North Dakota Law Review

Volume 77 | Number 1 Article 7

2001

Constitutional Law - Criminal Law: The United States Supreme Court Affirms the Use of Miranda Rights by Police to Determine the Admissibility of Statements Made during Custodial Interrogation

Gene A. Pearce

CONSTITUTIONAL LAW—CRIMINAL LAW: THE UNITED STATES SUPREME COURT AFFIRMS THE USE OF "*MIRANDA*" RIGHTS BY POLICE TO DETERMINE THE ADMISSIBILITY OF STATEMENTS MADE DURING CUSTODIAL INTERROGATION

Dickerson v. United States, 120 S. Ct. 2326 (2000)

I. FACTS

On January 24, 1997, an individual robbed the First Virginia Bank in Old Town, Alexandria, Virginia.[1] An eyewitness to the robbery saw the individual exit the bank and get into a vehicle, which was later found to be registered to Charles T. Dickerson of Takoma Park, Maryland.[2] After a few seconds, the robber was observed exiting the vehicle, placing something into the trunk, and then entering the passenger side of the vehicle.[3]

Three days after the robbery, ten Federal Bureau of Investigation (FBI) agents and an Alexandria, Virginia, police detective went to the home of Charles Dickerson where the vehicle used in the robbery was located.[4] FBI Special Agent Chris Lawlor knocked on the door of Dickerson's apartment and identified himself as an FBI agent.[5] Once Dickerson opened the door Agent Lawlor informed him that they were investigating a bank robbery.[6] Several agents then entered the apartment.[7]

When asked by Agent Lawlor, Dickerson consented to voluntarily accompany the agents to the FBI field office in Washington, D.C., for questioning.[8] He was not formally under arrest.[9] Before leaving the apartment, Dickerson retrieved a coat from his bedroom where a large amount of cash was observed lying on the bed.[10] Dickerson explained

---

1. United States v. Dickerson, 166 F.3d 667, 673 (4th Cir. 1999). The individual, who successfully robbed the bank of $876, was observed carrying a silver semi-automatic pistol and a black leather bag. *Id.*

2. *Id.*

3. *Id.*

4. *Id.* FBI Special Agent Christopher Lawlor had primary contact with Charles Dickerson, while Detective Thomas Durkin of the Alexandria Police Department assisted in the investigation. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* Dickerson and the United States disagreed as to whether the agents had Dickerson's permission to enter his apartment. *Id.*

8. *Id.* At a suppression hearing, Dickerson testified that he did not feel that he could refuse to accompany the agents. *Id.* at 673 n.2.

9. *Id.*

10. *Id.* at 673.

that the cash was his winnings from gambling in Atlantic City, New Jersey. Dickerson refused to consent to a search of his apartment.[11]

At the FBI field office, Special Agent Lawlor and Detective Thomas Durkin of the Alexandria Police Department interviewed Dickerson.[12] During questioning, Dickerson denied any involvement in the Alexandria, Virginia, robbery.[13] Upon Dickerson's denial, Special Agent Lawlor applied for and received a telephonic search warrant for Dickerson's apartment.[14]

After being informed of the impending search, Dickerson consented to give a statement implicating himself in a series of bank robberies, including the one in Alexandria, Virginia, along with a person he identified as Jimmy Rochester, who had actually committed the robberies.[15] Following his statement, Dickerson was placed under arrest.[16]

As a result of Dickerson's confession, Jimmy Rochester was arrested and admitted that he was involved in nineteen robberies in three states.[17] He also admitted that Dickerson was his getaway driver in seven of the robberies.[18] The subsequent searches of Dickerson's apartment and vehicle produced items used or taken in the robberies.[19]

As a result of his statement and subsequent investigation, Charles Dickerson was indicted by a federal grand jury.[20] The charges included 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.[21]

Based on his claim that he had confessed prior to being read his *Miranda* rights, Dickerson filed a motion to suppress his statements and

---

11. *Id.*

12. *Id.*

13. *Id.* Dickerson did admit that he had been in the area of the robbery when it had occurred and that he had ran into an old friend who had asked him for a ride to Maryland, which Dickerson agreed to provide for him. *Id.*

14. *Id.* at 673-74. To obtain the warrant from Judge James E. Kenkel, Special Agent Lawlor informed him that the robber had used a pistol and a leather bag, that he had demanded unmarked bills, and that he had fled the scene of the robbery in a vehicle that was registered to Charles Dickerson. *Id.* at 673. In addition, the judge was informed that Dickerson had over $550 in cash when they contacted him at his apartment, that he had paid his back rent with a considerable amount of cash, and that Dickerson himself admitted to being in the area of the robbery when it had occurred. *Id.*

15. *Id.* at 674.

16. *Id.*

17. *Id.* Rochester admitted to robbing eleven banks in Georgia, three banks in Virginia, four banks in Maryland, and an armored car in Maryland. *Id.*

18. *Id.* Rochester indicated that Dickerson was the driver of the getaway car when he robbed three banks in Virginia and four banks in Maryland. *Id.*

19. *Id.* In the apartment, agents found a silver semi-automatic pistol, dye-stained money, a pre-recorded "bait bill" from another robbery, ammunition, masks, and latex gloves. *Id.* In Dickerson's vehicle, agents found a black leather bag and solvent used to clean money that had been stained by dye. *Id.*

20. *Id.*

21. *Id.*

all evidence obtained.[22] In opposition to the motion, Special Agent Lawlor testified at the suppression hearing that Dickerson was read his *Miranda* rights prior to his confession.[23] In particular, Agent Lawlor testified that Dickerson confessed a short time after he had obtained the warrant to search Dickerson's apartment.[24]

A discrepancy in Agent Lawlor's statement was discovered when the advise-of-rights form indicated that Dickerson waived his rights at 9:41 p.m. while Agent Lawlor indicated on the search warrant that he received the warrant at 8:50 p.m.[25] This indicates that Dickerson waived his rights almost an hour after the warrant was issued, contrary to Agent Lawlor's statement that Dickerson was given his *Miranda* rights "shortly" after the warrant was received.[26] The district court found Dickerson's testimony more credible and suppressed his statement, "finding that it was made while he was in police custody, in response to police custody, in response to police interrogation, and without the necessary *Miranda* warnings."[27]

Upon the district court's denial of a motion for reconsideration, the Government filed an interlocutory appeal with the United States Court of Appeals for the Fourth Circuit.[28] The Fourth Circuit, by a divided vote, reversed the suppression order.[29] It held that *Miranda v. Arizona*[30] was not a constitutional holding and that Dickerson's statement satisfied congressional intent in 18 U.S.C. § 3501, which made statements admissible if they were found to be given voluntarily.[31] The Fourth Circuit also recognized that the clear intent of § 3501 was to restore "voluntariness as the test for admitting confessions in federal court."[32]

---

22. *Id.* at 674-75. Dickerson moved to suppress the evidence obtained as a result of his statement—the identification and subsequent confession of Jimmy Rochester—and the evidence obtained from his apartment and vehicle. *Id.* at 674. Dickerson moved to suppress this evidence based upon the claim that law enforcement failed to give him his *Miranda* warnings, which require that before any custodial interrogation a suspect be informed of his or her rights to remain silent and to the presence of an attorney. *Id.* at 675; Miranda v. Arizona, 384 U.S. 436, 444 (1966).

23. *Dickerson*, 166 F.3d at 675.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 677.

29. *Id.* at 695.

30. 384 U.S. 436 (1966).

31. *Dickerson*, 166 F.3d at 695. Congress enacted 18 U.S.C. § 3501 in 1968 shortly after the *Miranda v. Arizona* decision. *Dickerson*, 166 F.3d at 671. The statute provides that a federal judge, when examining the admissibility of a custodial confession, shall determine the voluntariness of the confession based upon the totality of the circumstances surrounding the giving of the confession. 18 U.S.C. § 3501 (1994). The presence or absence of any particular factors need not be conclusive as to a determination of its voluntariness. *Id.*

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

On appeal, the United States Supreme Court *held*, in a seven-to-two decision, that *Miranda* and its progeny are constitutional decisions and, as such, cannot be overruled by Congress.[33] By reversing the judgment of the court of appeals, the Supreme Court affirmed the suppression of Dickerson's statement.[34] As a constitutional decision, *Miranda* governs the admissibility of custodial statements in both federal and state courts.[35]

II. LEGAL BACKGROUND

The Fifth Amendment states, in part, that no person "shall be compelled in any criminal case to be a witness against himself."[36] The Supreme Court has recognized that this fundamental right became an integral part of our Constitution through many years of enduring difficulties and persecution.[37] As a result, this right, among others, has been secured "for ages to come, and . . . [is] designed to approach immortality as nearly as human institutions can approach it."[38]

Due to such a firmly rooted constitutional principle, the Court has emphasized the necessity of procedures which will ensure that individuals are permitted to exercise their Fifth Amendment privilege against self-incrimination.[39] The Court has promulgated the *Miranda* warnings as being such a necessary procedure.[40]

A. HISTORY—ADMISSIBILITY OF CONFESSIONS

In the eighteenth century, English common law recognized that confessions obtained by threats or promises could not be used against a defendant at trial.[41] If a defendant wished to voluntarily confess to the crime, yet escape the requisite punishment, he could appeal to the Crown for mercy under the Law of Approvement.[42] Under this law, a defendant was required to show that he was not the principal offender while making an honest and complete confession regarding the crime charged and any other "treasons" and felonies of which he was also aware.[43] A failure of complete disclosure resulted in a sentence of death.[44] To be recognized

33. Dickerson v. United States, 120 S. Ct. 2326, 2329 (2000).
34. *Id.* at 2330, 2337.
35. *Id.* at 2329-30.
36. U.S. CONST. amend. V, § 3.
37. Miranda v. Arizona, 384 U.S. 436, 442 (1966).
38. *Id.* (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387 (1821)).
39. *Miranda*, 384 U.S. at 439.
40. *Id.* at 471.
41. The King v. Rudd, 168 Eng. Rep. 160, 161 (K.B. 1783).
42. *Id.* at 162.
43. *Id.*
44. *Id.*

as truly voluntary, a confession had to be obtained by a person of authority without using any type of inducement.[45] Induced confessions were not presumed to be untrue, they were only considered dangerous to the "due administration of justice."[46]

In the later half of the nineteenth century, the Supreme Court, in *Hopt v. Utah*,[47] recognized that a confession which was not given as a result of inducements, threats, or promises was "freely and voluntarily made."[48] The Court added that such a freely given confession was "of the most satisfactory character."[49] Twelve years later, in *Pierce v. United States*,[50] the Court ruled that the presence of officers while a defendant was in custody did not change the voluntariness of the confession, as long as it was not "extorted by inducements or threats."[51]

One year after the *Pierce* decision, the Court in *Bram v. United States*,[52] first recognized the Fifth Amendment as a constitutional basis for voluntary confessions.[53] The Court recognized that once an issue is raised at a criminal trial as to the voluntariness of a defendant's confession that issue is determined by the Fifth Amendment, which commands that no person shall be forced to incriminate himself or herself.[54] The Court explained that the language of the Fifth Amendment was "but a crystallization" of the voluntariness standard found under common law.[55]

In 1936, in *Brown v. Mississippi*,[56] the Court recognized a second constitutional basis for voluntary confessions: the Due Process Clause of

---

45. Regina v. Baldry, 169 Eng. Rep. 568, 569 (Cr. Cas. Res. 1852).

46. *Id.*

47. 110 U.S. 574 (1884).

48. *Id.* at 584. Upon the arrest of Hopt for murder at a local railroad yard, Hopt was immediately removed from a large angry crowd, which had gathered to witness the arrest. *Id.* Two or three minutes after his arrest, while he was being escorted to jail and away from the angry crowd, Hopt confessed to the murder. *Id.* The angry crowd included the father of the murder victim who was said to have made a motion to draw his revolver but was prevented from doing so by the arresting officer. *Id.*

49. *Id.*

50. 160 U.S. 355 (1896).

51. *Id.* at 357. Two defendants, convicted of murder, argued that a confession given while they were under arrest and handcuffed amounted to an inducement. *Id.*

52. 168 U.S. 532 (1897).

53. *Id.* at 542. In *Bram*, the defendant, who was the first mate on a ship sailing from Boston to South America, was placed in custody after the ship's captain and two others were murdered. *Id.* at 535-36. After pulling into Halifax, Nova Scotia, the defendant was taken to the police department where the police, prior to being contacted by the United States consul, interviewed him. *Id.* at 536-37. During questioning, the defendant denied guilt. *Id.* at 539. The defendant's conversation with police was offered as a confession at his subsequent trial. *Id.* at 540. At trial, defense counsel objected to the admission of the defendant's conversation by arguing that the conversation occurred while the defendant was in police custody and that it was not voluntary. *Id.* at 539. The objection was denied. *Id.*

54. *Id.* at 542 (quoting U.S. CONST. amend. V).

55. *Id.* at 543.

56. 297 U.S. 278 (1936).

the Fourteenth Amendment.[57] The Supreme Court stated that any state action, regardless of the agency, must comply with the fundamental principles of liberty and justice.[58] The Court recognized that a trial based upon a confession that was obtained as a result of physical coercion is only a "mere pretense."[59] The Court went on to rule that confessions obtained by physical coercion are a clear violation of the Due Process Clause.[60]

Starting in 1940, the due process voluntariness test became the standard by which confessions were measured.[61] In *Chambers v. Florida*,[62] the Court applied the standards of due process when it addressed the prolonged interrogation of the petitioners.[63] Such use of compulsive confessions was viewed by the Court as a denial of "due process of law as guaranteed in the Fourteenth Amendment."[64] The Court added that to allow confessions to be obtained in this manner would turn the due process requirement into a "meaningless symbol."[65]

Four years later in *Ashcraft v. Tennessee*,[66] the Court held that the nonstop questioning of a suspect, without benefit of communication or rest for thirty-six hours, was also a violation of the Due Process Clause of the Fourteenth Amendment.[67] In 1963, the Court, in *Haynes v.*

---

57. *Id.* at 285-87. In *Brown*, law enforcement officials tortured three young black men, who were suspected of murdering another man, until they agreed to confess to the crime. *Id.* at 281-82. The first defendant was hanged by a rope, let down before losing consciousness, and then whipped until he finally confessed. *Id.* The other two defendants were made to strip and then forced over the back of chairs where they were whipped with a leather strap until they confessed. *Id.* The Court, in commenting on the methods used to obtain the confessions, stated that they could not imagine any methods more offensive than those used on these petitioners. *Id.* at 286.

58. *Id.* at 286 (quoting Herbert v. Louisiana, 272 U.S. 312, 316 (1926)).

59. *Brown*, 297 U.S. at 286.

60. *Id.* at 286-87.

61. United States v. Dickerson, 166 F.3d 667, 684 (4th Cir. 1999).

62. 309 U.S. 227 (1940).

63. *Id.* In response to the murder of an elderly white man, the county sheriff took approximately forty black citizens of Pompano, Florida, into custody where they were questioned for seven days. *Id.* at 230. The three petitioners in this case were subjected to interrogation for five days, which culminated in an all night interrogation resulting in the confessions. *Id.* at 231. During the week that the petitioners were interrogated, they were not permitted to speak with friends, relatives, or an attorney. *Id.* When questioned in jail, they usually found themselves surrounded by four to ten men consisting of the sheriff, deputies, jailers, and private citizens. *Id.*

64. *Id.* at 228.

65. *Id.* at 240.

66. 322 U.S. 143 (1944).

67. *Id.* at 153-54. Ashcraft was charged with hiring another man to kill his wife. *Id.* at 144. There was a dispute as to whether Ashcraft actually confessed to the crime. *Id.* at 151. The officers who interrogated Ashcraft claimed that after 28 hours of constant questioning, Ashcraft named a young black man, whom he had occasionally given a ride to work, as the possible killer. *Id.* Once found and questioned, this young black man stated that Ashcraft had hired him to kill Ashcraft's wife, which he did. *Id.* According to the officers, when Ashcraft was confronted with this information he made a self-incriminating statement but refused to sign the transcript of his statement. *Id.* Ashcraft denied ever making the statement. *Id.*

Washington,[68] again ruled as a violation of the Fourteenth Amendment, a confession obtained after a sixteen-hour interrogation.[69] The Court also indicated that in order to determine if a confession was coerced, in violation of the Fourteenth Amendment, the "totality of the circumstances" surrounding the confession must be examined.[70]

In the 1964 decision of *Malloy v. Hogan*,[71] the Court made it clear that the Fifth Amendment's Incrimination Clause was incorporated into the Due Process Clause of the Fourteenth Amendment.[72] In recognition of its holding in *Bram*, the Court indicated that when examining a confession in light of constitutional concerns regarding the right against self-incrimination, the inquiry was not the conduct of law enforcement in obtaining the confession but rather whether the obtained confession was "free and voluntary."[73] In other words, a confession cannot be obtained as a result of any threats, promises, or improper influences, regardless of how slight those influences may tend to be.[74]

The Court stated that this change to the federal standard in state cases recognized that the American system of criminal prosecution involves unhindered parties presenting their arguments before an impartial decision-maker rather than an inquisitorial system where the decision-maker defines the scope and extent of inquiry.[75] As a result, both federal and state governments were constitutionally required to determine the guilt of an accused by independently obtained evidence and not simply from coerced statements coming from the mouth of the accused.[76]

In a decision made on the heels of *Malloy*, the Court in *Escobedo v. Illinois*[77] held that a person who is the "focus" of a police interrogation should be guaranteed his or her rights under a constitutional privilege.[78]

---

68. 373 U.S. 503 (1963).

69. *Id.* at 504. During this time Haynes, who was suspected of committing a robbery, was kept incommunicado until he made a written statement. *Id.* at 514.

70. *Id.* In *Haynes*, the suspect was not permitted to contact his wife or an attorney until he confessed, even though law enforcement had possession of sufficient evidence to charge him with the crime. *Id.* at 510. It was not until he was in custody for approximately five to seven days that the petitioner was first allowed to contact his wife. *Id.* at 511.

71. 378 U.S. 1 (1964).

72. *Id.* at 6. Malloy, who had pled guilty to gambling, was ordered by the county's superior court to testify at an inquiry into gambling and other related criminal activity being conducted in the county. *Id.* at 3. Malloy refused to testify invoking the Fifth Amendment's privilege against self-incrimination. *Id.* The county superior court held him in contempt and ordered him to jail until he agreed to answer the questions. *Id.* The Connecticut Supreme Court of Errors affirmed the decision. *Id.*

73. *Id.* at 7.

74. *Id.*

75. *Id.* at 13.

76. *Id.* at 7-8.

77. 378 U.S. 478 (1964).

78. *Id.* at 490-92. In *Escobedo*, the petitioner was taken into custody and transported to the police department where he was questioned about a homicide. *Id.* at 479. During questioning, petitioner requested to speak with his attorney but was denied. *Id.* at 481. In addition, petitioner's attorney, who

The Court held that when the police begin to focus on a particular suspect, take him into custody, proceed with interrogations, and deny requests for the presence of an attorney, the suspect's constitutional privileges have been violated.[79] Statements taken during that time may not be used against the suspect at a criminal trial.[80] The Court reasoned that when the law enforcement function changes from investigatory to accusatory, the adversary system begins to operate and requires the accessibility, by the accused, to established constitutional privileges.[81] The Court also reasoned that the American criminal justice system should not depend, for its effectiveness, on keeping its citizens ignorant of their constitutional rights.[82]

B. *MIRANDA V. ARIZONA*

Two years later, in the landmark decision *Miranda v. Arizona*, the Court stated that it was necessary to establish certain procedural safeguards to ensure that individuals, who were in police custody and subject to an interrogation, be accorded their Fifth Amendment privilege not to incriminate themselves.[83] These procedural safeguards have become commonly known as the "*Miranda* rights."[84]

In *Miranda*, the Court first recognized that the history of in-custody interrogation was plagued with physical brutality at the hands of the police.[85] The *Miranda* Court recognized that although such brutality had become the exception, limitations had to be made to ensure that such practices would forever be eliminated.[86] In addition to the use of physical force, it was recognized that in-custody statements may also be obtained by interrogation techniques which are psychological in nature and thus, coercive.[87] To support this conclusion, the Court made reference to several police texts, which demonstrated that then-present police practices employed the use of psychological techniques in the

---

was informed of his client's predicament, responded to the police department where he requested to speak to the petitioner. *Id.* at 480. The police told him that he could not speak with his client until they finished questioning him. *Id.*

79. *Id.* at 490-91.

80. *Id.*

81. *Id.* at 492.

82. *Id.* at 490.

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

84. *Id.*

85. *Id.* at 445-47; *see also* IV NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 4 (1931). In its 1931 report, the Commission concluded that beatings and other forms of cruelty were used by a vast number of police agencies to obtain confessions from suspects. *Id.* In 1961 it was again reported that some police officers were still relying on physical brutality to obtain confessions. COMMISSION ON CIVIL RIGHTS REPORT, JUSTICE 17 (1961).

86. *Miranda*, 384 U.S. at 447.

87. *Id.* at 448.

interrogation process.[88] Due to the potential for physical and psychological abuse, the Court stated that the custodial interrogation itself "exact[ed] a heavy toll on individual liberty and trade[d] on the weaknesses of individuals."[89]

The *Miranda* Court stated that it had always demanded a high standard of proof to show that an individual had waived a constitutional right and that this standard applied to in-custody interrogations.[90] In order to protect those in-custody rights, the Court concluded that, in the absence of a fully effective equivalent, it was necessary to provide individuals with required warnings and a subsequent waiver before any statement would be deemed admissible.[91] These four warnings, which were required to be given prior to questioning, were: (1) the suspect has the right to remain silent, (2) any statement the suspect makes may be used against the suspect, (3) the suspect has the right to the presence of an attorney during questioning, and (4) an attorney will be provided for the suspect if the suspect cannot afford one.[92]

Even though the Court required the use of such warnings by police prior to questioning, it emphasized that it was not its intention to hinder law enforcement in the traditional function of investigating crime.[93] The Court specified that confessions are a vital part of a criminal investigation and that any statements, given freely and voluntarily without compulsion, are admissible as evidence.[94] The Court concluded that "volunteer statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."[95]

The Court did add that in lieu of the warnings, Congress and the states were free to search for potential alternatives for protecting the constitutional privilege of those subject to in-custody interrogations.[96] The Court qualified that statement by insisting that if other procedures were

---

88. *Id.* at 449 n.9; *see also* FRED EDWARD INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1986) *and* CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1956) (giving examples of psychological techniques that included seating arrangements in the interrogation room, simplicity of the room to minimize distracting influences, proximity of the suspect to the interrogator, effective personality of the interrogator, and perseverance).

89. *Miranda*, 384 U.S. at 455. To illustrate such exploitation of the weak, the Court made reference to several confession cases including one involving a heroin addict the Court described as a "near mental defective" and another where a woman confessed in order to prevent her children from being taken away. *Id.* at 456 (citing Townsend v. Sain, 372 U.S. 293, 297, 303 (1963); Lynumn v. Illinois, 372 U.S. 528, 531 (1963)).

90. *Miranda*, 384 U.S. at 475; *see also* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (stating that fundamental rights are presumed not to be waived).

91. *Miranda*, 384 U.S. at 476.

92. *Id.* at 444.

93. *Id.* at 477.

94. *Id.* at 478.

95. *Id.*

96. *Id.* at 467.

developed, they must be "at least as effective" as the prescribed warnings in apprising suspects of their right of silence.[97]

In the first of three dissents, Justice Clark stated that he would follow the rule established in *Haynes*, which looked at the totality of the circumstances in order to determine if a statement is voluntary.[98] Under this rule the state would have the burden to prove that a statement had been clearly voluntary when the necessary warnings had not been given.[99] Justice Clark reasoned that the Fifth Amendment, on which the Court rested its holding, was more arbitrary than the Due Process Clause, which was more effective in protecting individuals in police custody.[100] He reasoned that there was "no significant support" in prior cases for the Court to hold that the Fifth Amendment prohibited custodial interrogations.[101]

In the second dissent, Justice Harlan argued that the new rules established by the Court were not designed to prevent police misconduct.[102] Instead, these rules actually discouraged confessions by reinforcing the resolve of the suspect.[103] This would result in the frustration of an effective tool of law enforcement in obtaining confessions, which had been recognized as an important aspect of crime control.[104]

Justice Harlan added that in establishing these rules, the Court was doing nothing more than a hazardous experiment, which placed society's welfare at risk.[105] He also recognized, as did Justice Clark, that the Due Process Clause provided ample protection for those who provided confessions to police.[106]

In the third and final dissent, Justice White argued that the Court's holding was not suggested by the Fifth Amendment nor did it have any support in English or American history; rather it was a direct departure from precedent.[107] In short, Justice White argued the Court had made new law, which had as its foundation a deep distrust for all confessions.[108] As a result, there inevitably would be occasions when this new law would return a criminal into society, even those who had been

---

97. *Id.*
98. *Id.* at 502 (Clark, J., dissenting).
99. *Id.* at 503.
100. *Id.*
101. *Id.* at n.4.
102. *Id.* at 505 (Harlan, J., dissenting). Justice Stewart and Justice White joined Justice Harlan in the second dissent. *Id.* at 504.
103. *Id.* at 505.
104. *Id.*
105. *Id.* at 517.
106. *Id.* at 505.
107. *Id.* at 528–31 (White, J., dissenting). Justice Harlan and Justice Stewart joined Justice White in the third dissent. *Id.* at 526.
108. *Id.* at 531, 537.

involved in serious criminal behavior.[109] It would also frustrate the effectiveness of police investigation and apprehension.[110] Justice White concluded that if it was necessary to place more controls on police interrogations, there needed to be an approach that was more flexible and not so much of a constitutional straightjacket as the Court's ruling would prove itself to be.[111]

C. POST-*MIRANDA*

In the years following the *Miranda* decision, both Congress and the Court attempted to qualify *Miranda*'s dictates.[112] Congress, by enacting 18 U.S.C. § 3501, made an attempt to return to the totality of the circumstances test.[113] The Court, on the other hand, limited *Miranda*'s exclusionary rule by allowing certain exceptions.[114]

1. *The Enactment of 18 U.S.C. § 3501 as an Attempt to Modify* Miranda

Two years after the *Miranda* decision, Congress enacted 18 U.S.C. § 3501 as part of the Omnibus Crime Control and Safe Street Act of 1968.[115] The Senate Judiciary Committee, which conducted extensive hearings on *Miranda*, found that the inflexible requirements of *Miranda* were unreasonable and harmful to law enforcement.[116] The Committee also revealed that incidents of police brutality, which were the basis for the *Miranda* decision, were not an accurate representation of current police activity and that incidents of coercion were "isolated" and definitely not the norm.[117] The Committee concluded that the Court overreacted to reports of widespread brutality when it established its holding in *Miranda*; thus "voluntariness" should be the determining factor of whether a custodial confession is admitted as evidence in federal court.[118]

Congress agreed with the Committee's view and enacted § 3501 which states, in part, that "[i]n any criminal prosecution . . . a confession . . . shall be admissible in evidence if it is voluntarily given."[119] The

109. *Id.* at 544.
110. *Id.*
111. *Id.* at 545.
112. *See* discussion *infra* Part II.C.1-2.
113. *See* discussion *infra* Part II.C.1.
114. *See* discussion *infra* Part II.C.2.
115. Pub. L. No. 90-351, 82 Stat. 210 (1968) (codified as amended at 18 U.S.C. § 3501 (1994)).
116. Brief for the Maricopa County Attorney's Office as Amicus Curiae Supporting Affirmance at 5–6, Dickerson v. United States, 120 S. Ct. 2326 (2000) (No. 99-5525).
117. *Id.* at 6–7.
118. *Id.* at 7.
119. 18 U.S.C. § 3501(a) (1994).

statute specifies that a trial judge shall determine if a confession is voluntary.[120] In making this determination, a judge shall take into consideration all of the circumstances surrounding the confession, including time elapsed between arrest and arraignment, whether the defendant knew the nature of the offense, whether the defendant was advised or knew that he did not have to make a statement and that any statement could be used against him, whether the defendant was advised of his right to counsel, and whether the defendant was without assistance of counsel when questioned.[121] The statute adds that "[t]he presence or absence of any of the above-mentioned factors . . . need not be conclusive on the issue of voluntariness of the confession."[122]

To opponents of the *Miranda* decision, the purpose of § 3501 was to modify *Miranda*'s overprotective exclusionary rule.[123] These opponents viewed *Miranda* as excessive because it resulted in the exclusion of voluntary confessions.[124] They reasoned that because *Miranda*'s exclusionary rule extended well beyond the Fifth Amendment's restriction on coerced statements, it was up to Congress to fashion a rule which retained the benefits of *Miranda* but kept its provisions within the dictates of the Fifth Amendment.[125]

The Executive Branch regarded § 3501 as unconstitutional, and refused to enforce it.[126] In 1994, in *Davis v. United States*,[127] Justice Scalia recognized this reluctance of the government.[128] He stated that § 3501 would be considered when another case, which fit within the terms addressed by that statute, came before the Court, regardless of whether the government raised the issue or not.[129] That opportunity arose when *Dickerson* came to the attention of the courts with the assistance of Professor Paul G. Cassell, court-appointed amicus curiae.[130]

---

120. Brief for Maricopa Attorney's Office at 7, *Dickerson* (No. 99-5525).

121. *Id.*

122. *Id.*

123. Brief for Court-Appointed Amicus Curiae at 13, Dickerson v. United States, 120 S. Ct. 2326 (2000) (No. 99-5525).

124. *Id.* at 2.

125. *Id.* at 2-3.

126. Brief for Petitioner at 10, Dickerson v. United States, 120 S. Ct. 2326 (2000) (No. 99-5525).

127. 512 U.S. 452 (1994).

128. *Id.* at 463-64.

129. *Id.* at 464.

130. United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999). Professor Paul G. Cassel, University of Utah College of Law, is an avid opponent of the *Miranda* decision and has written numerous articles on the issue. *E.g.*, Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of* Miranda*'s Defenders*, 90 NW. U. L. REV. 1084 (1996); Paul G. Cassell, *The Costs of the* Miranda *Mandate: A Lesson in the Dangers of Inflexible, "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299 (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, Miranda's *Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43

To proponents of *Miranda*, the "effect" of § 3501 was a return to the totality of the circumstances test to determine voluntariness, even though *Miranda* rejected that test.[131] They argued that § 3501 did not provide sufficient safeguards at the outset of the police interrogation.[132] In addition, it did not require the police to exercise any affirmative obligation to ensure that an obtained statement was truly voluntary.[133] Therefore, according to *Miranda*'s proponents, § 3501 was in direct conflict with the core holding of *Miranda*, which required that suspects be advised of their rights and that any decision of a suspect to use those rights be fully honored.[134]

2. *Exceptions to* Miranda

Since the *Miranda* decision, the Court has recognized certain exceptions to what in essence has become known as the *Miranda* "exclusionary rule."[135] The first exception was created in the 1971 case of *Harris v. New York*,[136] in which the Court held that statements taken in technical violation of *Miranda* may be used to impeach a defendant's creditibility, if he or she takes the witness stand during trial.[137] The Court reasoned that there was no constitutional protection for perjury.[138] In line with the *Harris* decision was *Oregon v. Hass*,[139] where the Court found that the shield provided by *Miranda* was not to be used as protection against inconsistent testimony.[140]

In *Michigan v. Tucker*,[141] the Court developed a second exception to the *Miranda* exclusionary rule.[142] In *Tucker*, the Court determined that the discovery of a witness from a statement given by a defendant after he was not fully advised of the *Miranda* warnings did not violate

---

UCLA L. REV. 839 (1996).

131. Petitioner's Brief at 28, *Dickerson* (No. 99-5525).

132. *Id.* at 29.

133. *Id.*

134. *Id.* at 28.

135. Brief for Court-Appointed Amicus Curiae at 13, *Dickerson* (No. 99-5525).

136. 401 U.S. 222 (1971).

137. *Id.* at 226. A "technical violation" of *Miranda* is where the police obtain an in-custody statement from a suspect without providing all of the requisite *Miranda* warnings prior to taking the statement. *Id.* at 222 (citing Walder v. United States, 347 U.S. 62 (1954)). Such a violation renders the statement inadmissible in the prosecution's cas-in-chief. *Id.* at 222.

138. *Id.* at 225.

139. 420 U.S. 714 (1975).

140. *Id.* at 722. Hass had been arrested for theft and then advised of his *Miranda* rights. *Id.* at 715. While he was being transported in a police vehicle, he informed the arresting officer that he wanted to speak to an attorney. *Id.* The officer told Hass that one would be contacted upon their arrival at the police station. *Id.* at 715-16. Prior to arriving at the station, Hass provided inculpatory information. *Id.* at 716. Even though this inculpatory information was excluded from the prosecutor's case-in-chief, the Court indicated that such information could be used against a defendant for impeachment purposes. *Id.* at 721-22.

141. 417 U.S. 433 (1974).

142. *Id.*

the Constitution.[143] The Court reasoned that when balancing the interests of the defendant with that of society, it must factor in the strong interest of making available all relevant and trustworthy evidence to the trier of fact.[144] The Court also stated that the conduct of the police did not curtail the respondent's privilege against self-incrimination but "departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege."[145]

A third exception was found in the 1984 case of *New York v. Quarles*.[146] The Court held that there is a "public safety" exception to the *Miranda* requirement that a suspect be advised of his rights before a statement may be admitted as evidence.[147] The Court also held that the exception does not depend upon the motivation of the officer.[148] In creating the public safety exception, the Court relied on the findings in *Tucker* that the "prophylactic *Miranda* warnings . . . are 'not themselves rights protected by the Constitution.'"[149]

A fourth exception was developed in *Oregon v. Elstad*,[150] where the Court held that an initial failure to advise a suspect of his or her *Miranda* warnings did not taint subsequent admissions after the warnings were given and waived.[151] The Court reasoned that when inquiring if a second statement is made voluntarily, it must examine the police conduct and surrounding circumstances of the statement.[152] The Court in *Elstad*

---

143. *Id.* at 450. While attempting to get medical assistance for a woman who had been bound and raped in her home, the police observed a dog inside the victim's house. *Id.* at 435. Realizing that the dog did not belong to the victim, the police followed the dog to Tucker's house. *Id.* at 436. Prior to interrogation, the police advised Tucker of his rights but failed to advise him that he would be furnished counsel if he could not afford one. *Id.* During questioning, Tucker stated that he had been with a friend during the time of the alleged assault. *Id.* When police questioned Tucker's friend, the friend's story actually served to implicate Tucker in the assault and rape. *Id.* at 436-37. Tucker tried unsuccessfully to prevent his friend from testifying based on the fact that he had not received his full *Miranda* warnings. *Id.* at 437.

144. *Id.* at 450.

145. *Id.* at 446.

146. 467 U.S. 649 (1984). A man with a gun was chased into a store by police. *Id.* at 652. After a short chase, the police caught the man but found that the shoulder holster he was wearing was empty. *Id.* Before the police advised him of his *Miranda* rights, they asked him where the gun was located. *Id.* The suspect told the police where the gun was located. *Id.*

147. *Id.* at 655-56. The public safety exception to *Miranda* postulates that the safety of the public takes preeminence over complying with the prophylactic rules of *Miranda*. *Id.* at 653. The Court indicated that the police, in this case, had to "insure that further danger to the public did not result from the concealment of the gun in a public area." *Id.* at 657.

148. *Id.* at 656.

149. *Id.* at 654 (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

150. 470 U.S. 298 (1985).

151. *Id.* at 318. Police arrived at the home of Elstad with a warrant for his arrest after he was implicated in a residential burglary. *Id.* at 300. During conversation with the police, but prior to being advised of his *Miranda* warnings, Elstad admitted to the burglary. *Id.* at 301. He was transported to the sheriff's office and approximately one hour after their arrival, Elstad was first advised of his *Miranda* rights. *Id.* After acknowledging and waiving his rights, Elstad gave a full confession. *Id.*

152. *Id.* at 318.

also stated that a violation of *Miranda* was not an "actual infringement of the suspect's constitutional rights."[153]

D. SUMMARY OF LEGAL BACKGROUND

The history of in-custody interrogations by police has been fraught with incidents of police misconduct.[154] Even though the past use of physical brutality to obtain confessions may be the exception today, it is still recognized that in-custody statements may also be obtained by the use of psychological influences and as such are still presumed to be coercive.[155] In order to protect against such presumptive coercion, the United States Supreme Court in *Miranda* required the police to advise suspects in police custody of certain rights and warnings before permitting the use of any statements, taken from suspects, to be used in court as evidence.[156]

Recognizing that voluntary confessions would be presumed coerced and therefore excluded as evidence if found to be in technical violation of *Miranda*, Congress enacted 18 U.S.C. § 3501.[157] Section 3501 provided *Miranda* type warnings and provisions; however, the absence or presence of any of these warnings was not conclusive as to the voluntariness of the statement.[158] It required the courts to look at the totality of the circumstances surrounding the confession in order to determine its voluntariness and hence, its admissibility as evidence.[159] The Executive Branch of the United States government independently determined that § 3501 was unconstitutional and refused to urge its application in the courts.[160]

III. ANALYSIS

Dickerson v. United States was decided by a seven-to-two majority, which held that "*Miranda* and its progeny govern the admissibility of statements made during custodial interrogation in both state and federal courts."[161] Chief Justice Rehnquist delivered the majority opinion.[162]

---

153. *Id.* at 308.
154. Miranda v. Arizona, 384 U.S. 436, 445-47 (1966).
155. *Id.* at 448.
156. *Id.* at 444.
157. Omnibus Crime Control and Safe Street Act of 1968, Pub L. No. 90-351, 82 Stat. 210 (1968) (codified as amended at 18 U.S.C. § 3501 (1994)).
158. *Id.*
159. *Id.*
160. Petitioner's Brief at 10, Dickerson v. United States, 120 S. Ct. 2326, 2329-30 (2000) (No. 99-5525).
161. *Dickerson*, 120 S. Ct. at 2329-30.
162. *Id.* at 2329. Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg, and Breyer joined the opinion of Chief Justice Rehnquist. *Id.*

Justice Scalia wrote a dissenting opinion in which he attacked the majority's affirmation of *Miranda*, which Justice Scalia considered to be an extraconstitutional constraint upon Congress and the states.[163]

A. THE MAJORITY OPINION

The majority addressed two issues: whether Congress had constitutional authority to supersede *Miranda* and whether the Court had to examine any other issues, other than those found in *Miranda*, to decide this case.[164]

1. *Whether Congress Had Constitutional Authority to Supersede* Miranda

Since there was an apparent conflict between the holding of *Miranda* and 18 U.S.C. § 3501, the Court had to decide whether Congress had constitutional authority to supersede *Miranda*.[165] The issue turned on the question of whether *Miranda* was a constitutional rule or a legislative regulation of evidence.[166] The Court recognized that the implementation and enforcement of rules of evidence and procedure are left to congressional discretion.[167] On the other hand, the Court emphasized that interpreting and applying the Constitution remains ultimately with the Court.[168] Therefore, if *Miranda* were only a legislative rule, then § 3501 would be the determinative authority of whether a suspect's confession may be admitted as evidence at trial.[169] If, on the other hand, *Miranda* were a constitutional rule, then Congress would be precluded from enacting any statute that superseded it.[170]

To support its contention that *Miranda* was a constitutional rule, which could only be interpreted and applied by the Court, the majority referred to the descriptive language and application of *Miranda* by the Court.[171] Additionally, the Court referred to its invitation to the states to

---

163. *Id.* at 2348 (Scalia, J.,dissenting). Justice Thomas joined Justice Scalia in the dissenting opinion. *Id.*

164. *Id.* at 2335.

165. *Id.* at 2332.

166. *Id.*

167. *Id.* at 2332; *see also* Palermo v. United States, 360 U.S. 343, 347-48 (1959) (showing that Congress exercised its power in defining the rules surrounding the production of evidence in criminal trials instead of leaving it to the courts).

168. *Dickerson*, 120 S. Ct. at 2332-33; *see also* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("Congress has been given the power to enforce, not the power to determine what constitutes a constitutional violation.").

169. *Dickerson*, 120 S. Ct. at 2332.

170. *Id.*

171. *Id.* at 2333-34.

develop equally protective procedures, to demonstrate that *Miranda* was a constitutional rule.[172]

First, in reference to descriptive language, the Court pointed to the *Miranda* Court's insistence that it give "concrete constitutional guidelines for law enforcement agencies and courts to follow."[173] In addition, the Court mentioned the numerous statements in the *Miranda* decision that demonstrated the intention to implement a "constitutional rule."[174] Therefore, the Court in *Dickerson* found it was the *Miranda* Court's understanding that it was promulgating constitutional standards, which would be applicable to all courts, both federal and state.[175]

Secondly, in recognition of its limited authority over state courts in addressing only constitutional issues, the Court demonstrated that *Miranda* was a constitutional issue by showing that the *Miranda* rule had been applied to prosecutions arising in state courts.[176] If not addressing a constitutional issue, the Court would have no supervisory authority over a state court.[177]

Furthermore, state prisoners had been permitted to raise alleged *Miranda* violations in federal *habeas corpus* proceedings.[178] Federal *habeas corpus* proceedings apply only to prisoners who are in custody in violation of the federal Constitution or federal laws or treaties.[179] Since *Miranda* was not a federal law or treaty, the Court stated that its

---

172. *Id.*

173. *Id.* at 2333-34 (quoting Miranda v. Arizona, 384 U.S. 436, 441-42 (1966)).

174. *Id.* at 2334 n.4. (citing *Miranda*, 384 U.S. at 445). "The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody . . . ." *Miranda*, 384 U.S. at 445. "The requirement of warnings and waiver of rights is . . . fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Id.* at 476. "[T]he issues presented are of constitutional dimensions and must be determined by the courts." *Id.* at 490.

175. *Dickerson*, 120 S. Ct. at 2334.

176. *Id.* at 2333; *see also* Stansbury v. California, 511 U.S. 318, 326 (1994) (stating that the analysis of the California Supreme Court conflicted with the precedents of the U.S. Supreme Court); Mu'Min v. Virginia, 500 U.S. 415, 422 (1991) (stating that the authority of the Supreme Court in state courts is limited to enforcing the federal Constitution).

177. *See* Smith v. Phillips, 455 U.S. 209, 221 (1982) (stating that before a state conviction can be overturned by a federal court, it must be determined that the state action violated a federal constitutional right).

178. *Dickerson*, 120 S. Ct. at 2333 n.3; *see also* Thompson v. Keohane, 516 U.S. 99, 102 (1995) (holding that issues involving the definition of "custody" to determine whether a suspect is entitled to *Miranda* are "mixed question[s] of law and fact" which require independent review); Withrow v. Williams, 507 U.S. 680, 683 (1993) (holding that the exercise of federal habeas jurisdiction extends to a state prisoner's claim that his conviction was based on a violation of *Miranda*).

179. *See* 28 U.S.C. § 2254(a) (1994).

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Id.

decision obviously assumed that it was a constitutional rule in order for state prisoners to be permitted to raise alleged *Miranda* violations.[180]

Finally, the Court called attention to the fact that *Miranda* recognized that there might be alternatives for protecting a suspect's constitutional privilege.[181] It added that the Constitution would not preclude Congress or the states from developing other procedures that were "at least as effective" as the *Miranda* rights in protecting that privilege.[182] When addressing constitutional issues applicable to the states, the Court has consistently set the minimum constitutional requirements that the states cannot go below in formulating its own rules or statutes.[183] Therefore, by stipulating that Congress or the states could develop other procedures that were "at least as effective" as *Miranda*, there was an indication that the Court had set the minimum constitutional requirements when it promulgated the *Miranda* rights.[184]

Addressing the issue of exceptions to the *Miranda* "exclusionary rule" that the dissent raised, the Court emphasized that any modification of the *Miranda* rule did not negate its constitutionality.[185] The Court pointed out that in addition to finding exceptions to the rule, it had also "broadened" its application beyond that of in-custody confessions.[186] The Court stated that the application of exceptions to, and the broadening of, the principles established in *Miranda* illustrated that "no constitutional rule is immutable."[187] The Court added that it would not be possible for a court to foresee the various possibilities in which a constitutional rule may be applied; therefore, modifications in the application of the rule were "as much a normal part of constitutional law as the original decision."[188]

The Court also recognized the *amicus'* contention that, in addition to the *Miranda* exclusionary rule, there were other remedies available for abusive police conduct.[189] The Court did not agree however, that these

---

180. *Dickerson*, 120 S. Ct. at 2333 n.3.

181. *Id.* at 2334 (citing *Miranda*, 384 U.S. at 467).

182. *Id.* at 2334.

183. *See* Smith v. Robbins, 528 U.S. 259, 273 (2000) (stating that there is an "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the 14th Amendment, to experiment with solutions to difficult problems of policy").

184. *Dickerson*, 120 S. Ct. at 2334.

185. *Id.* at 2334-35; *see also supra* Part II.C.2 (discussion on exclusionary rule exceptions).

186. *Dickerson*, 120 S. Ct. at 2335; *see also* Doyle v. Ohio, 426 U.S. 610, 619 (1976) (holding that the use for impeachment purposes of a suspect's silence, after arrest and being advised of *Miranda* rights, was a violation of the Due Process Clause); Arizona v. Roberson, 486 U.S. 675, 677, 688 (1988) (holding that after a suspect in custody has requested counsel, police may not question that suspect about a separate investigation).

187. *Dickerson*, 120 S. Ct. at 2335.

188. *Id.*

189. *Id.*; *see also* Brief of Court-Appointed Amicus Curiae at 28-40, *Dickerson* (No. 99-5525). Examples of federal remedies include *Bivens* actions and claims under the Federal Tort Claims Act.

additional remedies supplemented the protections found in 18 U.S.C. § 3501 enough to "meet the constitutional minimum" found in *Miranda*.[190] *Miranda* required certain procedures that would ensure that an in-custody suspect was warned that he or she had a right to remain silent and a right to counsel prior to any questioning.[191] Coupling the additional remedies identified by *amici*[192] with § 3501, which only required an examination of the totality of the circumstances, would not provide the necessary minimal protections required by *Miranda*.[193]

2. *The Court Only Examined Issues Found in* Miranda

Even though the Court recognized that there were various other contentions raised by *amici*, it declined to look any further than *Miranda*, due to the "procedural posture" of this particular case.[194] In other words, since the petitioners had not raised the arguments addressed by the *amici*, the Court was reluctant to examine them.[195]

The Court emphasized that § 3501 reinstated the "totality of the circumstances" test, a test which the Court rejected in *Miranda*.[196] In fact, the *Miranda* Court stated that something more than the "totality test" was necessary for the protection of a constitutional privilege.[197] Therefore, § 3501 was not sufficient as an "equivalent" to the *Miranda* warnings to ensure that required protection.[198]

See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (holding that a violation of the Fourth Amendment by federal agents, under the color of law, gives rise to a cause of action); 28 U.S.C. § 2680(h) (1994) (applying to acts or omissions of federal agents arising "out of claims of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution"); 18 U.S.C. §§ 241, 242 (1994 & Supp. V 1999) (prohibiting the deprivation of a subject's constitutional rights under the color of law). Examples of state remedies include § 1983 actions and state tort suits. *See* 42 U.S.C. § 1983 (1994 & Supp. III 1997) (permitting suits against state officers who, acting under color of law, deprive a citizen of any right, privilege, or immunity secured by the Constitution).

190. *Dickerson*, 120 S. Ct. at 2335.

191. *Id.*

192. *Supra* note 189.

193. *Dickerson*, 120 S. Ct. at 2335.

194. *Id.* at 2337 n.8; *see also* Brief of Court-Appointed Amicus Curiae at 45-48, *Dickerson* (No. 99-5525). An example of one of the other contentions which had been raised by the *amici* involved the issue of the "irrebuttable presumption" which results when there is a failure to administer the *Miranda* warnings. *Id.* The *amici* argued that such a presumption disappeared when the "application of the presumption does not reach the correct result most of the time." *Id.* They added that to apply the irrebuttable presumption was to change the standard of the Fifth Amendment from compulsion to warning-and-waiver, which redefined the state's legal obligation. *Id.* This problem, the *amici* contended, could be resolved if the Court changed the irrebuttable presumption into a rebuttable one, meaning that a statement would be presumed to be involuntary until the state could prove otherwise. *Id.* This would place the burden on the government to prove voluntariness while continuing to keep *Miranda* as an important part of the equation. *Id.*

195. *Dickerson*, 120 S. Ct. at 2337; *see also* Knetsch v. United States, 364 U.S. 361, 370 (1960) (stating that since an argument was not advanced by the petitioners, the Court had no reason to pass upon it).

196. *Dickerson*, 120 S. Ct. at 2335; *Miranda*, 384 U.S. at 457.

197. *Miranda*, 384 U.S. at 467, 490-91.

198. *Dickerson*, 120 S. Ct. at 2335.

The Court concluded that even if it did not agree with the *Miranda* decision, the principles of stare decisis would prevent the Court from overruling it now.[199] Even if the Court were to depart from *Miranda*, any departure of precedent must be supported by special justification.[200] Since *Miranda* had become so much a part of routine police practice in the United States, it had actually become part of the national culture.[201] As a result, the Court saw no justification to overrule *Miranda*.[202]

B. JUSTICE SCALIA'S DISSENT

Justice Scalia dissented because, in his opinion, *Miranda* placed constraints upon Congress and the states that were outside the reach of the Constitution.[203] He pointed out that the Court refused to clearly state in its opinion that the use of § 3501 or the failure to give the *Miranda* warnings violated the Constitution.[204] The reason for this, Justice Scalia contended, was that not only did § 3501 exclude exactly what the Constitution excluded, confessions obtained by coercion, but also, three of the Justices joining the majority opinion had gone on record as believing that a violation of *Miranda* was not a violation of the Constitution.[205] Therefore, in order to justify its decision in this case, the Court had to form an entirely new principle of constitutional law.[206] That new principal prohibited Congress from enacting legislation that not only violated the Constitution but also any other decision of the Court.[207]

According to Justice Scalia, for over seventy years the Court had rejected the premise that confessions obtained as a result of in-custody

---

199. *Id.* at 2336. To support this decision, the Court referred to the 1980 case of *Rhode Island v. Innis*, 446 U.S. 291, 304 (Burger, C.J.) ("The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date.").

200. *Dickerson*, 120 S. Ct. at 2336; *see also* Arizona v. Rumsey, 467 U.S. 203, 212 (1984) (stating that in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification).

201. *Dickerson*, 120 S. Ct. at 2336; *see also* Mitchell v. United States, 526 U.S. 314, 330 (1999) (Scalia, J., dissenting) (stating that the "wide acceptance in our legal culture" of a rule is "adequate reason not to overrule" it).

202. *Dickerson*, 120 S. Ct. at 2336.

203. *Id.* at 2348. Justice Thomas joined Justice Scalia in the dissenting opinion. *Id.* at 2337.

204. *Dickerson*, 120 S. Ct. at 2337.

205. *See id.* (citing *Davis v. United States*, 512 U.S. 452, 457 (1994), and stating that *Miranda* is a series of recommended safeguards which are not constitutionally protected); Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (stating that *Miranda* rights are not rights protected by the Constitution); Oregon v. Elstad, 470 U.S. 298, 304 (1985) (stating that a failure to administer *Miranda* warnings does not result in the same consequences as an infringement of a constitutional right); New York v. Quarles, 467 U.S. 649, 654 (1984) (stating that the prophylactic *Miranda* warnings are not rights protected by the Constitution).

206. *Dickerson*, 120 S. Ct. at 2337.

207. *Id.*

interrogations were coerced.[208] The only "conceivable basis" for the *Miranda* decision, Justice Scalia surmised, was to prevent "foolish rather than compelled confessions" by the suspect.[209] This was the only explanation for the Court to include the right to counsel and the requirement that this right be knowingly and intelligently waived.[210] As Justice Scalia reasoned, it was not necessary that counsel tell the suspect to remain silent, the police interrogator already tells the suspect that.[211] It was this apparent and open hostility toward confessions per se that made the *Miranda* decision so unacceptable.[212]

In addressing the exceptions to *Miranda's* exclusionary rule, Justice Scalia examined four cases, which, according to him, clearly demonstrated that the Court had concluded that a violation of *Miranda* was not necessarily a violation of the Constitution.[213] Justice Scalia pointed out that had the statement in *Tucker* been taken by police in violation of the Fifth Amendment, that statement and its "fruits" would have been excluded as evidence.[214] Justice Scalia also indicated that the holding in *Hass* recognized that a violation of *Miranda* was not "unconstitutional compulsion" since statements taken in actual violation of the Fifth Amendment privilege could not be used in a criminal trial, including its use as impeachment evidence.[215] Justice Scalia emphasized that the *Quarles* court was aware that if the *Miranda* warnings were required by the Fifth Amendment, no public safety exception would have been possible as the bar on self-incrimination is absolute.[216] Justice Scalia then indicated that the Court in *Elstad* made the statement to the effect

---

208. *Id.* at 2339; *see also* Crooker v. California, 357 U.S. 433, 437 (1958) (stating that police detention and examination of a suspect does not render a confession involuntary); Powers v. United States, 223 U.S. 303, 313-14 (1912) (stating that voluntary confessions are admissible at trial); Wilson v. United States, 162 U.S. 613, 623-24 (1896) (stating that the fact that a suspect is in custody does not render his confession involuntary).

209. *Dickerson*, 120 S. Ct. at 2339.

210. *Id.*

211. *Id.*

212. *See id.* (quoting from United States v. Washington, 431 U.S. 181, 187 (1977), "[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable.").

213. *See Dickerson*, 120 S. Ct. at 2340-41 (discussing Oregon v. Elstad, 470 U.S. 298, 318 (1985), which permits the admission of a suspect's statement even though it was preceded by an earlier statement taken without the advisement of the *Miranda* warnings); *see also* New York v. Quarles, 467 U.S. 649, 657 (1984) (creating a public safety exception to the *Miranda* exclusionary rule); Oregon v. Hass, 420 U.S. 714, 723-24 (1975) (holding that a voluntary statement taken in violation of *Miranda* could be used at trial for impeachment purposes); Michigan v. Tucker, 417 U.S. 433, 439 (1974) (holding that the identity of a witness by the statement of an in-custody defendant was not the "fruit" of a *Miranda* violation).

214. *Dickerson*, 120 S. Ct. at 2341; *see also* Nix v. Williams, 467 U.S. 431, 442 (1984) (stating that exclusion of evidence under the "fruit of the poisonous tree" doctrine is applicable to Fifth Amendment violations).

215. *Dickerson*, 120 S. Ct. at 2341.

216. *Id.*

that police who fail to provide the *Miranda* warnings should not reap the same consequences as if they had violated a Fifth Amendment privilege.[217]

In light of the four "exception" cases, Justice Scalia stated that it was not possible for the Court to come to the conclusion that a violation of *Miranda* was a violation of the Constitution.[218] However, Justice Scalia believed that the Court must come to this conclusion before it could strike down a statute of Congress that governs the admissibility of evidence in federal courts.[219] Justice Scalia stated that, in order to avoid such a conclusion, the Court provided two explanations for the findings in these cases.[220]

The first was that there was "some language" or dicta in these post-*Miranda* cases that did "indicate" that the *Miranda* warnings were not constitutionally mandated.[221] Justice Scalia emphasized that it was more than just dicta; that this "some language" was central to the holdings of *Tucker, Hass, Quarles,* and *Elstad* that a violation of *Miranda* was not a violation of the Constitution.[222]

The second explanation made by the Court was that "no constitutional rule is immutable."[223] The Court reasoned that no court can foresee all of the ways by which a law may be applied by counsel.[224] Justice Scalia recognized this fact; however, he argued that when rules are modified they still must make sense.[225] He emphasized this by stating that if confessions obtained in violation of *Miranda* were, in fact, violations of the Constitution, then the findings of these post-*Miranda* cases made no sense as they too involved confessions obtained in violation of *Miranda*.[226] Justice Scalia's conclusion then was that the only reasonable explanation for the findings of these post-*Miranda* cases was that a violation of *Miranda* was not a violation of the Constitution.[227]

Justice Scalia also discussed the Court's assertion that *Miranda* must be a constitutional rule because it has been applied to the states.[228] He

---

217. *Elstad*, 470 U.S. at 308-09; *see also Dickerson*, 120 S. Ct. 2341.

218. *Dickerson*, 120 S. Ct. at 2342.

219. *Id.* Justice Scalia added that the Court was violating the very principles of the separation of powers and that it was taking upon itself the privileges reserved for Congress. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* Justice Scalia reasoned that to deem otherwise would render the Court a "nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy." *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 2343. Justice Scalia indicated that to continually apply *Miranda* to the states despite

explained that if this was an "invocation of stare decisis," it must fail.[229] This was because, whether or not it was determined that *Miranda* was required by the Constitution, the post-*Miranda* exception cases clearly demonstrated that there were cases on both sides of the issue that would need to be reconsidered.[230] Therefore, "the stare decisis argument is a wash."[231]

Even though § 3501 dealt exclusively with the totality-of-the-circumstances test, Justice Scalia pointed out that the Court's decision had not "banished" this test from the law.[232] When a court examines any challenge to an in-custody statement, it undertakes both a *Miranda* and a voluntariness examination.[233] This is because the voluntariness inquiry remains the constitutional standard that governs the admissibility of evidence in situations involving impeachment, "fruits of the poisonous tree," and statements claimed to be taken unconstitutionally in spite of the fact that *Miranda* warnings were given.[234]

Justice Scalia concluded that the Court, in determining that *Miranda* is a constitutional rule, did not merely apply the Constitution, it expanded it.[235] Justice Scalia called this a "frightening antidemocratic power" which does not exist.[236] Therefore, in denying the effect of § 3501, the Court was in "plain violation" of the United States Constitution.[237]

IV. IMPACT

Dickerson affirmed that a failure to advise a subject, who is in police custody, of his or her *Miranda* rights precludes the use of any statements obtained.[238] The underlying purpose of the *Miranda* exclusionary rule is to deter the use of coercion, inherent in custodial interrogations, which prevents individuals from exercising their Fifth Amendment privilege not to incriminate themselves.[239]

---

the Court's statements that a violation of its dictates is not an actual constitutional violation, is evidence of *Miranda*'s illegitimacy. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 2347.

233. *Id.*

234. *Id.* Justice Scalia added that in reference to its application, the totality of the circumstances test is no more difficult to apply than *Miranda*. *Id.* In fact, Justice Scalia agreed with a previous dissent written by Justice O'Connor who stated that the "voluntariness inquiry often can make judicial decisionmaking easier rather than more onerous." *Id.* (quoting Withrow v. Williams, 507 U.S. 680, 711-12 (1993) (O'Connor, J., dissenting)).

235. *Id.* at 2337.

236. *Id.*

237. *Id.* at 2338.

238. *Id.* at 2329; *see also* Mapp v. Ohio, 367 U.S. 643, 657 (1961) (finding evidence inadmissible if obtained in violation of the Constitution).

239. Miranda v. Arizona, 384 U.S. 436, 439 (1966).

Even though the *Miranda* exclusionary rule appears to have a valid constitutional purpose, there are easily recognizable disadvantages to its application.[240] The first is that the *Miranda* exclusionary rule "sweeps more broadly" than the Fifth Amendment itself in that it may be applied even when there is no violation of a Fifth Amendment privilege.[241] This would be the case where a non-coerced statement was given voluntarily by a suspect, but the officer failed to advise the suspect of the *Miranda* warnings prior to the giving of such statement.[242]

By failing to administer the *Miranda* warnings prior to receiving a statement, there is a presumption that any subsequent confession was compelled.[243] As such, the Fifth Amendment precludes a prosecutor from using presumably compelled testimony in his or her case-in-chief.[244] Therefore, even though a suspect may provide an otherwise voluntary statement, with no resulting constitutional harm, the failure to provide the *Miranda* warnings would preclude the use of such a statement.[245] In summary, a failure to provide the *Miranda* warnings "does not *constitute* coercion but rather affords a bright-line, legal presumption of coercion, requiring suppression of all unwarned statements."[246]

A second disadvantage, which was recognized by the Court, is that a voluntary statement made by a subject, who may be well aware of his *Miranda* rights, would still be excluded if he were not properly given the warnings.[247] Even though *Miranda* has become firmly implanted in our national culture to the point of being commonly known, an in-custody suspect must still be advised of such warnings.[248] The Court conceded that a failure to advise of these warnings could likely result in a guilty defendant being set free.[249]

A third disadvantage is that, historically, the Court has had difficulty in defining terms which are necessary in determining when the *Miranda* warnings should be given.[250] Twenty-eight years after the *Miranda* decision, the Court still had to address this definition issue in *Stansbury v.*

---

240. *Dickerson*, 120 S. Ct. at 2336.
241. Oregon v. Elstad, 470 U.S. 298, 306 (1985).
242. *Id.* at 307.
243. *Id.*
244. *Id.* at 306-07.
245. *Id.*
246. *Id.* at 307 n.1.
247. Dickerson v. United States, 120 S. Ct. 2326, 2336 (2000); *see also* Michigan v. Harvey, 494 U.S. 344, 350 (1990) (recognizing that the *Miranda* rules would result in the exclusion of some voluntary and reliable statements).
248. *Dickerson*, 120 S. Ct. at 2336.
249. *Id.* at 2326.
250. Brief of Amicus Curiae Manning & Marder, Kass, Ellrod, Ramirez at 4, Dickerson v. United States, 120 S. Ct. 2326 (2000) (No. 99-5525).

California,[251] where even the Supreme Court of California had difficulty in defining the concept of custody.[252] The Court itself has admitted that "the task of defining custody is a slippery one."[253]

The Court's difficulty with definitions is also found with the term "interrogation."[254] A case demonstrating the Court's obvious difficulty with this term is found in *Pennsylvania v. Muniz*,[255] where there were six different opinions regarding the definition of "interrogation" of a drunk driver.[256]

Finally, a fourth difficulty arises when police administer the *Miranda* warnings, obtain a valid confession, and then are later informed by the courts that there was a breach of *Miranda* due to such things as a redefinition of a term as discussed above.[257] As the Court stated in *Elstad*,

> police are not trained to act as counsel, determining the difficult question of when custody begins.[258] The police can only be expected to adhere to the current decisions of the Court, which may provide some direction in defining such terms as custody, even though the courts themselves seem to have difficulty in accomplishing this task.[259]

In recognition of the inherent difficulties associated with the application of *Miranda*, police officers cannot realistically be expected to make no errors.[260] When nonculpable errors are made in the administration of the *Miranda* rights, it should not result in the same consequences as an intentional violation of the Fifth Amendment privilege.[261] To do so could compromise the confidence that the public

---

251. 511 U.S. 318 (1994).

252. *Id.* at 319 (holding that the subjective interpretation of an officer on whether a person being interrogated is a suspect does not figure into the determination of defining custody).

253. Oregon v. Elstad, 470 U.S. 298, 309 (1985).

254. Brief of Amicus Curiae Manning & Marder, Kass, Ellrod, Ramirez at 4, *Dickerson* (No. 99-5525).

255. 496 U.S. 582 (1990).

256. *Id.* The differences of opinion as to the definition of interrogation included a five-to-four split involving the questioning of the defendant as to the date of his sixth birthday, an eight-to-one split as to statements given by the defendant during a sobriety test, an eight-to-one split as to statements made by the defendant when asked to submit to a breathalyzer test, and an inability of the Justices to agree as to responses made by the defendant to certain booking questions. *Id.*

257. *See Elstad*, 470 U.S. at 316 (citing *United States v. Bowler*, 561 F.2d 1323, 1324 (9th Cir. 1977), where the trial court suppressed a statement made prior to administration of *Miranda* warnings); United States v. Toral, 536 F.2d 893, 896 (9th Cir. 1976) (showing that a confession can be deemed inadmissible, even when the *Miranda* warnings have been given, due to the length of the in-custody interrogation); United States v. Knight, 395 F.2d 971, 974-75 (2d Cir. 1968) (examining the admissibility of a confession based upon the custody of a suspect by two separate police agencies).

258. *Elstad*, 470 U.S. at 316.

259. Brief of Amicus Curiae Manning & Marder, Kass, Ellrod, Ramirez 3-4, Dickerson v. United States, 120 S. Ct. 2326 (2000) (No. 99-5525).

260. *Elstad*, 470 U.S. at 308-09.

261. *Id.*

has in the appropriateness of the exclusionary sanction, just as an "over-criminalization" sanction can do.[262] It may ultimately result in "disrespect for the law and the administration of justice."[263]

A potential solution to dissipate the disadvantages associated with the *Miranda* exclusionary rule would be to extend and apply the "good faith" exception, which is normally applicable to Fourth Amendment search and seizure concerns.[264] The government, which supported the affirmation of *Miranda*, intimated that such an exception might be appropriate when an officer makes a "reasonable" mistake in complying with the dictates of *Miranda*.[265]

Embodied in the relationship between the Fourth and Fifth Amendment is the uniform underlying purpose of each amendment's exclusionary rule—to deter police misconduct.[266] However, when the police action has been taken in objective good faith or in a reasonable belief that such conduct has not violated a right, it is incorrect to assume that adherence to such an exclusionary rule will continue to provide deterrence.[267] This is because the deterrent purpose of the exclusionary rule is to prohibit the deprivation of a constitutional right by willful, or at least negligent, police conduct.[268] Where police action is taken in objective good faith, the deterrence rationale loses it purpose.[269]

Regarding the exclusion of potentially useful evidence, the Court has recognized that it must be sensitive to the costs and benefits of the imposition of the exclusionary rule.[270] While a defendant may reap the benefit from an exclusion, the primary cost is that exclusion interferes with a trial court's truth-seeking function "by barring relevant and trust-

---

262. Sharon L. Davies, *The Penalty of Exclusion–A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1319-20 (2000).

263. United States v. Leon, 468 U.S. 897, 908 (1984) (stating that in instances where law enforcement officers have acted in good faith, the use of the exclusionary rule bestows such a large benefit upon the guilty defendant that it offends the "basic concepts of the criminal justice system").

264. *Id.* at 900, 920-21. The Court determined that a "good faith" exception to the Fourth Amendment's exclusionary rule involves a law enforcement officer who, acting in objective good faith, obtains a search warrant from a judge or magistrate and acts within the scope of that warrant. *Id.* at 920. Since there would be no illegality, the exclusionary rule's deterrence objective would not apply. *Id.* at 920-21.

265. Brief for the United States at 36 nn.25 & 26, Dickerson v. United States, 120 S. Ct. 2326 (2000) (No. 99-5525).

266. Illinois v. Gates, 462 U.S. 213, 260 (1983) (showing that the deterrent purpose of the Fourth Amendment exclusionary rule rests upon the assumption that the police have either willfully or negligently deprived a subject of a constitutional right); *see also Leon*, 468 U.S. at 906 (stating that the intention of the exclusionary rule is not to cure the invasion of a right, but to create a judicial remedy through the deterrent effect); Michigan v. Tucker, 417 U.S. 433, 447 (1974) (showing the deterrent purpose of the *Miranda* Fifth Amendment exclusionary rule).

267. *Gates*, 462 U.S. at 260.

268. *Tucker*, 417 U.S. at 447.

269. *Id.*

270. *Gates*, 462 U.S. at 257.

worthy evidence."[271] Such a cost has been a source of concern for the Court for quite some time.[272] Since such a rule prevents a jury from having the ability to review evidence, its application must be justified and limited to situations that will in fact deter misconduct.[273] As the Court has stated, it is difficult to justify the exclusion of highly probative evidence obtained from a voluntary statement which will be "irretrievably lost to the factfinder."[274]

Over the years the Court has recognized the importance of such probative evidence in relation to its reduced deterrent effect, and has fashioned certain exceptions to its exclusionary rules.[275] Several of these exceptions have been applicable to both Fourth and Fifth Amendment concerns.[276]

Since the Court has now affirmed, however, that a failure to provide *Miranda* warnings is a presumption of coercion resulting in the exclusion of evidence, it is reasonable to assume that a good faith effort to comply with its dictates should also be permitted an exception.[277] To say otherwise would require the exclusionary rule to be applied on a "strict liability basis," which precludes the use of all exceptions.[278] The extension of the "good faith" exception to the *Miranda* exclusionary rule would simultaneously applaud an officer's good faith effort in obtaining a valid, voluntary confession while still emphasizing that wrongful police conduct will not be tolerated.[279]

A. APPLICATION TO NORTH DAKOTA

North Dakota has recognized that evidence obtained in violation of constitutional mandates precludes the use of that evidence at trial.[280] Even though the North Dakota Supreme Court has applied the "good

---

271. *Id.*

272. United States v. Leon, 468 U.S. 897, 907 (1984).

273. *Gates*, 462 U.S. at 257-58.

274. Oregon v. Elstad, 470 U.S. 298, 312 (1985).

275. *Gates*, 462 U.S. at 256.

276. *Id.* at 256-57. The Court has permitted the use of illegally obtained evidence for impeachment purposes. *See* United States v. Havens, 446 U.S. 620, 626-28 (1980) (discussing Fourth Amendment application); *see also* Harris v. New York, 401 U.S. 222, 224-26 (1971) (discussing Fifth Amendment application). The Court has also allowed subsequent evidence, which had been obtained initially from an illegal source, to be introduced at trial. *See Elstad*, 470 U.S. at 300, 318 (discussing Fifth Amendment application).

277. *Elstad*, 470 U.S. at 309 (stating that an error by police in administering the *Miranda* warnings should not result in the same consequences as a direct violation of a Fifth Amendment privilege).

278. Davies, *supra* note 262, at 1330 (indicating that "the good faith exception ensures that the exclusion sanction will not be applied on a strict liability basis"); *see also* Dickerson v. United States, 120 S. Ct. 2326, 2341 (2000) (Scalia, J., dissenting) (finding that if the *Miranda* warnings were required by the Fifth Amendment, exceptions would not be possible because the "bar on compelled self-incrimination is absolute").

279. Davies, *supra* note 262, at 1330.

280. City of Jamestown v. Dardis, 2000 ND 186, ¶ 19, 618 N.W.2d 495.

faith" exception to violations of a state statute,[281] it has nevertheless declined to decide whether the North Dakota Constitution precludes a "good faith" exception to the exclusionary rule involving search and seizure concerns.[282] Therefore, the entire issue of a good faith exception, as it relates to any constitutional concern, remains unresolved.[283]

B. SURVEY

In order to gauge the impressions of North Dakota criminal attorneys as they relate to the issues involving *Miranda*, the exclusionary rule, and the good faith exception, I chose to conduct a non-scientific survey.

Prosecutors and criminal defense attorneys from nine representative counties within North Dakota were randomly selected to receive the survey.[284] These counties contain some of the state's largest populated areas and would, per capita, have a higher crime rate. A higher crime rate would produce significantly more situations where *Miranda*, the exclusionary rule, and the good faith exception would apply. Hence, the attorneys in these areas would be more familiar with these issues.

The survey, which was mailed to each volunteer participant, consisted of a total of eight questions, including seven multiple-choice questions after an initial question identifying what type of criminal work the participants were involved in prosecution or defense. The survey also contained space for additional comments.[285] Of the eighteen surveys sent out, fifteen were completed and returned.[286]

In question number two,[287] participants were asked if the mandatory use of *Miranda* by law enforcement had made their job easier. Fifty percent of the prosecutors and forty-three percent of the defense attorneys answered affirmatively.[288] One prosecutor did indicate that many

---

281. State v. Herrick, 1999 ND 1, ¶ 28, 588 N.W.2d 847, 852.

282. *Id.* ¶ 27; *see also* Christopher Paul Fischer, Comment, *"I Hear You Knocking But You Can't Come In": The North Dakota Supreme Court Again Declines To Decide Whether The State Constitution Precludes A Good Faith Exception To The Exclusionary Rule*, 76 N.D. L. REV. 123, 157 (2000).

283. *See* Fischer, *supra* note 282, at 159 (concluding that the issue of the good faith exception involving violations of the state constitution "remains an open question").

284. These representative counties were: Burleigh, Cass, Grand Forks, Morton, Ramsey, Richland, Stark, Ward, and Williams. Prior to sending the surveys I contacted, by telephone, the office of twelve prosecutors and nine defense attorneys in order to solicit their cooperation. One prosecutor did not return my call, one defense attorney declined to participate, and another defense attorney was unavailable to respond. A total of eighteen surveys were eventually sent out, eleven to prosecutors and seven to defense attorneys.

285. In completing the survey, the attorneys had the option of either permitting their name to be used or not. For those who declined, neither their names nor work locations were disclosed in this case comment.

286. Of the 15 completed and returned surveys, eight were from prosecutors and seven were from defense attorneys.

287. "Has the mandatory use of *Miranda* rights by law enforcement made your job easier?"

288. Four of the eight prosecutors, or 50%, indicated that the mandatory use of Miranda had

suspects will make frivolous challenges to the properly given warnings when they realize that their statements are going to be used against them.[289] Interestingly, twenty-five percent of the prosecutors and fourteen percent of the defense attorneys did not know if it made a difference at all.[290] Criminal defense attorney Don Campbell of Minot, who stated that the use of *Miranda* did not make his job easier, explained that ninety-nine percent of the defendants he has represented had voluntarily submitted themselves to law enforcement interrogation prior to his representation.[291]

Question number three[292] asked if the attorneys believed that law enforcement, for the most part, were properly applying *Miranda* as required by the courts. All of the prosecutors surveyed stated that they believed they were, while only fifty-seven percent of the defense attorneys answered affirmatively.[293] One defense attorney indicated in his response that federal law enforcement agents properly apply the warnings while it is a "hit and miss" situation with state or local officers.[294] An opinion contrary to this was given by Grand Forks County Assistant State's Attorney Warren Johnson, who stated that he found officers were more likely to overuse *Miranda*, even when it was not legally necessary.[295]

In the fourth question,[296] attorneys were asked whether the application of *Miranda* should be tightened, loosened, or stay the same. Seventy-five percent of prosecutors indicated that it should stay the same while twenty-five percent of the same group indicated that it should be loosened.[297] In his response, Morton County State's Attorney Allen Koppy, expressing a view shared by Chief Justice Rehnquist,[298] stated

---

made their job easier, while three of the seven defense attorneys, or 43%, indicated the same.

289. Anonymous Survey Response "A" (Feb. 2, 2001) (on file with author).

290. Two of the eight prosecutors, or 25%, indicated that they did not know if the mandatory use of *Miranda* by law enforcement made their job easier, while one of the seven defense attorneys, or 14%, indicated the same response.

291. Response to Survey by Don Campbell, defense attorney in Ward County, N.D. (Jan. 25, 2001) (on file with author).

292. "Do you believe law enforcement, for the most part, is properly applying the *Miranda* rights as required by the courts?"

293. All eight of the prosecutors surveyed indicated that they believed law enforcement was properly applying *Miranda*, while four of the seven defense attorneys, or 57%, indicated the same response.

294. Anonymous Survey Response "B" (Feb. 1, 2001) (on file with author).

295. Response to Survey by Warren Johnson, prosecutor in Grand Forks County N.D. (Jan. 24, 2001) (on file with author).

296. "Do you believe that the application of *Miranda* rights by law enforcement should be tightened, loosened, or stay the same?"

297. Six of the eight prosecutors, or 75%, indicated that the application of the *Miranda* rights by law enforcement should stay the same, while two of the eight prosecutors, or 25%, indicated that it should be loosened.

298. *See* Dickerson v. United States, 120 S. Ct. 2326, 2336 (2000) (reasoning that "Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

that *Miranda* has become so much a part of our national legal culture that it should not be changed, it should stay the same.[299] Of the defense attorneys, only forty-three percent stated that it should stay the same, while fifty-seven percent indicated that it should be tightened.[300]

Question five[301] asked the attorneys if the current use of *Miranda* hindered law enforcement in effectively performing their jobs. All of the defense attorneys indicated that it was not a hindrance, while only thirty-eight percent of the prosecutors felt that it was.[302] One prosecutor indicated that a major problem exists in dealing with juvenile criminals.[303] Since North Dakota law prohibits law enforcement from speaking to juveniles unless a parent or attorney is present, regardless of whether *Miranda* is given, statements are normally not taken from juveniles.[304] This is especially true when the juvenile criminals are runaways and there is not immediate access to a parent or guardian.[305] This prosecutor concluded that this tended to be a major hindrance to law enforcement when attempting to investigate juvenile crime.[306]

Question six[307] asked if the attorneys supported the use of the exclusionary rule in preventing the admissibility of evidence illegally obtained by law enforcement. All of the defense attorneys indicated that they did support the rule while seventy-five percent of the prosecutors indicated the same.[308] One prosecutor stated that, while at a seminar, an FBI instructor asked them that if the purpose of the exclusionary rule is to prevent the police from acting unconstitutionally, what purpose does it serve if the police think or feel that they are acting within the Constitution?[309] This prosecutor added that when lawyers and judges disagree

---

299. Response to Survey by Allen Koppy, Morton County N.D. State's Attorney (Feb. 10, 2001) (on file with author).

300. Three of the seven defense attorneys, or 43%, indicated that the application of *Miranda* by law enforcement should stay the same, while four of the seven defense attorneys, or 57%, indicated that it should be tightened.

301. "Do you believe that the current use of *Miranda* rights 'hinders' law enforcement in effectively performing their jobs?"

302. All of the seven defense attorneys surveyed indicated that the current use of *Miranda* did not hinder law enforcement in performing their jobs, while three of the eight prosecutors, or 38%, indicated that it was not a hindrance.

303. Anonymous Survey Response "C" (Jan. 25, 2001) (on file with author).

304. *In re* D.S., 263 N.W.2d 114, 120 (N.D. 1978) (indicating that in any type of proceeding a juvenile must be represented by either a parent, guardian, custodian, or counsel); *see also* N.D. CENT. CODE § 27-20-26(1) (1991 & Supp. 1999).

305. *See D.S.*, 263 N.W.2d at 120 (concluding that a child not represented by parent, guardian, or counsel cannot waive right to counsel).

306. Anonymous Survey Response "C" (Jan. 25, 2001) (on file with author).

307. "Do you support the use of the 'exclusionary rule' in preventing the admissibility of evidence illegally obtained by law enforcement?"

308. All of the seven defense attorneys surveyed indicated that they support the use of the exclusionary rule, while six of the eight prosecutors, or 75%, indicated their support of it.

309. Anonymous Survey Response "C" (Jan. 25, 2001) (on file with author).

or have trouble understanding what is proper, how can one expect a law enforcement officer to know any better?[310]

The seventh question[311] asked if the attorneys supported the use of the "good faith" exception to the exclusionary rule. A majority of both prosecutors and defense attorneys supported such an exception. Eighty-seven percent of the prosecutors stated that they supported it while fifty-seven percent of the defense attorneys indicated the same response.[312] One defense attorney, who does not support exclusion, expressed his concern that if law enforcement officers cannot follow the law, they lose the respect that they should receive from the public.[313]

The eighth and final question[314] asked the attorneys if they would support the "good faith" exception as applied to voluntary confessions obtained by law enforcement in "technical" violation of *Miranda*, yet done in "good faith." Seventy-five percent of the prosecutors surveyed supported such an extension of the "good faith" exception while eighty-six percent of the defense attorneys opposed the idea.[315] Defense attorney Kerry Rosenquist of Larimore stated that the "good faith" exception to *Miranda* is a "slippery slope" remedy.[316] He added that a rule without boundaries is not a rule that can be followed without error, but it can easily be abused.[317] Grand Forks County Assistant State's Attorney Warren Johnson indicated however, that he supports such an exception, but that each application of the exception would need to be examined on a case-by-case basis within our adversary system of justice.[318]

As a final note to this survey, I combined the responses from both the prosecution and defense attorneys for the final question.[319] I discovered that they were split fairly evenly: fifty-three percent of all attorneys

---

310. *Id.*

311. "Do you support the use of the 'good faith exception' to the exclusionary rule?"

312. Seven of the eight prosecutors, or 87%, indicated that they supported the use of the "good faith exception" to the exclusionary rule, while four of the seven defense attorneys, or 57%, indicated that they support it.

313. Anonymous Survey Response "B" (Feb. 1, 2001) (on file with author).

314. "Would you support the extension of the 'good faith exception' to voluntary confessions obtained by law enforcement when the confessions were obtained in 'technical/ violation of *Miranda*, yet done in 'good faith'?"

315. Six of the eight prosecutors, or 75%, indicated their support for the extension of the good faith exception to technical violations of *Miranda*, while six of the seven defense attorneys, or 86%, opposed it.

316. Response to Survey by Kerry Rosenquist, defense attorney in Grand Forks County, N.D. (Jan. 24, 2001) (on file with author).

317. *Id.*

318. Response to Survey by Warren Johnson, prosecutor in Grand Forks County, N.D. (Jan. 24, 2001) (on file with author).

319. Instead of viewing the results separately in the prosecutor and defense attorney categories, I looked at the total "yes" responses versus the total "no" responses to determine the overall support for the extension of the "good faith exception" to technical violations of *Miranda*.

surveyed opposed the idea of extending the "good faith" exception to *Miranda*, while forty-seven percent supported such an extension.[320]

Overall, this small, unscientific survey seems to indicate that for the most part, criminal attorneys in North Dakota largely support the use of *Miranda*, the exclusionary rule, and the "good faith" exception to that rule as applied to the Fourth Amendment. Differences emerge however when the question is raised about extending the application of the "good faith" exception to the *Miranda* exclusionary rule. Since it appears that these differences are almost evenly split, there is the real possibility that it may be only a matter of time before this issue is directly addressed in the courts.

V. CONCLUSION

In *Dickerson*, the United States Supreme Court held that *Miranda* was a constitutional decision and could not be overruled by an act of Congress.[321] Therefore, *Miranda* governs the admissibility of statements taken from subjects while in police custody in both federal and state courts.[322] If the United States Supreme Court recognizes a "good faith" exception to the *Miranda* exclusionary rule, the North Dakota Supreme Court could then be forced to examine, and finally resolve, their constitutional "good faith" issue.

Gene A. Pearce[*]

---

320. Of the 15 attorneys who responded to the survey, eight of the 15, or 53%, opposed the extension of the "good faith exception" to technical violations of *Miranda*, while seven of the 15, or 47%, supported the idea.

321. Dickerson v. United States, 120 S. Ct. 2326, 2329 (2000).

322. *Id.*

* First and foremost, I would like to thank my wife, Denise, for her continual patience, support and encouragement. I would also like to thank my parents for always being there for me.