any advantages from applying it in those collateral actions. *See Stone*, 428 U.S. at 489-95.

134. *See Stone*, 428 U.S. at 687-88.

135. *See id.* at 690, 692-93.

136. *See Minnick v. Mississippi* 498 U.S. 146, 152 (1990). Robert Minnick and James Dyess escaped from a jail in Mississippi, and a day later broke into a mobile home to search for weapons. They were discovered by the homeowner and a friend, both of whom were shot and killed. The two escapees fled to Mexico and four months after the murders, Minnick was arrested in Lemon Grove, California. *See id.* at 148.

137. *See id.* at 149.

Minnick was appointed counsel who met with him two or three times.¹³⁸

On Monday of the following week, Deputy Sheriff J.C. Denham of Clark County, Mississippi, was in San Diego to question Minnick in connection with the murders.¹³⁹ This interrogation was conducted without Minnick's attorney present.¹⁴⁰ The Supreme Court held that *Miranda's* protection against interrogations taking place without the suspect's attorney present, is not terminated when the suspect consults with his attorney.¹⁴¹ Rather, the suspect has a right to have his attorney present during questioning, and the fact that consultation has taken place does not eliminate *Miranda's* requirement that counsel be present before interrogation is reinitiated.¹⁴²

It seems evident from the holdings in *Withrow* and *Minnick*, that the Supreme Court is unwilling to completely abolish the *Miranda* doctrine.¹⁴³ The Supreme Court has stated the reason for its adherence to the *Miranda* doctrine is "to give concrete constitutional guidelines for law enforcement agencies and courts to follow. As we have stressed on numerous occasions, '[o]ne of the principal advantages' of *Miranda* is the ease and clarity of its application."¹⁴⁴

IV. ARGUMENTS THAT SUPPORT MAINTAINING *MIRANDA*

A. *Public Policies Behind Miranda*

In addition to its constitutional basis, *Miranda* rests on sound public policy. In order for a government to remain strong, it must be the ultimate and consummate respecter of law.¹⁴⁵ Justice Brandeis put it this way:

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be im-

138. *See id.*

139. *See id.* Minnick contended, at trial, that his jailors told him he had to talk with Denham and that he "could not refuse." *Id.*

140. *See id.*

141. *See id.* at 150-51. The *Minnick* Court concluded that the right of counsel is not based solely on the Sixth Amendment grounds adhered to in *Edwards v. Arizona*, 451 U.S. 477 (1981), but also on Fifth Amendment grounds adhered to in *Miranda*. *See Minnick*, 498 U.S. at 152.

142. *See Minnick*, 498 U.S. at 152-53. The Court confirmed that this rule is intended to act as a check against police misconduct even though the *Miranda* rights have been administered. The protection is created by counsel's presence who can testify of any improprieties. *See id.*

143. *See generally Withrow*, 507 U.S. 680 (Supreme Court declined to extend the *Stone* rule to every criminal habeas review case on the premise that the *Miranda* Warnings safeguard fundamental trial rights); *Minnick*, 498 U.S. 146 (concluding that a suspect's right to counsel is not based solely on the Sixth Amendment grounds adhered to in *Edwards v. Arizona*, 451 U.S. 477 (1981), but also on Fifth Amendment grounds adhered to in *Miranda*).

144. *Arizona v. Roberson*, 486 U.S. 675, 680 (1988) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 430 (1984)).

145. *See generally Mapp v. Ohio*, 367 U.S. 643 (1961).

perilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution.¹⁴⁶

The Supreme Court agrees that allowing police to engage in questionable or outright unlawful practices will be the means of providing an incentive for all citizens to simply ignore, or worse, take the law into their own hands.¹⁴⁷ Requiring law enforcement agents to give persons in custody notice of their rights prior to questioning builds a positive public perception of law enforcement and increases trust in that institution. Opponents of *Miranda* claim it creates a sophisticated class of criminals who know exactly what their rights are, and as a result the likelihood of obtaining confessions is greatly reduced.¹⁴⁸

It has also been recognized, however, that during the same time period since *Miranda* was decided, technology and sophistication have changed law enforcement as well.¹⁴⁹ In fact, the doctrine is so prevalent that general law enforcement practices have changed to conform with it, and to such an extent, that it is hard to conceive of any difficulty, or even any unwillingness on the part of police to give the *Miranda* warnings.¹⁵⁰

Indeed, our entire system of criminal justice hinges on the ideal that suspects are presumed innocent until proven guilty.¹⁵¹ In order to sustain this ideal our criminal justice system models an accusatorial approach rather than an inquisitorial one.¹⁵² An accusatorial system requires a definite accuser and

146. *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

147. *See id.* at 485.

148. *See* Gilbert G. Gallegos, *Voluntary Confessions Law*, CONG. TESTIMONY, May 13, 1999, available in 1999 WL 16947867.

149. *See* *Withrow v. Williams*, 507 U.S. 680, 695 (1993).

150. *See id.* (citing *New York v. Quarles*, 467 U.S. 649, 663 (1984) (O'Connor, J., concurring in judgement in part and dissenting in part) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring in judgement)) (“meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures”). *Id.* This point was further bolstered during an interview with Mark Gardner, the Student Bar Association President at California Western School of Law, who prior to law school was a Police Sergeant with the Takoma Park Police Department, in Takoma Park, Maryland. During his six and a half years as a police officer, Mr. Gardner related that he was always trained to use and scrupulously adhere to *Miranda*. He said that the rule was clear and easy to administer, and provided a measure of protection for the officers when subsequently faced with claims of misconduct. In his opinion, and from his perspective as a prior police officer, *Miranda* is the safest route to follow. Interview with Mark Gardner, Student Bar Association President, California Western School of Law, in San Diego, Cal. (July 28, 1999).

151. *See generally* Lawrence Herman, *The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule* (Part I), 53 OHIO ST. L.J. 101 (1992).

152. The privilege against self-incrimination embodies “many of our fundamental values and most noble aspirations . . . our preference for an accusatorial rather than an inquisitorial

knowledge by the defendant of the charges against him.¹⁵³ A defendant is presumed innocent until proven guilty before a jury in a public trial.¹⁵⁴ In contrast, an inquisitorial approach allows a trial to proceed based simply on suspicion alone.¹⁵⁵

Regardless of what the Supreme Court has done since *Miranda* was decided, it is noteworthy to mention that the Supreme Court consistently applies *Miranda's* holding when determining the admissibility of confessions in state court proceedings.¹⁵⁶ This is critical because the Supreme Court can only "bind the state courts with rules that are *designed to implement and protect constitutional rights.*"¹⁵⁷ Yet, the Supreme Court has also announced that the *Miranda* warnings are not constitutionally protected, but rather, merely prophylactic in nature.¹⁵⁸ Despite this pronouncement by the Supreme Court, scholars and practitioners believe *Miranda* has enough of a constitutional basis that doing away with *Miranda* would essentially do away with Fifth Amendment rights.¹⁵⁹ While *Miranda* warnings may not be constitutionally protected, Fifth Amendment rights are, and eliminating *Miranda* warnings as they have evolved in American jurisprudence has the danger of seriously impeding them.¹⁶⁰

system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses . . ." *Withrow*, 507 U.S. at 692 (quoting *Murphy v. Waterfront Comm'n of New York Harbor*, 384 U.S. 52, 55 (1964)).

153. See Herman, *supra* note 151, at 106.

154. See *id.*

155. Often times the accused did not know the identity of the accuser, nor the charges because the entire process was shrouded in secrecy. See *id.* at 106.

156. See James K. Robinson, *Voluntary Confessions Law*, CONG. TESTIMONY, May 13, 1999, available in 1999 WL 16947870.

157. Robinson, *supra* note 156 (citations omitted) (emphasis added).

158. See *New York v. Quarles*, 467 U.S. at 654 (explaining that *Miranda's* proscribed set of warnings are merely prophylactic). See also *Michigan v. Tucker*, 417 U.S. 433, 444-46 (1974). The Supreme Court explained that the *Miranda* warnings are only prophylactic, and not constitutionally protected rights. In *Tucker*, defendant was charged with rape and battery based on the testimony of a friend, whose identity was disclosed to police through a confession obtained after an incomplete set of warnings were given. The defendant told the officers he understood the charge against him, that he did not want an attorney, and that he understood his rights. See *id.* at 436. The *Tucker* Court concluded that the defendant's statements were not taken in violation of his constitutional rights, but that police conduct "departed only from the prophylactic standards . . . laid down by this Court in *Miranda* to safeguard that privilege." *Id.* at 446.

159.

Paul Smith, following the case for the National Association of Criminal Defense Lawyers, said the federal statute should be invalidated. "There's enough of a constitutional aspect to *Miranda* that Congress cannot take away the rights it provided," Smith said. "If you don't force police to give the warnings, you effectively are taking away the rights."

Carelli, *supra* note 18, at A19.

160. One commentator suggests

that current developments in Fifth Amendment jurisprudence actually encourage

CONCLUSION

One thing is certain, the debate between *Miranda* and Section 3501 will continue until the Supreme Court clarifies which of the two approaches will be the governing rule in America. More important however, is upon which rule will the Supreme Court place its imprimatur? A wealth of scholarly effort has been spent on both sides of the *Miranda* debate. The conclusion reached by this article is this that *Miranda* is still a viable doctrine and should be maintained as the standard by which confessions are evaluated for admissibility.

The danger of abandoning *Miranda's* "irrebuttable presumption" in favor of Section 3501's voluntariness test is that it is unclear just what warnings are absolutely required under Section 3501. For well over three decades, the rule has been clear under *Miranda* that all of the proscribed set of warnings must be given when police place a suspect in custody for the purpose of interrogation. By contrast, the risk of inconsistent results looms large under the "totality of the circumstances" approach of Section 3501. For in one instance, the lack of warning to a suspect of his right to consult with counsel may not prove critical in the court's analysis, and the confession may be admitted without this important warning ever being given. Yet, a totally different result may obtain in a factually similar case because a different court finds it critical that a suspect was not advised of the right to consult with an attorney.

This confusion need not even exist because *Miranda* is a workable doctrine, which has been properly circumscribed by the very Court which created it. The limited use of confessions to impeach the suspect is proper. The Framers of the Constitution intended the Fifth Amendment Privilege to be a means of protection against a suspect being compelled to provide evidence of his own guilt, and not to commit perjury. Adherence to *Miranda's* holding safeguards a person's Constitutional rights under the Fifth Amendment. At the same time, *Harris* and its progeny provide an appropriate balance of interests by disallowing an accused, in a criminal trial, to make a mockery of the judicial system by committing perjury without impunity.

law enforcement officials to violate the standards of conduct imposed upon them by the *Miranda* decision, and that . . . [t]his problem can be solved only if the Supreme Court reconstitutionalizes *Miranda*, at least to the extent necessary to enforce those restraints on state and federal officials that it initially found crucial to properly safeguarding an individual's Fifth Amendment privilege against self-incrimination. Failing this, the Court should cease promulgating prophylactic rules that it cannot or will not enforce, both to avoid losing institutional prestige and to curb the shift in constitutional interpretive authority from itself to the executive branches of state and federal governments.

Klein, *supra* note 61, at 418.

Therefore, based on these proper Supreme Court limitations, a general prosecutorial favoritism toward *Miranda*, the F.B.I.'s long-standing adherence to the warnings, and the ease of administering *Miranda*, the Supreme Court should hold that *Miranda* is the appropriate standard and not Section 3501.

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