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# Dickerson and the Future of Miranda

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# *DICKERSON* AND THE FUTURE OF *MIRANDA*

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## I. INTRODUCTION

The American system of justice, in conjunction with the Fifth Amendment to the United States Constitution,[341] protects a suspect from incriminating himself. This protection has expanded beyond trial applications and into settings involving governmental authority. In the last half of this century, protection from self incrimination has been recognized in grand jury hearings,[342] trials relative to government employment,[343] and custodial interrogations.[344] American courts recognize that a person may not be subjected to an inquisition in which the evidence against him is obtained from a compelled confession. The evidence to convict should be discovered through an investigation carried out by the police and the executive branch of the government.[345] A confession is not to be ignored because it is a particularly pleasing piece of evidence,[346] but a confession or evidence from a suspect should be voluntarily given and never compelled. This belief is the foundation of the United States Supreme Court's decision in *Miranda v. Arizona*, which required that a suspect be aware of his right to remain silent in the face of police interrogation.[347]

In *Miranda*,[348] the Court constructed a procedure through which it could be determined whether a suspect was aware of certain Fifth and Sixth Amendment rights. The rights the *Miranda* court sought to protect were the right against compelled self-incrimination protected by the Fifth Amendment.[349] The reading of Miranda rights does not, however, establish that a confession in a custodial interrogation is voluntary.[350] A

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[341] U.S. CONST. amend. V.

[342] Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52, 94 (1964).

[343] Gardner v. Broderick, 392 U.S. 273, 497 (1968); Garrity v. New Jersey, 385 U.S. 493, 497 (1967).

[344] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[345] *Murphy*, 378 U.S. at 55.

[346] Hopt v. Utah, 110 U.S. 574, 584 (1884) (citations omitted).

[347] *Miranda*, 384 U.S. at 444.

[348] *Id.* at 436.

[349] U.S. CONST. amend. V.

[350] United States v. Rivas-Lopez, 988 F. Supp. 1424, 1432 (D. Utah 1997) (quoting Oregon v. Elstad, 470 U.S. 298 (1985)).

challenge to the voluntariness of a confession must still be adjudicated on a case by case basis.[351] By contrast, the lack of Miranda warnings results in an irrebuttable presumption that a confession by a suspect in custody was compelled.[352]

With the announcement of the *Miranda* decision, concern arose that the police would be hampered in their efforts to arrest and convict criminals.[353] *Miranda* applied to all trials that commenced after the decision was handed down.[354] Congress reacted to these concerns by passing, 18 U.S.C. § 3501 in the 1968 Omnibus Crime Act, which defined a test for determining whether a confession obtained from a suspect met the Fifth Amendment standard for voluntariness.[355]

Prior to *Miranda*, the admissibility of a confession was determined under a common law test of voluntariness.[356] This criterion required adjudication of every confession where compulsion was claimed. In *Miranda*, the Court took a detailed look at the practices employed by police in obtaining confessions and information from suspects and then evaluated the various tests used to determine if such confessions were voluntary.[357] As a result, a bright line test was created.[358] Unless a suspect is read his rights and he effectively (knowingly and intelligently) waives those rights, there is a presumption that the custodial interrogation is coercive.[359] This presumption can be rebutted on a case-by-case basis in cases of actual compulsion.[360] For example, police are still prevented from physically inducing confessions and from making false promises to

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[351] *See generally* Arizona v. Fulminante, 499 U.S. 279 (1991); Colorado v. Connelly, 479 U.S. 157 (1986); Mincey v. Arizona, 437 U.S. 385 (1978).

[352] New York v. Quarles, 467 U.S. 649, 664 (1984) (O'Connor concurring) (citing Michigan v. Tucker, 417 U.S. 433, 445, 447–48, 451, 452 n.26 (1974); Orozco v. Texas, 394 U.S. 324, 326 (1969)); United States v. Dickerson, 166 F.3d 667, 691 (1999).

[353] *More Criminals to Go Free? Effect of High Court's Ruling*, U.S. NEWS & WORLD REP., June 27, 1966, at 32.

[354] Johnson v. New Jersey, 384 U.S. 719, 733 (1966).

[355] Omnibus Crime Control and Safe Streets Act of 1968, title II, § 701(a), Pub. L. No. 90-351, 82 Stat. 210 (codified as amended at 18 U.S.C. § 3501 (1994)).

[356] *See* Haynes v. Washington, 373 U.S. 503, 514 (1963) (quoting Lynumm v. Illinois, 372 U.S. 528, 534 (1963)).

[357] *Miranda*, 384 U.S. at 445–65.

[358] *Quarles*, 467 U.S. at 664 (O'Connor concurring in part) ("[Miranda has] afforded police and courts clear guidance on the manner in which to conduct custodial investigation: if it was rigid, it was also precise.")(quoting Rehnquist, J., in chambers in Fare v. Michael C., 439 U.S. 1310, 1314 (1978)); *Miranda*, 384 U.S. at 441-42 ("We granted certiorari . . . to give concrete constitutional guidelines for law enforcement agencies and courts to follow.").

[359] *Miranda*, 384 U.S. at 479.

[360] *See generally* Arizona v. Fulminate, 499 U.S. 279 (1991); Colorado v. Connelly, 479 U.S. 157 (1986); Mincey v. Arizona, 437 U.S. 385 (1978).

suspects. Psychological trickery and verbal pressure, however, are allowed in obtaining confessions.[361]

With the passage of 18 U.S.C. §3501, Congress declared that a five part balancing test must be used in determining whether a confession is voluntary.[362] The trial judge must consider all the circumstances surrounding the confession including (1) the timing of the confession in relation to the arrest and arraignment, (2) whether the suspect knew the nature of the offense he was charges with, (3) whether the was advised or knew that he did not have to make a statement and that any statement could be used against him, (4) whether the suspect was advised of his right to counsel; and (5) whether the suspect had counsel present when he was questioned and when he made the confession.[363] If the judge finds a confession to be voluntary, as defined by §3501, the confession or information is heard by the jury. The jury is instructed to give the confession or evidence the weight they feel it deserves.[364]

This federal law has rarely been used by the executive branch of the federal government,[365] and only in a few instances has it been addressed by the courts when not raised by the parties themselves.[366] *Dickerson v. United States*[367] is one such case where the Fourth Circuit considered §3501 sua sponte and applied the statute in the absence of Miranda warnings.

This action by the Fourth Circuit raises four issues which will be addressed in this paper. Part I addresses the issue of whether the federal executive branch can decline to enforce a law passed by Congress will be examined, as well as the related question of whether, in the face of executive refusal to use a law, can the courts sua sponte rely on that law to decide a case. In Part II the Miranda rule will be examined to determine if it is only a prophylactic rule that is not constitutionally required. Part III is a discussion and examination of the character of the Miranda rule and the

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[361] *See* Frazier v. Cupp, 394 U.S. 731 (1969).

[362] Under 18 U.S.C. § 3501(b) the trial judge considers 1) the time elapsing between arrest and arraignment; 2) whether the suspect knew the nature of the crime about which he was being questioned; 3) whether the defendant was advised of his right to remain silent and that his statements could be used against him; 4) whether the defendant had been advised of his right to counsel; and 5) whether the defendant was without assistance of counsel when the confession or statements were made. None of the factors to be considered are conclusive.

[363] *Id.*

[364] 18 U.S.C. § 3501(a).

[365] *See* Eric D. Miller, Note, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. CHI. L. REV. 1029, 1029 (1998).

[366] *See* Davis v. United States, 512 U.S. 452, 464-65 (1994) (Scalia concurring);United States v. Crocker, 510 F.2d 1129, 1138 (10th Cir.,1975); United States v. Rivas-Lopez, 988 F. Supp. 1424, 1435 (D. Utah, 1997).

[367] United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999).

comment made by Judge Michael in *Dickerson* concerning the applicability of a prophylactic rule to the states through the Fourteenth Amendment.[368] An attempt will be made to analyze what the effect would be if the U.S. Supreme Court upholds §3501 in Part IV.

## II. JUSTICE DEPARTMENT TO CONTRESS "NO THANKS!"

From the time of its passage in the Johnson administration, §3501 has rarely been used by the Justice Department to salvage a confession which suffered from a Miranda deficiency. The Tenth Circuit considered §3501 in 1975 and found that the statute was valid. But the Tenth Circuit also held that if the terms of the statute were complied with there was no requirement for compliance with *Miranda* in *United States v Crocker.*[369] Since 1975, the Justice Department has not attempted to use §3501 in a federal appeals court or before the United States Supreme Court.[370] Even though the statute has been argued in amicus briefs,[371] the Justice Department has circumvented judicial consideration of the statute by dismissing the indictments or by withdrawing briefs that rely on §3501 and resubmitting briefs that rely on other factors.[372]

The executive branch of the federal government apparently believes §3501 to be unconstitutional. Most recently, Attorney General Janet Reno informed Congress that the Justice Department would not be defending the constitutionality of §3501.[373] Title Two of the U.S.C. 288k(b) provides that the Attorney General or the Solicitor General must notify Congress in a timely manner of any court decision affecting the constitutionality of a law where the Attorney General does not intend to appeal.[374] However, the statute does not provide a mechanism for requiring the Justice Department to inform Congress that it will not *enforce* a law passed by Congress.

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[368] *Id.* at 697 (Michael, J., concurring and dissenting) ("If Miranda is not a constitutional rule, why does the Supreme Court continue to apply it in prosecution arising in state courts?").

[369] *See* United States v. Crocker, 510 F.2d 1129, 1138 (10th Cir., 1975)(finding that the lower court did not err in applying §3501 and that application of §3501 guidelines was in compliance with Miranda mandates.).

[370] *See* Miller, *supra* note 25.

[371] *Dickerson*, 166 F.3d at 680 n.14.

[372] *See* Miller, *supra* note 25. (For example, in Cheely v. United States, 21 F3d 914 (9th Cir. 1994) the government's brief made only passing reference to §3501. The court requested briefing on the question of whether the issue merit an en banc rehearing. The government opposed a further hearing.) (In United States v. Sullivan, 1998 US LEXIS 4106 (4th Cir), the U.S. Attorney's office originally submitted a brief invoking §3501 but the brief was withdrawn and a replacement was submitted that did not mention §3501.).

[373] *See* Letter from Janet Reno, Attorney General, to Congress (Sept. 10, 1997).

[374] 2 U.S.C. § 288(k)(b) (1994).

The executive branch is charged with the responsibility to "take Care that the Laws be faithfully executed."[375] While responsibility for creating the laws is vested in Congress, executive oversight is provided by the President's veto power. Once a law is passed and signed by the President or passed over his objection, it is the law of the land and is no longer subject to executive review.

Laws exist at all levels of government that are rarely enforced and some laws that are regularly enforced are not always enforced. Prosecutors have the freedom to determine which cases will be prosecuted and under what circumstances no charges will be brought or charges will be dismissed.[376] These decisions are made in good faith based upon the strength of the evidence, the judicial and prosecutorial resources available, and the nature of the violation. But, prosecutorial discretion to pursue a case is inherently different from refusing to apply a law passed by Congress that would aid the prosecution of people who violate the law. As Justice Scalia noted in *Davis v. United States*, "once a prosecution has been commenced and a confession introduced, the Executive assuredly has neither the power or the right to determine what objections to admissibility of the confession are valid law."[377]

The Justice Department has indicated that the law is unconstitutional, and therefore, will not be used to appeal cases claiming *Miranda* violations.[378] But the authority to declare a law unconstitutional does not rest with the executive branch of the government. With the decision in *Marbury v. Madison*, that authority was taken by the judicial system.[379] The courts are now left with a valid law which the Justice Department will not argue in court, yet is raised in amicus briefs and, on occasion, by the judiciary itself.[380] The Fourth Circuit, in *Dickerson v. United States*,[381] considered §3501 although the government resubmitted a brief that did not include an argument based on §3501.[382] The Justice Department appears to have overstepped its constitutional mandate by picking and choosing which laws it will invoke and enforce. The Justice Department has claimed law making duties by acting as the arbiter of the constitutionality of laws validly passed by Congress.

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[375] U.S. CONST. art. II, § 3.
[376] Davis v. United States, 512 U.S. 452, 464 (1994) (Scalia concurring); United States v. Armstrong, 517 U.S. 456, 464 (1996).
[377] *Davis*, 512 U.S. at 464–65.
[378] *See* Miller, *supra* note 25, at 1033–35; *see also* Letter from Janet Reno, *supra* note 33.
[379] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[380] *Davis*, 412 U.S. at 464–65.
[381] *Dickerson*, 166 F.3d at 672 ("the government argued that because Dickerson's statements were voluntary, they were nonetheless admissible under the mandate of 18 U.S.C. § 3501 (1985)"; 166 F.3d at 680 ("the applicability of § 3501 was not briefed by the Government on appeal.").
[382] *See* Miller, *supra* note 25, Part II D.

## III. THE CONSIDERATION OF § 3501 SUA SPONTE

Courts historically have been reluctant to consider issues not argued by the parties to decide cases.[383] They typically rely on the parties before them to bring all pertinent issues and law to their attention. However, the court cannot ignore significant legal issues that the parties neglect to being to the court's attention: "[T]he proper administration of the criminal law cannot be left to the stipulation of the parties."[384] In *Young v. United States*,[385] the United States Supreme Court responded sua sponte to a confession of error by the government in a case interpreting the Harrison Narcotics Act.[386] In a case where the validity of a controlling federal statue was questioned by reason of inadvertent repeal by Congress, *United States National Bank of Oregon v. Independent Insurance Agents of America*,[387] the Court held that "when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."[388] In *Carlisle v. United States*,[389] Justice Scalia wrote a majority decision overruling an acquittal granted outside the terms of the Federal Rules of Criminal Procedure, stating that "[f]ederal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."[390] Justice Stevens, dissenting in the same case, quoted Judge Learned Hand, stating "[a] judge, at least in a federal court, is more than a moderator; he is affirmatively charged with securing a fair trial and he must intervene sua sponte to that end, when necessary."[391]

Therefore, despite judicial reluctance to consider issues sua sponte, the precedent for a court to take such action on its own initiative is clear. Without a finding by a higher court that a law is unconstitutional, a court, in the interest of coherence and equity, should apply a law it considers valid to the matters before it. In *Dickerson*, Judge Williams considered the facts surrounding the confession made by Dickerson and the district court's finding that the confession was voluntary and then applied a valid federal statute, 18 USC §3501.[392] The court held that the confession was

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[383] Young v. United States, 315 U.S. 257, 259 (1942).
[384] *See id.* at 258.
[385] *Id.*
[386] *See id.*
[387] U.S. Nat. Bank of Oregon v. Independent Ins. Agents of America, 508 U.S. 439 (1993).
[388] *Id.* at 446 (quoting Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991)).
[389] Carlisle v. United States, 517 U.S. 416 (1996).
[390] *Id.* at 426 (quoting Bank of Nova Scotia v. United States, 487 U.S. 250, 254–55 (1988)).
[391] *Carlisle*, 517 U.S. at 437 (Stevens dissenting) (quoting Brown v. Walter, 62 F.2d 798, 799 (2d Cir. 1933)).
[392] *Dickerson*, 166 F.3d at 671.

admissible[393] under 18 USC §3501, despite the Justice Department's withdrawal of a brief that relied on the statute[394] and re-submission of a brief that made no mention of the statute.[395] The Fourth Circuit even noted that "[t]he United States Department of Justice took the unusual step of actually prohibiting the U.S. Attorney's Office from briefing the issue."[396] Regardless of the stand taken by the Department of Justice, the Fourth Circuit considered §3501,[397] claiming to be "a court of law and not of politics."[398] Judge Williams found that the "question of whether §3501 governs the admissibility of confessions in federal court is squarely before us today" and the "Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it."[399] After reviewing the history of §3501 before the Fourth Circuit, Judge Williams held that "[a]gainst this background, the Government's failure to raise the applicability of §3501 on appeal in this case does not come as a surprise. Of even greater importance, neither does it prevent us from considering the applicability of §3501 on appeal."[400]

In a constitutional scheme that relies on checks and balances between the three branches of government and a division of authority and discretion as to the enactment of laws, the enforcement and interpretation of the law would in certain instances require sua sponte consideration of laws. There is no question that 18 U.S.C. §3501 was passed by both the House of Representatives and the Senate and signed into law by President Johnson on June 19, 1968.[401] It is the failure of the executive branch to use this statute, which broadens their law enforcement abilities, that troubles the courts.[402] The courts are correct in their assessment that the judicial branch is charged with determining the constitutionality of a statute and, in the absence of a finding that a statute violates the United States Constitution, applying it to federal cases.

*Dickerson* has been appealed to the United States Supreme Court, and the issue may be laid to rest in the 1999-2000 term.[403] Justice Scalia discussed §3501 at length in his concurring opinion in *Davis*.[404] Although

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[393] *See id.* at 695.
[394] *See id.* at 676 (citing United States v. Sullivan, 138 F.3d 126 (4th Cir. 1998)).
[395] *See id.* at 680.
[396] *Id.* at 681.
[397] *Id.* at 672.
[398] *Id.*
[399] *Id.* at 682.
[400] *See* 18 U.S.C. § 3501 (1985).
[401] *See* Lyndon B. Johnson, Statement by the President Upon Signing the Omnibus Crime Control and Safe Streets Act of 1968 (June 19, 1968).
[402] *See generally* Davis v. United States, 512 U.S. 452 (1994); Dickerson v. United States, 166 F.3d 166 (4th Cir., 1999); United States v. Crocker, 510 F.2d 1129 (1975).
[403] United States v. Dickerson, 166 F.3d 667 (1999), *petition for cert. filed,* (U.S. July 30, 1999) (No. 99-5525).
[404] *Davis*, 512 U.S. at 462–65.

the Supreme Court declined to apply §3501(c) to a suspect arrested on state charges in *United States v. Alvarez-Sanchez*,[405] the Court did not challenge the applicability of §3501 to federal cases. The disturbing quality of the Justice Department's non-implementation of §3501 is that it blurs the constitutional duties of the legislative, executive and judicial branches. The Justice Department is usurping the law making powers of Congress when it, on its own volition, determines a law to be unconstitutional and , without direction from the Judicial Branch, ignores the laws of the elected representatives of the people. Therefore, under this analysis, the courts are fulfilling their constitutional obligation by considering §3501 sua sponte.

## IV. MIRANDA: CONSTITUTIONALLY REQUIRED OR PROPHYLACTIC RULE?

Judge Michael, in his split opinion in *Dickerson*, wonders whether *Miranda* is a constitutional rule: "[t]he majority holds that §3501 governs the admissibility of confessions in federal court because Miranda is not a constitutional rule. . . . If Miranda is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts?"[406] Rather than deciding the §3501 issue, Judge Michael would leave the investigation of the executive's refusal to implement §3501 to Congress through use of its public hearing process.[407] But his comment leaves many questions open regarding the breadth of the Miranda warnings. Can the requirements of the Fifth Amendment be met without "Mirandizing" a suspect in custody? Are Miranda warnings just one way of satisfying a suspect's rights? Does the Fifth Amendment require that a defendant's statements be voluntary or that they be warned? Courts have looked at this distinction and, as early as the *Miranda* decision itself, the Miranda warnings were seen as only one method for guaranteeing suspects their Constitutional rights. "Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution . . . . Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect."[408]

Eight years after specifying the Miranda warnings, the Court in *Michigan v. Tucker*[409] started backpedaling on the status, if not the requirements, of *Miranda*. Tucker had been convicted after a witness testified to his involvement in a rape.[410] The witness had been located after Tucker made a statement that was not subject to sufficient warning as

[405] United States v. Alvarez-Sanchez, 511 U.S> 350, 357–58 (1994).
[406] *Dickerson*, 166 F.3d at 697 (Michael, J., dissenting).
[407] *Id.*
[408] *Miranda*, 384 U.S. at 467.
[409] Michigan v. Tucker, 417 U.S. 433, 448 (1974).
[410] *Id.* at 435.

to the availability of counsel.[411] Applying the Court's decision in *Johnson v. New Jersey*,[412] Tucker's statement could not be used in the prosecutor's case in chief since his trial commenced after the decision in *Miranda* was announced.[413] Writing for the majority, Chief Justice Rehnquist stated "[t]he Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."[414] Chief Justice Rehnquist went on to note that "[t]his Court said in *Miranda* that statements taken in violation of the Miranda principles must not be used to prove the prosecutor's case at trial."[415] *Michigan v. Tucker* decided the issue of whether the exclusionary rule as applied to the Fourth Amendment extended to violation of *Miranda* and the use of evidence derived from un-Mirandized statements. The exclusionary rule, as decided in *Wong Sun v United States*,[416] held that "fruits of police conduct which actually infringed a defendant's Fourth Amendment rights must be suppressed."[417] If a *Miranda* violation infringed a constitutional right, then no evidence obtained in that statement nor found as a result of that statement could be used in the prosecutor's case. The Court looked at the issue in a two part analysis: "We will therefore first consider whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect the right."[418] The Court allowed the witness discovered from the defendant's un-Mirandized statements to give testimony at trial but excluded the un-Mirandized statements as evidence.[419] The faulty warnings were a *Miranda* violation, not a constitutional violation.

*Miranda* warnings have a place in the protection of a suspect's right against self- incrimination, but they do not appear to occupy the entire field. Chief Justice Rehnquist, in *New York v. Quarles*,[420] writing again for the majority, stated that, "the prophylactic Miranda warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'"[421] Quarles made an un-Mirandized statement to the arresting officers about the location of a gun he had hidden in the store that was the

[411] *Id.* at 436.
[412] Johnson v. New Jersey, 384 U.S. 719 (1966).
[413] Michigan v. Tucker, 417 U.S. at 448.
[414] *Id.* at 444.
[415] *Id.*
[416] Wong Sun v. United States, 371 U.S. 471 (1963).
[417] *Tucker*, 417 U.S. at 445 (citing *Wong Sun*, 371 U.S. at 484).
[418] *Id.* at 439.
[419] *Id.* at 452.
[420] *Quarles*, 467 U.S. 649 (1984).
[421] *Id.* at 654 (citing *Tucker*, 417 U.S. at 444.

sight of his arrest.[422] The Court carved out a public safety exception to the requirements of *Miranda* allowing the admission of the statement made by Quarles about the location of the gun and the gun itself.[423]

A year later Justice O'Connor, writing for the majority in *Oregon v. Elstad*,[424] noted that "[t]he Miranda exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."[425] In differentiating Miranda protections from Fifth Amendment protections, Justice O'Connor noted, "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."[426] Elstad made statements to the police in his home prior to his arrest and prior to receiving Miranda warnings.[427] He later repeated the statements and made a full confession to the police after his arrest and during an interrogation at the police station.[428] The Court was unwilling to cast the second confession as coerced under the theory that the first confession "let the cat out of the bag" and Elstad's free will was impaired by this previous defect.[429] The Court looked to the voluntariness of the second confession, but not to the absence of warnings before the first.

These four cases define the scope of the Miranda requirements by: precluding the use of an un-Mirandized statement in the prosecutor's case in chief,[430] establishing a public safety exception,[431] admitting physical evidence and witnesses discovered through un-Mirandized statements,[432] and allowing admission of warned statements that were preceded by un-Mirandized statements.[433] What these cases do not do is define Miranda warnings as constitutionally required. The language in *Miranda* clearly states, "we encourage Congress and the states to continue their laudable search for increasingly effective ways of protecting the rights of

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[422] *Id.* at 652.
[423] *Id.* at 657.
[424] *Elstad*, 470 U.S. 298 (1985).
[425] *Id.* at 306.
[426] *Id.* at 307.
[427] *Id.* at 301.
[428] *Id.*
[429] *Id.* at 311.
[430] *Miranda*, 384 U.S. at 479; The use of statements made without the protection of Miranda warnings to impeach the defendant whose testimony is inconsistent with the unwarned statement was established in Harris v. New York, 401 U.S. 222 (1971)(quoting Wlader v. United States, 347 U.S. 62 (1954)).
[431] *Quarles*, 467 U.S. at 657.
[432] Michigan v. Tucker, 417 U.S.433, 450 (1974). In *Quarles,* the Court clarified that the Tucker decision applied to both witnesses and physical evidence, stating " We believe that [Tucker's] reasoning applies with equal force when the fruit of a noncoercive Miranda violation is neither a witness or an article of evidence but the accused's own testimony." 467 U.S. at 308.
[433] *Elstad*, 470 U.S. at 318.

individuals while promoting effective enforcement of our criminal laws."[434] Arguably §3501 does this by incorporating the content of Miranda warnings into a five part test that examines the constitutional protection against self-incrimination and the right to counsel.[435]

The Court has restricted *Miranda* by drawing perimeters around its edges but has not touched the depth of the decision. Although *Miranda* is broader than the constitutional guarantee, it is applied to proceedings in state matters.[436] The four cases above were all criminal matters before state courts, but the Supreme Court did not address the applicability of *Miranda* to the states in these cases. States have adopted *Miranda*'s requirements as a bright line rule for determining compliance with the Fifth and Sixth Amendment requirements. However, *Miranda* left open the opportunity for the states to protect these rights in another fashion.[437] No state has adopted alternative procedures, even though they were invited to by Chief Justice Warren.[438] In their article evaluating the effect of *Miranda* on law enforcement, Professors Paul Cassel and Richard Fowles suggest videotaping interrogations as an alternative to *Miranda*, questioning suspects in the presence of a magistrate or returning to the pre-Miranda voluntariness test.[439] The only state to attempt an alternative to *Miranda* is Arizona, which adopted a statute similar to 18 U.S.C. §3501.[440] Like the United States Department of Justice, Arizona relies on *Miranda* and does not invoke the statute to determine the admissibility of defendant's statements. Chief Justice Warren's invitation remains unanswered, and Judge Michael's observation that the Supreme Court is applying a rule not constitutionally required is not raised by the states in challenges to state convictions. Thus, although no state has effectively written a rule or instituted a procedure that would replace *Miranda*, Judge Michael's question about how a rule of law created by the Court to address a constitutional deficiency can be binding on the states even though it is not constitutionally mandated, has been left unanswered.

In trying to answer Judge Michael, we can look to Justice Warren's decision in *Malloy v. Hogan*.[441] The Fifth Amendment privilege against self-incrimination was made applicable to the states through the due

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[434] *Miranda*, 384 U.S. at 467.
[435] 18 U.S.C. § 3501 (1994).
[436] *Elstad*, 470 U.S. at 306–07 ("The Miranda exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.").
[437] *See Miranda*, 384 U.S. at 490.
[438] Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty Year Perspective on Miranda's Harmful Effect on Law Enforcement*, 50 STAN. L. REV. 1055, 1129–30 (1998).
[439] *Id.* at 1129.
[440] David E. Rovella, *"Miranda" Upheaval Likely*, NAT'L L.J., Mar. 1, 1999, at 1, A9.
[441] *Malloy*, 378 U.S. 1 (1964).

process clause of the Fourteenth Amendment in *Malloy*.[442] In that case, a convicted gambler, when called upon to testify at state gambling inquiry, refused to testify by invoking his Fifth Amendment privilege.[443] The defendant was subsequently jailed. The Supreme Court held that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement."[444] Chief Justice Warren in *Miranda* applied the *Malloy* holding to require Miranda warnings in state and local investigations just as "the substantive standards underlying the privilege applied with full force to state court proceedings."[445]

The answer to Judge Michael's question lies within the characterization of the Miranda protections either as constitutionally required and within the Fifth Amendment protection against self-incrimination, or as a rule of law that cannot be forced on the state governments by the federal judiciary. In a footnote Judge Williams recognizes this as "an interesting academic question" but says it has "no bearing on our conclusion that *Miranda*'s conclusive presumption is not required by the Constitution."[446]

However, whether *Miranda*'s protections are constitutionally required is the crux of the issue as to whether it is applicable to the states. The justices dissenting in *Miranda* did not find the warnings to be constitutionally required, stating, "[t]he Court appears similarly wrong in thinking that precise knowledge of one's rights is a settled prerequisite under the Fifth Amendment to the loss of its protections."[447] This thought has been repeated by the characterization of the Miranda requirements as a prophylactic rule.[448] Until there is a case challenged by a state on the grounds that *Miranda*'s rule cannot be applied to the states through the Fourteenth Amendment because it exceeds the Fifth Amendment requirements protecting a defendant's privilege against self-incrimination, Judge Michael's question will remain as Judge Williams described it - academic.

## V. *DICKERSON* AS DECIDED BY THE UNITED STATES SUPREME COURT

[442] *Id.* at 6.
[443] *Id.* at 3.
[444] *Id.* at 6.
[445] *Miranda*, 384 U.S. at 464.
[446] *Dickerson*, 66 F.3d at 691 n.21.
[447] *Miranda*, 384 U.S. at 513.
[448] *See* Oregon v. Elstad, 470 U.S. 298, 306 (1985); New York v. Quarles, 417 U.S. 649, 654 (1984); Michigan v. Tucker, 417 U.S. 433, 444 (1974).

If the Supreme Court grants certiorari[449] and hears Mr. Dickerson's appeal, the Court's opinion will most likely not address all the issues raised in the Fourth Circuit decision. "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision in the case."[450] In order to uphold the Fourth Circuit, the Court will have to reconcile their repeated findings that compliance with *Miranda* is not constitutionally required, with their holding in *City of Boerne v. Flores*[451] that Congress does not have the authority to pass a statute that supersedes a Supreme Court decision construing the Constitution.[452] However, if the Court finds that *Miranda* is required by the Constitution, then Congress lacked the authority to pass §3501. If *Miranda* is only a prophylactic measure that presents only one method for satisfying the Fifth Amendment protection from self-incrimination, then it may not be protected under the *City of Boerne* decision.

If, however, the Court can cast its decision on some narrower ground, the issue may be avoided. There is good reason for avoiding a finding that *Miranda* is not constitutionally required and can be superceded by Congress. Under the auspices of *Miranda*, courts have a bright line rule, with just a handful of exceptions for determining the admissibility of statements made by suspects under arrest.[453] If the law reverts back to a test of voluntariness, the *Miranda* rebuttable presumption of voluntariness will have to be replaced by another mechanism for determining voluntariness.[454] Furthermore, §3501 is applicable only in federal cases and therefore could not fill the gap left in the state courts.[455] The Miranda warnings, that even school children know from exposure to television police dramas, are regularly given by officers. Police and sheriff's departments have printed waiver forms that make compliance a routine.[456] To establish a new rule outside the procedures of *Miranda* that would give the same consistency of results would be monumental task. The application of a balancing test like §3501 would allow states and localities to continue to "Mirandize" suspects and protect statements from voluntariness challenges in non-coercive situations. Although opponents of Miranda argue that it has contributed many cases to the annals of

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[449] United States v. Dickerson, 166 F.3d 667 (1999), *petition for cert. filed*, (U.S. July 30, 1999) (No. 99-5525).
[450] Burton v. United States, 196 U.S. 283, 295 (1905).
[451] City of Borne v. Flores, 521 U.S. 507 (1997).
[452] *Id.*
[453] *See generally Elstad*, 470 U.S. 298 (1985); *Quarles*, 417 U.S. 649 (1984); *Tucker*, 417 U.S. 433 (1974).
[454] Since *Miranda* only three cases have been heard by the Supreme Court to determine the voluntariness of a confession presumed voluntary under *Miranda*. *See* Welsh S. White *What Is An Involuntary Confession Now?* 50 RUTGERS L. REV. 2001, 2014–15 (1998).
[455] *See* United States v. Pugh, 25 F.3d 669 (8th Cir. 1994).
[456] *See generally* Rovella, *supra* note 100.

unsolved or unpunished, crime,[457] substituting a balancing test that incorporates Miranda warnings as indicators of voluntariness may not effect more than a few cases with *Dickerson*'s unusual fact pattern. A United States Supreme Court finding that §3501 is constitutional would probably not result in the suspension of Miranda warnings by law enforcement personnel. The presumption that such warnings protect the suspect from coercive custodial interrogation would remain.

## VI. CONCLUSION

With *Dickerson*, Judge Williams has brought the Justice Department's policy of ignoring the existence of 18 U.S.C. §3501 to the forefront. However, the consideration of §3501 *sua sponte*, the narrow fact pattern to which she applied the ruling, and the presence of *Miranda,* like components in the balancing test presented by §3501, combine to make the effect of the Fourth Circuit decision uncertain. With a petition of certiorari pending before the United States Supreme Court,[458] law enforcement personnel and the legal community can only rely on their present procedures.

A dramatic change in the procedures required by *Miranda* and a substitution of hearings to determine voluntariness under the Fifth Amendment, in either the federal system or state proceedings, will create a burden that the court systems may be ill equipped to handle. Although all confessions are subject to review for voluntariness, the loss of a bright line rule giving a rebuttable presumption that a confession was not coerced, would require more judicial time to weight the elements of a balancing test. A compromise should be made between a balancing test, allowing voluntary confessions despite defective warnings, and a bright line test, presuming voluntariness in the absence of coercion. If certain standards are met, this compromise would meet the objective of the Warren court to protect suspects from inadvertently surrendering their constitutional rights and could prevent obvious miscarriages of justice. The end result would be that truthful confessions would no longer be excluded for technical violations that are not indicative of involuntariness.

[457] *See* Cassell & Fowles, *supra* note 98.
[458] United States v. Dickerson, 166 F.3d 667 (1999), *petition for cert. filed*, (U.S. July 30, 1999) (No. 99-5525).