No. 99-5525

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES THOMAS DICKERSON
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF ARIZONA VOICES FOR VICTIMS, CRIME VICTIMS UNITED, OREGON, PENNSYLVANIA COALITION AGAINST RAPE AS *AMICI CURIAE* URGING AFFIRMANCE

Filed March 9, 2000

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE**

Arizona Voices for Victims (AVV) is a non-profit organization dedicated to ensuring that crime victims receive their rights to justice, due process and dignified treatment throughout the criminal justice process. To this end, AVV has five areas of activity: educational programs; crisis response training programs; legal representation and referral programs; judicial accountability program; and data research project.

Crime Victims United, Oregon, (CVU) is a private non-profit organization dedicated to promoting respect and dignity for crime victims in the criminal process. CVU has been a force for change for victims in criminal procedure since 1980 enacting state constitutional crime victim's rights and laws in Oregon.

The Pennsylvania Coalition Against Rape (PCAR) is a non-profit organization established in 1975 to provide services to all victims of sexual violence. PCAR includes an administrative office in central Pennsylvania and a network of 52 regional centers that provide services in every county in Pennsylvania.

SUMMARY OF ARGUMENT

In the last thirty-five (35) years, there have been dramatic and pivotal changes to the fundamental building blocks underlying the *Miranda* decision. These changes inexorably lead to the conclusion that *Miranda's* strict exclusionary rule needs revision.

Since *Miranda* was handed down, the law has changed dramatically to acknowledge the compelling interests of crime victims in the criminal justice process. State constitutions, state and federal statutes, and court

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* *Amici Curiae* files this brief with consent of both parties. No counsel for any party authored in whole or in part. No one other than *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

opinions (including the opinions of this Court) now recognize the vital role of crime victims. It is now well-accepted that crime victims have an interest in ensuring that their assailants are held accountable for their criminal behavior. Strict application of *Miranda's* exclusionary rule, however, does not comport with an enlightened criminal justice system that ensures justice for both the criminal and the victim. The *Miranda* Court failed to take into account these vital interests when it established its strict exclusionary rule. Subsequent empirical evidence establishes that the *Miranda* Court clearly mis-gauged the costs and benefits of its prophylactic scheme. This empirical evidence reveals that the human costs of *Miranda* far outweigh its benefits. *Miranda's* sweeping scope is also inconsistent with this Court's recent opinions concerning the Constitution's federalism limits. This Court has established clear boundaries for federal government remedial schemes that prohibit otherwise lawful behavior by the States. This constitutional law evolution concerning federal remedial schemes calls for modification of the *Miranda* exclusionary rule.

Any of these substantial changes taken alone is sufficient for this Court to revisit *Miranda*. When viewed together, these changes compel the conclusion that the *Miranda* prophylactic remedial scheme should no longer be imposed on the States. Likewise, this Court should uphold 18 U.S.C. § 3501 as appropriate federal legislation that ensures voluntary statements without needlessly harming the interests of crime victims.

ARGUMENT

Since *Miranda v. Arizona*, 384 U.S. 436 (1966), was handed down, there have been substantial societal and legal changes that support reconsideration of *Miranda's* inflexible exclusionary rule. The law has changed dramatically to acknowledge the compelling interests of crime victims in the criminal justice process. The *Miranda* Court failed to consider the crime victim's vital interest in

ensuring that a criminal defendant is held accountable for his crimes and in limiting the needless harm a victim suffers when an assailant is freed for technical reasons. In addition, information obtained post-*Miranda* shows that the *Miranda* Court mis-gauged the adverse consequences of such a sweeping prophylactic scheme. For these reasons, States and Congress should be free to implement other schemes that ensure voluntary statements without allowing the criminal justice system to inflict needless harm on crime victims.

18 U.S.C. § 3501 insures that voluntary confessions are admitted in evidence, thus preventing the possible escape from justice of confessed, dangerous criminals. This is of particular concern to crime victims, who have a legitimate interest not only in avoiding depredations at the hands of criminals but also, more fundamentally, in seeing reliable evidence admitted in criminal trials.

A. Miranda Imposes Substantial and Unacceptable Costs on Crime Victims.

This Court has instructed that "[i]n the administration of criminal justice, courts may not ignore the concerns of victims." *Morris v. Slappy*, 461 U.S. 1, 14 (1983). This does not mean, of course, that the interests of victims can serve to excuse violating the constitutional rights of criminal defendants. *See id.* at 14. This case, however, presents no question of a defendant's "constitutional" rights. Petitioner Dickerson's incriminating statements were voluntary. Thus, the only issue before the Court concerns suppression of an admittedly voluntary statement because of a deviation from *Miranda's* prophylactic rule.[1]

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[1] Police deviations from *Miranda* are not violations of the Constitution. *Miranda* rights are "not themselves protected by the Constitution" and are "not constitutional in character." *Withrow v. Williams*, 507 U.S. 689, 690-91 (1993). Instead, a

1. The Cost of Re-Victimization.

Miranda's exclusionary rule is particularly pernicious from the perspective of crime victims. *Miranda* excludes an unwarned statement from trial even when it is clearly voluntary. Such a requirement is especially harmful in cases where the voluntary statement can be essential evidence of guilt. In such cases, *Miranda* frees a guilty offender simply because the police mistakenly failed to abide by *Miranda's* prophylactic requirements.

Crime victims expect that the criminal justice system will accurately and fairly determine whether an offender is guilty of the crime. They hope that this system will impose a prompt and just punishment on the convicted criminal. When, however, the criminal justice system strays from this fundamental mission – and allows factually guilty criminals to escape punishment for technical reasons – it deprives crime victims of the justice that they rightfully believe they are due. *See Richmond Newspapers v. Virginia*, 448 U.S. 571 (1980) (plurality opinion) ("Civilized societies withdraw from both the victim and the vigilante the enforcement of criminal laws, but they cannot erase from peoples consciousness the fundamental, natural yearning to see justice done – or even the urge for retribution."). *Miranda* thus conveys the unfortunate message that a victim's need for justice, or even urge for retribution, through legitimate means, are less worthy than the technical rules protecting the suspect. And in the process, the technical rules re-victimize them by devaluing the criminal act and denying dignity and respect to the victim's harm.

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deviation from *Miranda* is merely a deviation from court-created "prophylactic" rules set forth as "a series of recommended procedural safeguards." *Davis v. United States*, 512 U.S. 452, 457-58 (1994) (*quoting Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974)). "[A] simple failure to administer *Miranda* warnings is not in itself a violation of the Fifth Amendment." *Oregon v. Elstad*, 470 U.S. 298, 306 n.1 (1985).

In recognizing re-victimization resulting from *Miranda* the Department of Justice has explained:

> *Miranda's* rules are completely rigid and formal, in the sense that no showing, however strong, that a suspect's statements were freely given and truthful is deemed sufficient to excuse noncompliance. Cases accordingly arise in which perpetrators of the most serious crimes secure the exclusion of their admissions or the reversal of their convictions on the basis of technical violation of *Miranda* or related decisions that do not cast the slightest doubt on their guilt. This can result in the freeing of known criminals or the prolongation of the anguish of crime victims through years of additional litigation. The perception of such cases by members of the public must be that the system has become deranged, treating their lives, their security and their deepest sensibilities as pawns in an inscrutable game.

U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (1986), *reprinted in* 33 MICH. J.L. REFORM. 437, 545 (1989). *See also*, Brief of the United States at 50. ("There is no doubt that the public pays a heavy price if technical violations of *Miranda* result in suppression of otherwise probative evidence and non-prosecution of acquittal of felons ensues.")

In recent cases, this Court has demonstrated a sensitivity to the trauma the criminal justice system can inflict on crime victims. In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court acknowledged that re-victimization occurs when the criminal justice process fails to punish the guilty. This Court stated:

> Only with real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing that the moral judgment will be carried out. To

> unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' an interest shared by the state and victims of crime alike.

Id. at 550. *See also, Morris v. Slappy*, 461 U.S. 1, 14-15, (1982) (recognizing that the rights of a criminal defendant should not be applied in a manner that unnecessarily harms the crime victim and criticizing the lower court for failing "to take into account the interest of the (rape) victim . . . in not undergoing the ordeal of yet a third trial in the case . . . .").

The victims in the *Calderon* and *Morris* contexts were genuinely distressed by seemingly endless court procedures and delays in the justice process. While delayed justice is unacceptable, the complete denial of justice – because the guilty offender was not tried or convicted – traumatizes victims even more. Not only does the process itself lack concern about victim harm, it can also deprive the victim of a sense of personal security that comes from knowing that the assailant is imprisoned and unable to hurt them again.[2] Likewise, the victims are deprived of sentencing alternatives – such as restitution or restorative justice – that are designed to compensate victims or encourage remorse by the offender.

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[2] Victims' concern about re-victimization by same offender has prompted many states to enact legislation requiring *notice* to the victim whenever the offender is released from pretrial detention or prison. NATIONAL VICTIM CENTER, THE 1996 VICTIMS' RIGHTS SOURCEBOOK: A COMPILATION AND COMPARISON OF VICTIM'S RIGHTS LAWS, Table 3-B, (Listing 35 states providing notice of pretrial release and 40 states providing notice of final release from prison as of 1995). Likewise, victims are often granted the specific right to *be heard* in opposition to pretrial or prison release. *See id.*, Tables 9A and 9B.

2. The Cost of Future Victimization.

The loss of reliable confessions results in additional crime victims, who are victimized by released suspects who are factually guilty. Twenty-three percent of victims reported crime to prevent further crimes by the offender against themselves or third persons. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998, 189, TABLE 3.31.

There are no available statistics for recidivism by suspects released pursuant to *Miranda*. However, there is high probability that a person committing a serious offense and released will offend again. Department of Justice studies establish:

> (1) One in three violent offenders released from prison were rearrested within 3 years for another violent crime. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983, 2.
>
> (2) Of the 108,580 persons released from prisons in 11 states in 1983, 68,000 were rearrested and charged with more than 326,000 new felonies and serious misdemeanors, including approximately 50,000 violent offenses. *Id.*, at 1.
>
> (3) In 1996, recidivists accounted for 59% of jail inmates. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES, 1996, 6.
>
> (4) Approximately twelve percent of all prison inmates were violent recidivists who were presently incarcerated for a violent offense *and* had committed a violent offense in the past. *Id.*, 6, Table 8.
>
> (5) Among prison inmates previously incarcerated, 91% had been in jail or prison for another offense within 5 years before their current offense. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE PRISON INMATES, 1991, 11.

Clearly, release of an offender due to the operation of *Miranda* results in a high probability that there will be future victimization. Although shocking, statistics fail to adequately convey the tremendous human cost involved in "the acquittal and the nonprosecution of . . . dangerous felons [which] enables them to continue their depredations upon our citizens." *Davis v. United States*, 512 U.S. 452, 465 (1994) (Scalia, J., concurring). *See also* Gerald M. Caplan, *Miranda Revisited*, 93 YALE L.J. 1375, 1384-85 (1984) (Statistical studies "reduce crime to something remote and abstract, a string of numbers, an event that one reads about in the newspapers, something that happens in another part of town. There is no hint of rape as a nightmare come alive, or robbery as a ruinous matter.").

B. Miranda's Cost/Benefit Analysis is Outdated and Flawed.

In the realm of court-created safeguards rather than constitutional rights, the interests of crime victims must be considered. The *Miranda* regime rests on a cost/benefit calculation that evaluates competing concerns. *See Moran v. Burbine*, 475 U.S. 412, 434 n.4 (1986) (describing *Miranda* rules as "a carefully crafted balance designed to fully protect *both* the defendant's and society's interests. . . . "). Today, this cost/benefit analysis necessarily requires consideration of the interests of crime victims. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509 (1984) (recognizing that "society's interests" include the interests of victims, since both "the victims and the community" have an interest "in knowing that offenders are being brought to account for their criminal conduct").

1. Miranda Failed to Give Appropriate Weight to the Interest of Crime Victims.

The *Miranda* decision itself reflects an outdated and inadequate understanding for the interests of crime victims in the criminal justice process. Victims were absent from the development of *Miranda* doctrine. Crime victims

make no substantive appearance in the *Miranda* majority opinion itself.

The *Miranda* rule gave little room for consideration of victims. For example, the Court announced that it would "not *pause* to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda*, 384 U.S. at 468 (emphasis added). In announcing its unwillingness to investigate actual knowledge of rights, the Court turned a blind eye to the vital interests of victims in having such a determination.

Even the dissenting opinion of Justice White in *Miranda* fell short of a modern assessment of victim harm caused by the criminal process. In accurately predicting the increased future victimization of citizens as a natural result of the *Miranda* exclusionary rule, the dissent urged, "there will be not be a gain, but a loss in human dignity." 384 U.S. at 542. This observation remains true today. But Justice White's assessment of harm to human dignity (because of future crime caused by suspects released because of *Miranda* exclusions), did not acknowledge the re-victimization of initial victims caused by the technical rules that jeopardize the truth-determining process. Thus, *Miranda* imposes substantial and unacceptable costs on both the initial victim (whose cases become unprosecuteable because of exclusion of statements) and future victims (who are harmed by criminals released because of *Miranda*). These costs were not given appropriate consideration by the *Miranda* Court.

In later opinions, the Court has not substantially altered the one-sided balance struck in *Miranda*. The basic *Miranda* rules have remained in place, and to this day the *Miranda* doctrine does not "pause" to consider the individual circumstances of the case. Indeed, the Court has later described the *Miranda* presumption as "irrebuttable," *Oregon v. Elstad*, 470 U.S. 298, 307 (1985), meaning that the interests of crime victims in proving that confession was truly voluntary cannot ever be taken in account.

2. Miranda's Cost/Benefit Analysis Is Inconsistent with Currently Accepted Views of Victims' Interests.

Since the 1966 *Miranda* decision reached its one-sided assessment, there has been a revolutionary change in the legal recognition of crime victim's interests. At the time of *Miranda*, the criminal justice process was generally conceived of as a contest between two competing interests: those of the state in efficient prosecution and those of the defendant in fair adjudication. Perhaps the most significant theoretical description of the process was Professor Herbert Packer's identification of this two value system in the criminal justice process: the "Crime Control Model" and the "Due Process Model." *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-53 (1968).

Today there is a growing recognition that the two models are outdated and that they must be supplemented by a third model of criminal process that recognizes crime victims. *See* Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289. Since *Miranda*, thirty-two states have chiseled victims' rights into their respective constitutions.[3] The

[3] *See* ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; CONN. CONST. art. I, § 8(b); FLA. CONST. art. I, § 16b; IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. XV, § 15; LA. CONST. art. I, § 25; MD. CONST. art. XCVII; MICH. CONST. art. I, § 24; MISS. CONST. art. III, § 26A; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8(2); N.J. CONST. art. I, § 22; N.M. CONST. art. II, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, § 10a; OKLA. CONST. art. II, § 34; OR. CONST. art. I, § 43; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TEX. CONST. art I, § 30; UTAH CONST. art I, § 28; VA. CONST. art. I, § 8A; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m; 42 U.S.C. § 10606 (1994); ALA. CODE §§ 15-23-60 to -84 (1995); ALASKA STAT. § 12.61.010 (Lexis 1998); ARIZ. REV. STAT. ANN. §§ 13-4401 to -4439 (West Supp. 1998); ARK. CODE ANN. §§ 16-90-1101 to -1115 (Michie Supp. 1997); CAL. PENAL CODE §§ 679, 1102.6 (West 1999 & Supp. 1999); COLO. REV. STAT. § 24-4.1-302.5 (1998); CONN. GEN. STAT. ANN. § 54-203 (West Supp. 1999); DEL. CODE ANN. §§ 11-9401 to -9419 (1995 & Supp. 1998); FLA. STAT. ANN. § 960.001 (West Supp. 1999); GA. CODE ANN. §§ 17-17-1 to -15 (Michie 1997 & Supp. 1998); HAW. REV. STAT. ANN. § 801D-1 (Lexis 1999); IDAHO CODE § 19-5306 (Michie Supp. 1998); 725 ILL. COMP. STAT. ANN. 120/2 (West 1992); IND. CODE ANN. § 33-14-10-3 (Lexis 1998); IOWA CODE ANN. §§ 915.1-.100 (West Supp. 1999); KAN. STAT. ANN. § 74-7333 (Supp. 1998); KY. REV. STAT. ANN. § 421.500 (Lexis 1998); LA. REV. STAT. ANN. § 46:1842 (West Supp. 1998); ME. REV. STAT. ANN. tit. 15, § 6101 (West Supp. 1998); MD. CODE ANN. § 27-760 (Lexis Supp. 1998); MASS. ANN. LAWS ch. 258B, §§ 1-13 (Lexis 1992 & Supp. 1998); MICH. COMP. LAW ANN. §§ 28.1287(751)-(911) (Lexis 1996 & Supp. 1999); MINN. STAT. ANN. §§ 611A.01-.78 (West 1987 & Supp. 1999); MISS. CODE ANN. §§ 99-43-1 to -49 (Supp. 1998); MO. ANN. STAT. § 595.209 (West Supp. 1999); MONT. CODE ANN. §§ 46-24-101 to -213 (1997); NEB. REV. STAT. ANN. §§ 81-1848 to -1850 (Michie 1995); NEV. REV. STAT. ANN. §§ 178.569-.5698 (Michie 1997 & Supp. 1997); N.H. REV. STAT. ANN. § 21-M:8-k (Lexis Supp. 1998); N.J. STAT. ANN. § 52:4B-36 (West Supp. 1999); N.M. STAT. ANN. § 31-26-2 (Michie 1994); N.Y. EXEC. LAW §§ 640-649 (McKinney 1996); N.C. GEN. STAT. § 15A-825 (1997); N.D. CENT. CODE § 12.1-34-02 (1997); OHIO REV. CODE ANN. § 2930.01 (Anderson 1996); OKLA. STAT. ANN. tit. 19 § 215.33 (West Supp. 1999); OR. REV. STAT. § 147.410 (1991); R.I. GEN. LAWS § 12-28-2 (1994); S.C. CODE ANN. §§ 16-3-1110, -1505 (West Supp. 1998); S.D. CODIFIED LAWS §§ 23A-28C-1 to -5 (Lexis 1998); TENN. CODE ANN. § 40-38-102 (Michie 1997); TEX. CRIM. P. CODE ANN. §§ 56.01, .09 (West Supp. 1999); UTAH CODE ANN. § 77-37-1 (1995); VT. STAT. ANN. tit. 13, § 5303 (1998); VA. CODE ANN. § 19.2-11.01 (Michie Supp. 1998); WASH. REV. CODE ANN. §§ 7.69.010, .030 (West 1992 & Supp. 1999); W. VA. CODE § 61-11A-1 (1992); WIS. STAT. ANN. § 950.01 (West 1996); WYO. STAT. ANN. § 1-40-203 (Michie 1997).

federal government and all the States have enacted numerous statutory protections for victims' interests.[4]

[4] *Id. See generally* DOUGLAS E. BELOOF, VICTIMS IN CRIMINAL PROCEDURE *passim* (1999); NATIONAL VICTIM CENTER, THE 1996 VICTIM'S RIGHTS SOURCEBOOK: A COMPILATION AND COMPARISON OF VICTIMS RIGHTS LAWS *passim* (1996).

The recognition of victims' interests across the country encompasses at least three important concepts: fairness to the victim, respect for the victim, and dignity of the victim. For example, at least twenty states have constitutionally protected a crime victim's interest in being treated with dignity and at least eighteen states have constitutionally recognized a victim's interest in being treated fairly. Beloof, *supra*, 1999 UTAH L. REV. at 328-29. *See also Payne v. Tennessee*, 501 U.S. 808, 834 (Scalia, J., concurring) (noting the development of "a public sense of justice keen enough that it has found voice in a nationwide 'victim's rights' movement"). Victim rights of participation, privacy and protection exist in every procedural stage of the criminal justice process, from the investigative stage through parole hearings.[5]

Since *Miranda*, this Court's opinions, too, have given decidedly greater attention to the interests of crime victims. *See Calderon v. Thompson*, 523 U.S. 538 (1998) (holding that the harm to the victim caused by the criminal justice process had to be considered in evaluating the criminal defendant's constitutional claim); *Payne v. Tennessee*, 501 U.S. 808, 823, 828-30 (1991) (recognizing the victim as a unique individual human being and upholding the use of victim impact testimony in capital sentencing proceedings, recognizing that such testimony "serves entirely legitimate purposes," and rejecting earlier cases that "turn[ed] the victim into a faceless stranger at the penalty phase of a capital trial . . . .") (quoting with approval *South Carolina v. Gathers*, 490 U.S. 821 (1989)) (O'Connor dissenting); *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (holding that "[i]n the administration of criminal justice, courts may not ignore the concerns of victims . . . .").

As these opinions plainly demonstrate, close attention to victims' legitimate concerns in the development of rules of criminal procedure is now part and parcel of the judicial process. This significant change in law acknowledging

[5] *Id.* n.5, *supra* n.4.

victim harm means that *Miranda's* failure to give even passing attention to victims' interests is anachronistic.

3. Limiting Miranda's Sweeping Scope Will Enhance Public Confidence in the Criminal Justice System.

Contrary to claims of those seeking to invalidate Section 3501, *see e.g.* Brief of United States at 38, a decision which restricts *Miranda* sweeping exclusionary rule will not adversely unsettle public expectations. Public confidence is surely enhanced when crime victims' interests are finally considered. In the modern era, the public expectations are that victim dignity will be weighed in forming criminal procedure.

There is strong public support for crime victim rights and laws. For example, since *Miranda*, all 50 jurisdictions have provided for some procedure for victim impact statements at sentencing. NATIONAL VICTIM CENTER, THE 1996 VICTIM'S RIGHTS SOURCEBOOK: A COMPILATION OF VICTIM'S RIGHTS LAWS, TABLES 9A, 9B. Additionally, the history of electoral support of State Victim's Rights Constitutional Amendments, all passed since 1982, is illustrative of the strong public support of victim interests in the criminal process. In popular referendums the percentage of favorable votes cast was: Al. 80%; Ak. 87%; Az. 58%; Ca. 56%; Co. 86%; Ct. 78%; Fl. 90%; Id. 79%; Ill. 77% ; Ind. 89%; Ks. 84%; La. 69%; Md. 92%; Mi. 84%; Ms 93%; Mo. 84%; Ma. 71%; Neb. 78%; Nv. 74%; N.J. 85%; N. M. 68%; N.C. 78%; Oh. 77%; Ok. 91%; S.C. 89%; Tn. 89%; Tx. 73%; Ut. 68%; Va. 84%; Wa. 78%; Ws. 84%. NATIONAL VICTIM CENTER, CHART, VICTIMS RIGHTS CONSTITUTIONAL AMENDMENTS: A NUMERICAL OVERVIEW OF ELECTIONS (1999). In contrast, the public overall holds a low opinion of the criminal justice system. Thirty-seven percent (37%) of the public has very little or no confidence in the criminal justice process. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998, 104, TABLE 2.12.

If anything, the weighing of victims' interests in the Court's reconsideration of *Miranda* will bolster public confidence in the criminal justice system. As stated by the U.S. Justice Department: "*Miranda* is damaging to public confidence in the law, and can result in gross injustices to crime victims." U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRETRIAL INTERROGATION (1986) (*reprinted at* 22 UNIV. MICH. J. L. REFORM 437, 545 (1989)). Because of the popular support of laws recognizing victim dignity, limiting *Miranda's* harsh application based on consideration of victim dignity will be received with public acclaim rather than public derision. It is clear that the public desires consideration of victim interests as part of the legal culture. The deluge of modern victim laws reveals that the public does not accept a criminal justice process that devalues victim dignity. *See* Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289, *passim*.

4. Post-Miranda Empirical Evidence Establishes the Magnitude of Harm to Victims and Law Enforcement.

Post-*Miranda* empirical studies now reveal the devastation reaped by the *Miranda* exclusionary rule. The Court in *Miranda* promised that "[o]ur decision is not intended to hamper the traditional function of police officers in investigating crime." *Miranda*, 384 U.S. at 477. In more recent opinions, the Court appears to have proceeded on the premise that the *Miranda* rules have not harmed law enforcement. *See, e.g., Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring) ("law enforcement practices have adjusted to [*Miranda's*] strictures"). This premise is incorrect. The thirty-five years of experience with *Miranda* has lead to empirical studies that establish that the exclusion of voluntary confessions harms crime victims. Of course, none of this empirical evidence on *Miranda's* effects was available to the Court when it

decided *Miranda*. Nor has any of it previously been presented to this Court.

a. The "Before and After" Studies.

In the immediate wake of *Miranda*, researchers conducted a series of studies to measure the effects of the decision. The great bulk of these studies clearly demonstrated that *Miranda* made it much more difficult for police officers to obtain confessions from suspects.[6] A

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[6] *See* Richard H. Seeburger & R. Stanton Wettick, Jr., *Miranda in Pittsburgh – A Statistical Study*, 29 U. PITT. L. REV. 1, 12-13 (1967). (finding that Pittsburgh's confession rate for homicide, rape, robbery, burglary and larceny dropped from 49% to 32% following *Miranda*); *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. On Criminal Laws and Procedures of the Senate Comm. On the Judiciary*, 90th Cong., 1st Sess. 1120 (1967) (statement of Frank Hogan, District Attorney of New York County) (describing drop in incriminating statements from 49% to 15% following *Miranda*); *Controlling Crime Hearings, supra*, at 200-01 (statement of Arlen Specter, Philadelphia District Attorney) (estimating that before *Miranda* 68% of suspects charged with serious offenses gave police some form of statement and that after *Miranda* only 40.7% gave statements); *Controlling Crime Hearings, supra*, at 223 (statement of Aaron Koota, District Attorney of Kings County New York (Brooklyn)) (describing reduction in statements in serious cases from 90% to 59% following *Miranda*).

Although other studies have concluded that *Miranda* had a negligible effect on confession rates, the empirical data supports the opposite conclusion. *See* Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1573 (1967) (concluding that "not much has changed after *Miranda*" even while acknowledging that "[t]he data suggest a decline of roughly 10 to 15 percent from 1960 to 1966 in the number of people who gave some form of incriminating evidence over the entire time"); Cassell, *supra*, 90 Nw. U.L. REV. at 409 (reexamining and reanalyzing same data and concluding that data demonstrated a 16 percentage point reduction in the rate at which admissible confessions were obtained).

comprehensive analysis of all this data indicates that the confession rate declined 16 percentage points after *Miranda*. Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 Nw. U.L. Rev. 387, 395-418 (1996) (noting pre-*Miranda* 50% confession rate declined to 34%).

This reduced confession rate obviously affected the criminal conviction rate, as voluntary statements may be critical proof of guilt. Conservative estimates indicate that *Miranda* "has led to lost cases against almost four percent of all criminal suspects in this country who are questioned." Cassell, *supra*, 90 Nw. U.L. Rev. at 438.[7] This means that roughly 28,000 serious violent criminals and 79,000 property offenders within the crime index and more than 500,000 other criminals outside the crime index go free each year because of *Miranda's* exclusionary rule. *Id.* at 440. Such staggering numbers establish that *Miranda* grossly underestimated the impact of its exclusionary rule.

b. First-Hand Police Reports About Miranda.

In the years immediately following the *Miranda* decision, researchers conducted several surveys of police officers to obtain their first-hand assessment of the effects of *Miranda*. These surveys generally found that police officers reported harmful effects.[8] Overall, these first-hand

[7] *Compare* Stephen Schulhofer, *Miranda's Practice Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U.L. Rev. 500 (1996) (disputing cost analysis) *with* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 Nw. U.L. Rev. 1084 (1996) *and* Paul G. Cassell, *Miranda's "Negligible" Effects on Law Enforcement: Some Skeptical Observations*, 20 Harv. J.L. Pub. Pol'y 327, 330-32 (1997) (identifying fatal flaws in Schulhofer analysis).

[8] *See generally* Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 Nw. U.L. Rev. 1084, 1106-10 (1996); Cyril D. Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-*

accounts from police laboring under the *Miranda* rules provide strong evidence of its adverse impact on law enforcement.

Miranda Questionnaires: A Construct of Police Capacity to Comply, 1968 Duke L.J. 425, 465 (Table 12) (1966 survey finding that most police and prosecutors thought that the percentage of suspects who refused to make a statement had increased and that the percentage of confession had decreased after police responded to *Escobedo v. Illinois* by warning suspects of their rights); Project, *Interrogations in New Haven: The Impact of* Miranda, 76 Yale L.J. 1519, 1611-12 (1967) (reporting that interview of detectives in New Haven who were involved in interrogations found that they "unanimously believe [*Miranda*] will unjustifiably [help the suspect]" and "would hurt their clearance rate"); Otis H. Stephens *et al., Law Enforcement and the Supreme Court: Police Perceptions of the* Miranda *Requirements*, 39 Tenn. L. Rev. 407, 420 (1972). (reporting that virtually all of the officers surveyed in Tennessee and Georgia in 1969 and 1970 believed that Supreme Court decisions had adversely affected their work and most attributed this negative influence first and foremost to *Miranda*). Gary L. Wolfstone, Miranda – *A Survey of Its Impact*, 7 Prosecutor 26, 27 (1971) (survey in 1970 of police chiefs and prosecutors around the country found that most agreed that *Miranda* raised obstacles to law enforcement); James W. Witt, *Noncoercive Interrogation and the Administration of Criminal Justice: The Impact of* Miranda *on Police Effectuality*, 64 J. Crim. L. & Criminology 320, 325 (1973) (1970 interview of California police officers finding that they "were in almost complete agreement over the effect that the *Miranda* warnings were having on the outputs of formal interrogation. Most believed that they were getting many fewer confessions, admission, and statements."); Cassell, *supra*, 90 Nw. U.L. Rev. at 1108 (discussing an unpublished 1987 telephone survey of the membership of the Police Executive Research Forum found that their members favored "reconsideration of *Miranda* and some modification.").

Contrary survey evidence has been severely criticized. *Compare* American Bar Assoc. Comm. On Criminal Justice in a Free Soc'y, Criminal Justice in Crisis (1988) (contrary survey)

More recent data suggests that *Miranda* suppressed confession rates, even though the *Miranda* Court discounted the possibility of such a result.[9] Although broad generalizations are difficult, the most detailed and careful scholarly estimate is that pre-*Miranda* confession rates in this country were between 55%-60%.[10] After *Miranda*, the available studies reveal decidedly lower confession rates. The most recent and careful empirical study, in 1994 in Salt

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with Cassell, *supra*, 90 Nw. U.L. Rev. at 1108-10 (questioning bias of ABA survey) *and* Craig M. Bradley, The Failure of the Criminal Procedure Revolution 44 (1993) (study finding that prosecutors generally believe that a "disturbingly high" number of cases are lost due to *Miranda*).

[9] *Miranda* suggests that the suspect's lawyers might be able to monitor police interrogation and that police could therefore provide lawyers and have interrogation proceed. *See e.g.*, 384 U.S. at 470 (discussing the "functions" that "[t]he presence of counsel at the interrogation may serve" and observing that the "lawyer can testify . . . in court" about the interrogation). On this point, experience has shown that the *Miranda* Court was clearly mistaken. Today, if a suspect asks for a lawyer, the police simply stop questioning. Indeed, in later interpretations of *Miranda*, the Court has found it necessary to amplify the prophylactic *Miranda* rules by creating additional layers of prophylaxis to affirmatively *preclude* questioning even after suspects have consulted with a lawyer. *See Minnick v. Mississippi*, 498 U.S. 146, 151-54 (1990).

[10] *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation: An Empirical Study of the Effects of Miranda*, 43 UCLA L. Rev. 839, 871 (1996); *accord* Christopher Slobogin, Criminal Procedure: Regulation of Police Investigation: Legal, Historical, Empirical and Comparative Materials 6 (1995 Supp.) (concluding that a 64 percent confession rate is "comparable to pre-*Miranda* confession rates"). *Compare* George S. Thomas III, "*Plain Talk About the* Miranda *Empirical Debate: A 'Steady-State' Theory of Confessions*," 43 UCLA L. Rev. 933, 935-36 (1996) (deriving a lower pre-*Miranda* confession rate) *with* Cassell & Hayman, *supra*, 43 UCLA L. Rev. at 872-76 (rebutting Prof. Thomas' estimate).

Lake County, Utah, found an overall confession rate of only 33 percent. Cassell & Hayman, *Police Interrogation: An Empirical Study of the Effects of Miranda*, 43 UCLA L Rev. 839, 871, 869 (1996). This is substantially below the confession rates reported before *Miranda*, strongly suggesting that confession rates have in no way rebounded. This Salt Lake County data is generally consistent with such other data as is available.[11] Taken together, these studies confirm that confession rates in this country fell after *Miranda*. Cassell & Hayman, *supra*, 43 UCLA L. Rev. at 876 (concluding that *Miranda* depressed confession rates).

c. Declining Crime Clearance Rates.

"Clearance" rates – the rate at which police officers solve or "clear" crimes – have been widely viewed as a statistic that would reveal its effects, particularly by *defenders* of the *Miranda* decision.[12] Contrary to conventional academic wisdom, crime clearance rates fell sharply all over the country immediately after *Miranda* and remained at these lower levels over the next three

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[11] *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266 (1966) (finding that Berkeley detectives had a 64% in-custody questioning success rate); Cassell & Hayman, *supra*, at 926-30 (translating Leo confession rate to 39%); Floyd Feeney et al., Arrests Without Conviction: How Often They Occur and Why 142 (1983) (noting a Nat'l Inst. of Justice study of Jacksonville and San Diego with respective confession rates of 33% and 20% and overall incriminating statement rate of 51% and 37%); Gary D. Lafree, *Adversarial and Nonadversarial Justice: A Comparison of Guilty Pleas and Trials*, 23 Criminology 289, 302 (1985) (1977 study reporting 40% confession rate).

[12] *See e.g.*, Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435, 436 (1987) (claiming *Miranda* did not harm law enforcement because clearance rates quickly "rebounded" to pre-*Miranda* levels).

decades.[13] The FBI's figures for the national crime clearance rate from 1950 to 1995 for violent crimes (non-negligent homicide, forcible rape, aggravated assault and robbery) show that (1) violent crime clearance rates were fairly stable from 1950 to 1965, (2) fell sharply in the three years immediately after *Miranda*, and (3) have remained about 15 percentage points below the pre-*Miranda* rate. These national reports suggest that *Miranda* substantially harmed crime victims and significantly hampered law enforcement effectiveness and disprove the suggestion that there was any subsequent "rebound" of clearance rates.

d. Miranda's Effect on Crime Rates.

In the wake of the *Miranda* decision, crime rates skyrocketed. A possible link between the decision and crime rates was recently investigated in an elaborate econometric model. After controlling for various possibly confounding factors, the model revealed that *Miranda* was correlated with "an 11% increase in total crimes and a nearly 33% increase in violent crimes." Raymond A. Atkins & Paul H. Rubin, The Effects of Criminal Procedure on Crime Rates, Social Science Research Network Electronic Library, <http://papers.ssrn.com/paper.taf?ABSTRAT_ID=140992> These empirical results further support the conclusion that *Miranda* harmed many crime victims and damaged law enforcement effectiveness.

The modern Court, unlike the *Miranda* Court, possesses reliable empirical studies which measure the

[13] Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998). *Compare* John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998) (confirming and questioning various aspects of this analysis) *with* Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After Miranda: Coincidence Or Consequence*, 50 STAN. L. REV. 1181 (1998) (answering Prof. Donohue's questions).

impact of *Miranda* exclusion from the various angles of (a) "before and after" studies, (b) first-hand police reports, (c) declining crime clearance rates, and (d) crime rates. This new information reveals the magnitude of harm to individual crime victims and law enforcement efforts caused by *Miranda* and strongly supports the elimination of the *Miranda* exclusionary rule.

C. The Constitution's Federalism Limits Support Federal and State Legislative Remedial Scheme's That Protect Victims' Interests.

There are substantial constitutional limits on federal remedial schemes imposed on the States against their will. The Constitution establishes a system of "dual sovereignty" where the states surrendered enumerated powers to the federal government but retained a "residual and inviolable sovereignty." *Printz v. United States*, 521 U.S. 898, 919 (1997); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The Tenth Amendment protects those powers that have not been granted to the federal government by reserving those powers to the states. *Printz v. United States*, 521 U.S. at 919; *United States v. Lopez*, 115 S.Ct. 1624, 1631 n.3 (1995).

The Constitution's dual sovereignty system substantially limits the Federal Government's use of remedial schemes that intrude on States or the criminal justice process. There is a "longstanding public policy against federal court interference with state criminal proceedings." *Younger v. Harris*, 401 U.S. 37, 43 (1971). This Court has limited the exercise of judicial remedial power to specific constitutional violations. *Lewis v. Casey*, 518 U.S. 343, 360 n.7 (1996) (holding that "[c]ourts have no power to presume and remediate harm that has not been established"). This Court has also precluded courts from exercising plenary power to restructure the operation of state and local governmental entities and limited remedial

orders in both time and scope to address specific constitutional violations.[14] *Miranda's* remedial scheme simply does not comply with these well-established limits on judicial remedial authority.

Miranda vividly demonstrates why the courts are ill-suited to create broad public policy. Unlike Congress, this Court has no power to conduct hearings, collect evidence or hear testimony. This Court has frequently recognized that legislatures are "far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 195 (1997); *United States v. Gainey*, 380 U.S. 63, 67 (1965). The Court does not answer to the electorate. More importantly, its guiding principles, such as *stare decisis*, discourage state experimentation with different methods for achieving public policy goals; rather it binds courts to a rule of law that is designed to ensure equal justice through inflexibility.[15]

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[14] *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). *See also Milliken v. Bradley*, 418 U.S. 717, 744 (1974) (providing that inter district school desegregation remedial order was inconsistent with the equitable principle that the scope of the remedy is determined by the nature and extent of the constitutional violation); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("[F]ederal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation."); *Board of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) ("A federal court's regulatory control . . . [should] not extend beyond the time required to remedy the effects of past [Constitutional violations].").

[15] In any event, the factors required for disregard of *Miranda* precedents are more than met here. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992), the Court set out several factors to be considered in overruling an opinion. All these factors are powerfully

1. This Court's Remedial Powers Cannot be Greater than Congress's.

This Court has recently held that the Constitution's inherent federalism limits preclude Congress from creating substantive rights that intrude on the States. Those same limits apply to the federal courts. The courts may not amend the Constitution absent Art. V and must observe the sovereign character of the states. Thus, the federalism limits imposed on Congressional action set the upper limit on federal judicial prophylactic schemes.

The Fourteenth Amendment grants Congress the power to enforce the provisions of the Fourteenth Amendment by "appropriate legislation." U.S. Const., Am. XIV, Sec. 5. Congress thus may enact legislation for the purpose of remedying or preventing constitutional violations. *Kimel v. Florida Board of Regents*, ___ U.S. ___, 120 S.Ct. 631, 644 (2000). Section 5 authorizes preventative measures "even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the states.' " *City of Boerne v. Flores*, 521 U.S. at 518. While this legislative enforcement power is broad, it is limited by the separation-of-powers and the inherent limits of federalism. *See Boerne*, 521 U.S. at 518; *Oregon v. Mitchell*, 400 U.S. 112, 128 (1970); *see generally* Marci A. Hamilton, *City of Boerne v. Flores: A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699 (1998).

This Court has made clear that federal remedial legislation enacted pursuant to Section 5 may not create substantive rights that exceed the Fourteenth Amendment's

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impacted by (A) the change in law which now acknowledges victim harm, (B) the availability of new empirical evidence revealing the magnitude of victim harm resulting from *Miranda*, and (C) the recent clarification of the constitutional propriety of imposing remedial schemes on states. *Compare*, Brief for United States, 29-50 (denying changes in law or fact impacting these factors).

constitutional protections. *Boerne*, 521 U.S. at 518-19 (holding that legislation that "alters the meaning" of a constitutional provision cannot be deemed to "enforce" that provision). In order to prevent the grant of substantive rights under the guise of "remedial" legislation, this Court has established a three-step analysis when reviewing federal legislation that prohibits lawful state conduct. First, the preventative remedial scheme must be based on a clear record of " 'widespread and persistent deprivation of constitutional rights.' " *See College Savings Bank*, 119 S.Ct. 2199 at 2210 (quoting *Boerne*, 521 U.S. at 526). Second, whatever remedy Congress creates must be "congruent" with the constitutional evil identified. *Kimel*, 120 S.Ct. at 635; *College Savings Bank*, 119 S.Ct. 2224; *Boerne*, 521 U.S. 519. *See generally*, Marci A. Hamilton and David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469 (1999). Third, the remedy must be "proportional." *Id.*

Certainly, this Court – that has no such explicit grant of remedial power under the Fourteenth Amendment – cannot have remedial powers that exceed Congress's. The Constitution does not permit the federal government to create new constitutional rights unless it complies with the procedure for Constitutional Amendments. *See Boerne*, 521 U.S. at 529 (referring to Article 5 as the exclusive means for creating expanding constitutional rights). The Constitution's federalism limitations necessarily apply to federal government action, regardless of which federal branch created the remedial scheme. Thus, a preventative federal scheme that precludes lawful state conduct would be constitutional only if the *Miranda* Court had a clear record of " 'widespread and persistent deprivation of constitutional rights.' " *College Savings Bank*, 119 S.Ct.at 2210 (1999) (*quoting Boerne*, 521 U.S. at 526).

2. Miranda Lacks an Adequate Record of Widespread and Persistent Constitutional Violations.

The *Miranda* Court relied on a record as weak as the legislative record found lacking in *Boerne*. In *Boerne*, the Court found that the Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488, was not true remedial legislation, but was instead an attempt to create a new substantive right. This Court noted that RFRA's legislative record lacked recent examples of constitutional violations.[16] Rather, the record showed a pattern of conduct (generally applicable regulation that incidentally affected certain religions) that did not arise to the level of a constitutional violation. *Boerne*, 521 U.S. at 531.[17]

The *Miranda* record is likewise deficient. The Court's basis for *Miranda* was a series of reports indicating police threats of, or use of, force had been a common practice in the early 1930's, 384 U.S. at 445, to one Supreme Court case from that period, six Supreme Court Cases from the 1940s, and one from 1954. *Id.* The worst it could say about

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[16] *See Boerne*, 521 U.S. at 530 (noting that the legislative record "lack[ed] examples of modern instances of generally applicable law passed because of religious bigotry . . . " and that "[t]he history of persecution in this country detailed in the hearings mentions no episode in the past 40 years.").

[17] *See also Kimel v. Florida Board of Regents*, 120 S.Ct. 631, 649-50(1999) (finding legislative record consisting of isolated sentences clipped from floor debates and legislative reports, combined with a 1966 California state report on age discrimination in the State's public agencies, insufficeint to establish pattern of unconstitutional age discrimination by the States in 1974); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999) *passim* (Isolated instances of patent infringement suits against the States insufficient to establish a pattern of State patent infringement, let alone a pattern of constitutional deprivations of property without due process of law).

then-current (1966) conditions was that "[t]he Commission on Civil Rights in 1961 found much evidence to indicate that 'some policemen still resort to physical force to obtain confessions,' " *id.* at 446, and that [t]he use of physical brutality and violence is not, unfortunately relegated to the past or to any part of the country." *Id.* The evidence the Commission relied upon for this sweeping statement was one (1) 1965 case involving police brutality against a witness, five (5) state cases from 1945 to 1959 involving *other kinds* of police misconduct, a 1959 report from the Illinois division of the ACLU on Secret Detention by the Chicago Police, a 1950 law review article, and a 1965 law review article. *Id.* In fact, the Court conceded that "the examples given above are undoubtedly the exception now." *Id.* at 447. Furthermore, interrogation by physical force or threat of physical force was already excluded in 1966 under the Due Process clause thus rendering the *Miranda* exclusion rule unnecessary to address the problem.

While *Miranda* cites very few instances of coerced statements, it describes in elaborate detail suggestions from what it calls "police manuals and texts" on techniques for questioning suspects. 384 U.S. at 448. From these documents, the *Miranda* Court simply identified features of custodial interrogations that, particularly over a long period of time *could* break down a suspect's will. There was no evidence in the *Miranda* record of the actual use of the techniques. 384 U.S. at 532-33 (White, J., dissenting) (noting that there was no evidence about the extent to which the 1959 and 1962 manuals were used, that the majority had not examined any interrogation transcript, and that the empirical evidence actually available suggested that sustained interrogations were rare).

The majority proceeded to treat this "potentiality for compulsion", *id.* at 457, as *itself* the pervasive evil justifying the specified prophylactic measures, there was no demonstration that this potentiality was realized so frequently as to make compulsion itself pervasive. This

bootstrapping exercise is virtually identical to the exercise undertaken to support the Religious Freedom Restoration Act struck down in *Boerne*. Just as the potential for religious bigotry failed to justify sweeping prophylactic measures against the States, the potential for compulsion in interrogation fails to justify the sweeping prophylactic exclusionary rule of *Miranda*. The Self-Incrimination Clause does not forbid "potential compulsion," but rather actual compulsion.

The *Miranda* record of widespread and persistent actual constitutional violations is no stronger than the inadequate record in *Boerne*. 521 U.S. at 525-26. *Compare Miranda*, 384 U.S. at 444-58 *with South Carolina v. Katzenbach*, 383 U.S. 301, 310-15, 333-34 (1966) (Strong record of a determined and persistent effort to use literacy tests and other devises as covert mechanisms to deprive African Americans of the voting franchise; finding actual causal link between literacy tests and voting discrimination).

3. Miranda's Remedial Scheme Lacks Congruence.

Secondly, and in addition to a requirement of a record identifying widespread and persistent constitutional violations, the preventative scheme must be "congruent" to the constitutional deprivations identified. *Kimel*, 120 S.Ct. at 635. *Miranda's* approach lacks "congruence." *Miranda's* exclusionary scheme is not "congruent" because it is both over-inclusive and under-inclusive. It excludes un-warned voluntary statements yet fails to address the typical matters making a statement involuntary. As stated by the U.S. Justice Department:

> *Miranda's* system is a poorly conceived means of protecting suspects from coercion and overreaching in police interrogations. Its consequences are to divide suspects into two classes: those who stand on their rights and those who waive their rights and submit to questioning. The effect of *Miranda* on suspects in the former

> class is to not protect them from abusive questioning, but to enable them to insulate themselves from any form of questioning. In cases in which suspects do waive their rights, interrogations can be carried out much as they were before *Miranda*. In such circumstances *Miranda* is, in particular, virtually worthless as a safeguard against the specific interrogation practices that were characterized as abusive in the *Miranda* decision and cited as the empirical justification for *Miranda's* reforms.

U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (1986), *reprinted in* UNIV. MICH. J. LAW REFORM 451, 544 (1989).

Miranda is the wrong tool for the job. There is no satisfactory "congruence" between the *Miranda* remedial scheme and involuntary confessions.

4. Miranda's Remedial Scheme Lacks Proportionality.

Finally, *Miranda's* third glaring failure is the lack of "proportionality" in its exclusionary rule. *See Kimel*, 120 S.Ct. at 635; *College Savings Bank*, 119 S.Ct. at 2224; *Boerne*, 521 U.S. at 519. It is hard to imagine a more intrusive federal mandate that has caused such a wholesale change in the state criminal justice process than *Miranda*. *Miranda* controls police investigations, requires particular types of state court hearings, and restricts the states' ability to present often-critical evidence of guilt. More importantly, it restricts the ability of States to experiment with their own criminal justice models that grant greater respect to the rights of victims. It is quite conceivable that a state could decide that a legitimate victim's interest included an interest in a prosecution. In fact, states do recognize a crime victim's interest in prosecution where a prima facie case exists and provide

procedures for victims to challenge a prosecutor's decision not to prosecute.[18]

Similiarly, the victim has an interest in the admissibility of a voluntary confession which may be a necessary predicate to successful prosecution. "A core interest of the victim is that the truth be revealed and an appropriate disposition reached." Beloof, *supra*, 1999 UTAH L. REV., at 296. The prophylactic remedial scheme of the *Miranda* exclusionary rule prevents states from acknowledgment of the victim's interest in the admissibility of a voluntary confession.

D. Section 3501 Appropriately Excludes Involuntary Confessions.

For these reasons, this Court should hold that *Miranda* is not immune from legislative revision and does not preclude the States from experimenting with their own criminal justice models. There are many ways that States could fully protect a criminal defendant's right against compelled self-incrimination while considering the interests of crime victims. This Court has recently recognized that Supreme Court prophylactic rules should not be construed as the only means for ensuring State compliance with the Constitution. *See Smith v. Robbins*, ___U.S.___, 120 S.Ct. 746, 756 (2000) (the *Anders* procedure is only one

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[18] *E.g.*, *Commonwealth v. Benz*, 585 A.2d 764 (Pa. 1989) (Upholding statutory scheme for court to order prosecution where probable cause to charge exists and the state refuses to prosecute); *State of Wisconsin v. Unnamed Defendant*, 150 Wis. 2d 352, 441 N.W.2d 696 (1989) (Upholding statute providing for trial court investigation and trial court indictment independent of public prosecutor); *State ex rel. Miller v. Smith*, 382 S.E. 500 (W.Va. 1981) (Upholding right of victim to directly report crime to Grand Jury, criticizing federal practice for denying such access); TENN. CODE ANN. § 40-12-104 (codifying procedure for grand jury access for person having knowledge of offense); *See generally* Douglas Beloof, VICTIMS IN CRIMINAL PROCEDURE, 235-359 (1999) (Chapter 5, The Charging Process).

method of satisfying Constitutional requirements for indigent criminal appeals and the States may adopt different procedures if they adequately safeguard a criminal defendant's right to appellate counsel).

Under the Constitution, Section 3501 is an appropriate exercise of Congress's power. The *Miranda* decision itself recognized that Congress could create its own scheme for ensuring compliance with the Fifth Amendment. 384 U.S. at 467. Here, the scheme actually chosen by Congress ensures that involuntary confessions will be excluded from federal criminal trials. *See* 18 U.S.C. § 3501. In addition, Congress continued to encourage the use of *Miranda* warnings by making them a factor to be considered by the federal court during its voluntariness determination. *Id.*

States should likewise be permitted to create such legislative schemes so long as they do not impair the criminal defendant's Fifth Amendment right against self-incrimination. States should be permitted by the Court to create schemes that encourage a better understanding of the interests of all participants in the criminal process, including crime victims. Such separate state schemes encourage the thoughtful growth of our criminal justice process.

Even if this Court determines that Congress exceeded its legislative powers by enacting Section 3501, this Court should restrict the sweeping language contained in the *Miranda* decision. This Court should, as it did in *Smith v. Robbins*, make clear that the Court's own prophylactic rules are not the exclusive means for ensuring compliance with the Constitution and that States remain free to develop criminal justice models that grant greater protection to victims so long as the states still adequately safeguard the constitutional rights of the criminal defendant.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully Submitted,

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