# BASEBALL, HOT DOGS, APPLE PIE, AND *MIRANDA* WARNINGS

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## I. INTRODUCTION

Almost all Americans over the age of ten know the *Miranda* warnings.[1] Many have them memorized. Over time, legal rules from *Miranda* have evolved, yet most people know that they have the right to remain silent and the right to have an appointed attorney if they cannot afford one.[2] That knowledge was not, however, always as common as it is today.[3]

When the United States Supreme Court first adopted the *Miranda* rule, it was new and exotic.[4] At times, it was said to be a prophylactic rule subject to amendment or revocation by Congress.[5] There were some early efforts to

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

2. Ronald J. Rychlak, *The Right to Remain Silent in Light of the War on Terror*, 10 CHAP. L. REV. 663, 663 (2007). "If a suspect is interrogated while in custody, the officer has to inform the suspect of his or her rights to remain silent and to have an attorney present for questioning, and the suspect must waive those rights or statements made by the suspect will be inadmissible at trial." *Id.* at 663 n.2.

3. *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 113–17 (1998).

4. *See* Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 437 (1987) (noting that "*Miranda* rejected a long line of precedent").

5. *See, e.g.*, Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 940 (1999) (noting that *Miranda* rights have been called prophylactic). For an interesting treatment, see Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071 (2017). Baughman defines "[s]ubconstitutional checks [as] stopgaps formed to effectuate the rights in the Constitution when the system is stalled in dysfunction, when one branch has subjugated the others, or when one branch has colluded with another." *Id.* at 1074. She notes that these checks "are not derived explicitly from constitutional language but from an interest in protecting explicit constitutional structure and to give substance to specifically enumerated constitutional rights." *Id.*

do just that.[6] As time went by, however, people became accustomed to the rule.[7] It became an accepted part of American life.[8] As this acceptance happened, *Miranda* also became more than prophylactic. Today, even though aspects of it may be confusing,[9] *Miranda* is built into the American culture.[10] As such, the Supreme Court has properly come to view *Miranda* as a fully constitutional rule.[11]

## II. DEVELOPMENT OF THE LAW OF SELF-INCRIMINATION

Police and prosecutors often consider confessions to be persuasive—sometimes even conclusive—and a necessary part of the criminal legal system.[12] Suspects, however, do not confess their sins to police officers in order to be forgiven.[13] As one author articulated, "[B]y any standards of human discourse, a criminal confession can never truly be called voluntary. With rare exception, a confession is compelled, provoked and manipulated from a suspect by a detective who has been trained in a genuinely deceitful art."[14]

Too often, if suspects are *permitted* to testify at all, they end up being *coerced* to testify against themselves.[15] Moreover, investigators throughout history have resorted to tactics—some of them unsavory—to encourage statements from suspects.[16] Dating back to 866, Pope Nicholas I wrote:

> If a [putative] thief or bandit is apprehended and denies the charges against him, you tell me your custom is for a judge to beat him with blows to the head and tear the sides of his body with other sharp iron goads until he

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at 1074–75.

6. *See* Landsberg, *supra* note 5, at 925, 925 n.4; *infra* Part IV (discussing Congress's attempt to overrule *Miranda*).

7. *See* Dickerson v. United States, 530 U.S. 428, 430 (2000); Tonja Jacobi, Miranda *2.0*, 50 U.C. DAVIS L. REV. 1, 16–17 (2016).

8. *See Dickerson*, 530 U.S. at 430.

9. *See* David A. Thompson, *You Have the Right to Understand* Miranda*: A Proposal for the Next 50 Years*, 63 FED. LAW. 50, 54 (2016).

10. *See Dickerson*, 530 U.S. at 430.

11. *See id.* at 444.

12. *See* Jacobi, *supra* note 7, at 7–9.

13. *See infra* text accompanying notes 34–35 (discussing the complexity of confessions and their tendency to be involuntary).

14. DAVID SIMON, HOMICIDE 208 (1991).

15. Under traditional Jewish law, confessions—even when not disputed by the defendant—are not admissible. Samuel J. Levine, *An Introduction to Self-Incrimination in Jewish Law, with Application to the American Legal System: A Psychological and Philosophical Analysis*, 28 LOY. L.A. INT'L & COMP. L. REV. 257, 268 (2006) ("Because human life remains within God's province, human beings may not offer a legally valid confession resulting in their lives being taken, or in another form of corporal or capital punishment.").

16. *See, e.g.*, GLANVILLE WILLIAMS, THE PROOF OF GUILT: A STUDY OF THE ENGLISH CRIMINAL TRIAL 38–41 (2d ed. 1958) (discussing historic interrogation tactics).

> confesses the truth. Such a procedure is totally unacceptable under both divine and human law . . . . After all, if it should happen that even after inflicting all these torments, you still fail to wrest from the sufferer any self-incrimination regarding the crime of which he is accused, will you not then at least blush for shame and acknowledge how impious is your judicial procedure? Likewise, suppose an accused man is unable to endure such torments and so confesses to a crime he never committed.[17]

During the days of the Star Chamber, "procedures such as the rack and other instruments of torture were used to obtain confessions."[18] As a result of growing concern over harsh tactics, judges gradually developed the right to remain silent.[19] In fact, due to these harsh tactics, Great Britain eventually prohibited all parties from testifying at their own trials, including criminal defendants.[20]

As might be expected, the complete ban on testimony from all parties was eventually recognized as an obstacle to the pursuit of truth, and the rule that parties were incompetent was overturned.[21] With that development, criminal defendants once again could testify, but they were also given the right to remain silent.[22] Judges, however, were permitted to comment on

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17. Brian W. Harrison, *The Church and Torture*, THIS ROCK, Dec. 2006, at 23, 25 (quoting Pope Nicholas I, *Ad Consulta Vestra* ch. 86 (Nov. 13, 866)) (first alteration in original). "Nicholas went on to suggest a different approach based on scripture (Hebrews 6:16), which involved making the person swear innocence on the Holy Gospel and accepting his word at that point." Rychlak, *supra* note 2, at 666 n.12 (citing *Medieval Sourcebook: The Responses of Pope Nicholas I to the Questions of the Bulgars A.D. 866 (Letter 99)*, FORDHAM U., http://www.fordham.edu/halsall/basis/866nicholas-bulgar.html (last visited Oct. 25, 2017)).

18. Rychlak, *supra* note 2, at 667 n.16 (citing WILLIAMS, *supra* note 16, at 38–41). The Star Chamber was an English court that existed from the late 14th century until about 1641. Edward P. Cheyney, *The Court of Star Chamber*, 18 AM. HIST. REV. 727, 727 (1913). The Star Chamber was established to ensure the fair enforcement of laws against socially and politically prominent people that ordinary courts might be hesitant to sanction. *See id.* at 729–30. Due to the arbitrary use and abuse of its power, the Star Chamber eventually became synonymous with social and political oppression. *See id.* at 749. The *Miranda* opinion noted both the history of the "third degree" and the danger of false confessions. Miranda v. Arizona, 384 U.S. 436, 445–51 (1966). The *Miranda* opinion described the modern interrogation process as "psychologically rather than physically oriented." *Id.* at 448.

19. WILLIAMS, *supra* note 16, at 42–43 (chronicling the development of the right to remain silent over centuries); *see also Miranda*, 384 U.S. at 459 n.27 (remarking on how some commentators point to analogous principles in the Bible); CHARLES TILFORD MCCORMICK, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 244 n.2 (Edward W. Cleary ed., 2d ed. 1972) (describing the privilege dating back to canon law); David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1064 (1986) (characterizing the privilege as a historical relic).

20. *See* Scott Rowley, *The Competency of Witnesses*, 24 IOWA L. REV. 482, 485–90 (1939).

21. WILLIAMS, *supra* note 16, at 45–48 (noting that the House of Commons passed the Criminal Evidence Act of 1898 in an attempt to counteract unmerited acquittals caused by defendants not testifying). *See generally* Criminal Evidence Act 1898, 61 & 62 Vict. c. 36 (Eng.) (changing the rules for witness competency in Great Britain).

22. *See* Criminal Evidence Act 1898, 61 & 62 Vict. c. 36, § 1(a) (Eng.) (stating that a charged person "shall be a competent witness," but "shall [only] be called . . . upon his own application").

whether a defendant had testified, meaning that the fact was relevant.[23] Additionally, the new procedures compelled a defendant to answer incriminating questions if he elected to testify.[24]

Despite the restriction contained in the Fifth Amendment, early American courts followed the British practice of permitting prosecutors to introduce confessions, even if law enforcement officers had infringed on the rights of those who had been interrogated.[25] Outcomes hinged on whether the confession was reliable.[26] The concern was that suspects often confessed solely in order to end an interrogation.[27] Consequently, American confession law focused on reliability well into the twentieth century.[28]

In 1944, the Supreme Court in *Ashcraft v. Tennessee* addressed an interrogation method called the "third degree," which was considered aggressive at the time.[29] This involved techniques designed to bring forth confessions without brutal force, but it employed tactics such as bright lights, questioning that stretched over several hours, and sleep deprivation.[30] In the end, the Court determined that, if the manner of the interrogation was "inherently coercive," any resulting confession would be inadmissible, even if it appeared reliable.[31] An important takeaway from this case is that "if impermissible methods were used, a confession would be inadmissible

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23. *See* WILLIAMS, *supra* note 16, at 59–61. The privilege against self-incrimination was extended to criminal suspects in Great Britain for over 400 years. *Id.* at 42–43 (detailing the experience of a defendant who was imprisoned for remaining silent in response to the judge's questions and then released by the 1568 Court of Common Pleas).

24. *See id.* at 59–61.

25. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 294 (2d ed. 1992).

26. *See id*. ("[T]he question was put in terms of whether the defendant's confession had been induced by a promise of benefit or threat of harm, while on other occasions the inquiry was more directly put in terms of whether the circumstances under which the defendant had spoken impaired the reliability of the confession.").

27. *Compare* Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523, 529 (1999) [hereinafter Cassell, *The Guilty*] (stating that "false confessions occur quite infrequently"), *with* Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 430 (1998) (arguing that false confessions are common). The actual number of false confessions is unknown and probably unknowable; it is certainly subject to debate.

28. Rychlak, *supra* note 2, at 667; *see also* Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 863 (1979) (arguing that the Court's failure to articulate its policy purposes has led to similar ambiguity in the law of confessions and the due process voluntariness doctrine); Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 494 (2006).

29. Ashcraft v. Tennessee, 322 U.S. 143, 150–52 (1944).

30. *Id.* at 150 n.6. The Court held that Ashcraft's confession was induced by the officers' continual relay-style interrogation over a period of thirty-six hours and therefore was involuntary and compelled, rendering it inadmissible. *Id.* at 153–54.

31. *Id.* at 154; *see also* Watts v. Indiana, 338 U.S. 49, 50 n.2 (1949) (citing Lisenba v. California, 314 U.S. 219, 236–37 (1941)) (explaining that a confession must be the product of the defendant's free will in order to be deemed voluntary and thereby admissible, even though statements not given by free will may be reliable).

regardless of the impact that the methods had on that particular defendant."[32] As a result, the "voluntariness" test was created.[33]

Of course, to some extent, all confessions are involuntary.[34] Critics also argued that the voluntariness standard was too easy for interrogators to circumvent because it only prohibited the admission of statements that had been obtained by "interrogation methods that would exert so much pressure that the suspect would admit to facts regardless of whether she believed in the truth of the facts admitted."[35] Nevertheless, the voluntariness test remains valid, even though it has been largely supplanted by *Miranda*.[36]

In the late 1950s, the Supreme Court put in place the *McNabb-Mallory* rule.[37] It was built upon a federal statute[38] and Federal Rule of Criminal Procedure 5(a).[39] The *McNabb-Mallory* rule held that a federal criminal defendant must be arraigned "without unnecessary delay" and that any confession obtained during a delay not deemed necessary could be excluded in a subsequent prosecution.[40] However, this rule was eventually supplanted

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32. *Ashcraft*, 332 U.S. at 160. "The Court has noted, however, that the characteristics of a particular defendant might subject him or her to particular peril." *Id.* at 668 n.29; *see* Colorado v. Connelly, 479 U.S. 157, 165 (1986) ("[M]ental condition is surely relevant to an individual's susceptibility to police coercion . . . ."). In *Connelly*, a man felt compelled to act based on the voices he heard. *Connelly*, 479 U.S. at 161. One of his acts was to make a confession. *Id.* at 174–75 (Brennan, J., dissenting). Lower courts were persuaded by the testimony of psychologists and concluded that the defendant's confession was not voluntary and therefore, inadmissible. *Id.* at 162. However, the Supreme Court reversed, holding that there must be "coercive police activity" for a confession to be involuntary. *Id.* at 167. Because there was none here, the confession was not involuntary. *Id.* at 166–67.

33. *See generally* RONALD J. RYCHLAK & MARC M. HARROLD, MISSISSIPPI CRIMINAL TRIAL PRACTICE 123–24 (West 2004).

34. *See* Weisselberg, *supra* note 3, at 154. "Although confession may be good for the soul, it is lousy for the defense. Thus, in a typical case, to obtain statements from unwilling suspects, officers themselves must employ some form of deception." *Id*. (footnote omitted); *see* PETER BROOKS, TROUBLING CONFESSIONS 8–64 (2000) (discussing some of the deep-seated psychological and cultural reasons why suspects choose to speak to the police and confess); Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1828–29 (1987) (discussing a suspect's "almost irresistible impulse to respond to . . . accusations"); Claudio Salas, Note, *The Case for Excluding the Criminal Confessions of the Mentally Ill*, 16 YALE J.L. & HUMAN. 243, 254–55 (2004) (listing reasons why suspects feel compelled to confess).

35. Welsh S. White, *What Is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001, 2011–12 (1998).

36. RYCHLAK & HARROLD, *supra* note 33, at 124 (applying the voluntariness test at the state level); *see* YALE KAMISAR, POLICE INTERROGATIONS AND CONFESSIONS: ESSAY IN LAW & POLICY 86–87 (1980) (observing that "a cogent criticism of the old 'voluntariness' test also applies to *Miranda*," that is because the critical events occur in secrecy; the admissibility of the confession will be determined by the outcome of a "swearing contest" in court).

37. *See* Mallory v. United States, 354 U.S. 449, 453 (1957); McNabb v. United States, 318 U.S. 332, 341–42, 345 (1943).

38. *See* 18 U.S.C. § 595 (1940) ("It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial . . . .").

39. *See* FED. R. CRIM. P. 5(a).

40. United States v. Alvarez-Sanchez, 511 U.S. 350, 354 (1994).

by *Miranda*, one of the reasons being that it was never made binding on the states.[41]

The Warren Court, in the 1960s, radically changed the way society dealt with criminal suspects and criminals. "Prior to that time, protections afforded [to] defendants in state criminal proceedings (where most criminal cases are tried) were often quite limited. The Bill of Rights applied only to the federal government . . . ."[42] The Fourteenth Amendment, which applied to the states, had an "independent potency" and did not rely on the Bill of Rights.[43]

Only the fundamental rights deemed "implicit in the concept of ordered liberty" were provided to criminal defendants through the Fourteenth Amendment.[44] This was a very short list of rights for criminal defendants, including only those rights that must be accorded to defendants in any just society.[45]

During the 1960s, under Chief Justice Earl Warren, the Supreme Court began to apply a new reading to the Fourteenth Amendment.[46] The Court moved to "selective incorporation" of provisions in the Bill of Rights rather than looking for fundamental rights contained in the concept of ordered liberty.[47] In doing this, the Court dramatically reshaped American criminal procedure and provided all of the following rights to state criminal defendants: the exclusionary rule in the case of unreasonable searches and seizures;[48] the ban on cruel and unusual punishment;[49] the right to an attorney in felony cases;[50] the right to remain silent;[51] the right to confront opposing

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> "The so-called *McNabb-Mallory* rule . . . generally rendered inadmissible confessions made during periods of detention that violated the prompt presentment requirement of Rule 5(a) of the Federal Rules of Criminal Procedure. Rule 5(a) provides that a person arrested for a federal offense shall be taken 'without unnecessary delay' before the nearest federal magistrate, or before a state or local judicial officer authorized to set bail for federal offenses under 18 U.S.C. § 3041, for a first appearance, or presentment." *Id.* at 353.

41. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

42. Rychlak, *supra* note 2, at 668 (citing Adamson v. California, 332 U.S. 46, 66 (1947)); *see* Victor Li, *The 14th: A Civil War-Era Amendment Has Become a Mini-Constitution for Modern Times*, 103 A.B.A. J. 36, 36–45 (2017) (providing an interesting review of the Fourteenth Amendment).

43. Palko v. Connecticut, 302 U.S. 319, 324–28 (1937).

44. *Id.*

45. *Id.* A modern case involving the ordered-liberty doctrine, *McDonald v. Chicago*, examined a challenge to Chicago's gun control legislation. *See generally* McDonald v. Chicago, 561 U.S. 742 (2010). In *McDonald*, the Court held that the Second Amendment right was thought by ratifiers of the 14th Amendment to be "among those fundamental rights necessary to our system of ordered liberty" and is therefore rightfully enforceable against the states. *Id.* at 778.

46. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 654–55 (1961).

47. *See Adamson*, 332 U.S. at 51–54 (advancing the selective-incorporation doctrine).

48. *See Mapp*, 367 U.S. at 655. *See generally* RYCHLAK & HARROLD, *supra* note 33, at 65; Ronald J. Rychlak, *Replacing the Exclusionary Rule: Fourth Amendment Violations as Direct Criminal Contempt*, 85 CHI.-KENT L. REV. 241 (2010).

49. *See* Robinson v. California, 370 U.S. 660, 667 (1962).

50. Gideon v. Wainwright, 372 U.S. 335, 342 (1963); RYCHLAK & HARROLD, *supra* note 33, at 163.

51. *See* Malloy v. Hogan, 378 U.S. 1, 6 (1964); RYCHLAK & HARROLD, *supra* note 33, at 121.

witnesses;[52] the right to a speedy trial;[53] the right to subpoena defense witnesses to appear at trial;[54] the right to jury trials;[55] and protection against double jeopardy.[56] In 1972, the death penalty, as it was then applied, was declared unconstitutional.[57] And in 1973, states were no longer able to prohibit abortion during the beginning stages of pregnancy.[58]

As to interrogations and confessions, the Supreme Court originally introduced a rule based upon the Sixth Amendment.[59] In *Massiah v. United States*, the Court held that a suspect's statements cannot be "deliberately elicited" by the police after the suspect has been indicted or other judicial proceedings have begun unless the suspect has an attorney present.[60] The following month, the Court created the "focus" test in *Escobedo v. Illinois*, which applied the right to counsel as soon as an investigation focused on the accused and had a purpose of eliciting a confession.[61] The following year, the Court switched to a Fifth Amendment analysis.

## III. *MIRANDA V. ARIZONA*

"The Fifth Amendment protects an individual from being 'compelled in any criminal case to be a witness against himself.'"[62] In *Miranda*, the Supreme Court collectively examined the facts of four different cases and developed what has been called "a complex series of holdings."[63] A suspect's voluntary confession made in a custodial setting was inadmissible unless the suspect had been given four warnings before the confession:

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52. *See* Pointer v. Texas, 380 U.S. 400, 403 (1965).

53. *See* Klopfer v. North Carolina, 386 U.S. 213, 222–23 (1967).

54. *See* Washington v. Texas, 388 U.S. 14, 23 (1967).

55. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

56. *See* Benton v. Maryland, 395 U.S. 784, 787 (1969) (discussing protections against double jeopardy).

57. *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam); *see also* RYCHLAK & HARROLD, *supra* note 33, at 462.

58. *See* Roe v. Wade, 410 U.S. 113, 164 (1973); *see also* Ronald J. Rychlak, *Abortion, Thinking Americans, and Judicial Politics*, 14 LIFE AND LEARNING 77, 85–86 (2004) (discussing the moral dilemma of abortions early in pregnancy).

59. "Until 1964, the Court held that the Fifth Amendment did not apply to the states." Rychlak, *supra* note 2, at 670 n.51; *see, e.g.*, Malloy v. Hogan, 378 U.S. 1, 6 (1964).

60. Massiah v. United States, 377 U.S. 201, 206 (1964). This test remains valid even today, after the Supreme Court decided *Miranda*. *See, e.g.*, Fellers v. United States, 540 U.S. 519, 523–24 (2004).

61. Escobedo v. Illinois, 378 U.S. 478, 492 (1964).

62. Rychlak, *supra* note 2 (quoting U.S. CONST. amend. V). "Before *Miranda*, 'compulsion' to testify meant legal compulsion so that the witness faced the potential of perjury or contempt." *Id.* at 671 n.54; *see* Schulhofer, *supra* note 4, at 437–38 (analyzing the constitutional interpretation of the Fifth Amendment when applied to informal compulsion—which involves rejecting much precedent).

63. Schulhofer, *supra* note 4, at 436 (discussing the multiple cases decided by *Miranda*).

> (1) that he had the right to remain silent, (2) that any statement could be used against him, (3) that he had the right to have an attorney present at any questioning, and (4) that he had the right to have an attorney appointed if [he] was without funds.[64] While the Court pointed out that these rights could be waived, such a waiver would be examined to ensure it was made both "knowingly and intelligently."[65]

The *Miranda* decision itself raised questions about the constitutional status of these rules.[66] In *Miranda*, Chief Justice Warren wrote for the Court that these warnings were procedural "safeguards" which effectively secured the Fifth Amendment privilege against self-incrimination.[67] An accused person "must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored" to ensure that he is not coerced into self-incrimination.[68] The Court said that its holding was not intended to create a "constitutional straitjacket," and it encouraged both Congress and the states to creatively search for other ways to enforce criminal laws while still protecting the rights of suspects.[69] The Court went on to explain:

> [W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.[70]

The important limitation put on this explanation, however, was that "unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the [*Miranda*] safeguards must be observed."[71]

This understanding of the *Miranda* rule fit perfectly with the concept of rights that are incorporated into the Fourteenth Amendment (and hence binding against the states) only if they were "fundamental to the American

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64. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966).

65. *Id.*; *see* Oregon v. Hass, 420 U.S. 714, 722 (1975); RYCHLAK & HARROLD, *supra* note 33, at 129 (explaining that the Court later permitted the use of pre-warning statements for impeachment purposes only and disallowed it for substantive evidence).

66. *Miranda*, 384 U.S. at 467.

67. *Id.* at 444.

68. *Id.* at 467.

69. *Id. But see* Dickerson v. United States, 530 U.S. 428, 443–44 (2000) (finding 18 U.S.C. § 3501 to be unconstitutional).

70. *Miranda*, 384 U.S. at 467.

71. *Id.*

scheme of justice."[72] The Fifth Amendment right to due process was certainly fundamental to the American system.[73] A similar argument might even be made for the defendant's right not to be compelled to testify; however, in the early 1960s, the concept of a police officer providing legal advice to an arrestee—particularly advice on how not to self-incriminate—was not conceivable to most Americans.[74]

On the other hand, Chief Justice Warren gave some indications that the holding was constitutional in stature. He wrote about the need "for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."[75] He explained that the Court granted certiorari in *Miranda* "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."[76] Later in the opinion, Warren noted 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."[77] He explained:

> As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when *Escobedo* was before us, and it is our responsibility today. Where rights secured by the Constitution are involved, there can be no rulemaking or legislation which would abrogate them.[78]

Further evidence in support of the rule as one of constitutional magnitude is that, under *Miranda*, both federal and state officials have to provide the warnings.[79] Because the Supreme Court may only create rules of evidence for states when dealing with matters of constitutional magnitude, the Court must have found the warnings to be constitutionally required.[80] Even more tellingly, when turning to the facts pertaining to the custodial

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72. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

73. *See Miranda*, 348 U.S. at 468.

74. *See* Bruce Peabody, *Fifty Years Later, the* Miranda *Decision Hasn't Accomplished What the Supreme Court Intended*, WASH. POST (June 13, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/13/your-miranda-rights-are-50-years-old-today-heres-how-that-decision-has-aged/?wpisrc=nl_politics&wpmm=1 ("[A] Harris poll conducted a few months after the [*Miranda*] opinion found that 57 percent of respondents thought it was 'wrong,' with only 30 percent calling it 'right.'").

75. *See Miranda*, 384 U.S. at 439.

76. *Id.* at 441–42.

77. *Id.* at 490.

78. *Id.* at 490–91 (citing Escobedo v. Illinois, 378 U.S. 478 (1964)).

79. *Id.* at 497–99.

80. *Id.* at 506.

interrogation of Ernesto Miranda, the Court "concluded that statements were obtained from the defendant under circumstances that *did not meet constitutional standards for protection of the privilege*."[81]

The constitutional status of the *Miranda* warnings seemed to solidify in subsequent cases. In *Mathis v. United States*, the Court explained that, "[i]n the *Miranda* case this Court's opinion stated at some length the *constitutional* reasons why one in custody who is interrogated by officers about matters that might tend to incriminate him is entitled to be warned . . . ."[82] In *Orozco v. Texas*, the Court excluded a confession because it was "obtained in the absence of the required warnings [and] was a flat violation of the Self-Incrimination Clause of the Fifth Amendment as construed in *Miranda*."[83]

While the Warren Court had indicated that the *Miranda* warnings were of constitutional dimension, that understanding did not go unchallenged.[84] President Nixon appointed Warren Burger as Chief Justice in 1969. Following this appointment, the Burger Court went in a new direction. For example, in *Michigan v. Tucker*, Justice Rehnquist explained that the *Miranda* warnings were not "themselves rights protected by the Constitution but were instead measures to ensure that the right against compulsory self-incrimination was protected."[85] Rehnquist later called the warnings requirement a Court-created prophylactic rule rather than a constitutional necessity.[86]

The view of *Miranda* as being less than fully constitutional seemed to solidify by the 1980s. Justice O'Connor, in *Oregon v. Elstad*, explained that "errors . . . made by law enforcement officers in administering the prophylactic *Miranda* procedures . . . should not breed the same irremediable

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81. *Id*. at 491 (emphasis added); *see also* Yale Kamisar, *Foreword: From* Miranda *to § 3501 to* Dickerson *to* . . . , 99 MICH. L. REV. 879, 883 (2001) ("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.").

82. Mathis v. United States, 391 U.S. 1, 3 (1968) (emphasis added).

83. Orozco v. Texas, 394 U.S. 324, 326 (1969).

84. *See generally, e.g.*, Michigan v. Tucker, 417 U.S. 433 (1974); *see also* cases cited *infra* note 86 (illustrating how several aspects of the *Miranda* warnings are not protected by the Constitution).

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

86. *See* Davis v. United States, 512 U.S. 452, 457 (1994) (describing the *Miranda* warnings as a "series of recommended 'procedural safeguards' . . . [that] were not themselves rights protected by the Constitution . . . ." (alterations in original) (quoting *Tucker*, 417 U.S. at 443–44)); *see also* Withrow v. Williams, 507 U.S. 680, 690 (1993) ("*Miranda*'s safeguards are not constitutional in character."); Connecticut v. Barrett, 479 U.S. 523, 528 (1987) (explaining that the prohibition on further questioning—like other aspects of *Miranda*—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose); Moran v. Burbine, 475 U.S. 412, 424 (1986) (quoting New York v. Quarles, 467 U.S. 649, 654 (1984) (observing that it is well established that the *Miranda* warnings are not themselves rights protected by the Constitution)).

consequences as police infringement of the Fifth Amendment itself."[87] The Court continued to explain that "[t]he *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."[88] In *Duckworth v. Eagan*, the Court reaffirmed that "[t]he prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'"[89]

## IV. THE REACTION TO *MIRANDA*

*Miranda* has been called the Warren Court's "most controversial criminal procedure decision hands down."[90] Professor Henry Abraham wrote that *Miranda* "must rank as the most bitterly criticized, most contentious, and most diversely analyzed criminal procedure decision by the Warren Court."[91] Jacob Fuchsberg, a former president of the American Trial Lawyers Association, said that "[t]he Supreme Court's decision in *Miranda v. Arizona* virtually puts an end to the effective use of criminal confessions."[92] Later, Professor Ed Quevedo wrote that *Miranda* seemed to mark "the end of the world as we know it if you were reading the papers . . . . People thought it would lead to lawlessness, police would be handcuffed; we wouldn't be able to investigate crimes, [and] we couldn't punish perpetrators."[93]

In 1968, presidential candidate Richard Nixon took aim at *Miranda* in a position paper on crime entitled *Toward Freedom from Fear*.[94] He "urged Congress to pass a bill overturning *Escobedo* and *Miranda* and restore the

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87. Oregon v. Elstad, 470 U.S. 298, 309 (1985). The Court held that "fruit" of a non-coercive *Miranda* violation, at least when the fruit is a subsequent confession, need not be suppressed. *Id.* at 304.

88. *Id.* at 306; *accord Withrow*, 507 U.S. at 690–91.

89. Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (alterations in original) (quoting *Tucker*, 417 U.S. at 444).

90. Paul G. Ulrich, *What Happened to* Miranda*? A Decision and Its Consequences*, 72 J. MO. B. 204, 204 (2016) (quoting LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 394 (2000)).

91. HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 123 (7th ed. 1998); *see* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2631–32 (1994) (arguing that *Miranda* lacks historical and textual support); Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1432–35 (1985) (arguing that the traditional voluntary test was adequate and thus the *Miranda* protocols were unnecessary and irrational). *See generally* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege against Self-Incrimination*, 92 MICH. L. REV. 1086 (1994) (discussing misconceptions about the historical origins of *Miranda*).

92. *See* Miranda v. Arizona: *Rebalancing Rights and Responsibilities*, WEEBLY, http://76307797.weebly.com/public-reaction.html (last visited Nov. 8, 2017) (citing Miranda *Decision Said to End the Effective Use of Confessions*, N.Y. TIMES (Aug. 21, 1966)).

93. *See id.* (quoting telephone Interview with Ed Quevedo, Professor, Mills College (Dec. 2, 2013)).

94. *See* 114 CONG. REC. 12,936–39 (May 13, 1968).

voluntariness test in order to 'redress the imbalance' caused by these decisions and respond to the harm suffered by 'the peace forces in our society.'"[95] He also pledged to appoint more conservative judges and justices.[96]

Less than two years after the Court issued the *Miranda* decision, Congress tried to change things back to the way they were. Taking heed of Justice Harlan's dissenting opinion that the "social costs of crime are too great to call the new rules anything but a hazardous experimentation,"[97] Congress enacted 18 U.S.C. § 3501 with overwhelming majorities in both houses.[98] The statute required the trial court to take into account all circumstances surrounding the confession (including whether *Miranda*-type warnings had been given), when determining whether it was to be considered voluntary.[99] The absence of such warnings, however, would not by itself preclude a confession from being admissible.[100] In other words, the statute was intended to overrule *Miranda*.

President Johnson signed § 3501 into law before he left office.[101] The Justice Department, however, steadfastly refused to enforce or assert the provision through succeeding administrations, including the Nixon Administration, which followed directly after Johnson's.[102]

Section 3501 was not enforced for thirty years because the Attorneys General believed that the statute was unconstitutional.[103] Finally, in February

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95. Eugene R. Milhizer, Miranda*'s Near Death Experience: Reflections on the Occasion of* Miranda*'s Fiftieth Anniversary*, 66 CATH. U. L. REV. 577 (2017); *see* 114 CONG. REC. 12,937 (1968).

96. *See* Ulrich, *supra* note 90, at 204.

97. Miranda v. Arizona, 384 U.S. 436, 517 (1966) (Harlan, J., dissenting).

98. 18 U.S.C. § 3501 (2000); *see* Legislative History of the Omnibus Crime Control and Safe Streets Act of 1968 Pub. L. No. 90-351, 82 Stat. 197 (1968). The Senate passed the bill by a vote of 72-4. *See* RICHARD HARRIS, THE FEAR OF CRIME 98 (1969). The House thereafter voted 317–60 against a conference and then 369–17 in favor of accepting the Senate version in toto. *See id.* at 106–08; ADAM CARLYLE BRECKENRIDGE, CONGRESS AGAINST THE COURTS 106–08 (1970).

99. 18 U.S.C. § 3501(b)(3).

100. *Id.* § 3501(b)(5).

101. Max Frankel, *President Signs Broad Crime Bill with Objections*, N.Y. TIMES, June 20, 1968, at 1 (stating that President Johnson signed the Crime Bill at the last hour and concluding that it contained more good than harm).

102. *See* United States v. Dickerson, 166 F.3d 667, 682 n.16 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000) ("[T]he Department of Justice has taken the position that unless the Supreme Court overrules *Miranda*, 'the United States is not free to urge the lower courts' to 'rely on Section 3501[,] . . . [and] 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*.'"); *see also* Andrew B. Loewenstein, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351, 357–63 (2001) (discussing the Justice Department's refusal to enforce § 3501 and that under the Clinton Administration, the Department of Justice remained steadfastly opposed to enforcing § 3501); Eric D. Miller, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1034–35 (1998) (noting that Attorney General Ramsey Clark instructed United States Attorneys not to admit confessions into evidence unless they comported with *Miranda*).

103. *See* Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175, 222 (1999) (discussing the absence of judicial review of § 3501).

of 1999, a panel from the United States Court of Appeals for the Fourth Circuit ruled that *Miranda* warnings no longer were controlling in all federal cases.[104] The stage was set for a new evaluation by the Supreme Court.[105]

## V. *DICKERSON V. UNITED STATES*

*Dickerson* stemmed from a series of bank robberies in Maryland and Virginia. The defendant, Dickerson, confessed to his role and was charged with one count of conspiracy to commit bank robbery, three counts of bank robbery, and three counts of using a firearm during and in relation to a crime of violence. Shortly thereafter, he moved to suppress his confession. Although the district court found that the "confession was voluntary for purposes of the Fifth Amendment, it nevertheless suppressed the confession because it was obtained in technical violation of *Miranda*."[106] However, the Fourth Circuit reversed that decision and held that § 3501 controlled, even though the government had not based its argument on that statute.[107] The case was appealed to the Supreme Court.

In a 7–2 opinion delivered by Chief Justice Rehnquist, the Supreme Court reversed the Fourth Circuit and held that *Miranda* governed the issue of admissibility of statements made in custodial interrogations for both state and federal courts.[108] "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture," wrote Rehnquist.[109] "*Miranda* announced a constitutional rule that Congress may not supersede legislatively . . . . [W]e decline to overrule

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104. *Dickerson*, 166 F.3d at 692.

105. *See* United States v. Crocker, 510 F.2d 1129, 1138 (10th Cir. 1975) (holding that the trial court did not err when it applied § 3501 in concluding the defendant's confession was voluntary); United States v. Rivas-Lopez, 988 F. Supp. 1424, 1435–36 (D. Utah 1977) (holding, in the only other federal case dealing with § 3501, that § 3501 was constitutional). In a concurring opinion in *Davis v. United States*, Justice Scalia wondered why, "with limited exceptions [§ 3501] has been studiously avoided by every Administration, not only in this Court but in the lower courts, since its enactment more than 25 years ago." Davis v. United States, 512 U.S. 452, 463–64 (1994) (Scalia, J., concurring). Justice Scalia said he looked forward to a time "when a case that comes within the terms of [§ 3501] is next presented" to the Supreme Court. *Id.* at 464.

106. *Dickerson*, 166 F.3d at 671.

107. *See Davis*, 512 U.S. at 695.

108. *Dickerson*, 530 U.S. at 432. As an Associate Justice, Rehnquist wrote the majority opinions in both *New York v. Quarles* and *Michigan v. Tucker*. *See* New York v. Quarles, 467 U.S. 649, 651 (1984); Michigan v. Tucker, 417 U.S. 433, 435 (1974). In both of those cases, he saw fit to limit the application of *Miranda* in certain circumstances. *See Quarles*, 467 U.S. at 672 (limiting the application of *Miranda* when police officers act out of a concern for public safety); *Tucker*, 417 U.S. at 452 (distinguishing between Fifth Amendment and *Miranda* violations to limit the suppression of a suspect's statements). In *Dickerson*, however, he advanced "the fundamental constitutional basis for the imposition of the *Miranda* warnings when faced with the attempt by Congress to supersede that rule by enacting 18 U.S.C. § 3501." Peter W. Fenton & Michael B. Shapiro, Miranda *Redux: The Impact of* Dickerson v. United States, 40 CHAMPION 28 (2016).

109. *Dickerson*, 530 U.S. at 443.

*Miranda* ourselves."[110] He explained that *Miranda* has "constitutional underpinnings" and that *Miranda* is "a constitutional decision."[111]

So, despite the Court's prior prophylactic rule language, which created a logical and doctrinal inconsistency with the concept of a new constitutional rule, the Court endorsed the various exceptions to *Miranda* simply as "modifications" that were "as much a normal part of constitutional law as the original decision."[112] It also stated that its prior refusal to apply the "fruit of the poisonous tree" doctrine to *Miranda* violations "does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."[113]

Today it is hard to deny that *Miranda* is well accepted in the United States.[114] It is featured on television shows and in movies.[115] More importantly, police have become comfortable with the *Miranda* warnings.[116] By now, all active law enforcement officers have come up through the ranks with *Miranda*, and they have been trained to comply with its requirements.[117] *Miranda* is comparatively easy for police to follow, and all Americans expect it following an arrest.[118]

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110. *Id*. at 444.

111. *Id*. at 446. Viewed as a criminal law decision, *Dickerson* is unremarkable. *See generally id. Miranda* stays in place. *See generally Miranda*, 384 U.S. 436. *Dickerson*, however, is also a constitutional law case, and in that area *Dickerson* is more shocking. *See generally Dickerson*, 530 U.S. 428. It holds that a rule invented by the Supreme Court for the purpose of enforcing constitutional rights is immune to congressional limitation or modification. *See id.* at 441. It creates the category of a "constitutional decision," which seems to be indistinguishable from the Constitution itself. *See* Charles Krauthammer, *Supreme Hypocrisy*, WASH. POST (June 30, 2000), https://www.washingtonpost.com/archive/opinions/2000/06/30/supreme-hypocrisy/a62fc819-9ae7-47ed-9e7f-d7da46fd1301/?utmterm=.d8bc933b272b.

112. *Dickerson*, 530 U.S. at 441, 451. Those modifications and exceptions to *Miranda* include, *inter alia*: the public safety exception, see *Quarles*, 467 U.S. at 654; the jailhouse informant exception, see *Illinois v. Perkins*, 496 U.S. 292, 300 (1990); and routine booking questions, see *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990). Supreme Court cases after *Dickerson* have also tinkered with the application of *Miranda*. *See, e.g.*, Missouri v. Seibert, 542 U.S. 600 (2004). One of the most notable cases is *Missouri v. Seibert*, which involved a murder investigation in which the police officer who questioned the suspect conducted a "dress rehearsal," in which he first asked a series of questions regarding the crime, then after a short pause, read the suspect her *Miranda* rights and asked the same questions again. *Id.* at 600. The Court found that statements made by the suspect both prior to and following the warnings were inadmissible. *Id.* at 617.

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

114. While criticism used to come from those who were afraid that it would hamper good police work, today much of the criticism comes from those who fear that it does not provide sufficient protection to suspects. *See* Jacobi, *supra* note 7, at 17 ("Now the push for change to *Miranda* largely comes not from the prosecution-focused right, but from the defendant-focused left.").

115. *See generally* Rychlak, *supra* note 2, at 663 (stating the ubiquity of *Miranda* warnings in American television).

116. *See* Jacobi, *supra* note 7, at 16.

117. *See id.*

118. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996). That is not to say that all Americans correctly understand the rule. One Sunday afternoon years ago, an undergraduate student explained to me that, if he wanted, he could sue the police. It seems that

Over the years, many scholars have tried to gather empirical evidence to reveal *Miranda*'s impact on the admissibility of confessions, but the results have been inconclusive.[119] Some commentators have argued that the lost convictions were not outweighed by *Miranda*'s benefits.[120] A noted critic of *Miranda* once argued:

> Evidence of *Miranda*'s harmful effects is mounting. For example, along with various co-authors, I have developed empirical evidence of *Miranda*'s substantial harm to law enforcement. In my most recent articles, I have analyzed the precipitous drop in crime clearance rates that followed immediately on the heels of *Miranda* and concluded that *Miranda* severely hampered police effectiveness.[121]

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they had recently pulled him over and questioned him about a traffic matter, but they had not read him his *Miranda* warnings. When I suggested that the law did not work that way, he argued vehemently, noting that he had already talked the matter over with his father, and they both agreed that there was a lawsuit to be had.

119. *See* LAFAVE & ISRAEL, *supra* note 25, at 291; *see also* Paul G. Cassell, Miranda*'s "Negligible" Effect on Law Enforcement: Some Skeptical Observations*, 20 HARV. J.L. & PUB. POL'Y 327 (1997) (arguing that *Miranda* impedes law enforcement); Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 417, 438 (1996) (arguing that *Miranda* has significantly harmed law enforcement); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 871 (1996) (suggesting that *Miranda* has hampered law enforcement); Richard H. Seeburger & R. Stanton Wettick, Jr., Miranda *in Pittsburgh–A Statistical Study*, 29 U. PITT. L. REV. 1, 26 (1967) (arguing that *Miranda* is injurious to law enforcement).

120. 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, 1126 (1998)); *see* Paul G. Cassell & Richard Fowles, *Still Handcuffing the Cops? A Review of Fifty Years of Empirical Evidence of* Miranda*'s Harmful Effects on Law Enforcement*, 97 BOSTON U. L. REV. 685 (2017); Ronald J. Rychlak, *Interrogating Terrorists: From* Miranda *Warnings to "Enhanced Interrogation Techniques*", 44 SAN DIEGO L. REV 451, 466–69 (2007); Ronald J. Rychlak, Book Review, 12 NEW CRIM. L. REV. 335 (2009) (reviewing Alan M. Dershowitz, *Is There a Right to Remain Silent? Coercive Interrogation and the Fifth Amendment After 9/11* (2008)). "[C]laims of violations of human-rights law or the Constitution must be evaluated in the context of the realities created by Sept. 11." John C. Yoo, *Perspectives on the Rules of War: Sept. 11 Has Changed the Rules*, S.F. CHRON., June 15, 2004, at B9; *see also* M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 323 (2003) (proposing "foreign interrogation" as an exception to *Miranda*).

121. Cassell, *The Guilty*, *supra* note 27, at 531 (citations omitted).

> [T]he innocent are at risk not only from false confessions, but also from "lost" confessions—that is, confessions that police fail to obtain from guilty criminals that might help innocent persons who would otherwise come under suspicion for committing a crime [or become a victim of the criminals who did not confess]. . . .
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> . . . .
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> . . . [T]here is good reason to believe that the Supreme Court's decision in *Miranda* has exacerbated the risks to the innocent. The *Miranda* decision has reduced the number of truthful confessions, while at the same time doing nothing about, and probably even worsening, the false confession problem by diverting the focus of courts away from the substantive truth of confessions to procedural issues about how they were obtained.

*Id.* at 525–27 (citation omitted).

On the other hand, others have argued that the cost is minimal and the benefits that *Miranda* provides in protecting the innocent are significant.[122]

In a rather interesting twist, some commentators have suggested that the warnings themselves, skillfully used, actually help skilled interrogators obtain statements from suspects.[123] In a brilliant passage based on actual interrogations conducted by Baltimore detectives, author David Simon walks the reader through the use of *Miranda* warnings—both verbal and written—to bring forth a confession from a suspect.[124] The only conclusion to be drawn from that passage is that police have learned to "work around" *Miranda*, if not absolutely exploit it, to help extract statements from suspects. "As a result, the same law enforcement community that once regarded the 1966 *Miranda* decision as a death blow to criminal investigation has now come to see the explanation of rights as a routine part of the process—simply a piece of station house furniture, if not a civilizing influence on police work itself."[125]

## VI. CONCLUSION

Forced self-incrimination is both a threat to justice and an insult to the dignity and integrity of the citizens who are exposed to it.[126] The provision of *Miranda* warnings is one way to counter the threat and eliminate the insult. While some officers will try to exploit *Miranda*'s "loopholes,"[127] the rules themselves are designed to protect suspects' Fifth Amendment rights, which show respect to the citizens.

It was long debated whether *Miranda* rights were part of the Fifth Amendment or mere prophylactic rules, but in *Dickerson v. United States*, the Supreme Court recognized that *Miranda* warnings had become part of the American culture.[128] In fact, they have become as American as baseball, hot dogs, and apple pie. *Miranda* is fundamental to the American scheme of

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122. *See* SUSAN M. EASTON, THE RIGHT TO SILENCE 60–62 (1991) (arguing the right to silence protects the innocent); Ian Dennis, *Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self Incrimination*, 54 CAMBRIDGE L.J. 342, 348 (1995) (describing a justification for the privilege against self-incrimination as protection against wrongful conviction).

123. *See* SIMON, *supra* note 14, at 199.

124. *See id.* at 193–94; Rychlak, *supra* note 2, at 678 n.97 (quoting the passage).

125. SIMON, *supra* note 14, at 199. It can be seen as an indication that the warnings have not interfered with police work in any meaningful way, and so most of the concern about *Miranda* was unfounded. *Id.* On the other hand, it can be argued that *Miranda* must not be sufficiently protecting criminal suspects, so even more protections have to be given to them. *See* Jacobi, *supra* note 7, at 16 ("[P]olice are used to *Miranda* and no longer consider it a major hurdle to their investigative techniques.").

126. Miranda v. Arizona, 384 U.S. 436, 460 (1966) ("The constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens.").

127. *See* Missouri v. Seibert, 542 U.S. 600 (2004) (plurality opinion).

128. Dickerson v. United States, 530 U.S. 428, 430 (2000).

justice, and therefore, it is inherently coercive to fail to Mirandize a suspect—"no matter how well the suspect may have been treated, no matter how much his physical comfort has been respected, and no matter how well he may already have known his rights."[129] Statements taken in such situations are inadmissible in criminal prosecutions. That is the American way. In recognizing this, the Supreme Court properly elevated *Miranda* from prophylactic to full constitutional status.

129. Andrew C. McCarthy, *McCain &* Miranda, NAT'L REV. (Dec. 15, 2005, 2:21 PM), http://www.nationalreview.com/article/216270/mccain-miranda-andrew-c-mccarthy.