Identifying and (Re) formulating Prophylactic Rules and Incidental Rights in Constitutional Criminal Procedure

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IDENTIFYING AND (RE)FORMULATING PROPHYLACTIC RULES, SAFE HARBORS, AND INCIDENTAL RIGHTS IN CONSTITUTIONAL CRIMINAL PROCEDURE

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The *Miranda* conundrum runs something like this. If the *Miranda* decision represents true constitutional interpretation, and all unwarned statements taken during custodial interrogation are "compelled" within the meaning of the self-incrimination clause, the impeachment and "fruits" exceptions to *Miranda* should fall.[**] If it is not true constitutional interpretation, than the Court has no business reversing state criminal convictions for its violation. I offer here what I hope is a satisfying answer to this conundrum, on both descriptive and normative levels, that justifies not only *Miranda* but a host of similar Warren, Burger, and Rehnquist Court decisions as well. In Part I, I introduce and define the terms "constitutional prophylactic rule," "constitutional safe harbor rule," and "constitutional incidental right,"[1] and attempt to legitimate their use. I further demonstrate that constitutional criminal procedure is so flush with such prophylactic and safe harbor rules and incidental rights that trying to eliminate them now, by either reversing a large number of criminal procedure cases or "constitutionalizing" all of those holdings, would do more harm than good. I propose that we accept the fact that these rules and rights are a fixed part of our constitutional landscape, and focus instead on minimizing their risks and maximizing their benefits.

Thus, in Part II, I suggest that we can highlight their benefits; encouraging dialogue and

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[**] These exceptions fall because they are not based upon the premise that the constitutional clause itself contains these exceptions to its implementation, but rather upon the premise that the constitutional clause was not actually infringed. *See, e.g., Oregon v. Elstad*, 470 U.S. 298, 306 (*Miranda* "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.").

[1] The term "prophylactic rule" has been used by the scholars and the Court, though not as I define it. I believe the terms "constitutional incidental rights" and "constitutional safe harbor rules" are my own invention, at least in this context.

cooperation between the federal judiciary and state and federal executive and legislative officers, fostering experimentation with new procedures that may work better, and providing the flexibility to respond to new empirical and social science data without reversing constitutional decisions; and cabin their risks; infringing on principles of federalism and separation of powers, hardening rules that should be flexible enough to respond to changing facts, and deflecting attention away from actual constitutional violations; by caution, deference, and what I call and "truth-in-labeling." Caution requires the Court to refrain from creating prophylactic or safe harbor rules and incidental rights except where it clearly identifies the mandate of the constitutional clause at issue and/or the values underlying that clause, and then explains why a rule or right is necessary to protect or adjudicate that clause. Deference requires the Court to warn the other branches of the federal government and all branches of the state governments that some action is necessary, and act itself only if the other actors fail to offer alternative procedures that are within an acceptable range of functionality. Truth-in-labeling requires the Court to identify each doctrinal rule it creates as being either an explicit constitutional rule or remedy, or a prophylactic or safe harbor rule or incidental right, so that there is a clear signal that modification may be permissible.

Finally, in Part III, I examine Chief Justice Rehnquist's embarrassing failure, in *Dickerson v. United States*, to acknowledge much less resolve the *Miranda* conundrum. Inexplicably, *Miranda* is no longer a prophylactic rule (dashing all hopes for dialogue with other branches and improved alternatives), though neither is it "true" constitutional interpretation. Thus, an opportunity for a Court description of the status and justification for the *Miranda* warnings, as well as an acknowledgment of the status and justification for the host of other Court-created rules and rights that do not precisely track

the constitutional clause that they concern, was squandered.

I. Identifying and Justifying Prophylactic Rules, Safe Harbors, and Incidental Rights

I have argued elsewhere that the *Miranda* decision can best be explained, both normatively and descriptively, as a constitutional prophylactic rule designed to assist the Court in protecting the privilege against self-incrimination.[2] The fate of *Miranda*'s exceptions depends upon how prophylactic rules are defined and the purposes they serve. A foray through constitutional criminal procedure has convinced me that the *Miranda* decision is far from unique. There are quite a number of decisions where the Court, unable to precisely track the constitutional criminal procedural guarantee before it, created devices that assist it in identifying and adjudicating constitutional violations, and imposed those devices upon the federal executive branch and the States. I categorized these devices as constitutional prophylactic rules, constitutional safe harbor rules, and constitutional incidental rights. The conceptual framework I develop in this article for identifying and formulating these rules and rights can be applied not just to the *Miranda* decision and its exceptions, but throughout constitutional criminal procedure.

A "constitutional prophylactic rule" is a judicially-created doctrinal rule or legal requirement determined by the Court as appropriate for deciding whether an explicit or "true" federal constitutional rule is applicable. It may be triggered by less than a showing that the explicit rule was violated, but

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[2] Susan R. Klein, *"Miranda* Deconstitutionalized: When the Self-Incrimination Clause the Civil Rights Act Collide," 143 U. Penn. L. Rev. 417, 482-83 (1994) (suggesting that it is the Court's obligation under the constitution to create remedies or procedures necessary to safeguard a particular constitutional provision otherwise at risk, and, while these remedies and procedures may be "temporary and/or conditional" this "'constitutional common law' has the same status as 'true' constitutional interpretation" for purposes of civil rights actions).

provides approximately the same result as a showing that the explicit rule was violated. It is appropriate only upon two determinations. First, that simply providing relief upon a showing that the explicit right was violated is ineffective. Second, that use of this rule will be more effective and involve only acceptable costs. It should be clear that, thus defined, a constitutional prophylactic rule is purely instrumental; it strives to achieve the rule and/or value inherent in that constitutional clause, and has no utility outside of that function.

Conversely, a "constitutional safe harbor rule" is a judicially created procedure that, if properly followed by the government actor, insulates the government from the argument that the constitutional clause at issue was violated. It may allow conduct that violates the explicit constitutional rule to which it applies. It is appropriate only upon two showings. First, that providing relief every time an explicit right is violated is not feasible. Second, that the use of this rule will involve only acceptable costs.

The line between a prophylactic rule and safe harbor rule is this: a prophylactic rule potentially overprotects the constitutional clause at issue, while a safe harbor rule potentially underprotects it.[3] That is, a prophylactic rule will prohibit some government behavior that would otherwise be declared constitutional without the rule, and the safe harbor rule will allow some government behavior that would otherwise be declared unconstitutional without the rule.

Closely related to a prophylactic rule is a "constitutional incidental right," a judicially-created

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[3] *See* Appendix A for Venn diagrams providing examples of how a prophylactic rule can over but not underprotect a constitutional right, and a safe harbor rule can under but not overprotect a constitutional right. If the reader were to draw Venn diagrams for the other prophylactic and safe harbor rules discussed in sections A and B, she would find similarly that the all the prophylactic rules overprotect, and all the safe harbors underprotect.

procedure determined by the Court as the appropriate relief for the violation of an explicit or "true" constitutional rule. It is appropriate only upon two determinations. First, some relief is warranted, but no particular procedure is mandated by the constitutional rule itself. Second, the relief is effective and involves only acceptable costs. A constitutional incidental right is likewise purely instrumental; it seeks to advance the text of or values underlying the constitutional rule violated by either deterring future violations of that clause or reducing the harm visited upon an aggrieved party, it has no utility outside of those functions.

The line between prophylactic and safe harbor rules and incidental rights is this: an incidental right is what the court provides after the constitutional violation has already occurred. A prophylactic or safe harbor rule is a standard for government behavior designed to reduce violations or make alleged violations easier to adjudicate. If the rule works, there will be no recognized violation and no incidental right offered. If the prophylactic rule, safe harbor rule, or explicit constitutional rule is violated, then the question of an incidental right arises.

These definitions and categorizations build upon and expand the groundbreaking work by Professor Henry Monaghan, who declared "remedial rules" a species of "constitutional common law" over 25 years ago.[4] Almost 15 years after Professor Monaghan's article, David Strauss, while not offering a constitutional theory supporting prophylactic rules, noted that the use of such rules to protect

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[4] Henry P. Monaghan, *Forward: Constitutional Common Law*, 89 HARV. L.REV. 1, 2 (1975) ("a surprising amount of what passes as authoritative constitutional 'interpretation' is best understood as something of a quite different order--a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress.").

First Amendment values are a fixed part of our constitutional landscape.[5] The Court itself sometimes uses the term "prophylactic rule," though it never defines or attempts to justify it. On the other hand, the Department of Justice under Attorney General Edwin Meese, Professor Joseph Grano, and Justice Scalia have forcefully argued that prophylactic rules such as the *Miranda* warnings are constitutionally illegitimate because not authorized under Article III.[5]

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[5] David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U.CHI. L.REV. 190 (1988) (identifying prophylactic rules protecting the First Amendment, and suggesting that "'prophylactic' rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law"). *See also* Strauss, "*Miranda*, the Constitution, and Congress," 99 Mich. Law Rev. ___ (forthcoming 2001); Mitchell N. Berman, "Coercion Without Baselines: Unconstitutional Conditions in Three Dimension," (forthcoming) (arguing that the rules of germaneness and proportionality that emerge from *Nollan* and *Dolan* respectively are really prophylactic rules designed to enforce the right not to be coerced into waiving one's Fifth Amendment right to just compensation for a taking); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L.REV. 925 (1999) (comparing judicially-created prophylactic rules to similar Talmudic rules).

[5] *See* Office of Legal Policy, U.S. Department of Justice, Truth in Criminal Justice Report No. 1, Report to the Attorney General on the Law of Pre-Trial Interrogation (1986), reprinted in 22 U.MICH. J.L. REFORM 437 (1989) (asserting that *Miranda* "constituted a usurpation of legislative and administrative powers"); Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda,"* 54 U.CHI. L.REV. 938 (1987) (defending the finding of the Department of Justice report); Thomas S. Schrock and Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L.REV. 1117 (1978) (suggesting that prophylactic rules are "neither constitutional nor common law but pragmatism without either precedent or principle -- judicial realism radicalized and rampant); Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U.CHI. L.REV. 174 (1988); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW.U. L.REV. 100 (1985); *Dickerson v. United States*, 120 S.Ct. 2326, 2337 (2000) (Scalia, J., dissenting) (the power to impose prophylactic rules upon Congress and the States "is an immense and frightening antidemocratic power, and it does not exists").

My response is twofold. First, scholars have already offered the theoretical response.[6] Though there is no general federal common law displacing state rules of decisions where state law governs,[7] there is unquestionably federal common law created to interpret federal statutes as displacing conflicting state law,[8] to protect enclaves of federal interest,[9] to provide rules of decision where the Court is granted jurisdiction,[10] and to flesh-out federal constitutional commands.[11]

Second, I offer a purely practical response. The Court cannot perform miracles; if a constitutional theory requires the Court do the impossible, there is something wrong with the theory and not with the Court. As I demonstrate throughout the remainder of this Article, generating constitutional prophylactic rules and incidental rights to protect constitutional values is a beneficial, and necessary function of the judiciary.

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[6] *See generally*, Martha A. Field, "Sources of Law: The Scope of Federal Common Law," 99 Harv. L. Rev. 881 (1986) (suggesting federal courts have broad power to create federal common law based upon statutes, jurisdictional grants, and the federal constitution); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and The Federal System 700, 770 (2d ed. 1973).

[7] *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

[8] *Buckman Co. v. Plaintiffs' Legal Committee,* 2001 WL 167647, 121 S.Ct. 1012 (2001) (state law fraud claims impliedly preempted by the Food, Drug, and Cosmetic Act).

[9] *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943) ("duties of United States on commercial paper which it issues are governed by federal rather than local law").

[10] For example, the Court has created a body of common law rules of decision in controversies between states and in cases of admiralty, based upon article III's grant of jurisdiction. *See, e.g., Texas v. New Jersey*, 379 U.S. 674, 677 (1965) (conflicting claims to tax); *Kossick v. United Fruit Co*., 365 U.S. 731 (1961) (federal law of admiralty necessary for uniformity and consistency).

[11] *See supra* nn. 4-5.

The *Miranda* decision is a perfect example of this. The Court tried for thirty years to ensure that coerced confessions were not admitted in criminal trials by examining each confession which came before it.[12] The use of the "totality of the circumstance" test,[13] requiring the Court to thoroughly examine every detail about the individual defendant and the particular interrogation at bar, taught the Court two things. One, it was incapable of correctly identifying which custodial interrogations resulted in compulsion and which did not. The Court never offered a workable definition of "voluntary," there were too many factors which went into the indeterminate "voluntariness" equation, it was too difficult to reconstruct an often lengthy interrogation session after the fact, and it could not review a sufficient number of cases. Second, the Court discovered that law enforcement was receiving no guidance on which interrogation techniques were acceptable and which were not, which in turn led to further constitutional violations. Thus the Court, in deciding to institute the *Miranda* warnings, did not have the option of precisely adhering to the constitutional clause at issue: rather, it was forced to either under or overprotect the constitutional right. Without the *Miranda* warnings, the Court will inadvertently admit some confessions that are compelled. With the *Miranda* warnings, the Court will exclude some confessions that were not compelled. It seems to me that either choice can plausibly be justified as constitutionally legitimate. There is no principled reason to believe that when a judicially enforceable

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[12] *See, e.g., Haynes v. Washington*, 373 U.S. 503 (1963); *Spano v. New York*, 360 U.S. 315 (1959); *Payne v. Arkansas*, 356 U.S. 560 (1958); *Brown v. Mississippi*, 297 U.S. 278 (1936).

[13] The Court examined the conduct of the police in interrogating the suspect (threats or promises, trickery, withholding food and water, the duration of the questioning, plays upon sympathy, and the use of family and friends) and the characteristics of the suspect that might make him susceptible to coercion (age, intelligence, education, psychological and physical limitations).

rule of constitutional law cannot perfectly map the constitutional right at issue, the Constitution favors judicial underprotection over judicial overprotection. This is especially true when constitutionally protected individual liberties are at stake.[14]

It is true that the Court may not hear a sufficient number of cases interpreting non-constitutional issues to ensure that lower state and federal courts always get it right. I do not believe, however, that this calls for creating prophylactic rules in interpreting federal statutes or federal torts, for example. First, there is no reason to believe that either plaintiffs or defendants in ordinary civil litigation will suffer any lopsided interpretation of the law, unlike the fate suffered by criminal defendants.[15] Second, the stakes are much higher with criminal litigation - when lower courts get it wrong, an individual may be wrongfully imprisoned. It is, of course, for this reason that the federal constitution provides such extraordinary procedural protections in criminal cases, from the "beyond a reasonable doubt" standard of proof[16] to free counsel for indigent defendants.[17]

My conceptual framework for the creation of incidental rights will likewise be based upon practicality. Scholars have already well explained a court imposing a remedy, a close cousin to an incidental right, despite the fact that such remedy will not always precisely restore the aggrieved party to

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[14] *But see* Lawrence Gene Sager, "Fair Measure: The Legal Status of Underenforced Constitutional Norms," 91 Harv. L. Rev. 1212, 1219-20 (1978) (suggesting that structural constitutional values are wisely underenforced by the judiciary but should be regarded as legally valid to their conceptual limits by the other branches, but excluding criminal procedural guarantees).

[15] *See infra* n. 132.

[16] *In re Winship*, 397 U.S. 358 (1970).

[17] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

his rightful position as determined by substantive law, but will instead provide a little more or a little less.[18] Though one might argue that what I call "incidental rights" are more appropriate called constitutional remedies,[19] my insistence on new terminology acknowledges Court precedent that is unlikely to change. The paradigmatic incidental right is the exclusionary sanction for a violation of the Fourth Amendment. The Court has quite definitively stated that exclusion is not a personal remedy to which a defendant is entitled.[20] Moreover, using the term "incidental right" offers more flexibility than the term "remedy." That latter term implies an entitlement to complete restoration of the *status quo*. The former term strives to uphold the particular clause at issue, and thus permits the Court, Congress, a state legislature, a state judge, or even a law enforcement agency to experiment with different procedures for upholding that clause, which may or may not provide a remedy to the aggrieved party.

A. Constitutional Prophylactic Rules

Constitutional criminal procedure is rife with prophylactic rules, which most often take the form

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[18] *See, e.g*., David Schoenbrod, "The Measure of an Injunction," 72 Minn. L. Rev. 672; Douglas Laycock, Modern American Remedies 272-76 (2d ed. 1994). Professor Meltzer justifies what he calls "deterrent remedies" on the ground that the Court's "authority to declare the scope and implications of rights, and its obligation to address claims for relief presented by the parties--give it a distinctive claim to participate in the fashioning of deterrent remedies." Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM.L.REV. 247 (1988).

[19] My colleague Douglas Laycock insists that what I call "incidental rights" are just remedies, and that it would be clearer to say so.

[20] *See* nn. 81 - 82 and accompanying text.

of rebuttable or conclusive evidentiary presumptions or bright-line rules for law enforcement officials to follow. The Court finds the former necessary in cases where fact-finding would be particularly difficult, the latter necessary to guide officials making snap judgment without legal training, and both justified by the reality that the Court has limited time to hear individual cases. To my knowledge, no one has combed through constitutional criminal procedural decisions to identify these rules. A non-exhaustive list of cases involving what I would term prophylactic rules follows, ordered by constitutional clause.

The automobile inventory search exception to the Fourth Amendment's *per se* warrant requirement contains a prophylactic rule.[21] The exception was created to protect the vehicle and the property in it, to safeguard the police or other officers from claims of lost possessions, and to protect the police from potential danger.[22] The prophylactic rule declares "unreasonable" any inventory search that is not "carried out in accordance with standard procedures in the local police department.'[23] The purpose of the procedure requirement is to ferret out pretextual searches; limiting officer discretion by forcing them to follow procedures reduces the chance that an officer will use the inventory search exception to circumvent the requirements of probable cause and a judicial warrant. The rule is overprotective because it will exclude evidence obtained during an inventory search done at a station without standardized procedures for such searches, even if the search was "reasonable" because it was

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[21] The Court crafted the same exception, along with the same prophylactic rule, in the case of inventory searches of persons arrested. *Illinois v. LaFayette*, 462 U.S. 640 (1983).

[22] *South Dakota v. Opperman*, 428 U.S. 364 (1976).

[23] *Colorodo v. Bertine*, 479 U.S. 367, ___ (1987); *Florida v. Wells*, 495 U.S. 1 (1990).

conducted solely to protect the police against false claims.

The *per se* warrant requirement itself can be viewed as a prophylactic rule designed to ensure that searches are reasonable. Though Justice Stewart famously said that searches conducted without a judicial warrant are per se unreasonable under the Fourth Amendment,[24] it light of the numerous "exceptions"crafted since 1948,[25] it is difficult to argue with a straight face today that a search conducted without a warrant is "unreasonable" within the meaning of the Fourth Amendment. In fact, the vast majority of searches are conducted today without a warrant, yet they are regularly declared "reasonable" by the Court.[26] The per se warrant requirement has thus evolved into a presumption that a search conduct without a warrant is unreasonable, a presumption that can be rebutted by the prosecutor in any particular case.

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[24] *Johnson v. United States*, 333 U.S. 10 (1948). For a review of the debate among Justices and scholars regarding the relationship between the warrant and the reasonableness clauses of the Fourth Amendment, *see* Susan R. Klein, "Enduring Principles and Current Crises in Constitutional Criminal Procedure," 24 Law & Social Inquiry 533, 538 - 550 (1999).

[25] The exceptions include consent (*Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)), plain view (*Coolidge v. New Hampshire*, 403 U.S. 443 (1971)), the automobile exception (*Chambers v. Maroney*, 399 U.S. 42 (1970)), search incident to an arrest (*Chimel v. California*, 395 U.S. 752 (1969), inventory of automobiles (*South Dakota v. Opperman*, 428 U.S. 364 (1976)), exigent circumstances (*Vale v. Louisiana*, 399 U.S. 30 (1970)), immigration roadblocks (*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)), sobriety checkpoints (*Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990)), closely regulated business inspections (*New York v. Burger*, 482 U.S. 691 (1987)), special needs searches (*O'Connor v. Ortega*, 480 U.S. 709 (1987)), and searches at the international border (*United States v. Ramsey*, 431 U.S. 606 (1978)).

[26] *See, e.g.*, Richard Van Duizend, L. Paul Sutton, & Charlotte A. Carter, The Search Warrant Process x; 17-19, (1985). As far as I can tell, no statistic exists for the percent of searches conducted pursuant to an exception rather than a warrant. The studies instead offer anecdotal evidence by officers, or compare the number of search warrants issued in a particular jurisdiction to the index of crimes know to police for that same period. *Id*. at 18.

Turning to the Fifth Amendment's Self-Incrimination Clause, the obvious place to begin is the *Miranda* decision itself.[27] As I discussed previously, the warnings themselves do not embody the rule or value contained in the privilege, unless one makes the outlandish claim that every statement made in response to police questioning while a person is in custody is compelled. It is likely that many suspects already know their rights and give voluntary statements because they think they can outsmart the police, or their conscience gets the best of them; the same reasons why the great majority of suspects sign a waiver and make statements even after the *Miranda* warnings are given.[28] The warnings are purely instrumental, their utility lies solely in how well they protect the privilege by preventing compulsion and assisting the Court in adjudicating these claims.

Miranda's prophylactic rule was extended in *Edwards v. Arizona*[29] and *Arizona v. Roberson*[30] to prohibit the introduction in a prosecutor's case-in-chief of any statements taken by officers who reapproached a suspect for questioning after that suspect invoked her *Miranda* right to counsel. This rule is prophylactic because there is nothing valuable about prohibiting officers from questioning suspects, and the rule may well exclude statements given voluntarily, and thus not taken in violation of the explicit Fifth Amendment's privilege against self-incrimination.[31] The Court extended

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[27] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[28] *See infra* n. 205.

[29] 451 U.S. 477 (1981).

[30] 486 U.S. 675 (1988).

[31] For example, in *Arizona v. Roberson*, 486 U.S. 675 (1988) a defendant had been arrested and Mirandized for burglary and invoked his right to an attorney. Three days later a different officer

this conclusive presumption of compulsion yet again in *Minnick v. Mississippi*,[32] when it held that once a defendant invoked his *Edwards* right to an attorney he cannot be reapproached for an interview unless that attorney is physically present, even though the suspect consulted with his attorney after the invocation of rights but before the reapproach. This rule does not embody the Fifth Amendment's prohibition against compelled self-incrimination; certainly there will be statements made in violation of the *Minnick* rule where the defendant's will is not overborne -- for example, there may be cases where he simply changed his mind. Despite its failing in particular cases, however, the rule instrumentally advances Fifth Amendment values because, in most cases, it will be difficult for the Court to determine after the fact whether persistent attempts by official to persuade a defendant to waive his right resulted in compulsion.

The Fifth Amendment's Double Jeopardy Clause is also protected by a prophylactic rule, at least in the multiple punishment in a single trial scenario. In *Missouri v. Hunter*,[33] the Court held that where two criminal statutes prescribe the same offense under the *Blockburger* test, they are construed not to authorize cumulative punishments in the absence of clearly expressed legislative intent to the

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approached Roberson regarding a different burglary, Mirandized him, and obtained a statement. There was no intentional misconduct by the officers, as the second officer was unaware of the first officer's interrogation, and nothing suggested that Mr. Roberson's will was overborne.

[32] 498 U.S. 146 (1990).

[33] 459 U.S. 359 (1983). The Court framed this as a rule of statutory construction to protect the Double Jeopardy's prohibition of more punishment in a single proceeding than authorized by the legislature.

contrary.[34] The rule is a prophylactic one because it does not precisely track the underlying purpose of the double jeopardy clause in a single trial situation -- preventing the sentencing court from prescribing greater punishment than the legislature intended. Rather, it is instrumental, it is a method by which we divine legislative intent and ensure that the clause is not violated. There will certainly be instances, however, where the legislature intended cumulative punishments but did not speak clearly enough for the Court,[35] resulting in the vacation of a punishment that the Constitution permits.

Moving to the Sixth Amendment, the *Miranda* Court also gave us *United States v. Wade,*[36] requiring the exclusion of an in-courtroom identification of an accused when the accused participated in a post-indictment lineup without counsel.[37] This rule is a prophylactic one because the Court admits that not every post-indictment lineup in the absence of counsel is suggestive and thus violative of the Sixth Amendment and Due Process Clause if evidence of an identification during such a lineup is

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[34] *See also, Albernaz v. United States*, 450 U.S. 333 (1981) (noting that cumulative punishments can presumptively be assessed after a conviction for two offenses that are not the same under *Blockburger*.)

[35] In this setting, the prophylactic rule acts like a clear statement rule in statutory interpretation. *See, e.g*., William N. Eskridge, Jr. and Philip P. Frickey, "Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking," 45 Vanderbilt Law Rev. 593 (1992) (detailing the Court's use of "super-strong clear statement rules" to protect constitutional structures).

[36] 388 U.S. 218 (1967).

[37] As with the exclusion of evidence taken in violation of the Fourth Amendment, the judge will admit an in-court identification even after a post-indictment lineup in the absence of counsel if the government establishes by clear and convincing evidence that the in-court identification was not an exploitation of the illegality but rather was based upon observation of the suspect outside of the lineup. *Wade*, at ___.

admitted.[38] Rather, the rule is a preventive one; the pre-trial lineup "may not be capable of reconstruction at trial."[39] There is no inherent value in having counsel at the lineup, nor does the text of the Sixth Amendment require it. Its only value is instrumental; counsel can "avert prejudice and assure a meaningful confrontation at trial."[40]

The Sixth Amendment's Confrontation Clause is protected by a prophylactic rule in the form of a conclusive presumption. In *Bruton v. United States*,[41] the Court reversed its holding in *Delli Paoli v. United States*[42] that the admission of a co-defendant in a joint trial did not violate the confrontation clause so long as the jury was cautioned that the confession was admissible only against the confessing party. There is certainly no value in excluding voluntary reliable confessions, nor in the increased cost and burdens on the state in severing trials. Moreover, the *Bruton* rule will require reversing convictions where the jury was able or would have been able to heed the cautionary instruction, and the striking of state procedures that are not, in all instances, unconstitutional.[43] The Court treated *Bruton* as a

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[38] Professor Grano argued that *Wade*'s right to counsel requirement is not a prophylactic rule, but "is rooted squarely in the sixth amendment's right to counsel provision." Joseph D. Grano, "Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy," 80 NW U.L.R. 100, 119-21 (1985). This flatly contradicts the language in the Court opinion itself. *See* quote from *Wade* in n. 81, *infra*, and accompanying text.

[39] *Wade* at 236.

[40] *Wade* at 236.

[41] 391 U.S. 123 (1968).

[42] 352 U.S. 232 (1957).

[43] *Cruz v. New York*, 481 U.S. 186, 196-97 (1987) (White, J., dissenting) (describing *Bruton* as "prophylactic in nature.")

prophylactic rule in *Richardson v. Marsh*,[44] when it refused to extend *Bruton* to the admission of a nontestifying co-defendant's confession not directly linked to the defendant because it would impair "both the efficiency and fairness of the criminal justice system."[45] As the *Richardson* dissenters noted, concerns about costs would not ordinarily off-set a constitutional command.[46]

Another Sixth Amendment example can be found in *Cuyler v. Sullivan*[47] where the Court held that it will conclusively presume incompetency of counsel in violation of the Sixth Amendment whenever there is an actual conflict of interest due to multiple representation adversely affecting an attorney's performance. Such a presumption grants additional protection to a defendant, who is ordinarily required to show that the deficient performance of his counsel prejudiced his defense.[48] The *Cuyler* rule is a prophylactic one because it does not embody the text of the constitutional clause at issue, in that the defendant had "the assistance of counsel".[49] Nor does the rule embody the value underlying the Sixth Amendment, as counsel may have been competent, the trial may have been a fair one, and the defendant may well have been convicted despite the multiple representation. Similarly, the Court grants

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[44] 481 U.S. 200 (1987).

[45] *Richardson*, 481 U.S. at _____

[46] *Richardson*, 481 U.S. at ____ (Stevens, Brennan, and Marshall, JJ., dissenting).

[47] 446 U.S. 335 (1980).

[48] *Strickland v. Washington*, 466 U.S. 668 (1984) (criminal judgement will not be reversed due to ineffective counsel unless defendant establishes that his counsel's performance was deficient, and that there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different).

[49] Sixth Amendment to U.S. Constitution.

automatic reversal of a conviction when the trial court failed to inquire about an apparent conflict, again without requiring that the defendant establish prejudice.[50] Finally, the Court presumes prejudice where there is actual or constructive denial of the assistance of counsel altogether,[51] or state interference with counsel's assistance.[52] The reasons the Court provides for selectively over-protecting the Sixth Amendment fit nicely into my conceptual framework for prophylactic rule: "Prejudice in these circumstances is so likely that case by case inquiry is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify, and for that reason and because the prosecution is directly responsible, easy for the government to prevent."[53]

The Rehnquist Court most recently accepted a prophylactic rule last term in *Smith v.*

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[50] *Sullivan*, 446 U.S. at 347 (mandating reversal when the trial court has failed to make an inquiry even though it "knows or reasonably should know that a particular conflict exists"). The Court went further in *Wood v. Georgia*, 450 U.S. 261 (1981), where it held that the possibility of a conflict of interest at defendant's parole revocation hearing imposes on the trial judge a duty to inquire further, and the breach of that duty mandates automatic reversal of parole revocation.

[51] *See, e.g., Penson v. Ohio*, 488 U.S. 75, 82 (1988) (striking procedure that allowed counsel to withdraw before the court had determined whether counsel's evaluation of the case on appeal was accurate). Professor Schulhofer argued that the Sixth Amendment right of an indigent defendant to court appointed counsel is itself a kind of prophylactic rule designed to protect the constitutional value of a fair hearing. The Court conclusively presumes the need for counsel to avoid the necessity of considering such factors as defendant's maturity, background, and education. See Stephen Schulhofer, *Reconsidering Miranda*, 41 U.CHI. L.REV. 435 (1987).

[52] *See, e.g.*, *Perry v. Leeke*, 488 U.S. 272 (1989) (conclusively presuming the prejudice component of an ineffective assistance of counsel claim where a judicial order precluded a testifying defendant's overnight consultation with his counsel).

[53] Strickland, 466 U.S. at ___.

Robbins.[54] In the 1967 case *Anders v. California*,[55] the Court held that the Due Process and Equal Protection Clauses required some procedure to protect an indigent defendant's constitutional right to appellant counsel. Finding the California procedure in *Anders* unacceptable, the Court sketched its own procedure: the defendant's counsel must advise the Court that the appeal is "wholly frivolous," "request permission to withdraw," and file a brief referring to anything in the record that might arguably support the appeal.[56] The *Robbins* Court held that "the procedure we sketched in *Anders* is a prophylactic one; the States are free to adopt different procedures, so long as those procedures adequately safeguard a defendant's right to appellant counsel."[57] These rules are prophylactic under my definition because the procedures are not required by the text of the constitutional clauses at issue, nor are they inherently valuable, nor do they embody the values underlying the constitutional clause they are designed to protect. The value underlying this application of the due process and equal protection clauses is that an indigent defendant receive approximately the same justice as a rich one.[58] Any procedures that adequately assure the Court of this are acceptable, and many different procedures will

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[54] 120 S.Ct. 746 (2000).

[55] 386 U.S. 738 (1967).

[56] *Id.* at 744.

[57] 120 S.Ct. at 753 (California procedures allow counsel to remain silent on the merits of the case and offer to brief issues at the court's direction). *See also, Pennsylvania v. Finley*, 481 U.S. 551 (1990) (noting that the *Anders* procedures do not constitute an independent constitutional command, but rather a prophylactic framework); *Penson v. Ohio*, 488 U.S. 75 (1988) (stating that *Anders* erects safeguards).

[58] *See, e.g., McCoy v. Court of Appeals of Wis., Dist. 1*, 486 U.S. 429 (1988) (an indigent must receive "substantial equality" compared to the legal assistance that a defendant with paid counsel would receive).

surely suffice.

In *Batson v. Kentucky*,[59] the Court created a prophylactic rule to protect a defendant's Fourteenth Amendment right to Equal Protection by holding that a defendant can establish a *prima facie* case of purposeful discrimination in the selection of the petit jury based solely on evidence concerning the prosecutor's exercise of peremptory challenges against potential jurors of the same race as the defendant, shifting to the State the burden of coming forward with a neutral explanation for its challenges. This rule is prophylactic because it does not directly embody the value of the equal protection clause, which protects against intentional discrimination. It is simply one method of determining discrimination, a method that may well result in reversals of convictions where the prosecutor did not intentionally discriminate in her use of peremptory challenges, but was simply unable to marshal the evidence to rebut the defendant's *prima facie* case.

To safeguard against judicial vindictiveness in violation of the Fourteenth Amendment's Due Process Clause, the Court in *North Carolina v. Pearce*[60] established a rule requiring that a sentencing judge who imposes a more severe sentence upon a defendant after a new trial affirmatively state his reasons on the record, and those reasons must be based upon information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. The rule is prophylactic because there is no constitutional bar to the imposition of a more severe sentence upon retrial, only one imposed "vindictively" (because the defendant exercised his right to appeal). The

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[59] 476 U.S. 79 (1986).

[60] 395 U.S. 711 (1969).

Pearce rule, like any presumption, will invariably require the reversal and vacation of a sentence that was not imposed vindictively, but where the presumption was inadequately rebutted by the judge.[61] The prophylactic rule the Court imposed to protect against vindictive judges in *Pearce* was extended to vindictive prosecutors in *Blackledge v. Perry*.[62] As with *Pearce*, the presumption in *Blackledge* may well result in dismissal of charges the filing of which would not violate due process, simply because the prosecutor failed to rebut the presumption in the defendant's favor.

The Court in *Jackson v. Denno*[63] struck down a New York procedure allowing the same jury to determine the voluntariness of the confession and the guilt of the defendant, despite a cautionary instruction to disregard the confession in its entirety if the jury finds it was coerced. This conclusive presumption is a prophylactic rule because there is nothing inherently valuable in having a judge or a different jury determine these two issues, nor is this rule dictated by the text of the Amendment. Certainly there is some jury up to the task of separating its decisionmaking regarding the voluntariness of the confession from its decisionmaking regarding other evidence of the defendant's guilt, and in fact this might have happened in Jackson's case. Thus the Court reversed a state court conviction that might not have suffered a constitutional infirmity, and invalidated a state procedural rule that, at least in some

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[61] The Court has, on numerous occasions, acknowledged this possibility. *See, e.g., Michigan v. Payne*, 412 U.S. 47, 53 (1972) ("It is an inherent attribute of prophylactic constitutional rules, such as those established in *Miranda* and *Pearce*, that their respective application will occasion windfall benefits for some defendants who have suffered no constitutional deprivation.").

[62] 417 U.S. 21 (1974) (establishing a rebuttable presumption for prosecutorial vindictiveness when a prosecutor brings a more serious charge against a defendant seeking to exercise his statutory right to a trial *de novo* following his conviction on a lesser included misdemeanor.)

[63] 378 U.S. 368 (1964).

instances, would not run afoul of the federal constitution.

B. Constitutional Safe Harbor Rules

Safe harbor rules provide that when an officer properly follows a certain procedure, the Court will not entertain an argument from a criminal defendant that, on the facts of his particular case, the search was nonetheless unreasonable. Such rules may be necessary to offer clear guidance to non-law trained officers, and to assist the Court in adjudicating claims. For example, the Court in *Chimel v. California*[64] held that an officer can conduct a warrantless search of an arrestee and his "grab area" consistent with the Fourth Amendment to protect that officer against the arrestee's reach for a weapon, and to prevent the destruction of physical evidence. The explicit constitutional rule is that a warrantless search incident to an arrest conducted for such purposes is "reasonable" within the meaning of the Fourth Amendment. Realizing that it could not adequately determine on a case-by-case basis when the officer had such a purpose, and that the case-by-case method of adjudication gave little guidance to police, the Court created a safe harbor rule that proof of a constitutionally valid arrest triggers a conclusive presumption that the search of the arrestee was "reasonable" under the Fourth Amendment. In *United States v. Robinson*,[65] the Court extended this safe harbor rule to include containers found on an arrested defendant's person and, in *New York v. Belton*,[66] it further extended the rule to the search of an entire passenger compartment of an arrested defendant's car. In *Robinson*, the container

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64 395 U.S. 752 (1969).

65 414 U.S. 218 (1973).

66 453 U.S. 454 (1981) ("It is true, of course, that these containers will sometimes be such that could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested.") *Belton* was first identified as a pro-government prophylactic rule by Schulhofer, get cite.

searched, a cigarette package in defendant's pocket, obviously contained neither a weapon nor evidence of his offense of driving after the revocation of his license. Likewise, in *Belton*, the officers were permitted to search a leather jacket found in the back seat of the automobile, clearly out of the reach of a defendant standing quite a distance from the automobile. The safe harbor rule was extended once more in *Maryland v. Buie* to allow a protective sweep of rooms "adjoining the place of arrest from which an attack could be immediately launched.[67] The Court will not consider an argument by the defendant that the officers arresting him for mail fraud knew full well that such an attack would not be forthcoming, and the officers were actually searching for his cocaine stash without probable cause or a warrant.

Though these safe harbor rules may permit searches without warrants that might be "unreasonable" on their particular facts, they advance the Court's ability to enforce the reasonableness requirement of the Fourth Amendment generally, because in many instances searches of containers and passenger compartments of automobiles incident to an arrest may reveal weapons and evidence of crime, and it is difficult for the Court to determine *ex post* whether each particular search was reasonable. This safe harbor rule also instrumentally advances the Fourth Amendment mandate that all searches be reasonable in that it offers bright-line guidance for officers in the field, who might otherwise get it wrong.[68]

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[67]492 U.S. 325 (1990).

[68] *Belton*, 453 U.S. at ___ ("A single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.")

The Court made an identical move in expanding searches of automobiles pursuant to the automobile exception to the warrant requirement (regardless of whether the driver is arrested). The original justification for this exception was that cars are mobile so there is no time to obtain a warrant;[69] to this was added the justification that a driver has a decreased expectation of privacy in his automobile.[70] In a series of cases in from 1977 to 1982, the Court held that where an officer had probable cause to believe that a particular container in an automobile contained contraband or evidence of a crime, these justifications did not apply and the officer must seize the container and obtain a warrant before searching.[71] However, about a decade later in *California v. Acevedo*,[72] the Court determined that officers and courts were "confused" by the distinction between probable cause to search the car (permitting a warrantless search of the entire car, including closed containers) and probable cause to search a container located in a car (permitting a warrantless seizure but not a search), and thus created a safe harbor rule which permits officers to conduct a warrantless search in

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[69] *Chambers v. Maroney*, 399 U.S. 42 (1970).

[70] *California v. Carney*, 471 U.S. 386 (1985). This was a strange case to select for this expansion, as Mr. Carney lived in his motor home, and therefore had a greater expectation of privacy than any of the defendants in the earlier automobile exception cases.

[71] *Compare United States v. Chadwick*, 433 U.S. 1 (1977) (where officers have probable cause to believe a double-locked footlocker in the open trunk of an parked car contains a controlled substance, they cannot search without warrant) and *Arkansas v. Sanders*, 442 U.S. 759 (1979) (where officers have probable cause to believe that a suitcase in the closed trunk of a moving cab contains marijuana, they cannot search without a warrant) *with United States v. Ross*, 456 U.S. 798 (1982) (where officers have probable cause to believe that a vehicle contains a controlled substance, they may search the entire vehicle, including containers, without a warrant).

[72] 500 U.S. 565 (1991).

either case.

The Court has been rightly hesitant in accepting proposed safe harbors. In *Richard v. Wisconsin*,[73] the Court rejected Wisconsin's proposed "blanket rule" excusing the otherwise applicable Fourth Amendment "knock and announce" requirement when the search warrant concerned a felony drug offense. Last term, in *Illinois v. Wardlow*, the Court rejected the government's proposed safe harbor rule that "reasonable suspicion" to justify a *Terry* detention is always established by flight from a known police officer.[74] In each of these cases, the Court determined that the proposed rule would vastly underprotect the Fourth Amendment. It is simply not true, as an empirical matter, that most searches for controlled substances carry a risk of physical harm to the police or destruction of evidence (the justification for case-specific exceptions to the Fourth Amendment's knock and announce rule),[75] nor is it true that in most instances flight from an identified officer alone indicates that there is criminal activity afoot (the Fourth Amendment justification for a brief warrantless detention).[76] Thus, the burden

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[73] 520 U.S. 385 (1997).

[74] 120 S.Ct. 673 (2000).

[75] *Richards*, 520 U.S. at __the "blanket exception" proposed by the government "contains considerable overgeneralization").

[76] The majority opinion did not take a stand on the empirical question, simply noting that state courts disagree on whether unprovoked flight is sufficient grounds to constitute reasonable suspicion that criminal activity is afoot. *Wardlow*, 528 U.S. at ___, n.1. The four dissenters, agreeing that the Court should refrain from adopting a per se rule that unprovoked flight by itself always or never constitutes reasonable suspicion, cited existing empirical data indicating that minorities and those residing in high crime areas may flee even if innocent because "contact with the police itself can be dangerous." *Id* at ___, n. 7 (Stevens, J. , dissenting).

of proof remained with the government to establish a safety risk in *Richards*, and to articulate its reasons under the totality of the circumstances test for suspecting Mr. Wardlow of criminal activity, and the Court did entertain the argument from those defendants that the government action was unreasonable in those particular cases.

C. Constitutional Incidental Rights

As with prophylactic rules, no scholar has, to my knowledge, analyzed the constitutional criminal procedural doctrines to identify rights which are not themselves mandated by the constitutional clause the right is designed to further. A non-exclusive list of what I call incidental rights follows.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics[77] is the first example of what I call an incidental right, at least as the Court has subsequently interpreted that case. The Fourth Amendment's prohibition against unreasonable searches and seizures was allegedly violated in *Bivens* by federal agents effecting a residential arrest and search without a warrant, and employing excessive force. A constitutional incidental right, however, unlike a prophylactic rule, does not seek to prevent the particular constitutional violation at issue (quite impossible, since the violation already occurred). Rather, it seeks to provide a personal remedy to the particular plaintiff, deter future violations, or assist the Court in adjudicating or upholding constitutional rights. Nothing about the Fourth Amendment or the Constitution in general mandates a money judgment as compensation for a Fourth Amendment violation, or, perhaps, any remedy at all. Because Congress had not provided a remedy, the *Bivens* Court believed it was necessary for it to step in, at least until Congress offered an

[77] 403 U.S. 388 (1971).

alternative. I contend that *Bivens*-actions for federal violations of constitutional rights are incidental rights rather than pure constitutional interpretation for two reasons. First, a damage action is not the only or an indispensable method for protecting the underlying guarantee, many other options, such as exclusion of the evidence or injunctive relief, are possible. Second, though it appeared that *Bivens*-actions might be constitutionally mandated in 1971, and though many noted scholars argued that the constitution demands some remedy,[78] it is inaccurate at this time to say that *Bivens* actions are constitutionally required. As Harlan's concurrence in *Bivens* and later Court cases make clear, the Court is divining Congressional intent rather than interpreting the Federal Constitution, and therefore will not examine the adequacy of the Congressional remedial scheme in the area affected by the alleged wrongdoing.[79]

The best known example of what I define as an incidental right is the exclusionary sanction barring the admission of evidence obtained in violation of the Fourth Amendment. Though when it was first made binding on the states in *Mapp v. Ohio*[80] this exclusionary sanction appeared to be a

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[78] *See, e.g.*, Walter F. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L.REV. 1532 (1972).

[79] *See, e.g.*, *Bivens*, 409 U.S. at 405 (Harlan, J., concurring) (noting that the federal common law in *Bivens* arose not directly from the Constitution, but rather from the combination of the Court's historical ability to provide a remedy for the violation of individual liberties and an interpretation of 28 U.S.C. § 1331); *see also Schweiker v. Chilicky*, 487 U.S. 412 (1988) (holding that Congress intended the Social Security Disability Benefits Reform Act of 1984 to be the exclusive remedy for due process violation of wrongful termination of disability benefits, though that act did not apply to plaintiffs); *Bush v. Lucas*, 462 U.S. 367 (1983) (holding that there would be no damage remedy for federal civil servant's dismissal in retaliation for exercising First Amendment rights because of alternative Congressional remedial scheme).

[80] 367 U.S. 643 (1961).

constitutional requirement, this is no longer the case. Post-*Mapp* cases have made clear that the admission of evidence obtained in violation of the Fourth Amendment is not itself a violation of the Fourth Amendment, since the injury to the privacy of the victim has already occurred and cannot be repaired.[81] Rather, the exclusionary sanction is a judicially created procedure designed to deter future Fourth Amendment violations.[82] The exclusionary sanction does not embody either the text of or the values underlying the Fourth Amendment; it does not prohibit unreasonable search and seizures, and it does not protect the privacy of the person obtaining the benefit of the exclusion. Its purpose is purely instrumental - it is hoped that officers will have less incentive to violate other persons Fourth Amendment rights in the future. Assuming some other remedy, such as monetary damages or citizen review boards would deter as effectively, neither the Court nor the Constitution should prefer one over the other.

The Court in *Franks v. Delaware*[83] mandated a post-search hearing to determine whether an officer was deliberately or recklessly untruthful in her warrant affidavit, with exclusion of evidence as the outcome. The Court rejected "the alternative sanctions of a perjury prosecution, administrative discipline, contempt, or a civil suit" as inadequate. This was an incidental right created by the Court

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[81] *See, e.g., United States v. Calandra*, 414 U.S. 338 (1974) (witness can be asked questions during a federal grand jury interrogation based on information resulting from an unlawful search as use of the improperly seized material "works no new Fourth Amendment wrong").

[82] *See, e.g., United States v. Leon*, 468 U.S. 897 (1984); *Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357 (1998) (evidence obtained in violation of the Fourth Amendment could be used at a parole violation hearing because the deterrent effect of applying the exclusionary rule would not outweigh the cost); *Minnesota v. Carter*, 525 U.S. 83 (1998).

[83] 438 U.S. 154 (1978).

after balancing the time and cost of an extra proceeding against the detrimental effect on the Fourth Amendment of providing no effective remedy when officers establish probable cause by lying.

Yet another incidental right triggered by a Fourth Amendment violation is the rule that evidence taken during a suppression motion cannot be used by the prosecutor in her case-in-chief in the subsequent criminal trial. *Simmons v. United States*[84] straddles the line between a prophylactic rule and an incidental right. There may or may not be an actual Fourth Amendment violation, depending upon how the judge rules on the suppression motion. In either case, however, the Court has determined that allowing the government to use suppression hearing testimony against a defendant during the criminal trial puts him to an unfair choice between asserting his Fourth Amendment right against an unreasonable search and his Fifth Amendment privilege against self-incrimination.

The remedy for violation of a defendant's Sixth Amendment speedy trial guarantee should have been framed as an incidental right. In *Barker v. Wingo*,[85] the Court instead held that the remedy of dismissal of the indictment is "the only possible remedy." It is difficult to understand why Justice Powell believed this to be true. The Court of Appeals in *Strunk v. United States*[86] offered the novel rule of subtracting the unjustified days of delay from the defendant's total sentence after conviction, rather than dismissing the charge. One can imagine equally creative remedies, such as money damages; demotion

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[84] 390 U.S. 377 (1968). In this case, an alleged robber took the stand at the suppression hearing and admitted ownership of a suitcase with incriminating evidence inside in order to establish standing to contest the search.

[85] 407 U.S. 514 (1972).

[86] 467 F.2d at 973, reversed in *Strunk v. United States*, 412 U.S. 434 (1973).

of prosecutors involved in the case; or an instruction to the jury explaining that the government unreasonably delayed the trial, that this may prejudice the defendant, and they may take this into account in rendering their verdict. This case was also a perfect candidate for a constitutional prophylactic rule. Though Justice Powell claimed that the Court does "not establish procedural rules for the States, except when mandated by the Constitution,"[87] that, of course, is not true. This case would have given the Court the perfect opportunity to proffer a prophylactic rule similar to the Federal Speedy Trial Act adopted by Congress two years later,[88] or perhaps offer defendants some new action for mandamus in federal court to require the prosecutor to move forward in a timely manner.

The Court in *Vasquez v. Hillery*[89] provided for the reversal of the criminal conviction of a defendant clearly guilty of a brutal murder because African Americans were systematically excluded from the grand jury that indicted him. In fashioning the incidental right of reversal, rather than upholding the conviction on the basis of harmless error review or a finding that systemic racial discrimination no longer infects the selection of grand juries in Kings County, the Court weighed the impossibility of retrying the defendant for a 23-year-old offense against the seriousness of the constitutional violation and the desire to prevent racial discrimination in the future. The Court did consider alternative incidental rights, such as criminal prosecutions of those officials that engaged in the discrimination, or a civil rights action by blacks excluded from jury service against the discriminating officials, but found

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87 *Barker v. Wingo*, 407 U.S. at _____.

88 Federal Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (1975). *See infra* n. 114 and accompanying test.

89 474 U.S. 254 (1986).

them inadequate to the task.[90]

Finally, the dismissal of an indictment[91] or reversal of a conviction[92] in response to a successful claim that the Equal Protection Clause was violated by selective prosecution of a defendant because of his race, religion, ethnicity, or viewpoint is an incidental right. There is certainly nothing inherently valuable in dismissing the indictments of admitted drug dealers. The Court, however, demanded that some action be taken, though it has not opined that the constitution demands a particular response. Perhaps a civil action for money damages, the demotion or firing of the police officers or prosecutors involved, or forcing the government to prosecute the similarly situated individuals of the other races would do as nicely.

II. (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights

There is simply no returning to the pre-prophylactic rules and incidental rights days; both because the Court will not return,[93] and because, as a normative matter, the Court should not. The

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[90]Id. at 262, n. 5.

[91] The Court has "never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if the Court determines that a defendant has been the victim of prosecution on the basis of his race." *United States v. Armstrong*, 517 U.S. 456, n. 2 (1996) (refusing to allow discovery on selective enforcement of crack cocaine law as defendant failed to show similarly situated white crack users who were not prosecuted); *Wayte v. United States*, 470 U.S. 598 (1985) (refusing to dismiss indictment on selective prosecutions grounds as defendant failed to show the government selected non-registrants for prosecution on the basis of their speech).

[92] *Yick-Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (reversal of conviction for violation of ordinance prohibiting the construction of wooden laundries without a license because of discriminatory denial of licenses to individuals of Chinese origin).

[93] Only Justices Scalia and Thomas might be willing to reverse the great quantity of caselaw needed to return to those days. *Dickerson v. United States*, 120 S.Ct. 2326 (2000) (Scalia and

charge that prophylactic rules and incidental rights are constitutionally illegitimate, because the Court has no authority to provide greater protection than mandated by the federal constitution, seems to me merely a policy preference in favor of under-enforcement rather than over-enforcement of individual liberties. Those making this argument against prophylactic rules and incidental rights are resoundingly quiet about safe harbor rules, which underenforce individual liberties. Those rules, however, are subject to a similar criticism; it is constitutionally illegitimate for the Court to ignore a State's violation of the federal constitution in a case before it. Moreover, the Court is an institution that must craft rules and procedures allowing it to effectively decide the cases before it. Finally, as I demonstrate below, there are great advantages to utilizing prophylactic rules and incidental rights over the alternative of core constitutional interpretation if the Court moves carefully enough. A constitutional rule cannot be easily changed by subsequent legislation, but a prophylactic rule or incidental right can be.[94] Moreover, a prophylactic rules can be used as a technique for the Court to indicate its level of certainty regarding the propriety of a procedure. The critical question today is how the Court can best utilize these prophylactic rules, safe harbor rules, and rights in a way that maximizes their benefits and minimizes their dangers.

A. Fostering A Dialogue Between The Supreme Court and Other Federal and State Actors.

The primary critique of prophylactic rules one sees in the literature, in addition to the Article III

Thomas, JJ., dissenting).

[94] There may be the rare case where the Court will gradually accept a constitutional change triggered by legislation, However, it seems to me that there is certainly quite a different psychological advantage in a legislature requesting that the Court modify a prophylactic rule rather than a constitutional interpretation.

legitimacy critique, is that such rules implicate federalism and national separation of powers.[95] The concern is that the Court might wield this rulemaking authority to unnecessarily intrude upon criminal law, an area traditionally left to state authority,[96] beyond what pure constitutional interpretation would countenance. Additionally, in attempting to deter executive branch officials from violating the Constitution, and in drafting many criminal procedure rules and rights that arguably should be drafted by Congress, prophylactic rule-making intrudes upon the separation of powers in the national government. I do not believe the answer to the federalism criticism is any need for national uniformity in criminal procedures,[97] nor do I believe that the complete answer to the separation of powers argument is that vindication of constitutional rights is a traditional function of judicial review.[98] The more persuasive answer is that nature abhors a vacuum. When the Court promulgates such rules and rights it is not attempting to fashion uniform national rules, nor is it jealously guarding its judicial prerogative to remedy constitutional wrongs. Rather, it has stepped in by necessity; when states refuse to act to protect the constitutional criminal procedural guarantees in state criminal trials,[99] and when Congress and the Attorney General fail to protect the constitutional criminal procedural guarantees of federal defendants.

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95 *See* Schrock and Welsh, *supra* n. 7.

96 *United States v. Lopez*, 514 U.S. 549 (1995) (striking the Gun Free School Zone Act of 1990 as 1990 as beyond Congress' power pursuant to the commerce clause, in part because criminal law enforcement is an area "where states historically have been sovereign").

97 This was Professor Monaghan's response. *Supra* n. 5, at 18.

98 Monaghan argued this as well. Monaghan, *supra* n. 5, at 34.

99 Brennan, *The Bill of Rights and the States*, 36 N.Y.U. L.REV. 761 (1961) (arguing for selective incorporation).

The paradigmatic examples of the Court creating an incidental right and prophylactic rule because of state government failure are the *Mapp* and *Miranda* cases, respectively. The Supreme Court had no choice but to extend the exclusionary rule for violations of the Fourth Amendment to the states in 1961 because of the continued lawlessness the country experienced during the twelve years between *Wolf v. Colorado*,[100] where the Court held that the federal exclusionary remedy did not apply to the states, and *Mapp v. Ohio*,[101] where the Court held that it did. The Court had given the states every opportunity to act, yet state legislatures between the time of *Wolf* and *Mapp* provided no remedies for Fourth Amendment violations, state judges and police departments implemented no procedures to deter violations, and state law enforcement officials never bothered to learn much less obey the search and seizure rules imposed by the Federal Constitution.[102]

The same is true for extending warnings regarding the Self-Incrimination Clause to the states. While federal law enforcement agencies were routinely warning defendants of their Fifth Amendment privilege against self-incrimination,[103] state police departments were not only failing to warn but were

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[100] 338 U.S. 25 (1949).

[101] 367 U.S. 643 (1961).

[102] *See, e.g.*, Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure,* 34 L. & SOC. INQ. 533, 549-50 (1999); Donald Dripps, *Akhil Amar and Criminal Procedure and Criminal Law: 'Here I Go Down That Wrong Road Again,'* 74 N. CAR. L.REV. 1559 (1996).

[103] *Miranda* at __.

frequently engaging in excessively coercive interrogation techniques.[104]

Placing this blame on state actors and other branches of the national government is only part of the answer. The Court was also forced to develop prophylactic rules in light of its own institutional limitations. The Court could not hear a sufficient number of state confession cases to protect the Self-Incrimination Clause, and the Court could not persuade state actors to learn much less follow its interpretation of the Fourth Amendment. If the Court is unable to do its job without prophylactic rules and incidental rights, it must rely on police departments and legislatures to enact such rules, or it must fashion them itself. When the Court generates safe harbors, it is acting from this sort of necessity. The problem is not the state and federal officials fail to act after a signal that the Court is unable to protect the particular constitutional right at issue. Rather, the Court is responding to the fact that its own caselaw is too confusing for non-lawyer police to learn or follow, or the factual circumstances confronted by the state actors are too varied for a standard (rather than bright-line rule) to provide sufficient guidance. I will not include safe harbor rules as amenable to ready modification by the other branches. The creation or modification of a safe harbor by legislative or executive actors should be viewed by the Court with some suspicion, as such rules by definition enlarge executive power at the

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[104] *Miranda* at __. *See, e.g., Brown v. Mississippi*, 297 U.S. 219 (1941) (whipping of black suspect); *Haynes v. Washington*, 373 U.S. 503 (1963) (refusal to allow contact with family); *Spano v. New York*, 360 U.S. 315 (1959) (sympathy falsely aroused); *Payne v. Arkansas*, 356 U.S. 560 (1958) (threat of angry mob); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944) (36 hours of nonstop incommunicado interrogation); *Lynumn v. Illinois*, 372 U.S. 528 (1963) (false representation that children would be removed from home); *Reck v. Pate*, 367 U.S. 433 (1961) (deprivation of food, water, and sleep). As the *Dickerson* majority noted, the Court decided 30 confession cases between *Brown* in 1941 and *Escobedo* in 1964. *Dickerson*, 120 S.Ct. 2326, * 2330 (2000). This, of course, was just the tip of the iceberg.

expense of the constitution.

While legislative and law-enforcement failure to act and the Court's own institutional limitations explain why the Court began creating prophylactic rules, safe harbors, and incidental rights, it does not, by itself, defeat the federalism and separation of powers criticisms. These criticisms are answered by the fact that prophylactic rules and incidental rights are fully open to revision by Congress, federal executive action, and state legislative, executive or judicial action.[105] If one views the purposes behind federalism as the preservation of local control in fields traditionally left to state government, and the reform and evolution of criminal procedures attained by experimentation, these values should not be lost, and in fact would be advanced. While the Court will, of course, have the final say as to whether alternative prophylactic rules and rights provided by legislators, law enforcement agencies, and state

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[105] *City of Boerne v. Flores*, 521 U.S. 507 (1997) will not stand in the way of Congressional and Executive development of alternative procedures. The Court's invitation to these actors to assist in fashioning prophylactic rules and incidental rights telegraphs the Court's future decision as to whether the action would be "congruent" with, and "proportional" to, a constitutional violation. *City of Boerne*, 521 U.S. at 520. Thought the Court has left the boundaries unclear, prophylactic rules by Congress substituting for constitutional prophylactic rules developed by the Court should be acceptable, as "legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional". *Boerne*, 521 U.S. at 518.

Likewise, state attempts to fashion prophylactic rules and incidental rights should be constitutionally acceptable; first because the Court requested these attempts; second, because federalism demands that the states be granted at least as much leeway for experimentation as the federal government; and third, as a reflection of a state constitution which may provide greater protection than the federal constitution. *See, e.g.*, *State v. Gerschoffer*, Ind. Ct. App., No. 71A05-0003-CR-116, 11/28/00 (sobriety checkpoints permitted by Fourth Amendment violate Indiana Constitution); Leigh A. Morrissey, "State Courts Reject *Leon* on State Constitutional Grounds: A Defense of Reactive Rulings," 47 Vand. L. Rev. 917 (1994); Barry Friedman & Michael C. Dorf, "Shared Constitutional Interpretation after *Dickerson*," 2000 Supreme Court Review ___ (arguing that *City of Boerne* will not prohibit either federal or state alternatives to *Miranda*).

judges sufficiently protect the Bill of Rights in a manner the Court can effectively oversee, the use of prophylactic rules and incidental rights rather than pure constitutional interpretation gives the states exactly that opportunity for diversity and experimentation. Further, it allows the other two branches of the federal government increased opportunities for participation.

There are a number of examples of the Court signalling to other state and federal actors that a certain constitutional prophylactic rule or constitutional incidental right was up for grabs. These have been met with varying degrees of success. During the same term as the *Miranda* decision, the Court in *United States v. Wade*[106] instituted what I would define as a constitutional prophylactic rule and openly invited legislative or executive counteroffers. The Court noted that "[l]egislative or other regulations, such as those of local police departments, which eliminate the risk of abuse and unintentional suggestion at lineup proceedings and the impediment to meaningful confrontation at trial may also remove the basis for regarding the stage 'critical."[107] The resulting initial dialogue between the Court and Congress might be labelled a failure in light of the immediate Congressional attempt to overrule *Wade* without eliminating the potential for suggestive lineups,[108] though the federal executive branch has steadfastly refused to utilize that statute. On the state and local levels, however, there were

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[106] 388 U.S. 218 (1967).

[107] *Wade*, 388 U.S. at ___.

[108] As part of the Omnibus Crime Control and Safe Streets Act of 1968 Congress enacted not only 18 U.S. Code § 3501, attempting to repeal *Miranda*, but also enacted 18 U.S. Code § 3502, purporting to overrule *Wade*. This statute has, to my knowledge, never been used by a federal prosecutor in an attempt to admit witness testimony identifying a defendant after a post-indictment lineup in the absence of counsel.

early attempts to institute substitute procedures,[109] some effectively removing the need for counsel during those lineups.[110] More recently, there is success at the federal level as well. Attorney General Janet Reno commissioned the Technical Working Group for Eyewitness Evidence to develop the 1999 Guide for effective procedures for witness identifications.[111] Though no federal court has yet opined as to whether these recommended procedures effectively replace the need for counsel at lineups, at least one jurisdiction has already implemented them.[112]

A successful example of the dialogue and cooperation I envision is Congress' reaction to *Barker v. Wingo*.[113] Congress was understandably unhappy with the Court's selection of dismissal of an indictment against a quite possibly guilty defendant as a constitutional incidental right of the Sixth

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[109] *See, e.g*., F. Read, "Layers at Lineups: Constitutional Necessity or Avoidable Extravagance?" U.C.L.A. Law Rev. 17, 339-407 (1969) (regulations for New York City, Oakland, California, Washington D.C, and Clark County, Nevada published as appendices); Note, "Protections of the Accused at Police Lineups," Columbia Journal of Law and Social Problems 6, 345-373 (1970) (discussing regulations in Los Angeles, New Orleans, and Richmond, Virginia).

[110] *See, e.g.*, *People v. Fowler*, 461 P.2d 643 (Cal. 1969) (detailed regulations for the conducting of lineups, including that two still photographs be taken of the line, held sufficient); *Bruce v. State*, 375 N.E.2d 1042 (Ind. 1978) (no Sixth Amendment basis for exclusion where lineup was photographed and defense counsel had the opportunity to cross-examine the officer who created the lineup); *People v. Curtis*, 497 N.E.2d 1004 (Ill. 1986) (no right to counsel if lineup photographed); *but see United States v. LaPierre*, 998 F.2d 1460 (9th Cir. 1993) (videotape insufficient here, as it only shows the lineup members and does not record what occurred in the witness room).

[111] U.S. Dept.of Justice, Office of Justice Programs, National Institute of Justice, "Eyewitness Evidence: A Guide for Law Enforcement," Oct. 1999.

[112] The State of New Jersey has done so, according to Deputy Attorney General Lori Linskey. Telephone call with author on March 1, 2001.

[113] 407 U.S. 514 (1972).

Amendment's speedy trial guarantee. Passage of the Federal Speedy Trial Act[114] immediately after and in response to *Barker* offered the perfect prophylactic rule to prevent the application of the constitutional incidental right. By forcing federal prosecutors to try these cases in a timely manner, the Act prevents a violation of the Sixth Amendment and the implementation of the draconian incidental right of dismissal.

A successful example of a state response to a Court-created prophylactic rule is California's response to the Court's invitation in *Anders v. California*[115] to implement an alternative procedure to protect an indigent defendant's constitutional right to appellate counsel when his claims appear frivolous. The California Supreme Court took up the challenge in *People v. Wende*,[116] and the Court last term in *Robbins* was fully satisfied with these alternative procedures.[117]

There has also been some Court-Congress dialogue regarding the constitutional incidental right of the exclusion of evidence taken in violation of the Fourth Amendment, though unlike the two examples noted above, no successful enactment of alternative procedures. The exclusionary remedy

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[114] Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (1975) (codified at 18 U.S.C. §§ 3161-3174, 3152-3156 (1994)). The Speedy Trial Act was adopted in direct response to the Supreme Court's suggestion in *Barker* that setting specific time limits was part of the legislative function. *See* H.R. REP. NO. 93-1508, 1974 U.S.C.C.A.N. 7401, 7405 ("With respect to providing specified time periods in which a defendant must be brought to trial, the Court in *Barker* . . . said '. . . such a result would require this Court to engage in legislative or rulemaking activity . . . .'").

[115] 386 U.S. 738 (1967).

[116] 600 P.2d 1071 (1979).

[117] *See supra* n. 57.

has obvious disadvantages; it benefits solely guilty persons, does nothing to safeguard the privacy rights of innocent persons, and may create a windfall for the guilty party that is out of proportion to the gravity of the Fourth Amendment violation and the gravity of the defendant's crime.[118] Thus, Congress proposed a bill to replace the exclusionary remedy with a monetary damages scheme.[119] I have noted elsewhere that this proposal is clearly inadequate due to, among other things, its low cap on monetary damages, and its *ad hoc* jury verdicts rather than the written judicial opinions necessary to guide officer conduct.[120] Akhil Amar has suggested a more comprehensive set of remedies, including enterprise liability, the abolition of official immunities, and a sentencing discount for convicted defendants.[121] Such a proposal may come close enough to serving the same function as the constitutional incidental right to exclusion of evidence to be accepted by the Court, particularly if the civil damage remedy were supplemented with an automatic award of attorneys fees and the exclusion from the civil jury trial of evidence of criminality discovered during the search.[122] Moreover, we would still need some method for imposing categorical rules that law enforcement personnel can follow. Still, the potential for a

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[118] *See, e.g.*, Richard A. Posner, "Rethinking the Fourth Amendment," 1981 Sup. Ct. Rev. 49; Christopher Slobogin, "Why Liberals Should Chuck the Exclusionary Rule," 1999 U. Ill. L. Rev. 363.

[119] H. 666 and S. 3, 104 Cong., 1 Sess. (1995).

[120] Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 L. & SOC. INQ. at 549.

[121] Akhil Reed Amar, *The Constitutional and Criminal Procedure: First Principles*, Yale Univ. Press (1997).

[122] To ask a judge or jury to put out of her mind that the defendant is a criminal is to ask too much, and has already resulted in the skewing of Fourth Amendment doctrine.

federal or state legislatively designed alternative constitutional incident is possible.

One example of dismal failure of a prophylactic rule to foster a constructive and respectful exchange between Congress and the Court is the *Miranda* decision itself. The Court earnestly denied subjecting law enforcement to a "constitutional straightjacket," and invited "Congress and the States to .... search for ... other procedures which are at least as effective."[123] As Professor Yale Kamisar vividly described in his Cornell article last year,[124] Congress enacted 18 U.S. Code § 3501 in 1968 not in response to this request for alternatives but simply to overrule a decision it loathed. The Court reacted to this angry, disrespectful and disingenuous attempt to overrule a constitutional prophylactic rule it didn't care for exactly as one would expect.[125] This should not be the end of the matter, however. One can imagine numerous plausible candidates for the Court's request for "adequate protective devices."[126] Professor Amar and Lettow have suggested questioning by a magistrate,[127] I have earlier suggested providing an attorney in the interrogation room,[128] and scholars have long

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[123] *Miranda*, 384 U.S.at. 467.

[124] Yale Kamisar, *"Can (Did) Congress 'Overrule' Miranda?*, 85 CORNELL L. REV. 883 (2000).

[125] *United States v. Dickerson*, 120 S.Ct. 2326 (2000) (7-2) (striking federal statute as unconstitutional).

[126] *Miranda*, 384 at 467.

[127] Akhil Reed Amar and Renee B. Lettow, *Fifth Amendment First Principles: The Self Incrimination Clause*, 93 MICH. L. REV. 857 (1995).

[128] Susan R. Klein, "Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide," 143 Univ. of Penn. Law Rev. 417 (1994).

suggested videotaping all custodial interrogations.[129] A variant of Amar's position[130] would likely achieve all three benefits of the Court's constitutional prophylactic rule in that it would dispel the compulsion inherent in the custodial interrogation, provide guidance to police officers, and make it possible for the Court to rule on this issue. A magistrate is unlikely, however to engage in the false sympathy, intimidation and fabrication necessary to obtain incriminating statements.[131] Likewise, putting attorneys in the interrogation room would fulfill all three functions of the prophylactic rule but again would detrimentally over-protect the self incrimination privilege - few attorneys would allow their clients to speak.

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[129] *See, e.g*., Roscoe Pound, "Legal Interrogation of Persons Accused or Suspected of Crime," 24 J. Am. Inst. Crim. Law & Criminology 1-14, 1017 (1934); Glanville Williams, "The Authentication of Statements to the Police," 1979 Crim.L.Rev. 6; Yale Kamisar, "Forward: *Brewer v. Williams* - A Hard Look at a Discomfiting Record," 66 Geo. L. J. 209, 236-43 (1977); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 681-691 (1996) (arguing that substantive due process requires that the Court legally mandate the electronic-recording of custodial interrogations in all felony cases).

[130] The variant would eliminate the magistrate's contempt power to compel an answer and replace police interrogation with magistrate interrogation rather than supplementing it. The problem with Amar's proposal is without the contempt club we would likely see no confessions at all, and with the contempt club and the sworn testimony we violate the framers understanding of the Fifth Amendment. This is why the number of scholars who suggested unsworn interrogation before a magistrate years before Amar and Lettow's article suggested that the only sanction for a suspect's refusal to comply with the magistrate was to permit the trier of fact to consider that silence, and even that was thought to require a constitutional amendment for implementation. *See, e.g*., Paul G. Kauper, "Judicial Examination of the Accused - A Remedy for the Third Degree," 30 Mich. L. Rev. 1224 (1932); Walter V. Schaefer, The Suspect and Society: Criminal Procedure and Converging Constitutional Doctrine 78 (1967); Henry J. Friendly, "The Fifth Amendment Tomorrow: The Case for Constitutional Change," 37 U. Cin. L. Rev. 671 (1968).

[131] Susan R. Klein, ENDURING PRINCIPLES AND CURRENT CRISES IN CONSTITUTIONAL CRIMINAL PROCEDURE, 24 L. & SOC. INQUIRY 533, 554 (1999).

Videotaping confessions start to finish captures false and coerced confessions in a way *Miranda* never can. Videotaping, nonetheless, is not an alternative that adequately replaces the *Miranda* warnings. It may dispel some of the compulsion inherent in a custodial setting, assuming the defendant knows that it is recording and believes that it cannot be tampered with later, since officers are less likely to beat suspects on video. It offers no guidance, however, to police officers as to what kind of conduct is permitted, and it puts the Court right back into the same totality of circumstances boat it was drifting in prior to *Miranda*. Unlike in First Amendment cases involving obscene videos, courts will be unwilling to view hours and hours of tedious videotaped interrogations in every case involving a statement (assuming that judges even knew what they were looking for). They will still need some method for narrowing the class of cases. Videotaping plus a list of unacceptable police tactics would do nicely.

In revisiting past and developing future prophylactic rules and incidental rights, the dialogue I envision between the Court, Congress, state legislators, federal and state law enforcement agencies, and state judges should be possible if all parties act in good faith and treat each other with respect. Perhaps I am insufficiently cynical, but I believe such dialogue may fruitfully occur if the Court makes its invitation genuine. It is true that neither state nor federal legislatures are tripping over themselves to enforce constitutional criminal procedural guarantees that benefit persons suspected of crime.[132]

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[132] *See, e.g.*, Donald A. Dripps, "Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?," 44 Syracuse L. Rev. 1079 (1993), Harry A. Chernoff et al., The Politics of Crime, 33 Harv. J. on Legtis. 527, 535-38 (1996) (detailing the Willie Horton fiasco); Cal. Penal Code section 667 (West Supp. 1996) ("Three Strikes and You're Out" law).

However, it is possible that non-judicial state and federal actors will create and adopt procedures that separate the guilty from the innocent, rather than procedures that separate the very guilty from the less guilty, or that protect values not associated with the truth-seeking function of criminal trials. Even the most hawkishly "tough-on-crime" legislator should have little interest in incarcerating the innocent.[133] I have also noticed some interest by legislatures in eliminating the appearance of racism in the criminal justice system, even when these measures do not necessarily separate the guilty from the innocent.[134] Finally, threatened Court action (indicating that it will generate a rule or right if another branch fails to do so) might provide the necessary impetus. In any case, it seems to me we have nothing to lose by

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[133] Even my home state of Texas, not known for coddling criminals, is likely to enact a bill proposed by Sen. Rodney Ellis which requires the state to fund DNA testing of arrestee and convicted felons where appropriate. Likewise, the Department of Justice has set up committees to examine the use of DNA to free wrongfully convicted person, and the proper procedures to eliminate mistaken eyewitness identifications. DOJ Report, "Postconviction DNA Testing: Recommendations for Handling Requests, Sept. 1999 (identifying 68 cases of wrongfully convicted person exonerated by DNA evidence, and encouraging "the pursuit of truth over the invocation of appellate time bars."); U.S. Department of Justice Report, "Eyewitness Evidence: A Guide for Law Enforcement, National Institute of Justice, Oct. 1999. Congress is presently considering The Innocence Protection Act of 2000, H.R. 4167. Many of my suggestions for social science research in Part II, B, *infra*, concern criminal procedures which would improve accuracy.

[134] *See, e.g.*, President William J. Clinton's Presidential Memorandum on Fairness in Law Enforcement, 35 Weekly Comp. Pres. Doc. 1067 (June 9, 1999) (directing federal agencies to collect and report statistics relating to race, ethnicity, and gender for law enforcement activities); U.S. Dep't of Justice, U.S. Attorneys' Manual section 9-10.050 (1998) (requiring Committee appointed by Attorney General to consider whether racial bias played any role in decision to seek federal death penalty); Letter from Att'y Gen. Janet Reno and Barry McCaffery to President Clinton (July 3, 1997), reprinted in 10 Fed. Sent. R. 192, 193 (1998) (proposal by the Dept. of Justice and the Office of National Drug Control Policy to decrease the powder to crack cocaine ration from 100:1 to 10:1); S. 146, 106th Cong. (1999); S. 5, 106th Cong. (1999) (Republican bills incorporating a 10:1 ration);H.R. 939, 106th Cong. (1999); H.R. 1241, 106th Cong. (1999) (Democratic bulls treating crack and powdered cocaine as equivalents); 66 BNA Crim. Law Reporter 13, 1/5/00 (detailing New Jersey Governor Christine Todd Whitman's consent decree).

giving it a try. If the other branches fail to act, the Court can continue to fashion the prophylactic rules, safe harbor rules, and incidental rights it finds necessary. If other government actors introduce implausible alternative procedures that will defeat constitutional rights, the Court can simply ignore such mischievous legislative behavior or declare the alternatives inadequate.[135]

B. Fostering A Dialogue Between The Court, Empiricists, and Social Scientists

Properly understood, a prophylactic rule or incidental right comes into play when the Court finds that it cannot otherwise protect a particular constitutional clause. Although, in such situations, some prophylactic rule is necessary, no particular rule is required -- only one that is "effective." This permits the Court to create new prophylactic rules and incidental rights as changed circumstances and new data generated by social scientists mandate. It also allows the Court to change the rules by accepting alternate rules provided by Congress, state legislators, federal and state law enforcement agencies and state judges, who may have better knowledge of the circumstances encountered or facts on the ground, and who may be better institutionally-suited to play factfinder. Finally, labeling the procedures prophylactic rather than true constitutional interpretation permits the Court to determine the occasions when the rule comes into play. For example, the Court need not apply a prophylactic rule retroactively,136 it need not be cognizable on habeas,137 and it may create exceptions to the rule, if employing the rule in those situations or without exceptions is unnecessary or would involve unacceptable costs. While the Court can also refuse to provide relief for a "true" constitutional violation retroactively or on habeas, such action is more difficult to justify, particularly on the grounds of costs.138

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135 For example, 18 U.S.C. § 3501 was properly ignored by the Department of Justice, under both Democratic and Republican administrations, for many years. Though the Republicans did put some of their tirades into writing, they never implemented a policy to seek Supreme Court reversal of *Miranda* on this ground (though a few Assistant United States Attorneys made the attempt at the lower court level). It was only after a contrivance by a particular Assistant United States Attorney and a conservative law professor that section 3501 reared its ugly head in *Dickerson*.

136 *Michigan v. Payne*, 412 U.S. 47 (1973) (refusing to apply the prophylactic rule developed in *Pearce* retroactively to a case still on direct appeal); *Johnson v. New Jersey*, 384 U.S. 719 (1966) (*Miranda* nonretroactive).

137 *See, e.g., Stone v. Powell*, 428 U.S. 465 (1976) (where a state has given a defendant a full and fair chance to litigation his Fourth Amendment claim, federal habeas review is not available to a state prisoner alleging that his conviction rests on evidence obtained in violation of the Fourth Amendment); *Withrow v. Williams*, 113 S.Ct. 1745 (1993) (claimed violations of *Miranda* are cognizable on habeas).

138 For example, the Court in *Powell* and *Withrow* came pretty close to treating the Fourth Amendment exclusionary rule as an incidental right and the *Miranda* warnings as a prophylactic rule, and thus properly analyzing whether the extension of the right or rule is necessary on habeas and explaining the different outcomes. For example, the *Powell* Court noted that there is little marginal

Let us examine how the *Miranda* exceptions are consistent with my conception of prophylactic rules, and how social scientists might better inform the Court regarding these exceptions. All but one the *Miranda* exceptions can be explained by returning to my definition of a prophylactic rule. The explicit federal constitutional right at issue is the privilege against self-incrimination. A constitutional prophylactic rule is appropriate only upon two determinations: first, that providing relief only upon a showing that the explicit right was violated is ineffective; and second, that the rule will be effective while involving only acceptable costs. Providing relief only upon a showing that a statement was compelled is ineffective; the Court was unable to determine when the self-incrimination right was violated because of the post-hoc nature of the inquiry, because the totality of the circumstances test required the Court to examine too many facts in too many case, and because the judicial results of implementing the totality of the circumstances test provides no guidance to police officers for future conduct. I turn now to the second showing, that the prophylactic rules is appropriate because *Miranda* warnings are relatively effective in enforcing the explicit constitutional right at issue, and involve only acceptable costs.

Every Supreme Court case blessing the use of statements taken in violation of *Miranda* at a criminal trial except *New York v. Quarles* involved a good faith or unintentional violation of the prophylactic rule,139 coupled with particularly high costs for implementing the rule. Where

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benefit to enforcing what I call the incidental right of exclusion because it comes too late to produce a noticeable deterrent effect. *Powell*, 428 U.S. at 493. Thus, under my conceptual framework, it does not deter future violations of the Fourth Amendment nor make the defendant whole. Likewise, its cost is unacceptable, as the extension of the right to habeas "diverts attention from the ultimate question of guilt, squanders scarce federal judicial resources, intrudes on the interest of finality, creates friction between the state and federal systems of justice, and upsets the constitutional balance upon which the doctrine of federalism is founded." *Withrow*, 113 S.Ct. at 1758. In contrast, the extension of Miranda's prophylactic rule to habeas directly advances one of the values underlying the Self-Incrimination Clause, the exclusion of untrustworthy confession. Moreover, the cost of the extension is acceptable, as "eliminating review of *Miranda* claims would not significantly benefit the federal courts in their exercise of habeas jurisdiction, or advance the cause of federalism in any substantial way ... as virtually all *Miranda* claims would simply be recast" as due process claims. *Withrow*, 113 S.Ct. at 1754.

139 *Michigan v. Tucker*, 417 U.S. 433 (1974) (“because the questioning in *Tucker* occurred *before Miranda* was announced and otherwise conducted in an objectively reasonable manner, the exclusion of the derivative evidence solely for failure to comply with the nonexistent *Miranda* requirement would not significantly deter *Miranda* violations); *Oregon v. Elstad*, 470 U.S. 298, 309 (1984) (officer failed to give *Miranda* warnings because he was unaware that a defendant questioned in his own home was in “custody”; the officers failure to Mirandize “may have been the result of confusion as to whether the brief exchange qualified as ‘custodial interrogation’); *Duckworth v. Eagan*, 492 U.S. 195 (1989) (unintentional departure from precise language laid out in the *Miranda* opinion does not render warnings inadequate where they reasonably convey to the suspect his right to an attorney); *Harris v. New York*, 401 U.S. 222 (1971) (the interrogation in *Harris* took place on January 7, 1966, about six months before *Miranda* was handed down on June 13, 1966).

officers are trying to obey the dictates of *Miranda*, exceptions to the prophylactic rule may be acceptable.[140] An unintentional violation of *Miranda* would be less likely to lead to a coercive interrogation, and there will be so few of these that the Court will not be inundated with the due process totality of the circumstances claims it sought to prevent by instituting the *Miranda* prophylactic rule.

On the other hand, powerful costs are associated with applying the prophylactic rule in these cases. For example, in *Harris* the Court balanced the utility of the prophylactic rule against the serious costs of "a license to use perjury by way of a defense."[141] In *Michigan v. Tucker*,[142] the Court balanced the unintentional *Miranda* violation against a living individual witness's voluntary decision to testify.[143] In *Elstad* the Court weighed the unintentional failure to warn against the value to the truth seeking function of the trial of admitting a fully voluntary statement attenuated by time and an adequate *Miranda* warning from the initial statement in violation of the prophylactic rule.[144]

The case of *New York v. Quarles*, where the police intentionally refused to *Mirandize* a suspect because they believed that public safety demanded the information they sought, raises more difficult issues.[145] One could justify it on the grounds that the Fifth Amendment itself must yield to public safety issues. No constitutional right is absolute, and one could plausibly argue if a suspect refused to reveal where he had planted a bomb in the schoolyard the Constitution might tolerate some level of coercion to compel the defendant to reveal its location.[146] Even in the absence of a public safety exception to the Fifth Amendment, a single exception allowing an intentional *Miranda* violation will not negate the effectiveness of the rule. In the vast majority of instances, officers will continue to give the *Miranda* warnings because no public safety issue looms, and they know they will lose the statement without the warnings. Where danger to the community (like the loaded gun lying unprotected in an open supermarket in *Quarles*) is imminent, it seems to me the officers are going to ask questions without *Mirandizing* regardless of whether this triggers the prophylactic rule requiring

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[140] I don't believe this position is inconsistent with my suggestion in an earlier article that a deliberate *Miranda* violation constitute a proper basis for a 42 U.S.C. section 1983 action. Klein, "*Miranda* Deconstitutionalized," *supra* n. 3.

[141] *Harris v. New York*, 401 U.S. 222, 226 (1971). However, Harris was informed of his right to remain silent, and the assistant district attorney questioning Harris asked Harris if he wanted to speak to an attorney at that time; Harris said that he would "call tomorrow" and then answered several questions, the answers to which were used to impeach him at trial. *People v. Harris*, 298 N.Y.S.2d 245, 246 (N.Y. App. Div. 1969).

[142] 417 U.S. 433 (1974).

[143] *Tucker* at _____. *See also United States v. Ceccolini*, 435 U.S. 268, 277 (1978) (refusing to exclude testimony of live witness).

[144] "Nor did the officers exploit the unwarned admission to pressure respondent into waiving his right to remain silent." *Elstad*, 470 U.S. at 316.

[145] 467 U.S. 649 (1984) (5-4) (public safety exception to *Miranda* allows admission of statement in case-in-chief).

[146] Just as one does not have a First Amendment free speech right to yell "fire" in a crowded movie theater.

exclusion. As with *Terry* frisks,147 safety will seem more important and certainly more immediate than the future result of a suppression hearing.

If the other exceptions to *Miranda*, however, are permitted after intentional *Miranda* violations, the Court risks turning the exclusion of evidence in a prosecutor's case-in-chief for a *Miranda* violation from a sanction for misconduct into a price well worth paying in exchange for the derivative and impeachment evidence obtained.148 At that point the exceptions have swallowed up the rule; the rule no longer enforces the explicit federal constitutional right -- here the protection against violation of the privilege against self-incrimination -- and it no longer guides officers' conduct. Should the rule become ineffective in this manner, the Court would regress to deciding each case based on the totality of the circumstances - exactly what it was trying to avoid by crafting the prophylactic rule in the first place. To determine whether this is occurring, the Court should examine social science scholarship, such as Charles Weisselberg's study of California's law enforcement practices regarding interrogation,149 and reach its best guess on the question of whether, as an empirical matter, *Miranda* is being ignored often enough that it fails to function as a prophylactic rule. If the Court determines that the exceptions encourage violation of the rule, it may limit these exceptions to unintentional violations, and apply the per se exclusion to all uses of evidence obtained by intentional violations.150

Greater Court-social scientists interaction would be useful not only in determining when to carve out exceptions to a prophylactic rule, but modifying existing prophylactic rules and incidental rights or formulating new ones.151 One prime candidate for a new prophylactic rule would be

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147 *Terry v. Ohio*, 392 U.S. 1 (1968) (permitting brief detention without warrant based upon reasonable suspicion of criminal activity, permitting frisk without warrant based upon reasonable suspicion that the suspect is armed and dangerous).

148 *See* Sharon L. Davies, "The Penalty for Exclusion - A Price or Sanction?," 73 S. Cal. L. Rev. 1275 (2000) (discussing fourth amendment exclusionary sanction); Susan R. Klein, "*Miranda* Deconstitutionalized," *supra* n. 3 (discussing exceptions to *Miranda*).

149 Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109 (1998) (citing numerous examples); Weisselberg, "In the Station House After *Dickerson*," 99 Mich. Law Rev. ___ (forthcoming 2001) (examining police training on *Miranda*'s exceptions in California); Susan R. Klein, *Miranda Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PENN. L. REV. 417 (1994) (first recognizing this problem).

150 Lower courts have generally been utilizing the Court's exceptions for unintentional violations even for intentional ones, without noticing the difference or doing any kind of analysis on the effect of such widespread application of the exceptions. *See, e.g., People v. Peevy*, 953 P.2d 1212 (Cal.), *cert. denied*, 525 U.S. 1042 (1998) (statements taken after deliberate Miranda violations may still be used to impeach a testifying defendant).

151 Safe harbor rules might also be modified based upon empirical data. Consider, for example, the Court's per se rule regarding searches of the passenger compartment of an automobile made incident to an arrest. Suppose a well-designed empirical study in a number of locales revealed that weapons or evidence of the crime were found during these searches in less than one-half of one percent of the cases. Or suppose the study concluded that officers were more likely to be injured by searching in the field rather than arresting the defendant and allowing his friend to depart with the car. The Court might change this particular safe harbor rule, as a bright line rule may no longer be necessary to protect

procedures to protect a defendant's right to a fair trial in light of the unreliability of eyewitness testimony. While social science now establishes that human memory will mistake a later-seen picture as an original incident,152 that witness confidence is weakly related to accuracy, and that cross-racial identifications are particularly unreliable,153 the jury will never learn this.154 An increasing number of studies have shown misidentification to be one of the most frequent causes of the conviction of the innocent.155 By one estimate, there are 5,000 erroneous convictions per year due to eyewitness

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the officer or insure against the destruction of evidence. It may instead make sense to institute a rebuttable presumption against searching the passenger compartment of an automobile unless the officer can articulate a reason for the search, or demonstrate the safety of such a search.

152 *See, e.g.*, Roger B. Handberg, *Expert Testimony on Eye Witness Testimony: A New Pair of Glasses for the Jury*, 32 AMERICAN CRIM. L. REV. 1013 (1995) (explaining offering scientific explanation of why eye witness identification is often inaccurate); Michael M. Hoffheimer, *Requiring Jury Instructions on Eye Witness Identification Evidence in Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585 (1989) (listing many sociological and psychological studies documenting the problem of eye witness identification); Brian L. Cutler, Steven D. Penrod, & Heddy Red Dexter, *Jury Sensitivity to Eye Witness Identification Evidence*, 14 L. HUMAN BEHAVIOR 185 (1990).

153 Sherry L. Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); Daniel Levin, 129 Journal of Experimental Psychology: General, No. 4 (Dec. 2000).

154 While some federal and state courts give cautionary instructions, *Jones v. Smith*, 772 F.2d 668 (11th Cir. 1985); *People v. Wright*, 729 P.2d 280 (Cal. 1987), many leave it to the trial judge's discretion or consider it inappropriate, *United States v. Tipton*, 11 F.3d 602 (6th Cir. 1993); *Commonwealth v. Hyatt*, 647 N.E.2d 1168 (Mass. 1995). Moreover, such jury instructions do not reveal the social science data, they merely inform the jury that identification testimony depends upon the opportunity of the witness to observe and may have been influenced by the circumstances of the identification. The weight of authority disallows expert testimony of misidentification, on the grounds that the subject matter is not beyond the ken of the average layman, or would have undue influence upon the jury. *See, e.g., United States v. Larkin*, 978 F.2d 964 (7th Cir. 1992); *Rodriguez v. Commonwealth*, 455 S.E.2d 724 (Va. 1995).

155 Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317 (1997) (providing a lengthy and shocking review of studies documenting erroneous convictions, some resulting in execution of prisoners, some resulting in release); Hugh Adam Bedau & Michael L. Radelet, *Miscarriages of Justice and Potentially Cases*, 40 STANFORD L. REV. 21 (1987) (documented 17 cases in the 1970s and 1980s in which convicted capital murder defendant were subsequently shown to be probably innocent); E. Connors, T. Lundregan, N. Miller & T. McEwen, *Convicted by Juries, Exonerated by Science: Case Studies in the use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice, U.S. Department of Justice (DATE) (report of 28 defendants improperly convicted on the basis of inaccurate eye witness testimony later exonerated by DNA evidence); 11(10) DNA Criminal Practice

misidentification.156 The best candidate for countering these injustices is a new rule and/or an alternative to the right to counsel prophylactic rule imposed by *Wade*157 that would require proper procedures and guidelines for line-ups, show-ups, and photo arrays.158 Because suggestive lineups lead to mistaken identifications and cause high witness certainty, because juries believe confident eyewitnesses, and because an attorney can do little at the actual line-up to cure the suggestion or later on cross-examination to shake this strongly held but erroneous belief,159 a proper lineup beats the right to counsel at lineup (at least for an innocent defendant) hands-down. Other plausible candidates for such an alternative to *Wade*'s prophylactic rule include

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Manual 184 (May 7, 1997) (noting the DNA testing done by the FBI for state and local labs from 1989 to 1996 positively excluded 25 to 27 percent of the defendants tested); Elizabeth Loftus, "Ten Years in the Life of an Expert Witness," 10 Law & Human Behavior 241, 243 (1986) (estimating that one-half of wrongful convictions are due to misidentification).

156 Brian Cutler and Steven Penrod, "Mistaken Identification," 1995.

157 Solely as an alternative to the counsel provided by *Wade*, this procedure would solve only a small part of the problem. In the wake of *Wade*, police departments engage in line-ups pre-formal charge (*Kirby v. Illinois*, 406 U.S. 682 (1972)), and conduct photo arrays post-formal charge (*United States v. Ash*, 413 U.S. 300 (1973)). Were this new procedure to apply to all witness confrontations, life or picture, pre- or post-indictment, such a procedure would be vastly superior to the right to counsel offered in *Wade*. Counsel at a lineup has no authority to object to suggestive procedures, and if he sees any, he must withdraw as counsel to become a witness for his former client. More importantly, once the witness makes an erroneous identification based upon a suggestive identification procedure, it becomes ingrained in her mind. An ounce of prevention in terms of proper procedures that prevent false positives is worth a pound of cure in the form of exclusion of the out-of-court (but rarely the in-court) identification.

158 *See, e.g.*, Wells, Small, Penrod, Malpass, Fulero and Brimacombe, "Eyewitness Identification Procedures, Recommendations for Lineups and Photospreads," 22 Law and Human Behavior 6 (1998) (making four recommendations; (1) that the lineup or photo array be conducted by officer who is unaware of the identity of the suspect, (2) that the eyewitness be told that the culprit might not be in the lineup or photo array, (3) that the suspect should not stand out in the lineup or photo array, and (4) that a confidence statement should be taken from the eyewitness at the time of the identification).

159 *See generally* LaFave, Israel, and King, "Criminal Procedure," section 7.1(a) - (e) (2d ed., West 1999).

cautionary jury instructions160 and expert testimony161 though these devices mitigate rather than prevent the damage.

An area ripe for additional incidental rights is the doctrine of selective prosecution doctrine. Sufficient social science and empirical data support the proposition that blacks suffer from racial profiling in detentions and arrests,162 much higher rates of criminal prosecution, and significantly harsher sentences than whites,163 that the Court should accept a legislatively imposed evidentiary presumption of selective prosecution based solely on a showing of disparate impact. This new prophylactic rule would replace the Court requirement, from *United States v. Armstrong*,164 that a defendant is not entitled to discovery on his selective prosecution claim without establishing similarly-situated white individuals who were not prosecuted, a standard nearly impossible for a defendant to meet.

I am not suggesting here that the Court use social science and empirical data to discover the constitutional norm or value underlying a

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160 *See, e.g.*, Michael H. Hoffheimer, "Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials," 80 Journal of Crim. Law & Criminology 585 (1989) (suggesting special jury instructions).

161 *See, e.g.*, Wayne Westling, "The Case for Expert Witness Assistance to the Jury in Eyewitness Identification Cases," 71 Oregon Law Rev. 93 (1992) (advocating the use of expert witnesses to explain the unreliability of eyewitness testimony to juries).

162 See, e.g., David A. Harris, "'Driving While Black' and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops," 87 Journal of Crim. Law & Criminology 5__ (1997) (describing racially-based stops in by the Sheriffs Dept. in Volusia County, Florida, the Maryland State Police; the Bureau County, Illinois Police Dept., and the Sheriff's Dept. in Eagle County, Colorado, resulting in civil rights lawsuits); Civil Rights Bureau, Off. of the Atty' Gen., "The New York City Police Department's 'Stop & Frisk' Practice: A Report from the Office of the Attorney General" (Dec. 1, 1999) (collecting racial breakdown on stops and frisks).

163 *See, e.g.*, David Sklansky, "Cocaine, Race, and Equal Protection," 47 Stanford Law Rev. 1283 (1995) (noting punishment for crack cocaine, favored by Black Americans, 100 times more severe than punishment for powder cocaine, the form enjoyed by middle-class whites); David Baldus and George Woodworth, "The Death Penalty in Black and White: Who Lives, Who Dies, and Who Decides," Death Penalty Information Center, Washington, D.C. (1998) (noting that blacks in Philadelphia are four times more likely to receive a death sentence than whites, and that 100% of inmates on death row in Kentucky murdered white victims, despite fact that over 1,000 blacks became murder victims during the same time period); Marc Mauer and Tracy Huling, "Young Black Americans and the Criminal Justice System: Five Years Later," The Sentencing Project, Washington, D.C. (1995) (a 20 - 29 year-old African American male had a 30.2% chance of being under criminal justice control on any given day of 1994).

164 *See* n. 91, *supra*.

particular clause, nor to develop the constitutional rule itself.[165] Rather, I am suggesting that regardless of the method of constitutional interpretation used to develop the constitutional norm (be it Framers' intent, textualism, a balancing of interest approach, individual rights based liberalism, or anything else), social science and empirical data can assist the Court in developing the subsidiary rules and rights necessary to protect that norm, value, or rule. Thus I agree wholeheartedly with the claims by Professors Merritt[166] and Rubin[167] that the utility of social science is limited to informing legal decision making, not determining the content of legal doctrine or constitutional theory. The Court must first have a theory of what the explicitly constitutional clause is about, and must be able to articulate why, due to its own institutional limitations or the limitations of others, the prophylactic rule or incidental right is necessary to protect the explicit constitutional clause. Once the Court develops its theory and articulates its limitations, however, designing any necessary prophylactic rule, safe harbor, or incidental right can be informed and assisted by social science research. The great advantage of using modifications of prophylactic rules and incidental rights to reflect changes in data and circumstance is that we shore up the constitutional value without tarnishing the constitution itself with inconsistent decisions and frequent reversals.

Undeniably, the use of empiricism and social science data by the Court is risky, even in the more limited manner I propose. The Court often does a bad job of evaluating the data, as it did when it turned to social science to determine whether a six member jury functioned in the same manner as

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[165]Commentators calling for the use of social science research in constitutional decisionmaking include Tracey L. Meares and Bernard E. Harcourt, "Forward: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure," 90 J. of Crim. Law & Criminology 733 (2000) ("Theoretical principles cannot properly resolve difficult criminal procedure cases without the assistance of empirical evidence"); Michael Dorf, "Forward: The Limits of Socratic Deliberation," 112 Harv.L.Rev. 4 (1998) (suggesting that the Court should consider the social consequences of its decision); David L. Faigman, "'Normative Constitutional Fact-Finding': Exploring the Empirical Component of Constitutional Interpretation," 139 U.Pa.L.Rev. 541 (1991) (opining that the "Court's empirical myopia" undermines its legitimacy); Richard Posner, "Against Constitutional Theory," 73 N.Y.U.L.Rev. 1 (1989) (suggesting weakness in constitutional decisions is not lack of theory but inattention to empirical evidence).

[166] *See, e.g.*, Deborah Jones Merritt, *Constitutional Facts and Theories: A Response to Chief Judge Posner*, 97 MICH. L. REV. 1287 (1999) (suggesting that empirical exploration unmasks constitutional theory, social science discoveries can influence and inform the substance of constitutional theory, and social science can stimulate a dialogue between legal academics and social researchers); Deborah Jones Merritt, *The Future of Baake: Will Social Science Matter?*, 59 OHIO ST. L. J. 1055 (1998).

[167] Edward J. Rubin, *Law and the Methodology of Law*, 1997 WISC. L. REV. 521.

the twelve member one.[168] Moreover, there is quite a bit of unreliable junk science and advocacy statistics out there.[169] Finally, social scientists also tends to give different answers to the same questions, depending upon when they are asked.[170]

One answer to this criticism that the Court is not particularly good at fact-finding is that the Court is going to utilize social science data anyway, even in explicit constitutional interpretation,[171] and at least prophylactic rules and incidental rights are more easily modified.[172] A better answer is that the kind of empirical and social science data needed to determine when a prophylactic rule is needed, when to create exceptions, and when to jettison or change the rule should in fact come from the legislative branches of the state and federal governments. A legislature arguably has superior factfinding abilities,[173] and can consider the whole range of possible cases, whereas the Court must consider one case at a time. I agree that bowing to legislative and executive findings of facts is preferable. The Court's prophylactic rules and incidental rights should be viewed as last-resort and stop-gap measures easily replaceable by other federal and state actors.

C. Caution, Deference, and Truth-in-Labeling.

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[168] *Williams v. Florida*, 399 U.S. 78 (1970). The Court's dismal performance in this case was chronicled by Michael J. Saks, *Ignorance of Science is No Excuse*, TRIAL, Nov.-Dec. 1974 at 18. The Court seemed to regret this case when it came to a different conclusion in evaluating the constitutionality of five member juries in criminal trials. *Ballew v. Georgia*, 435 U.S. 223 (1978).

[169] *See, e.g.*, Michael Saks, Merlin and Solomon, "Lessons from the Law's Formative Encounters with Forensic Identification Science," 49 Hastings L.J. 106 (1988).

[170] *Brown v. Board of Education*, 347 U.S. 483 (1954) (examining social science literature documenting the effects of segregation) and *United States v. Virginia*, 518 U.S. 515 (1996) are recent examples where the Court got it right. However the sociological and psychological theories at the time of *Plessy v. Ferguson*, (1896) though not explicit recognized in the opinion, taught that the law was incapable of restructuring racial instincts. *See* Paul L. Rosen, THE SUPREME COURT AND SOCIAL SCIENCE, Urbana: University of Ill. Press (1971)

[171] *See, e.g.*, Rosemary J. Erickson and Rita J. Simon, THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS, Univ. of Ill. Press (1998) (detailing citations of social science data in 19 of the 35 cases studied in areas of sex discrimination and abortion rights cases before the Court between 1972 and 1992); John Monahan & Lauren Walker, Social Science in Law: Cases and Materials (3d ed. 1994) (identifying *Muller v. Oregon*, 208 U.S. 412 (1908) as the Court's first use of social science data).

[172] Another answer suggested by a colleague is to allow the Court to hire its own experts and commission studies, as was done in West Germany. *See* Hans W. Baade, *Social Science Evidence and the Federal Constitutional Court of West Germany*, 23 JOURNAL OF POLITICS 421 (1961).

[173] On the other hand, one could as plausibly argue that the superior factfinding abilities of legislators is mostly a myth, and that social science in the hands of Congressmen is pure advocacy.

The system I have suggested will reap all of the benefits of prophylactic rules, safe harbors, and incidental rights and escape most of the pitfalls only if the Court is cautious in creating the rules and rights, deferential in accepting alternative rules and rights offered by other branches of the federal government and by state actors, and clear in identifying procedures as entailing prophylactic rules or incidental rights fully open to revision (or safe harbors presumptively not open to revision). Caution requires that the Court generate prophylactic rules and incidental rights only when absolutely necessary. Moreover, before acting the Court should clearly warn the other branches of the federal and state governments in the appropriate cases that they must act to prevent a Court-imposed rule or right. This warning should be coupled with patience, such that action is taken only after long-term failure by the co-equal branches.174

Appropriate deference suggests that the Court accept alternative rules and rights proposed by other federal and state actors if they can plausibly be characterized as effective. As previously noted, the Court reasonably accepted California's alternative approach to frivolous appeals in *Robbins*,175 and correctly rejected a clearly inadequate alternative to the *Miranda* warnings in *Dickerson*.176 The Court should examine proposed prophylactic rules with the goal of protecting the constitutional clause at issue with the smallest amount of overprotection possible, and examine safe harbor rules with the goal of easing adjudication of the constitutional clause at issue with the smallest amount of underprotection. The deference accorded a legislative or executive branch-designed prophylactic rule or incidental right that constrains those branch actors and overprotect the constitution should not be afforded to legislative or executive-branch attempt to create a safe harbor rule that allows those branch actors to violate the federal constitution. Permitting a state or federal actor to bind itself to procedures that are in individual cases more stringent than what the federal constitution demands will not be subject to the abuse that we might see if we allow federal and state actors to exempt themselves from the federal constitution via safe harbor rules. The political pressure to create rules which make law enforcement more effective at the expense of individual liberties will be intense.

One difficulty with expecting other branches to ignore Court-created rules and rights in favor of alternative ones is that Article III does not permit federal courts to issue advisory opinions.177 State and federal actors will not always be able to predict whether a particular substitute prophylactic rule or incidental right will be deemed adequate by the Court. While they would obviously not wish to try a new procedure with a serious criminal, who may not be chargeable or who may be released if the prophylactic rule or incidental right was not "adequate" or "effective" in the Court's judgment. One answer is to use the procedure or right first in a misdemeanor trial as a test case. That will not always be possible, as once a statute is enacted (if that is the form of a particular rule) is it out of the legislature's control, and it may take many years for a test case to wend its way to the Court. Another method of encouraging innovation by the other branches is for the Court to strike down an inadequate rule or right prospectively only, preserving not only final convictions obtained pursuant to that discarded rule or right, but preserving all cases where an official actor relied upon the discarded rule or

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174 Case examples where the Court was forced to act are *Mapp v. Ohio* and *Miranda v. Arizona*, discussed *supra* nn. 100 - 104 and accompanying text.

175 *See supra* n. 54.

176 *See supra* n. 7.

177 This problem will not arise when a legislature or law enforcement agency creates a new prophylactic rule or incidental right.

right up to the date it was stricken.178 Additionally, to preserve the particular conviction at bar, the Court might craft some form of good faith exception to uphold criminal convictions in spite of what the Court declares to be an inadequate rule or right and therefore a constitutional violation.179

Finally, the Court must practice what I call truth-in-labeling. The dialogue, experimentation, and responsiveness to social science and empirical data I envision cannot occur if prophylactic rules and incidental rights are unrecognized as such. This candor is further necessary to defeat two potential problems with my conceptual framework: rules and rights might mutate into pure constitutional interpretation; and prophylactic rules may become a substitute for rather than a protector of the constitutional norm. For example, what I thought at one time was a benefit of *Miranda* - its symbolic value - may be viewed as a detriment. The *Dickerson* Court, in refusing to label the *Miranda* warnings either a prophylactic rule or pure constitutional interpretation, noted that it has "become embedded in routine police practice to the point where the warnings have become part of our national culture."180 Hardening a prophylactic rule into a constitutional command would defeat one of its primary advantages - it can be modified by the Court without spending the institutional capital necessary for a constitutional reversals, and it can be modified by other branch actors as better alternatives arise. As there is probably no single criminal procedure case as famous as *Miranda*, I few run-of-the-mill prophylactic rules or incidental rights will suffer such a fate. Moreover, such transformation is not necessarily a disadvantage, so long as the transformation is recognized and acknowledged by all actors.

The second problem is trickier. It does appear to me that some lower courts have used the *Miranda* warnings as a substitute for the required constitutional analysis a court must undertake before admitting any confession or statement regardless of whether the defendant was Mirandized - a finding that the statement was given voluntarily.181 In other words, the litigation focus on whether the prophylactic procedure was followed may deflect attention away from the core constitutional value at issue, rather than shining light upon it. My conceptual framework will not function successfully unless the Court first clearly explains to other federal and state actors the value underlying each constitutional clause, and then indicates precisely what it

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[178] *See, e.g., Michigan v. Tucker*, 417 U.S. at 433, n. 4 (Brennan, J., concurring) (noting that "The trend in our decisions since *Johnson* has thus been toward placing increased emphasis upon the point at which law enforcement personnel initially relied upon the discarded constitutional standards.").

[179] *See, e.g*., *United States v. Leon*, 4698 U.S. 897 (1984) (admitting evidence taken in violation of the Fourth Amendment where officer reasonably relied in good faith on an invalid search warrant); Arizona v. Evans, 514 U.S. 1 (1995) (admitting marijuana taken during search incident to an arrest where officers reasonably and in good faith relied upon an arrest warrant erroneously listed in a court computer record).

[180] 120 S.Ct. at *2335.

[181] Several commentators have noticed that as long as *Miranda* is followed, lower courts do not inquire into the voluntariness of the resulting confession. *See, e.g.*, Alfredo Garcia, "Is *Miranda* Dead, Was it Overruled, Or Is It Irrelevant?," 10 St.Thomas L.Rev. 461, 499-502 (1998), Richard A. Leo, "*Miranda* and the Problems of False Confession," in The *Miranda* Debate: Law, Justice and Policing 276-77 (Richard A. Leo & George C. Thomas, III, eds., 1998).

is attempting to accomplish in suggesting or promulgating the rule or right.

III. The Court's Failures in Dickerson v. United States

The Court did none of these things in *Dickerson*. This opinion was, in a word, terrible. The Court, when squarely faced with the issue of whether the four *Miranda* warnings were required by the federal constitution, not only refused to answer coherently, but breached its duty to provide a justification for *Miranda* or *Dickerson*, and squandered an opportunity to rationalize contradictory case law regarding *Miranda*'s exceptions. It could have written a well-reasoned decision either overturning *Miranda* (cheered by the naive right), reconstitutionalizing *Miranda* and reversing *Miranda*'s exceptions (cheered by the naive left), or affirming *Miranda* and justifying *Miranda*'s exceptions by acknowledging *Miranda* as a prophylactic rule, as I have suggested in Parts I and II of this essay (cheered by the center, as this maintains the current regulation of police questioning but holds out the promise of alternative procedures that might be an improvement). Chief Justice Rehnquist rejects all three of these options and, in an apparent compromise between the right and left wings of the Court, holds by judicial fiat that the law is to stay exactly as it was pre-*Dickerson*. While this is ostensibly a victory for the liberal wing of the Court, because *Miranda* is relatively ineffective at dispelling coercion, and because *Dickerson* forecloses any opportunity for improvement in protecting the privilege against self-incrimination, the decision is, in fact, a boon for those, like Chief Justice Rehnquist, far to the right of center.[182]

As Professor Schulhofer demonstrated in this symposium,[183] a Court decision to reconstitutionalize *Miranda* could be easily justified and convincingly written. The Court need only have stated that all statements taken during custodial interrogation in the absence of *Miranda* warnings are always "compelled" within in the meaning of the Fifth Amendment's Self-Incrimination Clause, exactly as are statements taken after an employer's threat

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[182] Professor William J. Stuntz argues as much in this symposium, "*Miranda*'s Mistakes," 99 MICH. L.REV. ____ (2001). A number of scholars, myself included, noticed this prior to *Dickerson*. *See, e.g.*, Laurence A. Benner, "Requiem for *Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective," 67 Wash. U.L.Q. 59 (1989) (noting that *Miranda* was, in fact, quite a retreat from the counsel required during custodial interrogations implied by *Escobedo*); Stephen A. Saltzburg, "*Miranda v. Arizona* Revisited: Constitutional Law or Judicial Fiat," 26 Washburn L.J. 1 (1986) (suggesting that *Miranda* favored law enforcement); Klein, "*Miranda* Deconstitutionalized," *supra* n. ___ at 424 (1994) ("the *Miranda* decision is best viewed as a compromise between competing interests"); David Simon, Homicide: A Year on the Killing Streets 199 (1991) (noting that if the "intent of the *Miranda* decision was, in fact, an attempt to 'dispel the compelling atmosphere' of an interrogation, then it failed miserably"), Peter Aranella, *Miranda* Stories, 20 Harv. J.L. & Pub. Pol'y 375 (1997) (suggesting that the warnings do not provide much protection against police pressure).

[183] Steven J. Schulhofer, "Substitute and Supplements for *Miranda*," 99 MICH. L.REV. ___ (2001). *See also*, Welsh S. White, "Defending *Miranda*: A Reply to Professor Caplan," 39 Vand. Law Rev. 1 (1986); Schulhofer, "Reconsidering *Miranda*," 54 U. Chi. L. Rev. 435 (1987); Charles J. Ogletree, "Are Confessions Really Good for the Soul? A Proposal to Mirandize *Miranda*," 100 Harv. L. Rev. 1826 (1987); *Michigan v. Tucker*, 417 U.S. 433 (1974) (Douglas, J., dissenting).

to discharge a public employee,184 and statements taken after a judge's threat to impose criminal contempt proceedings.185 Since compelled statements are inadmissible in a criminal trial for any purpose without exception,186 such a holding would require the Court to reverse all of those cases permitting the introduction of statements taken in violation of *Miranda* for impeachment, to rebut the insanity defense, to develop new leads, and to use at sentencing, as those cases were based on the now erroneous premise that the *Miranda* warnings were "not themselves rights protected by the Constitution."187

As a second option, the *Dickerson* Court could have reversed *Miranda* and admitting it had been deconstitutionalized by subsequent decisions. Though I believe such a holding would have been wrong, this is a defensible position which resulted in a plausible dissent. Justice Scalia, joined by Justice Thomas, concluded that since a violation of *Miranda* does not itself offend the Fifth Amendment, the Court has no power to reverse state convictions based upon *Miranda* violations. *Miranda*'s exceptions obviously become unnecessary, and contradictory case law regarding *Miranda*'s status is resolved. A model opinion reversing *Miranda* would also have contained an explanation of why prophylactic rules are unconstitutional (though at least Justice Scalia acknowledged the issue), and might eventually lead to the reversal of these many prophylactic rules in constitutional criminal procedure.

Unwilling to either constitutionalize or reverse *Miranda*, the *Dickerson* majority asserted that the *Miranda* doctrine has "constitutional underpinnings,"188 yet at the same time "the disadvantage of the *Miranda* rule is that statements which may be by no means involuntary. . . may

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184 *Garrity v. New Jersey*, 385 U.S. 493 (1967) (statement given by police officers in response to threat of removal from office if they asserted their privilege may not be used against them in subsequent criminal trial); *Lefkowitz v. Cunningham*; *Lefkowitz v. Turley*, 414 U.S. at 83.

185 *Kastigar v. United States*, 406 U.S. 441 (1972). Additionally, the Court has held it always constitutes compulsion to speak (and therefore a violation of the privilege) for the prosecutor or judge to comment adversely on the defendant's silence. *Griffin v. California*, 380 U.S. 609 (1965).

186 *See, e.g.*, *Portash v. New Jersey*, 440 U.S. 450 (1979) (statements compelled during grand jury proceeding by threat of criminal contempt cannot be used for impeachment in a later criminal case, distinguishing *Harris*). The Court never asks, for example, whether a particular public employee was "actually" compelled to make a statement upon threat of discharge or whether the statement was instead voluntary in some sense, the Court never asks whether a defendant might have chosen not to take the stand despite a prosecutor's comment on the invocation of his right. Once the Court determines that statements taken under those circumstances are compelled, they are always excluded.

187 *Michigan v. Tucker*, 417 U.S. 433 (1974). Such a holding would also bar the admittance of the "fruits" of compelled statements.

188 *Dickerson*, 120 S.Ct. at 2334, n.5.

nonetheless be excluded and a guilty defendant go free as a result."189 If the rule is in fact broader than the Fifth Amendment, Chief Justice Rehnquist ought to justify reversing a state criminal conviction based upon the state court admitting a statement that did not violate the privilege against Self-Incrimination. If the rule is a constitutional one, Chief Justice Rehnquist ought to explain the exceptions admitting evidence taken in violation of the constitution.190 Instead, in his non-answer to the question of why the traditional fruits doctrine developed in Fourth Amendment cases does not apply to *Miranda* violations, the Chief Justice stated "that unreasonable searches under the Fourth Amendment are different from unwarned interrogations under the Fifth Amendment."191 This comes dangerously close to being a non sequitur.192 How are they different, why are they different, and how does the Court justify refusing to apply the fruits doctrine to what we now know is a real Fifth Amendment Self-Incrimination Cause violation?

The Court could have answered these question by choosing a third option, writing a convincing opinion justifying constitutional prophylactic rules, safe harbors, and incidental rights in criminal procedure in general and for the *Miranda* decision in particular. Acknowledging *Miranda* as a prophylactic rule would encourage the Court to be more careful and explicit in identifying the factual bases for this rule. This would in turn encourage more effective research regarding those bases and thus more informed development of the rule (and its exceptions) and whether to retain or modify it. From this perspective, *Dickerson* not only falls far short but in fact goes in the wrong direction. We lose not only the opportunity to discover whether the *Miranda* warnings are working, but, if *Dickerson* portends things to come, we may suffer this same loss with regard to the other prophylactic rules and incidental rights.

An ideal opinion under my conceptual framework have done the following. First, the Court would have told us exactly what the privilege against self-incrimination requires, before determining whether we still need *Miranda*'s prophylactic rule to effectively preserve and adjudicate that privilege. That it prohibits a "compelled"193 statement, or one given after the defendant's "will was overborne"194 is insufficient. In contrast to the per

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189 *Dickerson*, 120 S.Ct. 2326, *2335.

190 *See, e.g., Dickerson*, 120 S.Ct. 2326, *2337 (Scalia, J., dissenting) (castigating the majority for refusing to bring *Dickerson* into the "mainstream of legal reasoning" by holding that a custodial interrogation not proceeded by the *Miranda* warnings violates the Constitution).

191 *Dickerson*, 120 S.Ct. 2326, * 2334.

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

193 *See, e.g., Malinski v. New York*, 324 U.S. 401, 404 (1945); *Malloy v. Hogan*, 378 U.S. 1 (1964).

194 *See, e.g., Bram v. United States*, 168 U.S. 532 (187) (confession must be "free and voluntary); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *Haynes v. Washington*, 373 U.S. 503 (1963); *Ashcroft v. Tennessee*, 322 U.S. 143 (1944). The terms "compelled" and

se rules the Court has given us on being fired from a government job, use of a subpoena, comment upon a defendant's silence, and threat of contempt, all of which constitute compulsion in every case,195 the Court has never well defined these terms in the context of police interrogation, custodial or otherwise.196 Without a definition of "compulsion," we cannot know when it is "dispelled," much less what procedures are adequate to dispel it. Every interrogation involves some amount of pressure to talk, how much pressure is too much, and what kinds of pressure are acceptable? Is an admission influenced by a misunderstanding of the law defining criminal responsibility (the felony murder rule for example) involuntary? Is an admission influenced by the anxiety generated by hostile police officers involuntary? It seems likely to me that as a philosophical matter, defining voluntariness is inherently impossible.197 Even accepting the notion of free will, there is no objective baseline for what types of pressure are "coercive," that term is a moral judgment about what kinds of conduct are tolerated and what kinds are wrongful. Perhaps either the present due process totality of the circumstances

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"involuntary" are used interchangeably by the Court. *See* Lawrence Herman, "The Unexplored Relationship Between the Privilege Against Compulsory Self-Incrimination and the Involuntary Confession Rule (pts 1 & 2)," 53 Ohio St. L. J. 101, 551 (1992); *but see* Schulhofer, "Reconsidering *Miranda*,"54 U.Chi.L.Rev. 435 (1987) (advocating separate analyses and separate tests for the Fifth Amendment and the Due Process Clause).

195 *See* cases cited *supra* nn. 184 - 186.

196 The Court could hold that a statement taken in violation of Miranda is per se compulsion, as are the other examples listed above. Then *Miranda* would be pure constitutional interpretation of the self-incrimination clause, and not a prophylactic rule.

197 *See, e.g*., George C. Thomas III, "*Miranda*: The Crime, The Man, and the Law of Confessions," In *Miranda* Debate: Law, Justice and Policing 7 (1998) (suggesting that defining voluntariness is "a philosophical or psychological problem of the first magnitude"); Thomas, "A Philosophical Account of Coerced Self-Incrimination," 5 Yale Journal of Law & the Humanities 79 (1993) (outlining four theories of coercion: empirical, normative, positive liberty, and social constructionist); Louis Michael Seidman, Rubashov's Question: Self-Incrimination and the Problem of Coerced Preferences, 2 Yale J.L. & Human. 149 (1990) (arguing against social constructionist view on grounds that actor may have no preferences independent of social interaction); Albert W. Alschuler, "Constraints and Confession," 74 Denver Univ. Law Rev. 957 (1997) (suggesting that country lawyers, often better philosophers than philosophers are, know that the term coercion cannot be defined); Yale Kamisar, "What is an 'Involuntary' Confession? Some Comments on Inbau and Reid's Criminal Interrogation and Confessions," 17 Rutgers Law Rev. 728, 747 (1963) ("To call the 'voluntariness' terminology loose and unrevealing is not the worst that can be said for it. It can also be downright misleading.").

test198 or a set of per se prohibitions on certain police practices we find morally offensive199 is the best Court can do.

Second, the Court should have reiterated the bases for *Miranda*'s prophylactic rule and used the available empirical data and social science research to support the proposition that these bases are still furthered by the rule. The Court appears to believe that the *Miranda* requirements are designed to dispel the compulsion inherent in custodial interrogations and assure that such compelled statements do not influence the determination of the defendant's guilt; to ease the Court's adjudication as to whether particular confessions were compelled; and to guide officers in conducting custodial interrogations.200 The *Miranda* warnings are then a supplement to the due process totality-of-circumstances test, in that they make any resulting statement more likely to be actually voluntary, give the Court one more factor to weigh on the voluntary side of the scale when it must decide whether to admit the statement, and provide a procedure for all officers to follow. Arguably, there is more and better information available at the time of *Dickerson* to determine how well the *Miranda* prophylactic rule works. To determine whether *Miranda* is working, the Court should have examined empirical data as to whether defendant's are now confessing "voluntarily" as opposed to "involuntarily." This, of course, would have required a definition of compulsion or when the will is overborne. To be fair to the Court, even if we had such a definition, social science research has provided little information as to why defendants' make pre- or post-*Miranda* incriminating statements. Richard Leo's work comes the closest,201 though he focuses more on what the interrogating officers did and how the defendants responded and not directly on why the suspects confessed.202 Designing a study to isolate why

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198 *Schneckloth*, 412 U.S. at 226 (the totality of the circumstances test examines "both the characteristics of the accused and the details of the interrogation").

199 *See infra* n. 203.

200 If the Court were to decide that the warnings, instead of or in addition to dispelling compulsion, are designed to reduce the number of false confessions, it should examine the empirical data on such confessions to see if the warnings are effective. If *Miranda* is underprotective, new prophylactic rules may be designed that prohibit those tactics likely to produce a false confession from an innocent suspect. *See, e.g*., Richard J. Ofshe, Richard A. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action," 74 Denver L. Rev. 4 (1997); Ofshe and Leo, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation," 88 J. Crim. L. & Criminology 429 (1998) (detailing specific instances of false confessions); Welsh S. White, "*Miranda*'s Failure to Restrain Pernicious Interrogation Practices," 99 Mich. L. Rev. ___ (forthcoming 2001) (suggesting limits on threats of punishment, promises of leniency, threats of adverse consequences to loved ones, and misrepresenting the evidence, as these tend to produce false or untrustworthy confessions).

201 *See, e.g*., Richard A. Leo & Welsh S. White, "Adopting to *Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by *Miranda*," 84 Minn. Law Rev. 397 (1999); Richard A. Leo, "Inside the Interrogation Room," 86 J. Crim. L. & Criminology 266 (1996).

202 Part of the problem is that the available empirical data focusses primarily on whether *Miranda* has decreased confessions or clearance rates. *Compare* Paul G. Cassell & Richard Fowles, "Handcuffing the Cops? A Thirty-Year Perspective on *Miranda*'s Harmful Effect on Law

defendants confess would be incredibly difficult, and may have an honest Court to determine it would be preferable to develop a new set of prophylactic rules that focus entirely on the objective behavior of officers, outlawing those forms of interrogation likely to induce a rationale person not inclined to confess to do so nonetheless, or simply outlawing those practices it finds particularly offensive.203

Finally, had the *Dickerson* Court both followed my approach and been entirely frank, it might have admitted that *Miranda*'s prophylactic rule post-*Dickerson* is different from the prophylactic rule originally created in *Miranda*. In 1966, the *Miranda* Court probably believed all suspects would invoke their right to an attorney, and that it was in essence extending the *Escobedo v. Illinois*204 ruling requiring attorneys for "prime suspects" to the station house. The intuitive prediction was that most suspects would in fact request an attorney, and the warnings were a relatively incidental part of the process of implementing an attorney regime. As it turned out, defendants routinely waived their *Miranda* rights and gave incriminating statements

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Enforcement," 50 Stan.L.Rev. 1055 (1998), with Stephen J. Schulhofer, "*Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs," 90 NW. U.L. Rev. 500 (1996). While I would not be surprised to learn that the self-incrimination clause decreases the number of confessions and perhaps convictions (that latter proposition depends upon how many defendants waive their rights and whether officers obtain convictions by using other evidence), just as the Fourth Amendment's rule against unreasonable search and seizures and the Sixth Amendment requirement of effective counsel probably decrease the number of convictions, it seems to me this data is entirely irrelevant to the question of whether *Miranda* dispels compulsion. These statistics on post-*Miranda* confession and clearance rates are relevant, however, to a discussion as to how far to extend the prophylactic rule, and whether and how to design exceptions to it.

203 *See, e.g.*, Welsh S. White, "Police Trickery in Inducing Confessions," 127 U. Penn. L. Rev. 581 (1979) (arguing that *Miranda* ought to be interpreted to prohibit certain deceptive interrogation tactics); White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confession," 32 Harv. C.R.-C.L. L. Rev. 105, 149-53 (1997) (arguing that the Due Process Clause should establish a five hour maximum period of police interrogation, and that suspects should be informed of this at the outset); Alschuler, "Constraint and Confession," 74 Denver Univ. Law Rev. 957 (1997) (suggesting that Court shift attention away from the mind of the suspect and determine which interrogation techniques are improper, such as threats of harm, promises or leniency, and the fabrication of incriminating evidence).

204 378 U.S. 478 (1964). The *Escobedo* Court held that the Sixth Amendment's right to assistance of counsel extended preindictment to police interrogations of "prime suspects." *Id*. at 490-91. At the time, commentators predicted that *Escobedo* would effectively bar uncounseled interrogations, thus eliminating confessions. *See* Yale Kamisar, Police Interrogation and Confessions: Essays in Law and Policy 161, n.26 (summarizing predictions of commentators concerning *Escobedo*'s impact). Instead, *Escobedo* was subsequently limited to its peculiar facts. *See Kirby v. Illinois*, 406 U.S. 682, 689 (1972) ("the Court has limited the holding of *Escobedo* to its own facts").

without counsel.205 Thus, the warnings themselves have become the primary *Miranda* right. Chief Justice Rehnquist's fidelity to *stare decisis* is therefore quite disingenuous. The Court reaffirmed *Miranda* in *Dickerson* only because it turned out not to negatively impact law enforcement. An honest Court would have asked whether a requirement of counsel should be reaffirmed because it has evolved into a useful set of warning requirements.

The Court picked the worst of all possible worlds when it froze in place the *status quo*, without explaining how the *Miranda* warnings can have "constitutional underpinnings"206 yet, unlike other constitutional violations, be ignored at will. The answer to this, of course, is to label *Miranda* a prophylactic rule necessary only in certain circumstances. The Court all but foreclosed this option, and squelched any opportunity for dialogue between the Court and other branches of the federal and state governments, by flatly stating that Congress "may not supersede this Court's decisions interpreting and applying the Constitution."207 To top it off, the Court intimated that the *Miranda* decision itself was a mistake,208 (without identifying that mistake or telling us why it was a mistake) but that it is better to be consistent than to be right.

Conclusion

Had the *Dickerson* Court properly labeled *Miranda* a prophylactic rule designed to protect and adjudicate Fifth Amendment self-incrimination claims, this might have engendered agreement upon or at least opened debate concerning exactly what the Self-Incrimination Clause is designed to accomplish and how best to implement the privilege in the station house. More importantly, my conceptual framework, in addition to accounting for *Miranda* and the subsequent development of its exceptions, accounts for the many other prophylactic rules, safe harbors, and incidental rights in constitutional criminal procedure. Finally, rather than either reversing *Miranda* and potentially every other prophylactic rule, safe harbor rule, and incidental right, or freezing such rules and rights and their exceptions as "true" constitutional interpretation, frankly labeling them as prophylactic rules or incidental rights protecting the Fifth or some other Amendment has numerous advantages. It allows the Court to overturn a rule without spending the institutional capital of a constitutional reversal, fosters free and open discussion between the Court and state and federal legislators, stimulates social science and empirical research, and encourages the Court and state and federal legislators to experiment with different and competing rules and remedies.

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205 By most accounts, roughly 80% of suspects waive their *Miranda* rights, and the majority go on to incriminate themselves. *See, e.g*., Paul G. Cassell & Bret S. Hayman, "Police Interrogation in the 1990s: An Empirical Study of the Effects of *Miranda*," 43 U.C.L.A. L. Rev. 839 (1996); Richard A. Leo, "Inside the Interrogation Room," 86 J. Crim. L. & Criminology 266 (1996).

206 *Dickerson* at _____.

207 *Dickerson*, 120 S.Ct. 2326, *2327 (citing *City of Boerne*).

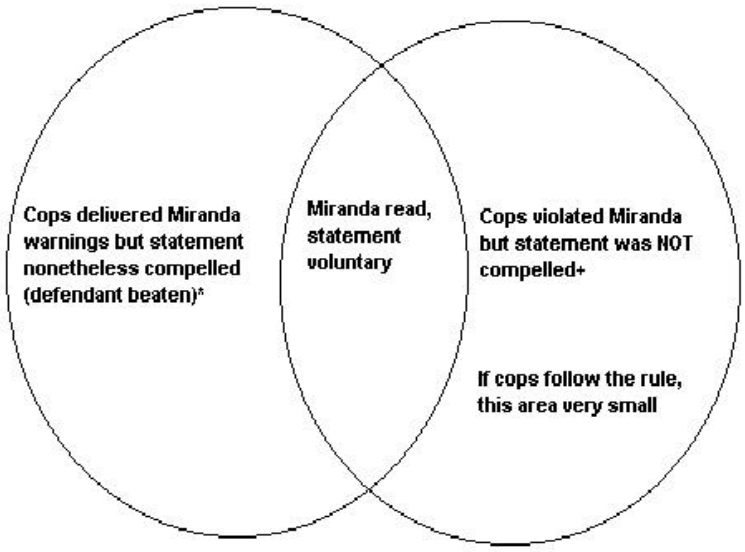
208 120 S.Ct. 2326, *2329 ("whether or not this Court would agree with *Miranda*'s reasoning and its rule in the first instance, stare decisis weighs heavily against overruling it now.")

APPENDIX A

VENN DIAGRAM OF PROPHYLACTIC RULE

Prophylactic Rule of *Miranda*
(4 warnings)

Fifth Amendment Privilege Against self-incrimination
(no compelled statements)



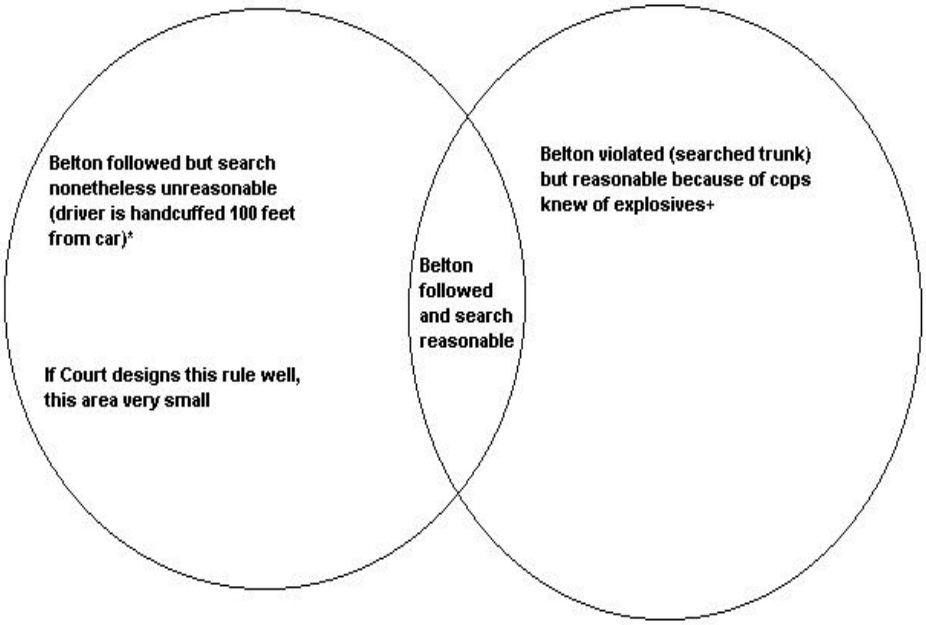
*Prophylactic rule **does not** underprotect, statement suppressed on Fifth and Fourteenth Amendment grounds.

+ Prophylactic rule **does** overprotect, government out of luck (statement successfully suppressed).

VENN DIAGRAM OF SAFE HARBOR RULE

Safe Harbor Rule of *Belton* (search incident to arrest includes passenger compartment of automobile)

Fourth Amendment Right Against Unreasonable Searches and Seizures



*Safe Harbor rule **does** underprotect, defendant out of luck (evidence admitted pursuant to Fourth Amendment)

+ Safe Harbor rule **does not** overprotect, evidence admitted under exigent circumstances or automobile exceptions to warrant requirement