

Postscript: Another Look at *Patane* and *Seibert*, the 2004 *Miranda* “Poisoned Fruit” Cases

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Some months after I finished writing an article that, *inter alia*, discussed the lower court opinions in *Patane* and *Seibert* (an article that appears elsewhere in this issue of the *Journal*),¹ the Supreme Court handed down its decisions in those cases.² In *Patane*, a 5–4 majority held admissible a Glock pistol located as a result of a failure to comply with *Miranda*. In *Seibert*, a 5–4 majority agreed with the state court that a “second confession,” one obtained after the police had deliberately used a two-stage interrogation technique designed to undermine the *Miranda* warnings, was inadmissible.³

In *Patane*, Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, dissented. In *Seibert*, Justice Souter, joined by the three *Patane* dissenters, wrote the principal opinion. The Chief Justice and Justices O’Connor, Scalia and Thomas would have admitted the evidence in *both* cases. Therefore, the lineup in both cases was the same except for Justice Kennedy. He sided with the prosecution in *Patane*, but with the defense in *Seibert*.

I. UNITED STATES v. PATANE

As I feared,⁴ Justice Thomas, who wrote the three-person plurality opinion in *Patane*,⁵ relied heavily on *Chavez v. Martinez*.⁶ He maintained that since “a mere failure to give *Miranda* warnings *does not, by itself, violate a suspect’s constitutional rights or even the *Miranda* rule,*”⁷ no violation of *Miranda* or the Constitution occurred in *Patane*—at least no “completed” violation—and thus,

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¹ See Yale Kamisar, *A Look Back on a Half-Century of Teaching, Writing and Speaking About Criminal Law and Criminal Procedure*, 2 OHIO ST. J. CRIM. L. 69 (2004).

² See *United States v. Patane*, 124 S. Ct. 2620 (2004); *Missouri v. Seibert*, 124 S. Ct. 2601 (2004).

³ For a discussion of the lower court opinions in these cases, see Kamisar, *supra* note 1, at 83–84.

⁴ See *id.* at 82.

⁵ Justice Thomas was joined by the Chief Justice and Justice Scalia. Justice Kennedy, joined by Justice O’Connor, concurred in the judgment.

⁶ 538 U.S. 760 (2003).

⁷ *Patane*, 124 S. Ct. at 2626 (emphasis added).

“there is . . . nothing to deter.”⁸ However, Thomas’s reliance on *Martinez* is misplaced.

The person who brought the § 1983 action in *Martinez* was never criminally prosecuted. Therefore no improperly obtained evidence—direct *or* derivative—was ever “used” against him. In *Patane*, on the other hand, the failure to comply with the *Miranda* rules did not stand “by itself”; it produced the evidence that was “used” against the defendant—the Glock pistol. And for more than a hundred years, it has been clear that the privilege against self-incrimination prohibits *the derivative use*, as well as the direct use, of compelled utterances.⁹

“Potential violations [of a suspect’s constitutional rights or the *Miranda* rule] occur, if at all,” asserts Justice Thomas, “only upon the admission of unwarned statements into evidence at trial.”¹⁰ I must say that this is a confusing and misleading assertion.

Potential violations of the Self-Incrimination Clause take place upon the admission at trial of compelled statements *or evidence* (physical or otherwise) *derived from* such statements. Until the Court told us otherwise in *Patane*, the same could have been plausibly said for physical evidence derived from unwarned but presumptively compelled statements—presumptively compelled because obtained in violation of the *Miranda* rules.

Indeed, during the *Patane* oral arguments, when the Chief Justice suggested that *Chavez v. Martinez* was dispositive because, adding up all the votes in the various opinions written in that case, there were six votes for the proposition “that the Constitution was not violated by [a] failure to give [the] *Miranda* warnings until [the statements] were offered in evidence,”¹¹ Deputy Solicitor General Michael Dreeben felt the need to point out that *Chavez v. Martinez* “alone does not decide this case”:

[T]he reason . . . is that the Court has, in instances of actual compulsion out of court, applied a derivative evidence suppression rule. That’s the rule that the Court adopted in *Counselman v. Hitchcock*, and it [has] followed [that rule] in its immunity line of cases where it has held that [in order to satisfy] the Fifth Amendment right against compelled self-incrimination, you need to suppress both the statement and the fruits.¹²

⁸ *Id.* at 2629.

⁹ See *Counselman v. Hitchcock*, 142 U.S. 547 (1892); see also Robert M. Pitler, “*The Fruit of the Poisonous Tree*” Revisited and Shepardized, 56 CAL. L. REV. 579, 619–20, 650 (1968). See generally the discussion in Kamisar, *supra* note 1, at 84–94.

¹⁰ *Patane*, 124 S. Ct. at 2629.

¹¹ Transcript of Oral Argument at 15, *United States v. Patane*, 124 S. Ct. 2620 (2004) (No. 02-1183).

¹² *Id.* at 15. At another point in the *Patane* oral arguments, see *id.* at 7, the Deputy Solicitor General conceded that if, in response to a grand jury subpoena, a person under threat of contempt of court revealed the existence of a gun, the weapon, as well as the statement, would *not* be admissible.

The *Patane* plurality opinion tells us—and it does so as many as four times—that “[t]he Self Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement.”¹³

This strikes me as a peculiarly worded comment. One who reads it quickly might think that the plurality is saying that the reach of the Self-Incrimination Clause does not extend to the “physical” or “nontestimonial” fruit of a confession. But a second look makes it clear that that is not what the plurality is saying. The operative phrase is not “the physical or nontestimonial fruit,” but “a voluntary statement.” And, of course, the Self-Incrimination Clause is not implicated by the admission into evidence of *anything* that is the fruit of “a voluntary statement.”

The question presented in *Patane* was whether, for purposes of the Fifth Amendment’s ban against the use of evidence derived from compelled statements (or, if one prefers, for purposes of the “poisoned fruit” doctrine), a statement obtained without giving the requisite warnings should be treated as a compelled statement or a voluntary one. Once you *assume* that statements obtained as a result of a failure to comply with the *Miranda* rules are “voluntary”—just as “voluntary” for derivative evidence or tainted fruit purposes, for example, as a statement *volunteered* by someone *not* in police custody—the analysis is over. You have *assumed the answer* to the question presented.

But why lump together (a) statements obtained without satisfying the *Miranda* rule and (b) what might be called purely or completely voluntary statements? Instead of putting the *Miranda*-deficient statements under the heading “Voluntary Statements,” why not classify them under the heading “Compelled, Coerced and Presumptively Compelled Statements”?

After all, at the very least a statement obtained from a custodial suspect who was not given the requisite *Miranda* warnings is presumptively coerced. As Justice Thomas himself observes in *Patane*, “[t]o protect against [the] danger” that “the possibility of coercion inherent in custodial interrogation” might cause “a suspect’s privilege against self-incrimination . . . [to] be violated,” “the *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution’s case in chief.”¹⁴

At one point, Justice Thomas informs us that “the Self-Incrimination Clause contains its own exclusionary rule” and that, unlike the Fourth Amendment exclusionary rule, “the Self-Incrimination Clause is self-executing.”¹⁵ The Fifth Amendment certainly does have its own “exclusionary rule.” Moreover, as noted

¹³ 124 S. Ct. at 2626 (first full paragraph); *see also id.* at 2626 (second full paragraph) (“The Clause cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements”); *id.* at 2624 (“the *Miranda* rule protects against violations of the Self-Incrimination Clause, which, in turn, is not implicated by the introduction at trial of physical evidence resulting from voluntary statements”); *id.* at 2630 (“Introduction of the nontestimonial fruit of a voluntary statement, such as respondent’s Glock, does not implicate the Self-Incrimination Clause”).

¹⁴ *Id.* at 2627.

¹⁵ *Id.* at 2628.

earlier,¹⁶ *Counselman v. Hitchcock* held that the Fifth Amendment protects a witness against the derivative use of his compelled testimony, thus invoking *what has come to be known as* the poisonous tree doctrine. (And *Counselman* did so decades before the doctrine had ever been utilized or articulated in a search and seizure case).¹⁷

Justice Thomas does not deny that the Self-Incrimination Clause has *its own* “fruits” doctrine. The Court has “repeatedly explained,” he observes, “that those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (*or evidence derived from their statements*) in any subsequent trial.”¹⁸

But then Thomas’s reasoning takes what strikes me as a strange turn: “This explicit textual protection,” he concludes, “supports a strong presumption *against* expanding the *Miranda* rule any further.”¹⁹

Why doesn’t what Justice Thomas calls the “explicit textual protection” of the Fifth Amendment (I take it he means that the “exclusionary rule” and the “fruits” doctrine are explicit in the text of the Fifth Amendment) cut *the other way*? Cut *in favor of excluding* evidence derived from a *Miranda* deficient statement?

Justice Thomas’s reasoning becomes still more puzzling when one recalls that he joined Justice Scalia’s dissenting opinion in *Dickerson*.²⁰ On that occasion, Justice Scalia maintained that unless one agreed with the *Elstad* Court that “*Miranda* violations are not constitutional violations”²¹ (a view Scalia and Thomas share, but the *Dickerson* majority rejected), it would be hard to explain why the “fruits’ doctrine” applies to the fruits of illegal searches but not to the fruits of

¹⁶ See *supra* text accompanying note 9.

¹⁷ As I have said elsewhere:

If, as the search and seizure cases seem to say, the poisonous tree doctrine is the corollary of an exclusionary rule, why shouldn’t the Fifth Amendment have its *own* poisonous tree doctrine? After all, the Fifth Amendment’s prohibition against compelled self-incrimination “*is* an exclusionary rule—and a constitutionally created one.” Moreover, “unlike the Fourth Amendment, the Fifth Amendment is directly concerned with the introduction of tainted evidence at trial; it is in fact the introduction of such evidence that constitutes the primary violation of the Amendment.”

Yale Kamisar, *On the “Fruits” of Miranda Violations, Coerced Confessions and Compelled Testimony*, 93 MICH. L. REV. 929, 987 (1995). The first quotation is from Alan M. Dershowitz & John Hart Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1214 (1971). The second quotation is from Note, *Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli*, 82 YALE L.J. 171, 178 (1972).

¹⁸ *Patane*, 124 S. Ct. at 2628 (quoting *Chavez v. Martinez*, 538 U.S. 760, 769 (2003)) (emphasis added).

¹⁹ *Patane*, 124 S. Ct. at 2628 (emphasis added).

²⁰ *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (striking down a federal statute purporting to abolish *Miranda* because “Congress may not legislatively supersede our decisions interpreting and applying the Constitution”).

²¹ *Id.* at 455 (Scalia, J., dissenting).

Miranda violations “since it is *not* clear on the face of the Fourth Amendment that evidence obtained in violation of that guarantee must be excluded from trial, whereas it *is* clear on the face of the Fifth Amendment that unconstitutionally compelled confessions cannot be used.”²²

Moving on to another point, Justice Thomas twice cites *United States v. Hubbell*²³ for the proposition that the word “witness” in the Self-Incrimination Clause “limits the relevant category of compelled incriminating communications to those that are ‘testimonial’ in character.”²⁴ Once again, this statement is misleading, or at least confusing. *Hubbell* does not say that in order for the Self-Incrimination Clause to be implicated the evidence *ultimately* acquired and offered in evidence must be “‘testimonial’ in character”—only that the *initial* act in the chain of events that led to the proffered evidence must be “testimonial” (as Mr. Patane’s statement revealing where his Glock pistol was hidden certainly was).²⁵

Justice Thomas’s reference to *Hubbell* is puzzling because that case cuts the other way. The opinion of the Court in *Hubbell* emphasizes that the fact that the evidence *ultimately* obtained and offered at the trial is “physical” or “nontestimonial” does not insulate it from the effects of a prior testimonial act, such as a coerced confession or compelled statement—the use of the physical evidence is still *the prohibited use of evidence derived from* the compelled statements.²⁶

²² *Id.* at 455; see also *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 222 (1968):

Unlike the search and seizure “fruits” doctrine, which was established to further the deterrent rationale underlying the exclusion of the primary evidence itself, “the fifth amendment exclusionary rule is an essential element of the constitutional right, not just a means of enforcing the right.”

²³ 530 U.S. 27 (2000).

²⁴ *Patane*, 124 S. Ct. at 2626 (quoting *Hubbell*, 530 U.S. at 34); see also *id.* at 2630 (quoting *Hubbell*, 530 U.S. at 34–35) (“[W]e have held that ‘[t]he word ‘witness’ in the constitutional text limits the’ scope of the Self-Incrimination Clause to testimonial evidence.”).

²⁵ As the *Hubbell* Court explained, the Fifth Amendment is not implicated, “even though the act may provide incriminating evidence, [when] a criminal suspect [is] compelled to put on a shirt, to provide a blood sample or handwriting exemplar, or to make a recording of his voice.” 530 U.S. at 35. These are all nontestimonial acts.

²⁶ See *Hubbell*, 530 U.S. at 37–39:

[A] half-century ago . . . we explained:

“The privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.” *Hoffman v. United States*, 341 U.S. 479, 486 (1951). Compelled testimony that communicates information that may “lead to incriminating evidence” is privileged even if the information is not inculpatory. It is the Fifth Amendment’s protection against the prosecutor’s use of incriminating information *derived directly or indirectly from* the compelled testimony of the respondent that is of primary relevance in this case. (emphasis added) [In *Kastigar v. United States*, 406 U.S. 441, 453 (1972), upholding a federal immunity statute,] we stressed the importance of [the statute’s] “explicit

At one point, Justice Thomas concedes that “the physical fruit of *actually coerced* statements” must be excluded,²⁷ but he does not seem to realize the full significance of that concession. It is not at all clear (and Justice Thomas does nothing to make it clear) why the specific language in the text of the Fifth Amendment constitutes an impenetrable barrier to the exclusion of physical evidence obtained from someone in Mr. Patane’s circumstances, but is inoperative when the issue presented is the admissibility of the same kind of evidence derived from statements obtained in violation of “the core protection” afforded by the Fifth Amendment.²⁸

Why do the words of the Fifth Amendment—“compell[ing]” a person “to be a witness against himself”—dictate the outcome in a case like *Patane* (according to the Thomas plurality), when the police fail to comply with a rule based on the Fifth Amendment and designed to implement it, but simply disappear when we deal with a more direct infringement of the Fifth Amendment?²⁹ In both instances we are talking about the same amendment, are we not?

proscription” of the use in any criminal case of “testimony or other information compelled under the order (or any information *directly or indirectly derived from* such testimony or other information).” We particularly emphasized the critical importance of protection against a future prosecution *based on knowledge and sources of information obtained from the compelled testimony*. *Id.* at 454.

Id.

²⁷ See *Patane*, 124 S. Ct. at 2630 (emphasis added). Although it is often said and widely assumed that this is the rule, so far as I can tell the admissibility of physical evidence derived from a coerced confession is an issue that, surprisingly, the Supreme Court has never explicitly addressed. For a discussion of various possible reasons why the Court has not done so, see Kamisar, *supra* note 17, at 990–1004.

²⁸ *Patane*, 124 S. Ct. at 2626 (plurality opinion); see also *Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (“If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as *police infringement of the Fifth Amendment itself*.”) (emphasis added).

²⁹ Early in the *Patane* oral arguments, there was an interesting exchange between Justice Scalia and the Solicitor General Office’s premier criminal procedure lawyer, Michael Dreeben. When Mr. Dreeben described *Miranda* as “a rule that implements the Fifth Amendment . . . by providing an extra level of protection for the core of the Fifth Amendment right,” Transcript of Oral Argument at 4, *United States v. Patane*, 124 S. Ct. 2620 (2004) (No. 02-1183), Justice Scalia asked him whether or not *Miranda* was “a Fifth Amendment right.” *Id.* Justice Scalia pressed Mr. Dreeben on this point, perhaps because he was annoyed that four years earlier, in *Dickerson v. United States*, 530 U.S. 428 (2000), the Solicitor General’s office had refused to defend the constitutionality of a federal statute purporting to abolish *Miranda* in federal cases.

In light of *Dickerson*, Mr. Dreeben had to say that *Miranda* was a constitutional right. In order to win his case, however, Dreeben had to argue that a violation of the *Miranda* rule was something significantly less than a violation of the core of the Self-Incrimination Clause itself. Mr. Dreeben conceded that if the pistol had been found as the result of a “core” violation of the Self-Incrimination Clause, it would have had to have been excluded. Not surprisingly, Dreeben told the Court that *Miranda* “is a constitutional right” but one “distinct from the right not to have one’s compelled statements used against oneself.” *Id.* at 5.

“The admission of such fruit [as Mr. Patane’s Glock pistol],” Justice Thomas assures us, “presents no risk that a defendant’s coerced statements (however defined) will be used against him at a criminal trial.”³⁰ In any event, he adds, “[t]he exclusion of unwarned statements . . . is a complete and sufficient remedy’ for any perceived *Miranda* violation.”³¹

Justice Thomas never explains, however, *why* the Glock pistol would be excluded if it were the fruit of a coerced confession (or compelled testimony). Nor does he explain *why* the exclusion of the coerced confession *without more* would not be “a complete and sufficient remedy” for a coerced confession that produced a Glock pistol.

Justice Thomas does assert that “statements taken without sufficient *Miranda* warnings are presumed to have been coerced . . . only when necessary to protect the privilege against self-incrimination.”³² But he does not tell us *why* it is necessary to exclude a Glock found as the result of a coerced confession (or compelled testimony) but not one found as the result of a failure to comply with the *Miranda* rules. Why doesn’t the rationale for the “fruit of the poisonous tree” doctrine apply in *both* instances?

Why would we exclude the physical fruits of coerced confessions—*or the coerced confessions themselves*, for that matter—when, checked with external evidence, statements contained in them are independently established as true? Because, as the Court told us in *Spano v. New York*,³³ the ban against the use of coerced confessions turns not only on their possible unreliability but on the notion that “the police must obey the law while enforcing the law.”³⁴

Mr. Dreeben went on to say that “*Miranda* addressed [] a situation in which it was extremely difficult for the courts to sort out whether a statement was coerced or not coerced, and [that *Miranda* was designed] to avoid the risk that an actually coerced statement would be used in evidence against the defendant, thus violating the core Fifth Amendment right.” *Id.* at 6.

³⁰ 124 S. Ct. at 2630.

³¹ *Id.*

³² *Id.*

³³ 360 U.S. 315, 320 (1959) (Warren, C.J.).

³⁴ *Id.* The most emphatic articulation of the view that untrustworthiness is not, or at least is no longer, the principal reason for excluding a coerced or involuntary confession is probably Justice Frankfurter’s opinion for a 7–2 majority in *Rogers v. Richmond*, 365 U.S. 534 (1961). In that case, in the course of overturning the conviction, Justice Frankfurter emphasized that “a legal standard which took into account the circumstances of [a confession’s] probable truth or falsity” did not satisfy due process. *Id.* at 543. Justice Frankfurter also pointed out:

[Convictions based on coerced confessions cannot stand] not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system [I]n many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement.

And why do we throw out the physical fruits of coerced confessions as well as the confessions themselves? Presumably because, as the Court told us in *Nardone v. United States*,³⁵ the first case to use the phrase “fruit of the poisonous tree,” to forbid the direct use of police methods but to put no curb on their indirect use would only “invite” the very methods we disapprove and want to discourage.

Doesn’t the Court care that when the police fail to administer the *Miranda* warnings to custodial suspects, they are disobeying the law while enforcing it? Doesn’t the Court care that when the prosecution is allowed to use the physical fruits of police failures to comply with the *Miranda* rules, they “invite” the police to turn their backs on *Miranda*?³⁶

At one point during the oral arguments in *Patane*, Justice Ginsburg asked the Deputy Solicitor General the following question:

This was a case where [the] crime that the police were after . . . was gun possession. It might be narcotics possession; it might be stolen goods. And in all those situations, are you saying that the constitutional rule is

Id. at 540–41.

As observed in 2 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 6.2(b), at 445 (2d ed. 1999), “*Rogers* thus made certain what had been strongly intimated in several earlier cases . . . , namely, that the due process exclusionary rule for confessions (in much the same way as the Fourth Amendment exclusionary rule for physical evidence) is also intended to deter improper police conduct.” See also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 23.02[B], at 442–43 (3d ed. 2002); WALTER V. SCHAEFER, THE SUSPECT AND SOCIETY: CRIMINAL PROCEDURE AND CONVERGING CONSTITUTIONAL DOCTRINES 6, 10–11 (1967) (the text of lectures delivered shortly before *Miranda* was handed down); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 16.02(3), at 407 (4th ed. 2000); Francis A. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 DEPAUL L. REV. 213, 235 (1959); Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957 (1997); Monrad G. Paulsen, *The Fourteenth Amendment and the Third Degree*, 6 STAN. L. REV. 411, 429 (1954); Roger J. Traynor, *The Devils of Due Process in Criminal Detection, Detention, and Trial*, 33 U. CHI. L. REV. 657, 666 (1966) (pre-*Miranda*).

³⁵ 308 U.S. 338, 341 (1939) (Frankfurter, J.).

³⁶ As David A. Wollin, *Policing the Police: Should Miranda Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, 845 (1992), has pointed out, “Expert interrogators have long recognized, and continue to instruct, that a confession is a primary source for determining the existence and whereabouts of the fruits of a crime, such as documents or weapons.” Shortly after *Miranda* was handed down and long before the Supreme Court had occasion to address the specific issue, Pitler, *supra* note 9, at 620, warned: “[I]f the police were permitted to utilize illegally obtained confessions for links and leads rather than being required to gather evidence independently, then the *Miranda* warnings would be of no value in protecting the privilege against self-incrimination.”

Consider, too, the comments of B. James George, Jr., *Fruits of the Poisonous Tree: What’s In—What’s Out, in A NEW LOOK AT CONFESSIONS: ESCOBEDO—THE SECOND ROUND* 121–22 (B. James George, Jr. ed., 1967) (transcript of conference held during the summer following the *Miranda* decision). Professor George noted that “what data there are suggest” that “obtain[ing] leads from a suspect on the basis of which they can discover real or demonstrative evidence, or identify prosecution witnesses . . . is usually more important to law enforcement” than “obtain[ing] statements that they can later present in court,” but indicated that this was a *reason for admitting* the fruits of *Miranda*-deficient statements, *not* excluding them.

that a police chief can say to his officers, go in and get [the suspect] to tell you where the narcotics are, where the gun is, where the stolen goods are? We don't worry about his statement, but we want the goods.³⁷

Deputy Solicitor General Dreeben's answer was "that is my position," but he did not think "it would be a prudent policy for law enforcement to adopt."³⁸ Why not? Because, Mr. Dreeben explained, many suspects waive their rights, and what if a suspect advised of his rights waives them and "offers up information that is incriminating [about] unanticipated crimes or provides leads to information that the police haven't previously anticipated"?³⁹ Secondly, by failing to administer the warnings the police "increase the likelihood that a later court . . . will conclude that this . . . is a case involving actual compulsion."⁴⁰

The second argument strikes me as quite weak. It takes a great deal more to establish that a confession is coerced than a mere failure to administer the *Miranda* warnings. The first argument is more substantial. Mr. Patane's interrogators did have *something* to lose by failing to give him the *Miranda* warnings. But it is highly unlikely that any member of the *Patane* majority would have changed his or her vote if the failure to satisfy the *Miranda* rule were such that the police had *nothing to lose* by refusing to comply with *Miranda*.

Consider, for example, a situation where the suspect has *invoked* his right to counsel, but the police continue to question him in order to retrieve the murder weapon or some other nontestimonial evidence.⁴¹ In this set of circumstances the police have *nothing to lose* by rejecting the request for counsel (they will lose any statement the suspect might make, but they would have lost any statement anyway if they had honored the suspect's request for counsel and immediately ceased all questioning) and *something to gain* (the use of physical evidence that the inadmissible statement might turn up). I do not deny that the Court could and *should* distinguish the hypothetical case from the *Patane* case.⁴² I am only saying that the present Court is highly unlikely to do so.

³⁷ Transcript of Oral Argument at 10–11, *United States v. Patane*, 124 S. Ct. 2620 (2004) (No. 02-1183).

³⁸ *Id.* at 11.

³⁹ *Id.* at 12.

⁴⁰ *Id.*

⁴¹ In the police training tape discussed in Kamisar, *supra* note 1, at 94, and quoted at considerable length in Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 189 (1998), the deputy district attorney tells police officers that when a "Mirandized" suspect invokes his rights they can go "outside *Miranda*," *i.e.*, continue to talk to him: "[H]e's invoked *Miranda* and you say, 'Well, I'd still like to find the evidence in the case.' So you go 'outside *Miranda*' . . . and then he tells you where the stuff is, we can go and get all that evidence." Weisselberg, *supra*, at 190.

⁴² The hypothetical case *should* be distinguished from *Patane* because rejecting a suspect's request for counsel is a more serious failure to comply with *Miranda*—and more likely to be a deliberate failure—than not giving a custodial suspect a full set of warnings. Moreover, excluding only the statement obtained by questioning someone who has asked for a lawyer, but not the physical

The *Patane* plurality does say at the outset that the question presented is “whether a failure to give a suspect the warnings prescribed by *Miranda* requires suppression of the physical fruits of the suspect’s unwarned but voluntary statements,”⁴³ but the main themes of the plurality opinion are that the Self-Incrimination Clause is not implicated by the admission of the physical fruit of a statement that is not actually compelled; violations of *Miranda* occur—or are “completed”—only upon the admission at trial of the *Miranda*-deficient statements; and the word “witness” in the text of the Self-Incrimination Clause limits the scope of the Clause to testimonial evidence.

“Unlike the plurality,” the concurring justices (Justice Kennedy, joined by Justice O’Connor) found it “unnecessary to decide whether the detective’s failure to give Patane the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself, or whether there is ‘anything to deter’ so long as the unwarned statements are not later introduced at trial.”⁴⁴ But the concurring justices do make plain their approval of *Oregon v. Elstad*,⁴⁵ which admitted a “second confession” or “successive confession” (one obtained after a suspect has been questioned in successive unwarned and warned phases and confesses during both phases).⁴⁶ And they also make clear their belief that the case for admitting the physical fruits of a *Miranda* failure is stronger than the case for admitting a second confession:

Here . . . the Government presents an even stronger case for admitting the evidence obtained as the result of Patane’s unwarned statement. Admission of nontestimonial physical fruits (the Glock in this case), even more so than the postwarning statements to the police in *Elstad* . . . does not run the risk of admitting into trial an accused’s coerced incriminating statements against himself. In light of the important probative value of reliable physical evidence, it is doubtful that exclusion can be justified by a deterrence rationale sensitive to both law enforcement interests and a suspect’s rights during an in-custody interrogation.⁴⁷

On the question whether, for “poisoned fruit” or “derivative evidence” purposes, failures to administer the *Miranda* warnings should be distinguished

evidence the statement produced, is a woefully weak sanction in a situation where the police have nothing to lose by continuing to question the suspect, but something to gain (the physical evidence).

⁴³ 124 S. Ct. at 2624.

⁴⁴ *Id.* at 2631.

⁴⁵ *See id.* at 2630–31 (discussing *Oregon v. Elstad*, 470 U.S. 298 (1985)).

⁴⁶ *See* the discussion in Kamisar, *supra* note 1, at 88–94.

⁴⁷ 124 S. Ct. at 2631 (Kennedy, J., concurring). *But see supra* text at notes 33–34 and authorities quoted and cited in note 34.

from failures to honor a suspect's assertion of his *Miranda* rights, the Court's "*Miranda* impeachment" cases are instructive.

In *Harris v. New York*,⁴⁸ the Burger Court struck its first blow at *Miranda*, ruling that statements preceded by defective warnings, and thus inadmissible to establish the prosecution's case-in-chief, could nevertheless be used to impeach the defendant's credibility if he chose to take the stand in his own defense. Four years later, the Court went a step further in *Oregon v. Hass*.⁴⁹

In *Hass*, after being advised of his rights, the defendant *asserted* them. The police refused to honor the defendant's request for a lawyer and continued to question him. The Court held that on these facts, too, the resulting statements could be used for impeachment purposes.

In *Hass*, the defense argued that, unlike the situation in the earlier *Harris* case, when a suspect asserts his rights the police have nothing to lose and something to gain (the use of statements for impeachment purposes) by continuing to question him; therefore, permitting the police to use the statements would take away any incentive for following *Miranda*. The state supreme court had found this argument convincing. So did the two dissenters (Justice Brennan, joined by Marshall, J.). But a 6–2 majority, per Justice Blackmun, was unmoved by "[t]his speculative possibility."⁵⁰ "[T]he balance was struck in *Harris*," maintained Blackmun, "and we are not disposed to change it now."⁵¹

II. MISSOURI v. SEIBERT

Although the prosecution prevailed in *Patane*, the evidence derived from a failure to comply with *Miranda*, a so-called second confession, was held inadmissible in *Missouri v. Seibert*⁵² (a companion case to *Patane*). The fact situation in *Seibert*, however, was quite extreme:

The officer involved had "resort[ed] to an interrogation technique he had been taught."⁵³ At the first questioning session he had made "a 'conscious decision' to withhold *Miranda* warnings"⁵⁴ and, after obtaining incriminating statements, had called a short recess (twenty minutes) before resuming the questioning. At the outset of the second session the officer did advise the suspect of her rights, and did obtain a waiver, but he then confronted the suspect with the statements she had made during the first session (when she had not been warned of her rights). Not

⁴⁸ 401 U.S. 222 (1971).

⁴⁹ 420 U.S. 714 (1975).

⁵⁰ *Id.* at 723.

⁵¹ *Id.*

⁵² 124 S. Ct. 2601 (2004).

⁵³ *Id.* at 2606.

⁵⁴ *Id.*

surprisingly, the suspect confessed again. The new statement was “‘largely a repeat of information . . . obtained’ prior to the warning.”⁵⁵

The failure to comply with *Miranda* was so deliberate and so flagrant that an 8–1 or 7–2 ruling in favor of the defense would not have been surprising. The fact that the vote on these extreme facts was 5–4 and that the derivative evidence was held inadmissible only because of Justice Kennedy’s somewhat grudging concurring opinion is significant evidence of the low state to which *Miranda* has fallen.

Although he concurred in the judgment, Justice Kennedy praised *Elstad*⁵⁶—which informed us that “a subsequent administration of *Miranda* warnings to a suspect who has given . . . [an] unwarned statement *ordinarily should suffice* to remove the conditions that precluded admission of the earlier statement”⁵⁷—and he left no doubt that in the typical “second confession” case he would admit the evidence.⁵⁸ At one point he maintained that “to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning . . . would be extravagant.”⁵⁹

Although he voted to exclude the second confession because the two-stage interrogation technique used in the case “undermines the *Miranda* warning and obscures its meaning,”⁶⁰ Justice Kennedy indicated that he might very well have voted the other way if one or more “curative measures” had been taken.⁶¹ He pointed out, for example, that “a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances.”⁶²

Although a future Court might be impressed with a two or three hour recess between the first and second questioning session, rather than a twenty-minute break, I am not at all sure that it would really make any difference. One might argue that during a longer recess the impact of the unwarned incriminating statement might “wear off.” But it strikes me that one could argue just as plausibly that during a longer recess the impact of the earlier statements might “sink in” and the suspect might become quite distressed about having become, or been made to be, the “deluded instrument of his own conviction.”⁶³ Nor is it plain to me that

⁵⁵ *Id.*; see also the discussion in Kamisar, *supra* note 1, at 92.

⁵⁶ See 124 S. Ct. at 2615, 2616.

⁵⁷ *Elstad*, 470 U.S. at 314 (emphasis added).

⁵⁸ See 124 S. Ct. at 2616.

⁵⁹ *Id.* at 2615.

⁶⁰ *Id.* at 2614.

⁶¹ See *id.* at 2616.

⁶² *Id.*

⁶³ See Pitler, *supra* note 9, at 618:

Miranda was predicated on the absence of prior unlawful police activity which would pressure the accused to waive his rights or cause the court to lose confidence in police warnings An “admissibility” warning by the police after an initial [unwarned]

replacing the officer who presided at the first questioning session with a new police officer would have much of an ameliorative effect.

I think it fairly clear from his concurring opinion, however, that if Ms. Seibert's interrogator had arranged for a two or three hour recess rather than a twenty-minute break, *and* the second questioning session had gotten under way with a new police officer in charge, *and* the new officer had been careful not to refer specifically to the prewarning statement, Justice Kennedy would have voted in favor of admitting the evidence. It remains to be seen whether, after *Seibert*, the police will continue to use a modified version of the two-step questioning technique, what "curative measures" they will adopt and how the courts will respond.

Justice Kennedy also pointed out that "[a]lternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient."⁶⁴ However, two decades ago, in *Elstad*, the Court rather peremptorily dismissed the suggestion that when an unwarned statement is obtained and the police resume questioning the suspect should be given, in addition to the standard *Miranda* warning, a supplementary warning that the earlier statement is not admissible (or at least that it may not be):

Such a requirement is neither practicable nor constitutionally necessary. In many cases, a breach of *Miranda* procedures may not be identified as such until long after full *Miranda* warnings are administered and a valid confession obtained. The standard *Miranda* warnings explicitly inform the suspect of his right to consult a lawyer before speaking. Police officers are ill-equipped to pinch-hit for counsel, construing the murky and difficult questions of when "custody" begins or whether a given unwarned statement will ultimately be held admissible.⁶⁵

confession, absent consultation with a lawyer, would have a negligible impact on the suspect. And the opportunity for [a second chance to obtain an admissible confession] would only serve to discourage compliance with *Miranda* [the first time in order] to facilitate procurement of a second confession.

Id.

⁶⁴ 124 S. Ct. at 2616. Justice Souter, author of the principal opinion in *Seibert*, was careful to note that:

[w]e do not hold that a formal addendum warning that a previous statement could not be used would be sufficient to change the character of the question-first procedure to the point of rendering an ensuing statement admissible, but its absence is clearly a factor that blunts the efficacy of the warnings and points to a continuing, not a new interrogation.

Seibert, 124 S. Ct. at 2612 n.7.

⁶⁵ 470 U.S. at 316–17. However, the Court never explicitly considered the possibility that if the police are "ill equipped" (or unwilling) to tell the person who has made an unwarned statement that that statement *may be* inadmissible or even that it is *unclear* whether the earlier statement is admissible, we should require them to let defense counsel do so.

Ironically, the occasion when the police are most likely to know that the unwarned statement obtained during the first questioning session is inadmissible is when they *deliberately* withheld the *Miranda* warnings during the first session. But if the police *really believed* (as they expect the rest of us to believe) that a fresh set of *Miranda* warnings, plus an additional warning explaining the likely inadmissibility of the earlier unwarned statement, would completely “cure” everything and restore the suspect to exactly the same position he would have been in had he never made the earlier unwarned statement, *what do the police gain by deliberately withholding the warnings in the first place* and giving the *Miranda* warnings and the supplementary warning later? Wouldn’t it be a good deal simpler just to give the appropriate warnings *in the first place*?

A final point about *Seibert*: The four dissenters (Justice O’Connor, joined by Chief Justice Rehnquist and Justices Scalia and Thomas) seem to say that if the suspect is unaware of the deliberate or flagrant nature of the police misconduct, the deliberate and flagrant nature is irrelevant.⁶⁶ But the issue in *Seibert* was *not* the extent to which the suspect was actually coerced or how much pain and suffering he experienced, but whether, considering the particular circumstances, it was necessary or appropriate to exclude the evidence derived from a failure to comply with *Miranda*. And in determining whether exclusion is necessary or appropriate, “the flagrancy of the police misconduct constitutes an important step in the calculus.”⁶⁷ This is so *whether or not* the victim of the police misconduct is fully aware of the magnitude of the misconduct.

Suppose, for example, that after a highly publicized murder the police “round up” 100 people, take them to the station house and question them. Some of the people unlawfully arrested may have no idea that anybody else was arrested and taken to the police station for the same crime—let alone that ninety-nine other people were “rounded up.” But that has, or at least should have, no bearing on the purposefulness and flagrancy of the police misconduct.

Similarly, the fact that Ms. Seibert was *unaware* that the officer had made a conscious decision to withhold the *Miranda* warnings during the first questioning session does not make the officer’s failure to give the warnings any less purposeful. Nor does the fact that Ms. Seibert failed to realize how she was being manipulated when the officer confronted her with the unwarned statement she had uttered earlier make the police tactic any less a flagrant failure to comply with *Miranda*.

When the officer *foresees* the challenged derivative evidence as a probable product of his *deliberate* failure to comply with *Miranda*, the exclusion of the derivative evidence is especially appropriate. Since the purpose of the *Miranda* exclusionary rule, as well as other exclusionary rules, is to discourage undesirable

⁶⁶ See 124 S. Ct. at 2617–18.

⁶⁷ United States v. Leon, 468 U.S. 897, 911 (1984); cf. Brown v. Illinois, 422 U.S. 590, 603–04 (1975) (“[I]n determining whether the confession is obtained by exploitation of an illegal arrest,” a number of factors are relevant, “particularly, the purpose and flagrancy of the official misconduct.”).

police conduct, “where that conduct is particularly offensive [as it was in *Seibert*,] the deterrence ought to be greater and, therefore, the scope of exclusion broader.”⁶⁸

III. SOME FINAL THOUGHTS

I have no doubt that if the case had come before the Supreme Court a short time after *Miranda* was decided, the Court would have thrown out the fruits of a *deliberate* failure to comply with *Miranda* whether or not the fruits were “testimonial.” Moreover, I have little doubt that if the case had arisen a short time after *Miranda*, and if the admissibility of a “second confession” were at issue, the Court would have excluded the confession *regardless of whether* the break between the first and second questioning session was twenty minutes, two hours, or four. Finally, I have little doubt that if the case had arisen a short time after *Miranda*, the Court would even have excluded the fruits of a negligent failure to comply with *Miranda* as well as a deliberate one.⁶⁹

However, as a Justice Department lawyer delicately put it during the oral arguments in *Patane*, “there are many things in the *Miranda* opinion that have not stood the test of later litigation in this Court.”⁷⁰

The heading of the *New York Times* article on the rulings in *Patane* and *Seibert* was that the Supreme Court had barred the “delayed *Miranda* warning tactic.”⁷¹ The lead paragraph informed us that the Court had “rejected a police interrogation tactic designed to induce suspects to give incriminating statements after purposely delaying *Miranda* warnings.”⁷² This is correct as far as it goes, but one taking a “wide angle view” of the two *Miranda* “poisoned fruit” cases might well have chosen a different heading and a different lead, such as:

“The Court barred the use of a particular interrogation technique designed to circumvent *Miranda*—deliberately delaying the giving of the now familiar

⁶⁸ Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136, 1150–51 (1967), quoted with approval in 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, CRIMINAL PROCEDURE § 9.3(c), at 348 (2d ed. 1999).

⁶⁹ Indeed, I said as much, and at some length, the year *Miranda* was handed down. See George, *supra* note 36, at 147–51 (transcript of conference held in the summer following the *Miranda* decision) (remarks of Yale Kamisar). But see remarks of B. James George, Jr., *id.* at 121–24.

⁷⁰ Transcript of Oral Argument at 8, *United States v. Patane*, 124 S. Ct. 2620 (2004) (No. 02-1183). The lawyer, Deputy Solicitor General Michael Dreeben, was responding to the following statement by Justice Ginsburg:

Miranda itself said, [that] unless [the requisite] warnings and waivers are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him, no evidence as a result of interrogation. That sounds like . . . a derivative evidence rule to me.

Id. at 7–8.

⁷¹ Linda Greenhouse, *Tactic of Delayed *Miranda* Warning Is Barred*, N.Y. TIMES, June 29, 2004, at A17.

⁷² *Id.*

warnings—but made it fairly clear that in the great bulk of cases the so-called ‘derivative evidence’ or ‘poisoned fruit’ doctrines will not prevent the police from getting around *Miranda*.”

First of all, it is plain that the Court will admit the “second confession” in cases where a police officer has not admitted, and it cannot otherwise be established, that he made a conscious decision to withhold the *Miranda* warnings. (This is essentially the *Elstad* case all over again.) And, as Judge Ebel, who wrote the lower court opinion in *Patane*, observed, “[e]ven in cases where the failure to administer *Miranda* warnings was calculated, obtaining evidence of such deliberate violations of *Miranda* often would be difficult or impossible.”⁷³

Second, I think it fairly clear from Justice Kennedy’s concurring opinion in *Seibert* (and we must keep in mind that Kennedy cast the decisive vote) that even when the police deliberately withhold the *Miranda* warnings, the derivative evidence might well be admissible if the police take certain “curative measures” (although the curative powers of these suggested measures seem quite suspect),⁷⁴ such as lengthening the break between the two questioning sessions or replacing the officer who conducted the first questioning session with another. (Any one curative step might suffice; the taking of *several* curative steps is quite likely to permit the use of the second confession).

It is unclear whether the police can escape *Seibert*’s proscription simply by being careful not to confront the Mirandized suspect with the unwarned statement she made earlier. But it is possible this one change from the *Seibert* facts might suffice. The plurality opinion cautions that “[w]e do not hold that a formal addendum warning that a previous statement could not be used would be sufficient . . . to the point of rendering an ensuing statement admissible.”⁷⁵ But concurring Justice Kennedy dwells on the fact that because the interrogating officer confronted the defendant with her earlier unwarned statements, the postwarning questioning session “resembled a cross-examination.”⁷⁶ Kennedy also observes that the officer’s reference to the prewarning statement “shows the temptations for abuse inherent in the two-step technique.”⁷⁷

An addendum warning that a previous statement may not be used may not suffice, but it will certainly help. An addendum warning plus one curative step might well be sufficient.

As for *Patane*, I believe the present Court would have let in the Glock pistol (or any other physical fruits of a failure to comply with *Miranda*) even if the officer had made a conscious decision to withhold the warnings. I think the most

⁷³ *Patane v. United States*, 304 F.3d 1013, 1029 (10th Cir. 2002), *rev’d*, 124 S. Ct. 2620 (2004).

⁷⁴ See *supra* text following note 62 for a discussion on the suspect nature of “curative measures.”

⁷⁵ *Seibert*, 124 S. Ct. at 2612 n.7.

⁷⁶ *Id.* at 2615.

⁷⁷ *Id.*

plausible reading (albeit a painful one) of Justice Thomas's plurality opinion and Justice Kennedy's concurring opinion is that *whether or not* the officer's failure to comply with the *Miranda* rule is deliberate, the physical fruits of a *Miranda*-deficient statement are always admissible.

Four years ago, in *Dickerson v. United States*, the Court reaffirmed (perhaps one should say revived) the constitutional status of *Miranda*.⁷⁸ But Chief Justice Rehnquist's opinion of the Court did not really explain how its holding could be reconciled with such cases as *Elstad*, which seemed to be based on the premise that *Miranda* was not a constitutional decision. Indeed, Professor (now Judge) Paul Cassell, who had been appointed by the Court to defend the federal statute, the validity of which was at issue in *Dickerson*, charged that the Court's failure to come to grips with cases like *Elstad* "leaves *Miranda* . . . incoherent."⁷⁹ And Cassell was not alone.⁸⁰

Chief Justice Rehnquist's opinion in *Dickerson* treated cases like *Elstad* very gingerly. He did so probably because the language in those cases was very difficult to reconcile with the holding in *Dickerson*, yet the Chief Justice wanted *Elstad* and other cases that had carved out exceptions to *Miranda* to remain in place.⁸¹ But to say that *Dickerson* relied on cases like *Elstad* (as does the plurality

⁷⁸ 530 U.S. 428 (2000).

⁷⁹ Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in Dickerson*, 99 MICH. L. REV. 898, 901 (2001). Continued Cassell:

Why can the "fruits" of *Miranda* violations be used against a defendant? The traditional rule excludes fruits of, for example, unconstitutional searches. In *Oregon v. Elstad*, the Court said very specifically that the reason for not following the Fourth Amendment rule in the *Miranda* context was that "a simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." The majority in *Dickerson* viewed these statements not as "prov[ing] that *Miranda* is a nonconstitutional decision" but rather that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." Again, in its haste to dispose of the case, the Court did not tarry to explain the difference.

Id. at 901–02.

⁸⁰ See Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Miranda, Dickerson, and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 33 (2001) (asserting that *Dickerson* neither repudiated *Miranda* nor the cases viewing *Miranda*'s requirements as not rights protected by the Constitution nor reconciled the two lines of precedent); Yale Kamisar, *Foreword: From Miranda to § 3501 to Dickerson to . . .*, 99 MICH. L. REV. 879, 896 n.75 (2001) ("the Chief Justice made a feeble attempt to reconcile *Elstad* with the 'constitutionalized' *Miranda* doctrine"); Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1071, 1075 (2002) (the *Dickerson* Court "squandered an opportunity to rationalize contradictory case law regarding *Miranda*'s exceptions" and its attempt to explain why the "fruits doctrine developed in Fourth Amendment cases does not apply to *Miranda* violations . . . comes dangerously close to being a non sequitur"); David A. Strauss, *Miranda, the Constitution, and Congress*, 99 MICH. L. REV. 958 (2001) ("[i]t is not clear that [*Dickerson*] ever really answered" such central questions as "why has the Supreme Court repeatedly said that the rights created by *Miranda* are 'not themselves rights protected by the Constitution?'").

⁸¹ See Kamisar, *supra* note 80, at 893–94.

opinion in *Patane*)⁸² or that *Dickerson* cited cases such as *Elstad* “in support” (as does the concurring opinion in *Patane*)⁸³ is surely to inflate what the *Dickerson* opinion actually said.

Dickerson left precedents like *Elstad* undisturbed even though they seem to be based on the wrong premise (in *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). But in *Patane* five members of the Court seem to be telling us that cases like *Elstad* rested on *the right* premise after all (*Miranda* really was a subconstitutional decision).

Dickerson spared *Miranda* the death penalty. But now that *Patane* is on the books, it is not at all clear what else was accomplished by the reaffirmation (or revivification) of *Miranda*’s constitutional status.⁸⁴

Miranda dodged a bullet in *Dickerson*.⁸⁵ Four years later, however, *Miranda* took a bullet in the shoulder (*Patane*) and barely missed another one that would have put it on life support.

Patane corroborates Donald Dripps’ comment that the *Dickerson* opinion was “intentionally written to say less rather than more, for the sake of achieving a strong majority on the *narrow question* of *Miranda*’s continued vitality.”⁸⁶ As *Dickerson* demonstrates, a large majority is unwilling to overrule *Miranda* (or to let Congress do so). As *Patane* makes plain, however, a smaller majority is unwilling to take *Miranda* very seriously.

⁸² See 124 S. Ct. at 2628 (“The [*Dickerson*] Court’s reliance on our *Miranda* precedents, including both *Tucker* and *Elstad*, further demonstrates the continuing validity of those decisions.”).

⁸³ See *id.* at 2631 (“I agree with the plurality that *Dickerson* did not undermine [such precedents as *Elstad*] and, in fact, cited them in support.”).

⁸⁴ The anomalous thing about the three-person *Patane* plurality opinion is that Justice Thomas, author of the opinion, and Justice Scalia, who joined the opinion, were the two dissenters in *Dickerson*. As pointed out in *The Supreme Court, 2003 Term*, 118 HARV. L. REV. 296, 301 (2004) (an excellent note that did not come to my attention until my article was in press):

The [*Patane*] plurality opinion characterized *Miranda* as a constitutionally based prophylactic rule. This representation is somewhat surprising because Justice Scalia and Thomas, when dissenting in *Dickerson*, had explicitly noted that the Court failed to embrace this approach despite the strenuous arguments made for it [in *Dickerson*] by both the petitioner and the United States. In fact, although the dissenters recognized that this approach might have rendered *Miranda* jurisprudence coherent, they rejoiced in the Court’s failure to rely on it because, believing that such prophylaxis was an “immense and frightening antidemocratic power [that] does not exist,” they suggested that “incoherence [might be] the lesser evil.”

⁸⁵ But see William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 976 (2001): “*Dickerson* represents not a bullet dodged but an opportunity missed. As things stand now, from almost any plausible set of premises, police interrogation is badly regulated. Because of *Dickerson*, it will continue to be badly regulated for a long time to come.”

⁸⁶ Dripps, *supra* note 80, at 3 (emphasis added).