

Saint Louis University Public Law Review

Volume 28

Number 2 1984: *How One Year Reshaped Criminal
Procedure (Volume XXVIII, No. 2)*

Article 6

2009

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Recommended Citation

Jung, William F. (2009) "Not Dead Yet: The Enduring Miranda Rule 25 Years After the Supreme Court's October Term 1984," *Saint Louis University Public Law Review*: Vol. 28 : No. 2 , Article 6.

Available at: <https://scholarship.law.slu.edu/plr/vol28/iss2/6>

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**NOT DEAD YET: THE ENDURING *MIRANDA* RULE 25 YEARS
AFTER THE SUPREME COURT'S OCTOBER TERM 1984**

WILLIAM F. JUNG*

The holding and rule ordained by *Miranda v. Arizona*,¹ is now in its fifth decade. Although often maligned and occasionally lauded, the *Miranda* rule has remained an integral part of criminal procedure and Fifth Amendment jurisprudence in this country. This article examines *Miranda* and the rather rocky road it has traveled, especially in overcoming two cases impacting the rule in the Supreme Court's October Term 1984: *New York v. Quarles* and *Oregon v. Elstad*. A recent thesis of Professor Yale Kamisar is that *Miranda*, after surviving these cases and others, was dealt a body-blow by a case from the later Rehnquist Court. This theory may be overstated and is critiqued below. The article concludes by suggesting improvements to Fifth Amendment interrogation procedures, both within and independent of *Miranda*.

I. THE *MIRANDA* OPINION

Forty-three years after its creation, the majority opinion in *Miranda* still reads like a powerful and wide-reaching ukase. The Court intended to write and invoke a firm and clear rule of criminal procedure for every police officer in the country, and to impose this rule immediately. *Miranda*'s very firm tone and clear direction still resonates. Its boldness remains remarkable. The Court simply decided to use the Constitution to write rules of criminal procedure. Legislatures, study commissions, and bar rule-writing committees would not be needed to create this rule and standard for police interrogation.

The opinion was written, of course, as a follow-up to the *Escobedo v. Illinois*² case from two terms prior. That case found a Sixth Amendment right to counsel during custodial interrogation and reversed a conviction where the police ignored the confessing suspect's requests for counsel.³

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

2. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

3. *Id.* at 490-91.

Although *Miranda* relocated the right to counsel during interrogation to the Fifth Amendment's Self-Incrimination Clause, *Escobedo* and *Miranda* can best be viewed as the Supreme Court deciding that the "third degree," the use of inherently coercive interrogation techniques, was simply going to stop in this country.⁴ *Miranda*, at its most basic, simply aimed to stop any such practices cold. The goal of the rule is indeed laudatory. The sound purpose, and likely necessity, of the rule may make the aggressive force of its creation and birth understandable.⁵ The opinion's text begins with an extensive history lesson concerning the origins of the self-incrimination right.⁶ The Court reviewed the struggles in English common law to establish this right.⁷ The firm establishment of the right to avoid self-incrimination, enshrined in the Fifth Amendment, was then juxtaposed against modern police interrogation techniques designed to overcome that right without physical force.⁸ As the Court noted with a touch of dismay, "[t]he entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment."⁹

Although rich with historical and factual detail, the opinion's holding was simple and clear: custodial interrogation requires a four part warning. The subject must be informed clearly that he has a right to remain silent, that anything he says can be used against him in court, that he has a right to an attorney's presence during questioning, and if he can not afford an attorney, one will be appointed for him.¹⁰ The opinion also makes clear that waiver of these rights can only be established by the state by overcoming a high or "heavy" burden.¹¹

Like only a few other bold Supreme Court opinions establishing new constitutional or procedural rights, *Miranda* was not incremental: it was a large and controversial jump. Its firm rule was easy to state but left much to be settled later. For example, the opinion remains uncertain as to whether the rule was constitutional, straight out of the Fifth Amendment, or whether it was a prophylactic, advisory rule. Passages in the opinion can be read both ways, leaving that issue and others for a later day.

4. *Miranda*, 384 U.S. at 440–45.

5. *Id.* at 531 (White, J., dissenting). Dissents that do not eventually prevail have little persuasive force or impact on the law, of course. However, Justice White's lengthy dissent was hard hitting: "[T]he Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent. . . ." *Id.*

6. *Id.* at 442.

7. *Id.* at 442–43.

8. *See id.* at 444.

9. *Miranda*, 384 U.S. at 465.

10. *Id.* at 474.

11. *Id.* at 475.

Likewise, the remedy for a confession taken in violation of the rule was unstated. Was the confession suppressed for all purposes? Could it be used to impeach at least? Was the confession like a Fourth Amendment violation, a “poisonous tree” whose “fruit” or derivative use and leads were also suppressible? These and many other unanswered questions would be answered over the next forty years.

II. *MIRANDA* IN THE SUPREME COURT’S OCTOBER TERM 1984

A. *The Precursor: Michigan v. Tucker*

Prior to the key cases in October Term 1984, the Supreme Court had issued *Michigan v. Tucker*,¹² with Justice Rehnquist writing the majority opinion. In *Tucker*, the defendant identified a key eyewitness through a statement that came after faulty *Miranda* warnings.¹³ The warnings omitted that the defendant had a right to free counsel if he were indigent.¹⁴ The warnings were otherwise fairly given, and the facts of the case suggest that the suspect’s right to counsel was respected, and he was not otherwise coerced or given the “third degree.”¹⁵

Although the actual statement given by the defendant was suppressed as a *Miranda* violation, the trial court did admit the eyewitness testimony.¹⁶ On appeal then, the issue was whether a *Miranda* violation could be a “poisonous tree” such that any fruit or evidence derived from the violation should be suppressed.¹⁷

The Court found that only a violation of *Miranda*’s “prophylactic standards” occurred, not a violation of the underlying constitutional right.¹⁸ The *Miranda* violation was not intentional by the police, nor even negligent since the conduct occurred before the actual *Miranda* rule was announced, but prior to trial.¹⁹ The Court found significant that the violation was unintentional, as the rule had not yet been announced.²⁰ Therefore, the bar on using the derivative fruits of the illegal confession, as suggested by the *Wong Sun*²¹ line of cases, did not apply.

12. *Michigan v. Tucker*, 417 U.S. 433 (1974).

13. *Id.* at 436.

14. *Id.*

15. *Id.* at 444–45.

16. *Id.* at 437.

17. *Tucker*, 417 U.S. at 445.

18. *See id.* at 439.

19. *Id.* at 437.

20. *Id.* at 447.

21. *Wong Sun v. United States*, 371 U.S. 471 (1963).

B. Quarles: “Where’s the Gun?”

During the 1984 Term, *New York v. Quarles*²² was known to Court watchers as the “Where’s the gun?” case. The case established a “public safety” exception to *Miranda*.²³ The Court held that *Miranda*’s “prophylactic rule” protecting the Fifth Amendment was outweighed in situations posing a threat to public safety.²⁴

In *Quarles*, a woman told police officers that she had been raped at gunpoint, consequently the officers chased the assailant into a supermarket.²⁵ Inside the market, the officers stopped and frisked the assailant.²⁶ When the officer saw the assailant with an empty holster, he asked, “Where’s the gun?” The defendant answered, “Over there.”²⁷ The trial court admitted the un-*Mirandized* statement of the defendant and the gun.²⁸

The *Quarles* exception is fairly unremarkable. When the exigency passes, so does the exception. Although the rule makes sense and is not controversial, Professor Kamisar rightly noted that the *Tucker* and *Quarles* opinions drove a wedge between the *Miranda* warnings and the privilege against self-incrimination.²⁹

C. Oregon v. Elstad: “The Cat out of the Bag”

The other key opinion from October Term 1984 was *Oregon v. Elstad*.³⁰ In this “cat out of the bag” case, the interrogation was sequential, with the first post-arrest interrogation being unwarned, albeit voluntary.³¹ Moreover, there was no evidence of police chicanery or any attempt to deliberately thwart the warning requirement.³² At the station house sixty minutes later, the defendant confessed a second time in writing; this time after proper warnings.³³

The Court declined to hold the second, properly *Mirandized* confession inadmissible.³⁴ The Court reversed the lower court’s holding that the second

22. *New York v. Quarles*, 467 U.S. 649 (1984).

23. *Id.* at 651.

24. *Id.* at 654–56.

25. *Id.* at 651–52.

26. *Id.* at 652.

27. *Quarles*, 467 U.S. at 652.

28. *Id.* at 651.

29. Yale Kamisar, Dickerson v. United States: *The Case That Disappointed Miranda’s Critics—And Then Its Supporters* 45 (Univ. of San Diego Sch. of Law Legal Studies Research Paper Series, Paper No. 06-18, 2005), available at <http://ssrn.com/abstract=729163>.

30. *Oregon v. Elstad*, 470 U.S. 298 (1985).

31. *Id.* at 301.

32. *See id.* at 308.

33. *Id.* at 314–15.

34. *Id.* at 318.

confession was suppressible under *Wong Sun*,³⁵ as a “poisonous fruit” of the first, illegal interrogation.³⁶ The Court also declined to find that the second confession was rendered involuntary once the cat was out of the bag.³⁷

Justice O’Connor made clear for the Court that *Miranda* was not a “constitutional right” quoting and relying on the “prophylactic” language of *Michigan v. Tucker*.³⁸ Because there was no constitutional violation, nor a compelled or involuntary confession, she argued, there was no fruit of the poisonous tree to suppress.³⁹

Of the two opinions from October Term 1984, *Elstad* was much more damaging to the notion of *Miranda* as constitutional writ. *Elstad* left open a real chance for police misuse of the rule by deliberately omitting the *Miranda* warnings on the initial interrogation. This police strategy was a concern of the *Elstad* dissenters,⁴⁰ and is experienced by criminal practitioners in the field. This deliberate circumvention of the *Miranda* right would be addressed by the Court in a later case.⁴¹

Elstad left *Miranda* as a non-constitutional doctrine. Thus it is not surprising that there was more than a little head scratching when *Dickerson* later seemed to breathe the Fifth Amendment back into *Miranda*.

III. *DICKERSON* AND *PATANE*: PROFESSOR KAMISAR’S PARADOX

Professor Yale Kamisar’s work was cited several times by the *Miranda* majority, and his scholarship is rightly viewed as a vital part of *Miranda* itself and indeed, part of modern American Fifth Amendment jurisprudence.⁴² Still adding to this body of scholarship after five decades, Professor Kamisar wrote a recent comment on point for the American Bar Association Journal.⁴³ In this article, Kamisar traced the various cases after *Miranda* and addressed Justice Rehnquist’s hostility for the rule and his attempts to undermine it.⁴⁴

Kamisar’s article describes a paradox. The thesis of Kamisar’s article states that Chief Justice Rehnquist inexplicably saved *Miranda* in *Dickerson v.*

35. *Wong Sun v. United States*, 371 U.S. 471 (1963).

36. *Elstad*, 470 U.S. at 302–03, 318.

37. *Id.* at 318.

38. *Id.* at 306–08.

39. *See id.* at 305–08.

40. *Id.* at 328–30.

41. *Missouri v. Seibert*, 542 U.S. 600 (2003).

42. *See Miranda v. Arizona*, 384 U.S. 436, 440 n.2, 470 n.38, 473 n.41, 511 (1966).

43. Yale Kamisar, *Miranda’s Reprieve: How Rehnquist Spared the Landmark Confession Case, but Weakened Its Impact* [hereinafter *Miranda’s Reprieve*], 92 A.B.A. J. 48 (June 2006). *See also* Yale Kamisar, *Postscript: Another Look at Patane and Seibert, the 2004 Miranda “Poisoned Fruit” Cases* [hereinafter *Postscript*], 2 OH. ST. J. CRIM. L. 97 (2004); Yale Kamisar, *Foreword: From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879 (2001).

44. *Miranda’s Reprieve*, *supra* note 43, at 50–51.

*United States*⁴⁵ by holding that it was a constitutional rule that could not be altered by statute, but then *Miranda* took a “bullet to the body” by the Rehnquist Court’s opinion in *United States v. Patane*, which holds that there is no bar to use of leads or fruits derived from a *Miranda* violation.⁴⁶

Kamisar’s article was written in an engaging, entertaining style appropriate to the magazine he was writing for. He first outlined Rehnquist’s firm hostility to the *Miranda* rule.⁴⁷ There is little doubt that William Rehnquist arrived in Washington in 1969 with a firm view that the Warren Court’s jurisprudence in criminal procedure areas was unwise and too expansive.⁴⁸ In that regard, Chief Justice Rehnquist was far from alone. Kamisar discusses a previously unreleased memorandum that Rehnquist wrote to John Dean, a Justice Department superior when Rehnquist headed the Department’s Office of Legal Counsel.⁴⁹ In it, Rehnquist outlined a plan for a national commission to consider a constitutional amendment to reverse some Warren Court opinions in the criminal procedure field. *Miranda* was one of the main targets.⁵⁰ The commission idea was not accepted by Attorney General John Mitchell. According to Kamisar, Mitchell worried about controlling such a body.⁵¹

It appears likely that Rehnquist carried these views with him to the Supreme Court and kept them throughout his tenure there. Like others before him (Justices Warren and Brennan for example), however, Justice Rehnquist knew what it meant to get and garner votes. A strongly held and principled view is admirable but powerless alone. Although nicknamed “The Lone Ranger,” Justice Rehnquist was anything but.⁵² He was an amiable builder of bridges among his Supreme Court colleagues.⁵³ Like Justice Brennan, he was a genuinely friendly, nice man. These skills, along with a crackling intellect, made him a highly effective molder of the Court and its direction.⁵⁴

Both as a law clerk in the late 1940s, and later as an Associate Justice, Rehnquist served with the true “Lone Ranger” of modern times, William O. Douglas.⁵⁵ Douglas’ firm principles and strong stands often caused him to stand alone.⁵⁶ Douglas did not control or move the Court.⁵⁷

45. See generally *Dickerson v. United States*, 530 U.S. 428 (2000).

46. *Miranda’s Reprieve*, *supra* note 43, at 51.

47. *Id.* at 48–50.

48. *Id.*

49. *Id.* at 50.

50. *Id.*

51. *Miranda’s Reprieve*, *supra* note 43, at 50.

52. See generally DAVID HUDSON JR., *THE REHNQUIST COURT: UNDERSTANDING ITS IMPACT AND LEGACY* (2007).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

Rehnquist was no Douglas of the Right. It is Rehnquist's personable and persistent message of the judicial body—firm, constant, undramatic, and ever steady to the Right—that explains his jurisprudence regarding *Miranda* and solves Kamisar's paradox.

The first part of the paradox is Chief Justice Rehnquist's opinion in *Dickerson*.⁵⁸ In that case, the Fourth Circuit ruled that a confession without *Miranda* warnings was admissible under 18 U.S.C. 3501.⁵⁹ Section 3501 was a statute written two years after *Miranda* in which Congress sought to overturn that opinion.⁶⁰ Section 3501 stated that a voluntary confession could be admissible in federal court, notwithstanding whether warnings were given.⁶¹ Kamisar points out that Section 3501 was touted and endorsed by the Mitchell Justice Department when Rehnquist worked there in 1969.⁶² A memo advocating enforcement of Section 3501 against *Miranda*, likely drafted by Rehnquist, was sent by Mitchell to all U.S. Attorneys.⁶³ Yet in 2000, Chief Justice Rehnquist authored an opinion for the Court striking Section 3501 as unconstitutional and affirming that the *Miranda* rule is constitutionally based.⁶⁴ Logic might tell the uninitiated observer that Chief Justice Rehnquist rightly should have been in the *Dickerson* dissent with Justices Scalia and Thomas.

Professor Kamisar provides several possible explanations why a foe of *Miranda* would author the opinion upholding it firmly in *Dickerson*. Although the short answer is that no one can be sure there seems little chance that Chief Justice Rehnquist had developed an affinity or liking for *Miranda* after all these years. The theory posited by Kamisar that seems most likely is that Rehnquist authored the majority opinion to keep its writing out of the hands of the next senior-most Justice, John Paul Stevens.⁶⁵

Choosing the author of an opinion is a powerful tool in the hands of a Chief Justice, and it is one the Chief retains so long as the Chief is on the majority side of an opinion. This powerful tactic can be wielded in various ways.

57. HUDSON, *supra* note 52.

58. See *Dickerson v. United States*, 530 U.S. 428 (2000).

59. *Id.* at 432. In *Corley v. United States*, 129 S. Ct. 1558 (Apr. 6, 2009), a sharply divided Court cut back on Section 3501 further. The Court suppressed a voluntary confession given after the 6-hour presentment window of FED. R. CRIM. P. 5(a) and *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957). The opinion stated flatly that Section 3501(a) was intended to overrule *Miranda*, an attempt which the Court thwarted in *Dickerson*. *Corley*, 129 S. Ct. at 1563 n.1.

60. *Dickerson*, 530 U.S. at 431–32.

61. *Id.*

62. *Miranda's Reprieve*, *supra* note 43, at 50.

63. *Id.*

64. *Id.* at 51.

65. *Id.*

For example, this power can be used to limit or restrain the opinion as was likely done by Rehnquist keeping the case from Justice Stevens in *Dickerson*. The Chief Justice might also use the assignment power also to keep a wavering or unsure justice on the Chief's side by assigning that wavering justice the discretion of crafting the metes and bounds of the ruling; and also creating in him the pride of authorship. The opinion-assigning power can be used to disfavor or "punish" a member of the Court whom the Chief Justice views unfavorably. Some Court observers believe Chief Justice Burger used the power this way concerning Justice Blackmun during the "Minnesota Twins" later years.⁶⁶ Conversely, the Chief can use the assignment power to reward allies or foster alliances.⁶⁷

The opinion-assigning power can also be used to direct a "hot potato" a certain way. For example, the authors of *The Brethren* posited that Justice Blackmun sought to spare William Brennan, a prominent Roman Catholic, the "heat" of writing the majority opinion in *Roe v. Wade*.⁶⁸

Among the various reasons suggested by Kamisar for Rehnquist's *Miranda*-affirming decision in *Dickerson*, the opinion assignment strategy seems most plausible. Most likely, Chief Justice Rehnquist wrote *Dickerson* to spare *Miranda* from being expanded by Justice Stevens. To quote Professor Donald Dripps, the *Dickerson* opinion was "intentionally written to say less rather than more."⁶⁹

Despite Rehnquist's authorship of *Dickerson*, the enmity toward *Miranda* did not abate and was later seen in *United States v. Patane*. Chief Justice Rehnquist, in the 5-4 *Patane* majority, assigned the opinion to Justice Thomas.⁷⁰ Kamisar states that "*Dickerson* spared *Miranda*, the death penalty. But four years later, when *Patane* was decided, *Miranda* took a bullet to the body."⁷¹ This is perhaps overstated, but *Patane* did once again chip away at the resilient rule.

66. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 121–22 (1979).

67. See *id.* at 170–72.

68. *Id.* at 172–73.

69. Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 3 (2001).

70. *United States v. Patane*, 542 U.S. 630 (2004). Justice Thomas' opinion was a plurality judgment, only garnering three votes. Justices Kennedy and O'Connor concurred in the judgment. *Id.* In a companion case to *Patane*, the Court encountered a deliberate attempt to evade *Miranda* by utilizing the loophole opened by *Elstad*: the police as a matter of deliberate strategy interrogated first without warnings, thereafter warned the subject and got a post-warning confession that was sought to be introduced. See *Missouri v. Seibert*, 542 U.S. 600 (2003). Kennedy joined the pro-*Miranda* majority in that companion case, and the confession was suppressed. *Id.* at 604.

71. *Miranda's Reprieve*, *supra* note 43, at 51.

In *Patane*, the Court addressed whether admission of a gun obtained as a fruit of a *Miranda*-violative confession was admissible. Thomas' plurality cut back on the impact of *Dickerson* and ruled that "the *Miranda* rule is a prophylactic employed to protect against violating the Self-Incrimination Clause. The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement."⁷² In short, "[t]he Clause cannot be violated by introduction of nontestimonial evidence obtained as a result of voluntary statements."⁷³

Patane did limit *Miranda* and cut back on the direction set by *Dickerson*, but a "bullet to the body" seems overstated. The goal of *Miranda* was to help end "third degree" or "star chamber" tactics. *Miranda* still does that after *Patane*, albeit with less stringency than preferred by Professor Kamisar. Moreover, an involuntary or compelled confession still possesses and has always possessed "fruit of the poisonous tree" derivative use protection.⁷⁴

Additionally, the *Patane* opinion itself had but three votes: Rehnquist, Scalia and Thomas.⁷⁵ Justice O'Connor, in the concurrence, was replaced by Justice Alito, so perhaps that opinion might garner four at this time. *Patane*'s companion case shows five votes to suppress intentional tactics employed to defeat the *Miranda* rights.⁷⁶ A three-vote plurality should not be viewed as the death knell of a very resilient rule now approaching the half-century mark.

Patane certainly was not unexpected. Indeed, the Court had divided evenly on the issue in earlier cases.⁷⁷ *Elstad* predated and predicted *Patane*.⁷⁸ *Elstad*, for example, stated that "[t]he Fifth Amendment, of course, is not concerned with nontestimonial evidence."⁷⁹

The Court's "impeachment" cases also foreshadow and support *Patane*. In these cases, decided 35 years ago, confessions taken in violation of *Miranda* warnings and in violation of *Miranda*-invoked requests for counsel were held admissible to impeach.⁸⁰ Certainly if *Miranda* violations did not bar use of self-incriminating statements, it appears unlikely *Miranda* would bar

72. *Patane*, 542 U.S. at 636.

73. *Id.* at 637.

74. *Id.* at 639–40.

75. *Id.* at 633.

76. *Missouri v. Seibert*, 542 U.S. 600, 603–04 (2003).

77. *Massachusetts v. White*, 439 U.S. 280 (1978) (per curiam). See also *Patterson v. United States*, 485 U.S. 922 (1989) (White, J., dissenting).

78. Professor Kamisar observed: "[I]n *Elstad* the notion that *Miranda* was not a constitutional decision and therefore a violation of the *Miranda* rule was not deserving of a 'fruits' doctrine." *Postscript*, *supra* note 44, at 114. As Justice Kennedy noted in his concurrence in the *Patane* judgment: "In *Elstad*, *Quarles*, and *Harris v. New York*, evidence obtained following an unwarned interrogation was held admissible." *Patane*, 542 U.S. at 644 (citations omitted).

79. *Oregon v. Elstad*, 470 U.S. 298, 304 (1985).

80. *Oregon v. Haas*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971).

admission of a non-testimonial gun. Likewise, after *Elstad*, most lower courts were admitting non-testimonial fruits of *Miranda* violations.⁸¹

Patane is also less of a blow to *Miranda* for a reason related to criminal evidence and trials. Although leads or evidence (i.e. “the fruits”) obtained derivatively from a *Miranda* violation now may be used post-*Patane*, the confession itself cannot.⁸² That *Miranda* does not yield the “fruit of the poisonous tree” protection is less severe than in a search and seizure context.

First, most interrogations are used as simple admissions at trial. Most of them are not used derivatively to derive fruits. They are most frequently used simply as post-arrest statements at trial. Despite *Patane*, statements continue to be barred unless *Miranda* is followed.

In the search and seizure Fourth Amendment context, the “tree” is the constitutional violation itself, usually an illegal entry or overbroad search. The “tree” is rarely evidence and rarely used in Court. Only the “fruit” is damaging in court, the items found without or beyond the warrant, those things in the house, or buried in the back yard, etc. Accordingly, suppressing only the constitutional violation itself (the “tree” or illegal entry, overbroad physical search, etc.) means little and provides little protection. The “fruits” (items found) are what is important at trial and if garnered illegally, they must be suppressed both to incent the police in the future and to prevent them from profiting in the present. The *Wong Sun* “fruit of the poisonous tree” rule is more vital and needed in the Fourth Amendment context than the Fifth.⁸³

IV. IMPROVING FIFTH AMENDMENT INTERROGATION PROCEDURES

A. *Within* *Miranda*

Any improvements in the area of interrogation procedures should be directed to making the law and rules clearer and making police compliance with those procedures simple and transparent. Any change on improvement in these rules would focus on *Miranda*’s and the Self-Incrimination Clause’s underlying goal: protecting the rights of suspects to both non-coercive and constitutionally-informed interrogation. Unfortunately, *Miranda* is now

81. David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, 835–36 n.154.

82. *See Patane*, 542 U.S. at 630.

83. This somewhat esoteric concept appears to be what the Court was stating in *Dickerson* when it said: “[U]nreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment.” *Dickerson v. United States*, 530 U.S. 428, 441 (2000). Likewise in *Elstad*, the Court stated, “The exclusionary rule . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth.” *Elstad*, 470 U.S. at 306.

freighted with layers of exceptions, loopholes, and by-ways created by case law.

Within the context of *Miranda*, the most acute need for improvement nationwide is development of uniform warnings. The varying nature of the *Miranda* warnings, many different to a startling degree, is remarkable. A recent article has illustrated that among and even within jurisdictions, large differences exist in the nature of the warnings, their words, their length, their cognitive complexity and indeed their very subject matter.⁸⁴ State courts routinely are asked to “pass” on, or adjudicate, the varying iterations of warnings that are given.⁸⁵ It would be an easy task for law enforcement agencies nationwide, or a series of state supreme courts, to come together to set forth a uniform and simple four-part warning.

The energy and expense expended in fighting and adjudicating these various iterations of *Miranda* texts and warnings is entirely unnecessary. Moreover, unclear or illegal warnings defeat the law enforcement goal of achieving legally effective interrogation and convicting the guilty. The entire matter seems easily curable and remarkably wasteful.

B. *Outside Miranda*

One simple way to gain confidence in interrogation techniques and results, outside the context of *Miranda*, is to impose a recordation requirement. Such a rule would require that all interrogations be recorded, perhaps with some safeguard for exigent reasons if a recording could not be made. In this age of micro-electronics, the requirement would seem to pose only a mild inconvenience and would vastly increase confidence in the interrogation result. Indeed, most police officers carry cellular telephones with recording devices. To avoid a chill to interrogation, there could be no requirement that the suspect be warned about the taping or that the taping be visible. Some jurisdictions do have this rule or variants of it. All told, some 450 police departments record interrogations in varying factual situations.⁸⁶

Alaska and Minnesota require custodial interrogations to be recorded when practicable, under the due process clauses of their state constitutions.⁸⁷ Texas

84. Richard Rogers et al., *Miranda Rights . . . and Wrongs*, 23 A.B.A. CRIM. JUST. 4, 5 (Summer 2008).

85. For example, the Florida Supreme Court recently issued a 14-page opinion grappling with a printed law enforcement form warning that ultimately failed to advise the suspect of the right to the lawyer's presence during interrogation. *Florida v. Powell*, 998 So. 2d 531 (Fla. 2008).

86. THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS: A POLICY REVIEW 2, (2007) available at http://www.thejusticeproject.org/wp-content/uploads/pol_pack_recording-fin2.pdf. See also Thomas P. Sullivan, *The Time Has Come for Law Enforcement Recordings of Custodial Interviews, Start to Finish*, 37 GOLDEN GATE U. L. REV. 175 (2006).

87. THE JUSTICE PROJECT, *supra* note 86, at 15–16.

requires non-written confessions to be audio-recorded.⁸⁸ The New Jersey Supreme Court has appointed a study commission on the issue.⁸⁹

In 2003, Illinois passed legislation requiring that all police interrogations of suspects in homicide cases be recorded.⁹⁰ The bill was sponsored by then-State Senator Barack Obama.⁹¹

Federal law enforcement agencies, such as the FBI, strongly resist such requirements and indeed have formal policies against recordation of interrogation.⁹² The reasons for these policies are not stated. One reason, which seems less worthy given the ubiquitous nature of recording devices, is the inability to record. This concern is easily handled by requiring recordation only when practical, such as at the station house or when some recording device may be present.

Perhaps one reason cited for some law enforcement resistance to recordation of interrogation involves the use of deception or craft by the interrogator. Deceptive interrogation techniques, such as false statements to the subject, are indeed permissible in some situations.⁹³ Recordation of an interrogation that used deception or craft as a technique might later embarrass the officer, or might reveal confidential police practices. A full discussion of how recordation requirements might intersect with deceptive-style interrogation is beyond the scope of this article and needs to be developed in practice. There seems to be few cogent arguments against “sunlight,” however, and inertia appears to be the main reason for the objection.

Recording interrogations as a routine practice would greatly enhance judicial and public confidence in the process, making for more solid and less suppressible confessions. It would also likely increase the high percentage of guilty pleas, as is already the case where there are written confessions.

88. TEX. CODE CRIM. PROC. ANN. art. 38.22(3) (Vernon 2005).

89. THE JUSTICE PROJECT, *supra* note 87, at 16.

90. 725 ILL. COMP. STAT. 5/103-2.1 (2006).

91. Press Release, Office of the Governor, Governor Signs Six-Bill Package Addressing Serious Problems in Illinois' Criminal Justice System (July 17, 2003), *available at* <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?RecNum=2188&SubjectID=5>.

92. Sullivan, *supra* note 87, at 180.

93. *E.g.*, United States v. Ceballos, 302 F.3d 679, 694–95 (7th Cir. 2002) (Police falsely told suspect that codefendant implicated him in drug transactions.); United States v. Palmer, 203 F.3d 55, 62 (1st Cir. 2000) (Officer falsely told suspect, who was molested as a child, that co-conspirator was a child molester.); United States v. Unser, 165 F.3d 755, 766 (10th Cir. 1999) (subterfuge by police).