Welcome, thank you all so much for coming. My name is Kathryn Watts and I’m Associate Dean for research and Faculty Development here at the law school. And it is my distinct pleasure today to welcome you all to what promises to be a very enriching and enlightening discussion. A presentation by Professor Yale Kamisar of University of Michigan School of Law about Miranda, what we all know to be a truly landmark criminal procedure decision. And it is also our great fortune today to be joined today by Professor Ron Collins, a friend of Professor Kamisar’s who will introduce Professor Kamisar today. This even today and the event that will be occurring tomorrow at 5pm between Professor Kamisar and Judge Fletcher and Attorney General Kroger has been the work of many, many hands. Professor Mary Fan one of them, Professor Jackie McMurtrie and really it’s been sort of the brain behind it has been Professor Collins in terms of the vision of inviting Professor Kamisar out here for this two-day event and also his return this Spring to talk with us about Miranda. So we are very grateful to Professor Collins for his vision and his hard work on this event.

Professor Collins is the Harold S. Shefelman scholar here at the University of Washington. He specializes in first amendment law and constitutional law. Prior to joining us in 2010, he served at the First Amendment Center in Washington DC. He is the author and editor of numerous books, more than I will try to name here today and his work has been published in leading journals across the country including the Stanford Law Review, Michigan Law Review, Harvard Law Review and the Supreme Court Review. Professor Collins has brought just a tremendous sense of energy and intellectual life to the law school since joining us in 2010 and I’m so pleased to have you help me in welcoming him to the podium to introduce Professor Kamisar today.

Kathryn, thank you for those kind remarks which were too long, but the next time I have an opportunity to introduce Professor Watts, I assure you I’ll speak twice as long, but thank you. What a delight it is to be back in the Pacific Northwest, having been in the other Washington just a few days ago, Washington DC, and to be here on the occasion of sharing an event with my close friend of some thirty years, Professor Yale Kamisar, our distinguished speaker.

I really don’t know where to begin when introducing Professor Kamisar, but let me just highlight a few things about this remarkable man, this remarkable American, born in 1929 grew in the Bronx of European Jewish immigrants. And thereafter found him self at New York University followed by Columbia Law School.

At a time when the United States was in a conflict with Korea, Professor Kamisar, then a young man, enlisted in the army and for his service, he was awarded the purple heart. At that same time, about that time, when he was an infantry platoon leader, he and his colleagues were responsible for taking the place called T-bone Hill, is that correct? And for that, their battalion was awarded the
Presidential Unit Citation, which for those of you who don’t know it, is the same citation awarded to the Navy Seals earlier this year. And as is the custom now, let me on behalf of everybody here and all Americans, Professor Kamisar, thank you for your service to our country. But it certainly doesn’t end there, actually it begins there, if you will.

Not long thereafter, he found himself at a place called Covington and Burling in Washington DC and it looked like he was going to set out on a career in anti-trust law and he probably would have continued in that way after graduating from Columbia Law School, except for the fact that he was involved in a pro bono case involving a man accused of illegal drug possession, what have you. When the young attorney, Kamisar, got involved in the case, he realized that there was something very problematic about this man’s handwritten confession. And pro bono, he successfully defended that man and of course it was the beginning of what would be a remarkable career in the law of criminal procedure and particularly the law of confessions.

And thereafter, in about 1957, he comes to the University of Minnesota Law School, where he begins his law teaching career. Thereafter goes to the University of Michigan in 1965. It is a remarkable testament if you just think about it for a moment, I’m sure many of you in this room are familiar with Professor Kamisar’s casebook on criminal procedure and his constitutional law casebook. But it is a remarkable figure, but it is a true one, over a half a million law students have used either the Kamisar book on criminal procedure or constitutional law. A remarkable feat by any measure and it is a testament to the work of this incredible scholar.

I was just talking to Yale today, before 1965, criminal procedure was not taught as a stand alone class in American law schools. If it was taught at all, it was taught as part of constitutional law, or the law of evidence, or perhaps the law of criminal law. But after the Miranda decision, it became a class in its own rite. And who was the co-author of the first casebook on criminal procedure? None other than Professor Kamisar and he has been tilling those fields ever since. Cited in numerous opinions by the United States Supreme Court, and other courts, literally thousands of articles.

I would just close on this, if you will know the measure of this man, if you will know the content of his character, let me just offer this short story, if I may. In 1976, I co-authored an article on Miranda versus Arizona, that was published in the Southern California Law Review and at that time I was working at Legal Aid. And my secretary, I should say our secretary, there was one secretary for fifteen lawyers, came to my desk and she said, 'There’s a Yale Kamisar on the phone, he wants to speak with you.' I said, 'Is it Yale Kamisar’s secretary?' She said, 'No, no, it’s a man, he has rather a distinct voice.' I said, 'Like a booming voice?' She said, 'Yes, yes, she said, that’s it.' And so I thought, it tells you a little something about me, the first thing I’m thinking what did I get wrong, right, why else would he be calling. So somewhere along the line, I got something wrong. Prozac hadn’t been invented yet, and so I took a deep breath and I picked up the phone and:

'This is Yale Kamisar, is that Ron Collins? Are you Ron Collins?'

'Yeah.'

'Are you the guy that wrote the article on Miranda versus Arizona?'

'Well I co-authored it.' 'The one that ran in the Southern California Law Review?'

'Yes.'

'Who are you? I’ve never heard of you.'

I said, 'I guess I don’t have much to say other than I co-authored that article.'
And he said, ‘Well it was a wonderful article and I wonder if you would mind if I excerpted it in my casebook?’

That was the beginning of a remarkable friendship with a remarkable man. Would you please join me in extending a warm welcome to our friend, my friend, and our distinguished speaker, Yale Kamisar?

Yale Kamisar

Well thanks for that wonderful introduction. I have one correction. I’m not patriotic to have enlisted in the army. I was an ROTC guy in college and they activated me. Other than that it’s fine. I should say before getting into my talk. I really enjoy coming to Seattle. My son and daughter-in-law have been here for many years. My grandson is a student at the University of Washington, trying to make the tennis team and I think he will this year. And the weather is better than it is in Michigan and pretty good anywhere so that’s nice, also.

There’s been a good deal of talk lately about Miranda and it has not been very laudatory. People have been saying badly battered, it’s dying, it’s dead, it might as well be dead. And I understand that, I haven’t been happy with the way things have been going, myself. Only last year a case called Thompkins, Berghuis v. Thompkins, Miranda received another blow, it caught the 5:4 majority. Unfortunately some of these cases are 5:4 majorities. A 5:4 majority says, that essentially you can persuade someone to confess, or persuade someone to, I should put it more gently, cooperate with police even though he hasn’t waived his rights. That’s just a far cry from the original Miranda, you really have to talk about the original Miranda and the current version of Miranda which is far different. So there has been a lot of talk about, might as well give Miranda a decent burial.

And I’m reminded of a saying by G.K. Chesterton, ‘Don’t ever tear a fence down until you know why it was put up.’ And we might ask ourselves why was the Miranda fence erected in the first place? Well because the test that preceded it was woefully inadequate. The test that preceded it was called the Voluntariness Test and was supposed to decide whether the defendant’s will was broke, was overcome, well this was all rhetoric and it wasn’t very useful. In fact, the first article I ever wrote on confessions was back in 1963 and I remember spending hundreds of hours on it trying to figure out what were they doing? What were they really doing? And as far as I could tell, they were doing two things: they were deciding whether the confession was obtained under circumstances which made it unreliable or they were deciding whether the methods the police used were so offensive that it could not be tolerated.

The trouble with the Voluntariness Test, it didn’t focus on either one of the two grounds for throwing out the confession and we didn’t know what was offensive until the Supreme Court told us. And then the other thing that was going on, that didn’t help, was that the test kept changing. In 1944, thirty-six hours in interrogation, relay interrogation, was considered offensive, believe it or not, the court split 6 to 3, it’s hard to believe that there were three justices who didn’t think that 36 hours of relay interrogation was intolerable. And then years later in the Haynes case, they said 8 hours was intolerable. And then there was a case where a woman was told that unless she cooperated with police and answered their questions, she would lose custody of her kids and they said that was unacceptable. And then there was a case where someone was stripped naked for a few hours just to get them into more of a confessing mood. And if you really feel weak and helpless, that’s what you do, when you’re stripped naked for a few hours. Even Bill Staunch, the late Bill Staunch, who was one of the strongest critics of Miranda, agreed that the old test was inadequate because it didn't really sort out good confessions from bad confessions. It didn’t really sort out good interrogation from bad interrogation.
Now a person named Mike Sideman, once wrote an illuminated article on confessions back in the nineties and he focused on Frankfurter’s last opinion. Frankfurter had been a great force when it came to confessions. He had made a number of important contributions. He was the one who said that even though the confession was corroborated and even though we know it’s true, we’re still going to throw it out because we refuse to ratify the methods the police used in getting the confession. And the article writers call that the Police Methods Test, regardless of trustworthiness. But anyhow, at the end of his career, just a year before he finally retired because of illness, he wrote a sixty-seven page opinion in a case called Column v. Connecticut where he tried to explain, he tried to make sense of the Volitariiness Test. And he had probably the greatest law clerk he had ever had in his long and distinguished career, Tony Amsterdam, who has taught at Stanford, and Pennsylvania and now at NYU Law School, he put all of his energy into it, his last effort and it was a terrible failure. He came out saying that the confession was coerced after sixty-seven pages and a group led by Holland said, we agree with everything you’ve said, but we conclude the confession was not coerced. We agree with your analytical framework, we like everything that you’ve said, but we don’t agree with the outcome. We think the confession was coerced and you said it was not coerced. And then there was another group led by Earl Warren who said we don’t agree with anything you’ve said but we agree the confession was coerced. So we agree with the result, but nothing you said. So he wound up with one justice coming out the same way and agreeing with the opinion and that was Stewart. If anything was a disaster, that was it. But it took a few more years for the court to finally change things in a dramatic way with Miranda.

One final kick at the Voluntariness Test, if you want to call it that, If a picture is worth a thousand words an opinion with all its graphic details is worth something also. I’m referring to a case called Mencie v. Arizona. Now this case was not decided in the 1930’s or 40’s when the question was whether the police could use the whip or hanging people, not hanging them completely, but just getting them in the mood to confess, by putting a rope around their neck for a while. This is a case in the late 1970’s, you could still impeach someone even though he made statements that were un-Mirandized. You could still impeach them if police had violated Miranda but not committed a coerced confession or an involuntary confession, because that old test still prevailed as a backup. So everybody agreed that the police had failed to comply with Miranda, but that wasn’t enough to keep the confession out for impeachment purposes if the defendant took the stand on his own behalf. So the question was whether his statements to the police were not only un-Mirandized, but coerced or involuntary. Well the suspect was shot barely in the head he was on the verge of coma when he came to the intensive care unit. He had tubes in his mouth so he couldn’t speak, but he was writing on scraps of paper, ‘I want a lawyer, I don’t want to talk to you until I see a lawyer.’ And the police paid no attention to him He also had all kinds of stuff sticking out of him. He had a feeding device on his arm he had a catheter in his bladder and the police questioned him for four hours. From eight o’clock to midnight and he keeps writing on scraps of paper, ‘I don’t want to talk to you’. And believe it or not, the Arizona courts all conclude that the confession was voluntary. I mean, what kind of a test is this? And you could say, well the Supreme Court reversed, so it came out okay. They system worked. I should point out that Rehnquist dissented. He thought the confession was voluntary and he thought that his colleagues were not giving sufficient deference to the lower courts. And this was of course the standard approach, you’re not giving enough deference, they were closer to the scene, and all that.

The system did not work because, here’s why: In the thirty years since Brown v. Mississippi and Miranda, the court only averaged one case a year. And most of those cases were death penalty cases. So if you wanted to get review in the Supreme Court, there was one good thing about the death penalty, you might improve you chances of getting review, if you didn’t have a death penalty case, you had almost no chance at all. The reason was that it was so fact sensitive, it was so much work…the constant battle...swearing contest going on all the time. The police would say things that
were entirely different than what the defendant would say and invariably the police would win because the police had more credibility than the individual defendant. So the system didn’t work and in fact during the early arguments in Miranda, Justice Hugo Black said, ‘You know, it’s so hard to take these cases because the record is so complicated and there is such sharp disagreement, that we just can’t do it, it’s more than we are capable of doing.’ And I think that’s one of the reasons why the court got rid of the Voluntariness Test and tried to come up with something that was more manageable, that made sense, or at least that the police could understand.

Now unfortunately, Miranda was unlucky, if you want to put it that way. In the early sixties, the crime wave went way up (21:38) and kept going up and on top of that there were riots or uprisings depending on your term in most of America’s major cities: Detroit, Chicago, Los Angeles. There were assassinations or assassination attempts: Martin Luther King, Governor Wallace was shot, not killed, Bobby Kennedy was shot and killed. And this was a great moment for many politicians. They could blame everything on the war in court and they did, everything. In fact John McClelland, was the chairman of the key committee that eventually passed federal statute that purported to abolish Miranda. And he’d had these huge charts all over the senate room and every time there was an increase in crime, there was a Supreme Case next to it. And the clear implication is this supreme court case caused this increase in crime or caused that riot or caused this assassination and Senator Irving was his chief lieutenant, he may have been a hero when it came to the Watergate affair, but was not when it came to Miranda, or at least he was not from my point of view. It’s hard to believe, they’re purporting to abolish a major supreme court case, the votes are seventy-two to four in favor of this bill in the Senate and three hundred and sixty-nine to seventeen in the House of Representatives, it’s overwhelming, overwhelming. And on top of everything else, Senator Kennedy is assassinated in the middle of the debates and a bunch of congressmen stand up and say let’s support this bill for Bobby, when in fact, his chief legislative assistant Peter Edmond, said if Senator Kennedy had not been shot, he’d be leading the opposition to this bill. And they’re all stampeding and doing it for Bobby Kennedy. Now the Southern Democrats weren’t the only ones who were attacking the Supreme Court, so was Richard Nixon, the 1968 candidate. He was the more respectable alternative to Governor Wallace. Governor Wallace had gone crazy, you know. But Nixon was more subdued, but he was bad enough. It’s hard to believe, but according to John Dean, I traced him down, he’s somewhere in Beverly Hills and he and I have been e-mailing each other. According to John Dean, Richard Nixon actually borrowed a speech by Warren Burger who was then a Federal Judge and used it in his standard stump speech. He fell in love with Warren Burger two years before he named him his Chief Justice. And Nixon's sub-speech, was: cab driver was shot in the head and a self-confessed killer got off because of Escobedo and Miranda or an old lady was raped and brutally treated and died and she got off because of Escobedo and Miranda, and it went on and on and sometimes, he had three different characters in the same stump speech. He had a position or a white paper on crime where he talked about the peace forces having fallen back in the face of a strong charge by the criminal forces. And I remember Frank Allen who was one of the pioneers in criminal procedure because of the articles he wrote in the 1950’s, just horrified at a presidential candidate talking about the bewildering problems of crime in America in terms of peace forces and criminal forces and what did the Democrats do? What did Hubert Murphy do? Absolute silence.

Alright, well, one of the things that Nixon said is because of the war in court and because it had shifted so far in favor of defendants, future presidents, starting with him, of course, must appoint judges who are well-versed in criminal law and thoroughly experienced in criminal law and his first nomination is Burger, he trusts Burger. Now Burger was not well-versed in criminal law at all, he talked tough, he wrote angry speeches, he wrote angry dissents, he wrote angry articles. He ridiculed the American law enforcement system saying we’re becoming an impotent society. He looked admiringly at Swede, and Norway and Denmark and saying those guys know how to do it,
they don’t have any criminals against self-incrimination in those countries and that’s what we need and we’ve got to stop coddling criminals. But he didn’t have any background in criminal law. The person who had a greater background, a richer background in criminal law than anybody in the history of the Supreme Court, was guess who? Earl Warren.

Now Earl Warren had been either an assistant prosecutor or the head of the Alameda County District Attorney’s Office for eighteen years. And he had actually interrogated murder suspects, himself. And he had always felt a little uncomfortable about that and then he spent four more years as Attorney General. So his entire career until he became governor was in law enforcement. So there’s a certain irony there saying we need people experienced in criminal law, unlike who?

There’s a book by Erlichman, John Erlichman, one of the guys who went down because of Watergate, and there are books by Dean as well, and they point out that Warren Burger campaigned to be Chief Justice, that simple, open and shut. And he won. He was just what Nixon was looking for but years later, there was another nominee, William Rehnquist, who was about as pro-police, police friendly as Burger, and a lot more effective because he was a much more likable guy than Burger and he probably got more accomplished than Burger. But he had not been in office more than two months, when he wrote a secret memorandum, it never came out until John Dean disclosed it thirty years later, it was marked ’Administratively Confidential’ but it finally came out and it was a secret memorandum to John Dean urging president Nixon to establish a National Crime Commission to consider amending the constitution to get rid of such bad opinions as Miranda. Nothing ever came of it because the Attorney General, John Mitchell was worried that if a National Commission were established, it might be a run away commission, it couldn’t be controlled by the President. So he decided not to do anything about it. But he knew from that memorandum, how strongly Rehnquist felt about Miranda. He just hated it. And he was the guy who was picking the nominees for the Supreme Court, so that didn’t hurt Rehnquist’s chances at all.

You can argue about the pros and cons of the memorandum, but Rehnquist made one mistake. He said, and it’s a famous statement, and it’s true in so far as it goes. It’s the same statement that Ron Collins wrote in that CLE memorandum. It’s a true statement, but more to it than that. The statement is that, ‘any lawyer worth his salt will tell his client never to talk to the police.’ Now that’s true, as far as it goes, but Rehnquist took it one step further. The reason is that Miranda doesn’t require the police to get a lawyer for the suspect. It only requires the police to advise someone that he has a theoretical right to a lawyer, but it doesn’t say, we’ll get one for you. And in fact some of you may know that in one case, the Supreme Court upheld a series of warnings which said you have a right to a lawyer before a jury in questioning, but there’s no way to get you a lawyer until you go to court. Well, that’s an outrageous warning, which incredibly was upheld in court, because why are you going to ask for a lawyer if you’ve just got through being told you won’t get one until you go to the court. You’re not going to get one before a jury...See there’s no station house lawyer as there is in England. In England if you go to the police department, there’s a lawyer right on the stand representing indigents and so forth right in the police department. So it would have been true if Miranda required the police to produce a lawyer or said you can’t question someone unless he fist confers with a lawyer but Miranda just says you give the guy the Miranda warnings in the abstract and you talk about the right to counsel, but you don’t get too precise about when he gets one and how he gets one. Actually the American Civil Liberties Union argued that you shouldn’t be able to question anybody until he actually conferred with a lawyer, but the American Civil Liberties Union lost that argument.

I think that it’s very hard to teach this stuff because you like to assume that Supreme Court justices take precedent seriously, but they don’t. The older I get the more I feel they just don’t. They talk about stare decisis and respect for precedence when they’re appearing before the Senate Committee confirming them, but unfortunately there’s little evidence that they mean it. I had a
student recently argue a search and seizure case, a former student. He told me he had it won, he needed five votes, he needed O'Connor, she was the fifth vote, he was all set to win. And then Alito was confirmed to replace O'Connor. They rescheduled argument and Alito made it clear, first day on the Supreme Court that he was against him and he lost 5 to 4 instead of winning 5 to 4. But how do you teach that stuff? What can you say? It’s really hard. If the judges don’t take precedent seriously, how can the students take precedent seriously?

I would say that if I had to pick the two most police-friendly Supreme Court justices in the history of America, I would pick Burger and Rehnquist. Now you could argue maybe Robert Jackson, maybe William Howard Chaff, but I think those two were the most police-friendly in the history of the Supreme Court. Now what about the two other nominations that Nixon made: Lewis Powell and Harry Blackman? Lewis Powell was on the National Crime Commission established by Lyndon Johnson and he wrote a separate opinion in addition to the one written by the whole tribunal saying that Miranda has to be overturned by constitutional amendment if necessary. So he was on record as being very strongly against Miranda, as well. Now Harry Blackman is an interesting case. He was a childhood friend of Burger. He was best man at Burger’s wedding. They were the original Minnesota Twins, you know. There was no question that Burger got him on the Supreme Court, no question about that. But after voting with Burger again, and again, he disagreed in one important case and the Chief Justice came running down to his chambers yelling him telling him, ‘I got you onto the Supreme Court, I need your vote and you owe me your vote,’ and that was the end of the friendship. From that point on, Blackman voted a lot more with William Brennan than with Warren Burger. But the first five years, he was an automatic vote for Burger.

The first blow to Miranda came in a case called Harris v. New York. It was an impeachment case and the question was whether even though, the police had failed to give the suspect his Miranda warnings, whether they could impeach him? He took the stand in his own defense. Whether they could still impeach his credibility. And of course that was a very important issue because it might keep the person off the stand. If he made some statements that can’t come in to the prosecutor’s in chief, but can come into the case if he takes the stand in his own defense, he might not take the stand in his own defense and there’s a widely held view that if you don’t testify in your own defense, you’re much more likely to be convicted than if you do.

The general rule was that you had to let a defendant respond to all the elements of the case against him. You couldn’t impeach him if he said I didn’t do it in this case. But there was a complicated case called Walder where the defendant didn’t just deny that he committed this crime, but he made this sweeping claim that he had never possessed narcotics in his life, and he had never dealt with narcotics in his life and the court said, well come on, you know several years earlier you had been involved in drugs and you went too far. You can deny the elements of the crime in this case, but you can’t say I never committed a crime in this area. You went too far and therefore we can impeach you by pointing out that in a different case, unrelated to this one, you did commit a crime, you did commit the very crime you claim you didn’t. That was the only reason why the government was allowed to impeach the defendant in the case. Unfortunately Burger paid no attention to that limitation. The general rule was you could not impeach a person except if he went too far and in Harris, the defendant had not gone too far. But Burger had never indicate to the reader of his opinion what the general rule was and he had very carefully edited out all references to the general rule which had appeared in the Walter case. And that wasn’t the worst of it.

There’s language in Miranda which states specifically that you cannot impeach someone who takes the stand in his own defense with un-Mirandized statements, and these were un-Mirandized statements. Well that was mere dicta, not controlling, it’s mere dicta. Well the whole opinion in Miranda is sixty pages the majority is sixty pages long. It’s structured to tell court judges and police officials what has to be done now that the privileges against over-incrimination apply to the police
station, this is what has to be done: you have to change the way you do business a certain that from now on you have to give these warnings and so forth. But there’s a discussion of the history of the privilege of over-incrimination it goes for dozens of pages. If you take the position as Warren Burger did that the dicta is not controlling. Of the sixty pages that Warren wrote, about fifty-six pages are dicta, there’s nothing left except the narrow facts of Miranda and the three companion cases.

Finally, Harris argued that not only was I impeached with un-Mirandized statements, I was impeached with statements which were coerced, which were involuntary. And the rule is that even though the government can impeach me with un-Mirandized statements under certain circumstances, they cannot impeach me with coerced or involuntary statements and so let’s get to that issue. And he had made this claim at every level, at the trial level, at the intermediate appeal, in the early arguments before the Supreme Court. Chief Justice Burger said, we don’t have to reach that issue because you never made that argument. Well that’s just mind-boggling, well let’s just say that’s inexplicable. Now we know this because three very able law professors wrote articles about this case. Allen Gerschewitz and John Hart-Neeley wrote an article about it just ripping the hide off Burger. And Jeffrey Stone also wrote an article about it saying that the statement that the defendant had never claimed that the statements he made were coerced and involuntary were flatly untrue.

So it’s too bad that Mr. Harris could never get a ruling on the issue that he was entitled to get a ruling on. But the court’s misunderstanding of the record is important for another reason: it shows how sloppy this whole thing is. Where were the justices who joined Burger’s opinion and where the law clerks? It was clear from the record that he had made this argument and who made up the 5:4 majority? Burger and Blackman, Blackman was then in his pro-Burger era. The three dissenters in Miranda who were still left on the court. They were still mad at Miranda and they were still going to vote in favor of letting the confessions in and then you had the new appointments: Burger and Blackman, that’s the five.

A final comment on Harris. In announcing the judgement, the Chief Justice tried very hard to minimize the case’s significance. He said it was mostly a matter of interest only to members of the bar and he said the case is not worth describing from the bench. Now why did he say that? Well recently there have been a number of articles, notably an article by Barry Friedman called ‘The Stealth Overruling of Miranda’. This is the first case to start cutting down Miranda: Harris. And it’s also the beginning of the stealth overruling of Miranda, what we call the stealth overruling-pretending nothing happens. No big deal, why would any reporter be interested in this case? So it’s not only the beginning of the down sizing of Miranda, but it’s also the beginning of the stealth overruling of Miranda.

All right, I find it very troublesome, you put two new justices on the court, well four new on the court and the first shot at Miranda, the first blow they stick to Miranda (46:49) is by the new nominee, Chief Justice Burger. The second blow to Miranda is by the new nominee Rehnquist. It was a perfect, the Tucker case I’m talking about now, Michigan v. Tucker 1964, it’s a perfect case for the prosecution because the police obtained the confession before Miranda. Well how would anyone know what the Miranda rulings were, what the Miranda warnings were, in fact, the Supreme Court judges didn’t know what the Miranda warnings were until after they heard all argument and so the court made a mistake. It applied Miranda to cases that began after, the trials that began after Miranda even though the interrogation took place before Miranda. And they should applied Miranda only to interrogations that took place after Miranda. So it’s a loser and you can just tell it’s a loser. A loser for the defense anyhow and Rehnquist made the most of it. He won.

A number of comments by Rehnquist that’s very puzzling. He says, 'No one would contend that the questioning faced by the defendant or any resemblance of the historical practices at which the
privilege against self incrimination was aimed.’ Well, so what? There’s a case called Griffin v. California which was decided only a year earlier where the court said you cannot comment on the refusal of the defendant to take the stand in his own defense, he has a right to refuse to take the stand in his own defense. The judge can’t comment on it, the prosecutor can’t comment on it. Well commenting on the defendant’s failure to take the stand in his own defense is hardly comparable to the horrible practices which lead to the privilege against self-incrimination.

Then, Rehnquist says in another place in his opinion, ‘Mr. Trucker’s statements to the police could hardly be called involuntary as that term was defined by the court in the pre-Miranda era.’ Now why was that wrong? We have a new regime, we have the Miranda rulings now and the reason we have the Miranda rulings was because we were so unhappy with the Voluntariness Test. Why does it matter at this point after Miranda, whether these confessions were involuntary? We don’t need to find confessions involuntary in order to throw them out.

And another point, Rehnquist seems to equate compulsion with coercion. That’s a very interesting point. If you read the dictionary, compulsion and coercion are very close, but the trouble is they had a different history and a different bases. Compulsion is the term you use for the privilege against self-incrimination. You can’t compel someone to incriminate himself. Coercion is the term you use for the old Voluntariness Test. They are different. They may sound alike and they may look similar in the dictionary, but they are different terms with different background. What is Rehnquist saying? Is he saying that unless the pressure is sufficiently great to make the confession coerced it comes in because it has to be coerced in order for it to be compelled. Well if that’s true, what was the point of Miranda? There’s no point at all. What was accomplished? Obviously we are applying a different test and obviously compulsion requires less pressure than coercion. In fact, during the early arguments, Miranda had three companion cases, during the early arguments in one of the companion cases, I think they were all court appointed. Victor Earl, who was a court appointed lawyer from Kravatz, Wayne, and Moore, was asked by Justice Harland, ‘Are you claiming that your client’s confession was coerced?’ And Victor Earl said, ‘No way, the confession was not coerced.’ And that’s the whole point. It’s so hard to establish that a confession was coerced, we’ve got to get rid of this whole test and come up with something new. And so it was perfectly clear that compulsion requires less pressure than coercion and the two tests are not the same.

And finally another problem with this opinion by Rehnquist. In various places, Rehnquist calls Miranda warnings, ‘prophylactic rules, prophylactic standards and procedural safeguards’. Does this make the Miranda warnings and the Miranda rights second class constitutional rights? And then later Rehnquist talks about ‘protective guidelines’ and ‘recommended procedural safeguards’. Are these just guidelines are these just procedural safeguards, recommended safeguards? You read a Miranda opinion, it’s clear that Miranda’s a constitutional ruling. In fact, years later, Rehnquist says so when he writes the opinion in Dickerson, ‘reaffirming the constitutionality of Miranda.’ But he also says, in effect, and it’s not clear, Scalia and Alito and others have made it clear that they agree with him. He also says, ‘all the exceptions carved out of Miranda, on the basis that Miranda is not a constitutional decision stand as written.’ So what’s the point of reaffirming the constitutionality of Miranda when you’ve carved out all these exceptions based on the premise that Miranda is not constitutional?

It’s interesting to me and I hope to others that through all this yack about prophylactic standards and prophylactic rules, never once in Warren’s majority opinion in Miranda, never once in his sixty pages does Warren mention the term prophylactic rulings, never. And what’s even more significant is that none of the dissent mention prophylactic rules. I mean White writes a long, powerful dissent. Collin writes a long, powerful dissent. Neither one of them complains that where do you come off with these prophylactic rules? What are these prophylactic rules anyhow? What does that mean, prophylactic rules? White says well, these are bright line tests, but I think they are wrongly
administered. Alright, but he never suggests that Miranda did something extra-constitutional, inappropriate, they just don’t like the result. But White makes clear that the court had the power to do this even though he wrote a bitter dissent.

If one calls the Miranda rules prophylactic, whatever that means, one might fairly ask, compared to what? Well obviously compared to the fact-specific Voluntariness Test. But where did that come from? That’s not directly required. That’s not directly compelled. It came out of nowhere when you think about because the fifth amendment didn’t apply to the States until 1964, didn’t apply to the police station until 1966. Believe it or not, you had no privilege against self-incrimination in the police station. You didn’t need it in the courtroom because you had a lawyer next to you and you had your friends in the audience. It did apply if you appeared before a congressional committee maybe on TV. You didn’t need it when you’re on TV, you need it in the back room when nobody saw you. And when you look at the Constitution, you don’t find any terms and phrases which go with the Voluntariness Test. There’s nothing in The Constitution about coercion, about involuntariness, about breaking the will or overbearing the will. So why is the prohibition against the use of involuntary confessions as opposed to the protection inferenced by Miranda considered a constitutional right?

I think I’m running late so I’m going to stop right here, okay and get some questions. Any questions?

Professor Collins

Well let me take the liberty of...I was just checking. I recall there was an article in the Harvard Law Review by Harvey Monahan.

Kamisar

Common Law, yeah.

Professor Collins

Constitutional common law. In his attempt to say that a lot of what the court was doing and had been doing was constitutional common law. Do you understand given what he wrote there, Miranda to be a form of Constitutional common law?

Kamisar

No. I never understood that article anyhow, I’m sorry I never did. I know that Paul Cassal will argue...I should point out that the Clinton Administration would not allow the Department of Justice to defend the constitutionality of the federal statue that purported to overrule Miranda. So the Supreme court had to appoint someone to defend the constitutionality of the statue since the Department of Justice would not do it and they appointed a well-known professor named Paul Cassell and he made the common law argument but it didn’t get very far.

Yes?

Audience 1

I’m interested to learn more about this memo that former Justice Rehnquist wrote to John Dean. So Miranda actually never said this was going to be the permanent regime that The Constitution mandated, but simply a stop-gap and Congress was free to come up with something better. So just to defend Rehnquist since he is no longer with us to defend himself, perhaps as well as play devil’s
advocate, what if...

Kamisar

Well let me just correct you if I may. They didn’t say if Congress can come up with something better. They said these are the warnings that...one way to free the police...People ridicule the warnings: what are they doing with these warnings? Where do these warnings come from? But wouldn’t it have been better, I think not, would it have been better if the Supreme Court said okay the privilege against self-incrimination now applies to the police station, you guys figure out what to do and we’ll get back to you in five or seven years and we’ll tell you what you did was okay. So, instead, the Supreme Court says, one way to free the police to allow the police to interrogate people is to give the Miranda warnings. Now there may be other ways, but the other ways must be as effective as the Miranda warnings, they say that specifically. And Rehnquist says that when he reaffirms the constitutionality of Miranda in Dickerson, he says, same thing, they must be as effective. So Congress can’t do whatever it wants, it has to do something that is as effective. For example, having magistrates interrogating instead of police. Having police interrogate in the presence of magistrates. Having a tape-recorder requirement, having time limits like one hours or two hours for questioning, those might do it. But it’s interesting that neither Congress nor any state legislature did a damn thing because criminal defendants and criminal defense lawyers have many lobbyists. But, back to you.

Audience 1

So I want to defend Justice Rehnquist, I want to say something better in the sense that it’s as effective, but there’s democratic weigh-in, given that with all the virtues of democratic decision making, democratic weigh-in on the measures that would be as effective and that’s what I mean by something better, but...

Kamisar

Wait, wait, excuse me. I don’t understand what democracy has to do with The Constitution. I mean if we take a vote, I’m sure that the majority of American people would be against the privilege of self-incrimination. I’m sure a majority of the American people would be against some of the recent decisions on First Amendment. There certainly would be against decisions saying you couldn’t have school prayer in public schools, I mean, there’d be an overwhelming vote the other way, so the whole point of a constitution, I think, is to put limits on what democracies can do.

Audience 1

That’s a good rebuttal. Yes, but isn’t the goal of the court’s designed police procedure so that minute detail even prescribing the very words the police must utter or wouldn’t we benefit from democratic expertise such as an institutional competence argument, democratic expertise, sympathetic input, law enforcement testimony as to what is better suited to the conditions of police encounters? So to defend Justice Rehnquist’s memo, specifically.

Kamisar

Yeah.

Audience 1

I’m curious to learn more about it, though because one could argue that Justice Rehnquist was simply taking up the invitation to come up with something that is as effective as Miranda.
Kamisar

Oh, no, well I agree with that, but my point is that, how did this guy get on The Supreme Court? A lot of people who work for the Administration would love to be a Supreme Court Justice. What better way to get on the Supreme Court, you know Nixon hates Miranda, you know that he campaigned against Miranda. What better way to campaign for the Supreme Court than to write I hate Miranda too, just as much as you do President Nixon and that’s why I think we should amend the Constitution to get rid of it. And Nixon says, boy that guy is promising, he looks good. I’m not a legal ethicist, but I have some questions about whether the Supreme Court Justice who has written memos should at least acknowledge that he wrote those memos.

In assisted suicide arguments in the Supreme Court, I once moot courted the Attorney General in Vacco v. Quill and the first footnote says I moot courted this guy. I want the reader to know I moot courted this guy two days before the early arguments. He never mentions his memo, of course. He never mentions a memo written to United States attorneys, and this is a different memo, written to United States attorneys defending the statute which was later struck down. I’m just a little unhappy about that.

Audience 2

I’m sorry if this is a little off base but is there no attorney/client concern with him revealing that sort of information?

Kamisar

You know I haven’t ever really thought about it. But, it seems to me...It’s an interesting question. I don’t have the answer either. You know Ron? Is there attorney/client privilege?

Collins

I just take it a step further. First of all, I don’t have the answer. But the question is, is it also a question of recusal? When Chief Justice Rehnquist sat in the case, the Dickerson case, here was a man in the Justice Department was using a federal statue to tell members of the Justice Department how to circumvent Miranda. And then years later, he’s presiding over a case and you say well it didn’t really make a difference because he wrote the opinion that held, but why don’t you tell folks what would have happened had Rehnquist would have recused himself in that case.

Kamisar

In Dickerson?

Professor Collins

Yes.

Kamisar

Well if Rehnquist would have recused himself in Dickerson then the senior judge would have been Stevens and Stevens would have assigned the case to himself and Stevens was very fond of Miranda and Stevens would have written an entirely different opinion. In fact, I was telling Ron earlier today, it’s hard to believe. This is a true story, and if you don’t believe me, go to the 2005 issue of the Harvard Law Review volume 119, because you won’t believe me and I don’t blame you.
Audience 2

I believe you.

Kamisar

But when I tell you this story, you won’t believe me. Rehnquist has just died, his former law clerk Ted Cruise, who was at that time Solicitor General of Texas, writes a tribute to Rehnquist on his death saying he was a great justice, he was a very resourceful justice. He made the best of what he could even though things were looking bad. In Dickerson, he voted with the majority so he could assign the opinion to himself and write a bleepity-bleep opinion. He says, it is so bad, it’s embarassing. But what he did, he prevented Stevens from saying nice things about Miranda. And he instead, said things like well we’ve got Miranda under control, we’ve carved out some exceptions to Miranda so it’s not hurting law enforcement. I mean granted that’s not exactly a great tribute to Miranda and since then, in the sixty years since then, Thomas has been saying and Alito has been saying and Scalia has been saying, well all those cases that we did over thirty years which carved out exceptions to Miranda on the ground that Miranda was not a constitutional decision they’re all good, they’re all good as gold even though we now conclude that Miranda is a constitutional decision. So what have we accomplished? By Rehnquist writing the opinion, he wiped out the whole point of saying that Miranda is a constitutional decision and we reaffirm it because all those earlier opinions carving out exceptions like a public safety exception or a fruit of a poisonous tree exception are all based on the assumption that Miranda is not a constitutional decision. So Rehnquist accomplished a lot more by writing the opinion himself than what would have happened if Stevens would have written the opinion.

Audience 3

I have a couple of completely unrelated questions.

Kamisar

I hope they’re not completely unrelated.

Audience 3

Well unrelated to each other, but relevant to your talk, I hope.

Kamisar

Oh, okay.

Audience 3

If Miranda warnings are a constitutional requirement, why do you then argue that they should not be applied retroactively? And the second question had to do with that Harris, one of the decisions that you said that Burger ignored the Voluntariness argument that had in fact been preserved all the way up, why did the dissent not mention this?

Kamisar

Well, that’s a fair point. I don’t know why. The dissent was making other points other than this one. The dissent was pointing out that they had misread Walder and so forth.
Alright, now the first question about retroactivity. Retroactivity is all screwed up and the court has sometimes changed its position on retroactivity but it seems to me, even I who am relatively fond of Miranda would not apply it to a case where the police had to question someone a week before Miranda and the trial didn’t take place until a month after Miranda, how in the world can the police know what warnings to give? You can’t blame them, and so it seems to me the court made a mistake and should have said as a practical matter to be fair to the police, that the Miranda should apply to all interrogations after Miranda because no one knew what the warnings were going to be.

Audience 3

But it’s not the police’s rights that have been violated, it’s the defendant’s.

Kamisar

But we have to take into account...we have a balance why we should throw out this confession. It’s one thing to blame the police for not giving the Miranda warnings after they’re on notice that they’re supposed to give the Miranda warnings, but here, they’re doing the best they can, say, and then they gave some of the warnings. In the Harris they left out the warning about the right to counsel if you can’t afford one at the state expense. But they did say have a right to remain silent, they did say have a right to a lawyer, they just didn’t say specifically have a right to a lawyer even if you can’t afford one. But no one knew what the court was going to do, so I think you’ve got to accommodate competing interests and I would let that in.

Audience 4

I have a comment about the recussal of Justice Rehnquist on record and then I have a question about Dickerson. With regard to recussal, don’t you think that would kind of create a slippery slope? I mean, Justice Briar has heard a couple cases on constitutionality of US Senate guidelines, even before he became a judge he was one of the primary creators of it, so I would like to hear what you’d say about that. And also do you think the court will ever go back and reconsider those cases like Oregon v. Elstad where they based the whole decision the fact that it’s not a constitutional right, and now after Dickerson, they say it is a constitutional right.

Kamisar

Well to answer your last question first, it depends on how many appointments Obama has. When I was a law student, I wold say gee, teaching constitutional law would be the mile run if you’re a track star, the glamour race, what could be better than teaching constitutional law? I gave it up after about twenty years because justice so-and-so agrees with part 3b of so-and-so and dissents from part 4b, I mean come on. I remember one time there was a question whether you could put a flyer in someone’s mailbox without paying postage and the court spent 200 pages on this thing. They were by seven different opinions and concurring with part 3...

Audience 3

I’m finding the same thing in Civ Pro.

Kamisar

It’s pretty depressing when you know that the court can change results pretty quickly. I think it’s more true about criminal procedure than it is other things, there’s something about criminal procedure. By the time you become a supreme court justice, you’re in your fifties and you’ve made up your mind about the death penalty, you’ve made up your mind about Miranda, you’ve made up...
your mind about the fourth amendment exclusionary rule. I mean there are a lot of areas where people haven’t even thought about it like patent law, and tax law, and anti-trust law, but on some things you’ve made up your mind. Nixon did a very skillful job of knowing which people to put on the Supreme Court. He’s certainly right in the case of Burger and Rehnquist. None of these four guys were enamored of the war in court, none of them liked Miranda, none of them liked the exclusionary rule. Of course, Eisenhower made two mistakes, he put Brennen and Warren on the Supreme Court, but ever since then, the presidents have been much more careful and much more successful. One of the reasons for the stealth overruling of Miranda...why not just overrule it? They may have had the votes to do it. At one time I think they did. But they don’t want to do it, they don’t want to make noise, they don’t want to attract attention because people say what is this, you know you change the personnel...so they’re doing it quietly. I think there’s something about lawyers, they love to cut down cases slowly-distinguished cases and at some point if this goes on...If McCain had become president, and he had to choose two appointments rather than Sotomayor and Caden, it would have been all over because he says he wants justices like Scalia and Alito. I think what would have happened is that Scalia would have written an opinion saying it’s time to give Miranda a decent Christian burial, that would have been the end of it.

Audience 3

He would have said Catholic burial.

Kamisar

Maybe he would have just said burial to avoid church and state issues. Alright, anybody else?

[Applause]