

# LIVING WITH *MIRANDA*: A REPLY TO PROFESSOR GRANO

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## I. INTRODUCTION

Ten years ago, I wrote a review—*Whither Miranda*<sup>1</sup>—of Liva Baker's book, *Miranda: Crime, Law & Politics*.<sup>2</sup> In that article, I suggested that *Miranda v. Arizona*<sup>3</sup> actually has had little impact on the day-to-day operations of the police or other investigative agencies. Interviews, questioning, and interrogations are conducted almost exactly as they had been before *Miranda*, except for the addition of warning cards in formal settings.<sup>4</sup>

In addition, I argued *Miranda*'s value as a legal precedent has been minimal. "Today, in almost all the cases involving admissions, the essential issue is voluntariness, the same issue stressed before *Miranda*. The only difference is a slight shift in the nature of the inquiry."<sup>5</sup> The pre-*Miranda* inquiry was whether the *confession* was voluntary—that is, knowing, intelligent, and noncoerced.<sup>6</sup> The inquiry under *Miranda*, when warnings are required at all,<sup>7</sup> is whether the *waiver of rights* is voluntary—that is, whether it was given freely, knowingly, and intelligently.<sup>8</sup>

Before the trial court, both under the old and new standards, "the suspect would claim and the police would deny" that the confession or the waiver was

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1. Martin H. Belsky, *Whither Miranda*, 62 TEX. L. REV. 1341 (1984) (book review).

2. LIVA BAKER, *MIRANDA: CRIME, LAW & POLITICS* (1983).

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

4. Belsky, *supra* note 1, at 1357.

5. *Id.* at 1355.

6. See, e.g., *Rogers v. Richmond*, 365 U.S. 534 (1961).

7. See, e.g., *Berkemer v. McCarty*, 468 U.S. 420 (1984) (holding a traffic stop not "custody" and *Miranda* requirements do not apply); *New York v. Quarles*, 467 U.S. 649 (1984) (detailing "public safety" exception to *Miranda* requirements).

8. *Colorado v. Connelly*, 479 U.S. 157, 169-70 (1986) (holding standard for voluntariness of waiver same as for voluntariness of confession).

coerced.<sup>9</sup> The trier of fact "would resolve the questions of believability, usually in favor of the state."<sup>10</sup>

I did indicate in that article, however, that *Miranda* had a significant impact, but only as a symbol of the Warren Court's criminal justice "revolution."<sup>11</sup> As compared to complicated rules of search and seizure, for example, *Miranda* was relatively straightforward.<sup>12</sup>

To police, civil libertarians, "law and order" politicians, judges, prosecutors, defense counsel, and then the press and the public, *Miranda* became the "culmination of a judicial philosophy" that challenged many of the premises of the criminal justice system and also the self-perceptions and external perceptions of the roles of police, counsel, and judges.<sup>13</sup> *Miranda* has endured, I stated, because it "masks" changes that have lessened the constitutional protections of all of us as against the state.<sup>14</sup>

Recently, I had the opportunity to attend a symposium on the Warren Court's "Criminal Justice Revolution" of the 1960s,<sup>15</sup> and to participate in a discussion on the continuing impact of *Miranda*.<sup>16</sup> At that symposium, Professor Joseph Grano attacked the *Miranda* decision as being unsupported by the Constitution.<sup>17</sup> He also stated *Miranda* remains a real threat to law enforcement: "If we don't repudiate *Miranda*, someday somebody is going to take it seriously.

9. Belsky, *supra* note 1, at 1356.

10. *Id.*

11. *Id.* at 1354.

12. *Id.* at 1348.

[P]olice had to give warnings and then ask questions to determine if the defendant wanted to talk or to seek the aid of counsel. Lawyers were supposed to represent all citizens, rich and poor, preferably beginning at the station house. Police and prosecutors could not use at trial any confessions obtained without following these rules.

*Id.*

13. *Id.* at 1348-49.

For some, the majority opinion by Chief Justice Warren indicated how unfairly we treated the underprivileged. . . . To others, *Miranda* demonstrated that our judicial system was tying the hands of the police in investigating and stopping crime. . . . A third view focused on *Miranda*'s impact on the fragile balance between federal and state roles and on the sharing of powers among the executive, legislative, and judicial branches of government. . . . Finally, many feared the effect of *Miranda* and other cases on the [criminal justice] system. . . . An already overburdened system could respond only with additional prosecutors, judges, judicial administrators, and courtrooms, with higher costs and longer delays, and with less finality of judgments.

*Id.* at 1341-42.

14. *Id.* at 1360-61. I cited Professor Stanley Ingber's discussion of how *Miranda* has been used to assuage "intense pressure to reform police practices without, in reality, altering the status quo." *Id.* at 1361 n.115 (citing Stanley Ingber, *Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control*, 56 B.U. L. REV. 266, 273 (1976)).

15. Symposium, *Liberty and Security: A Contemporary Perspective on the "Criminal Justice Revolution" of the 1960s* (Apr. 4, 1992) [hereinafter Symposium] (available from the Constitutional Law Resource Center at the Drake University Law School).

16. *Id.* at 115-16, 119-20, 125, 127, 129, 136-37, 139-40.

17. *Id.* at 108-15.

One commentator has said it's time to 'Mirandize *Miranda*.' That means it's time to outlaw police interrogation. You will see a real effect on law enforcement if we go that far."<sup>18</sup>

Professor Grano and I worked together as prosecutors.<sup>19</sup> His comments both prior to and during that symposium have made me review my experiences as an assistant district attorney and reassess the need for, as well as the impact, and significance of, *Miranda*.

## II. THE IMPACT OF *MIRANDA*—A PERSONAL RECOLLECTION

I was a law student when the United States Supreme Court decided *Miranda*. The decision was received by faculty and students as *the* example of the "progressive" Warren Court's desire to incorporate civil liberties into the day-to-day operation of the criminal justice system.<sup>20</sup>

The decision was criticized for tying the hands of the police and inevitably leading to increased lawlessness and violent crime.<sup>21</sup> It was praised as upholding the rights of the poor, and minorities, against the official "state."<sup>22</sup> It was the focus of discussion not only in our courses on criminal procedure and constitutional law, but also in administrative law, evidence, torts, and even, to my surprise, comparative law.<sup>23</sup>

Between my second and third year of law school, I worked in a prosecutor's office in Philadelphia.<sup>24</sup> That office, the interns were told, was a "modern" prosecutor's office, working with the police, but not for the police. We would help the police understand the new constitutional doctrines, and make sure they were applied.<sup>25</sup> We would convict the guilty, while preserving the constitutional rights of all.<sup>26</sup> In fact, most of the summer interns in the prosecutor's office

18. *Id.* at 124.

19. *Id.* at 115.

20. See RAMSEY CLARK, *CRIME IN AMERICA* 204 (1971).

The truth is that the courts and primarily the United States Supreme Court have done more to right wrong, to perfect the system, to speed the process and to bring equal justice than the legislative and executive branches combined. That a handful of men have been capable of this shows how readily we can overcome, if we truly care.

*Id.*

21. See Yale Kamisar, *When the Cops Were Not "Handcuffed,"* in *CRIME AND CRIMINAL JUSTICE* 46, 53-55 (Donald R. Cressey ed., 1971) (quoting police officials, judges, and prosecutors).

22. See George Edwards, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 *FORDHAM L. REV.* 169, 188 (1966).

23. See Note, *Developments in the Law, Confessions*, 79 *HARV. L. REV.* 935, 1090-1119 (1966); see also Walter S. Tarnopolsky, *The Lacuna in North American Civil Liberties—The Right to Counsel in Canada*, 17 *BUFF. L. REV.* 145, 158 (1967).

24. See ARLEN SPECTER, *THE 1969 REPORT TO THE PEOPLE OF PHILADELPHIA* 266 (1970).

25. *Id.* at 197.

26. This perspective, which some may consider naive, is merely a restatement of the classic statement of a prosecutor's role given by the United States Supreme Court in *Berger v. United States*, 295 U.S. 78, 88 (1935). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1989); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 cmt. (1989).

agreed with *Miranda*, as well as *Mapp v. Ohio*,<sup>27</sup> *United States v. Wade*,<sup>28</sup> and related decisions.<sup>29</sup>

After law school and graduate school,<sup>30</sup> I was asked to return, and I accepted an appointment as an assistant district attorney. I was enthusiastic, as only a twenty-five year old can be. I would have prestige, power, visibility, and excitement. I was also, however, going to be an "upholder" of constitutional rights. I saw nothing inconsistent with being a prosecutor and also a member of the American Civil Liberties Union.<sup>31</sup>

In the late 1960s, the Philadelphia District Attorney's Office divided its attorneys into specialties. A number of young prosecutors were assigned to special units to handle pretrial motions, posttrial motions, and appellate work.<sup>32</sup> Being in these units meant we were on the "cutting edge" of developing constitutional doctrines<sup>33</sup> and were to act as intermediaries for justice.<sup>34</sup> We had the authority, and often exercised it, to drop cases because of constitutional violations.<sup>35</sup> We felt it our responsibility to spend a considerable period of our time training the police on how to live with constitutional decisions,<sup>36</sup> especially as applied by the "liberal" Pennsylvania Supreme Court.<sup>37</sup>

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27. *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding exclusionary rule as to search and seizure applies to states).

28. *United States v. Wade*, 388 U.S. 218 (1967) (recognizing a right to counsel at lineups).

29. This "liberal" perspective was, of course, the basis for continuous teasing of these often long-haired interns by the "old-timers" both in the prosecutor's office and the police department—and, I should add, in the public defenders' and private defense counsels' offices as well.

30. I attended graduate school at Cambridge University's Institute of Criminology in England. There, my professors described their "voluntary Judges Rules," and argued their society had no need for mandatory warnings or other rules arbitrarily setting up procedures for the police. See DELMAR KARLEN, *ANGLO-AMERICAN CRIMINAL JUSTICE* 101, 106-07, 121-29 (1967). English police, it was claimed, were much more respectful of individual liberties and rights. *Id.* at 98, 100. As part of my studies, I worked with police and probation officers in a "tough" section of London, called Elephant and Castle. I did not always observe this "respect" described by my professors.

31. My attitude may not have been, or still be, the norm. See DAVID HEILBRONER, *ROUGH JUSTICE* 14-15 (1990); DAVID NISSMAN & ED HAGEN, *THE PROSECUTION FUNCTION* at ix, 1, 77 (1982).

32. ARLEN SPECTER, *THE 1970-71 REPORT TO THE PEOPLE OF PHILADELPHIA* 178-235 (1972).

33. "[T]he Assistant District Attorneys in the Motions division must be experts in constitutional law and criminal procedure. Furthermore, they must keep up with the newest developments in these fields." *Id.* at 212.

34. SPECTER, *supra* note 32, at 212 ("In motions hearings, it is not really the defendant who is on trial, but the criminal justice system.").

35. See Martin H. Belsky, *Students as Prosecutors: The Philadelphia Experience*, 45 PA. B. ASS'N Q. 423, 427 (1974) (discussing the ethical obligation not to introduce evidence that is unconstitutional, even if unchallenged).

36. Young attorneys in the Motions and Appellate Divisions would prepare memoranda on every new decision that would explain those decisions and how to comply with them. These memos were, we hoped, written in practical, understandable, non-"legalese" language. In addition, we conducted training sessions for police officers and detectives on a regular basis as to new rules for evidence and for related on-the-street conduct.

37. As the Burger Court became more dominant in the early 1970s, the Pennsylvania Supreme Court, at least in the opinion of the district attorney's office, became more independent

In training police, we conveyed our general belief, stated in *Miranda* and other cases, that good investigatory work lessened the need for interrogations and confessions.<sup>38</sup> Thus, we often directed our training of police at improving investigating techniques so as to secure admissible evidence.<sup>39</sup>

Because of the concerns about legal technicalities, prosecutors also became increasingly involved with police investigations, particularly in major crimes and homicides.<sup>40</sup> The theory was that we would be able to give the police advice on the practical applications of constitutional doctrines and ensure the evidence that was secured was completely in accord with constitutional requirements.<sup>41</sup>

It was, of course, quite exciting. We each became "one of the boys" going out to solve crimes.<sup>42</sup> Moreover, we became more sympathetic to the conflicting pressures on the police. They were told to spend more time on the streets and to resolve cases as quickly as possible. The public's perception, accurate or not, was of increasing crime. As a result, prevention and arrest, and not evidence collection, had to be the priority.<sup>43</sup>

We saw how and why police often relied on confessions, rather than investigatory techniques. With over 300 homicides a year, for example, they did not have the time to conduct sophisticated fingerprinting investigations, to analyze circumstantial evidence, and to use other procedures to "close" the case.<sup>44</sup> Moreover, it was not clear these alternative investigatory techniques worked. A confession could be the only way to solve a crime.<sup>45</sup>

We also learned from the police and observed that defendants did confess, even after the most detailed warnings.<sup>46</sup> As a result, we soon became troubled by "technical applications" of the *Miranda* doctrine.<sup>47</sup> Our idealism became tempered with reality. We saw many of the individuals coming through the system,

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and "liberal" and interpreted the federal and state constitutions "more broadly" to provide for more defendant's rights. See generally Martin H. Belsky, *Criminal Procedure in Pennsylvania: The Pre-Trial Issues in Four Parts*, 78 DICK. L. REV. 209 (1973).

38. *Miranda v. Arizona*, 384 U.S. 436, 481 (1966).

39. Among the courses taught were chain of possession, use of fingerprinting, use of new techniques like voicegrams, and careful searches and seizures.

40. See SPECTER, *supra* note 24, at 61.

41. See SPECTER, *supra* note 32, at 57.

42. See Transcript of Hearing on Motion to Suppress at 396-460, *Commonwealth v. Hogan*, Nos. 2091-2092 (Phila. Ct. C.P. May 31, 1972) (testimony of Martin H. Belsky, Assistant District Attorney).

43. See ABRAHAM BLUMBERG, *CRIMINAL JUSTICE ISSUES AND IRONIES* 70-71 (2d ed. 1979); see also NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE REPORT ON POLICE 13 (1973) ("The fundamental purpose of the police . . . is crime prevention through law enforcement.").

44. In Philadelphia, for example, the number of homicides increased from about 200 to 400 a year from the late 1960s to the early 1970s. There was little increase in the number of homicide detectives. Most cases were "cleared" by an inculpatory statement. See SPECTER, *supra* note 32, at 58.

45. See Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L. CRIMINOLOGY & POL. SCI. 16-17 (1961).

46. Each of us had our own favorite "war story." Mine can be found *infra* note 147.

47. See *Commonwealth v. Davis*, 270 A.2d 199 (Pa. 1970) (holding language of warning not sufficiently precise), *cert. denied*, 402 U.S. 999 (1971).

and met with and felt for the victims of crimes. Sometimes it was quite hard not to wink or blink or nod at seeming violations of the constitutional doctrines when the result would be to punish the "bad guy."<sup>48</sup>

Our exposure to reality was reflected in how we dealt with pretrial motions. We became more accepting of the idea that we must uphold "police and public rights," as well as those of the defendant. We assumed the good faith of our investigators.<sup>49</sup> We questioned less frequently whether a search and seizure problem existed, or whether the defendant merely "abandoned" the evidence.<sup>50</sup> Moreover, we wanted to believe, and therefore assumed, the police gave appropriate warnings to the defendant and the defendant appropriately waived them.<sup>51</sup> We also assumed the defendant never made a request to see an attorney, a family member, or anyone else, or elected to remain silent.

After serving for a period of time in the motions or appellate divisions, many of us then moved on into major trial work.<sup>52</sup> Our focus was no longer constitutional rights, but proof of a defendant's guilt or responsibility.<sup>53</sup> Pretrial motions were not part of our direct responsibility, and we did not have to worry as much about the constitutional standards for statements, physical evidence, or identifications.<sup>54</sup>

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48. Martin H. Belsky, *On Becoming and Being a Prosecutor*, 78 NW. U. L. REV. 1485, 1515 (1984) (reviewing NISSMAN & HAGEN, *supra* note 31). Nissman and Hagen forcefully—too forcefully in my opinion—expressed this position in their book:

[T]he prosecutor's role should be obvious. Since the criminal defender is relying on a technicality to spring a manifestly guilty criminal to freedom so that they may return to prey on the community the prosecutor is sworn to protect, the prosecutor should use every technicality available to the people to challenge the defense technicalities.

NISSMAN & HAGEN, *supra* note 31, at 77.

49. Of course, this "good faith" standard now seems to have been adopted by the Supreme Court in reviewing police practices and the exclusionary rule. *United States v. Leon*, 468 U.S. 897 (1984) (discussing good faith reliance on a search warrant); *Duckworth v. Eagan*, 492 U.S. 195 (1989) (discussing good faith attempt to detail *Miranda* warnings).

50. To justify a search, police often relied on an argument that they never searched an individual, but rather that the individual "dropped" the item to avoid arrest when he saw the police officer approaching. The basis for this testimony was a legal doctrine. If an item is abandoned by an individual and no longer in his possession, observation and then seizure of that item cannot be a violation of the Fourth Amendment search and seizure rules. *See, e.g., Commonwealth v. Tatro*, 297 A.2d 139 (Pa. 1972); *see also* Belsky, *supra* note 37, at 251.

51. *See* David Rudovsky, *The Criminal Justice System and the Role of the Police*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 242, 246-47 (David Kairys ed., 1982).

52. Most assistant district attorneys went into regular felony and misdemeanor courts. Trials were only occasional in these cases. Almost all "nonmajor" cases were disposed of by plea.

53. In major trial work, like in nonmajor trial work, most cases were disposed of by a plea agreement. The system was set up, however, to have pleas heard in a separate "calendar room" and handled by a calendar assistant district attorney (usually the Chief or Deputy Chief of the unit). Only litigated cases were sent to "trial rooms." Thus, most attorneys in the major trial and homicide units spent their time preparing for trial and then trying cases. SPECTER, *supra* note 32, at 58-59, 79-80.

54. We did not have to worry "that much" about constitutional doctrines, because once admitted into evidence by the judge after a pretrial hearing, it would go before the fact-finder. Of course, defense counsel could and would argue the evidence was improperly secured and therefore

Trial prosecutors, even more than motions or appellate prosecutors, were and are even more conflicted about their obligations to assure that "justice is accomplished."<sup>55</sup> Our goal was to convict individuals. More often than not, we did not focus on police behavior and just became troubled when any piece of evidence was lost by pretrial motions.<sup>56</sup>

This concern about loss of evidence became tempered by the practical impacts of the new "constitutional code of criminal procedure."<sup>57</sup> Police and prosecutors became more accustomed to the rules, and saw how they operated. Administrators and government budget managers saw less need for a specialized cadre of constitutional experts in a special motions court.

For most defendants who have progressed through the arrest, preliminary hearing, and other screening processes, there is no issue as to proof of guilt.<sup>58</sup> To secure a reduced sentence, they were encouraged to plead guilty.<sup>59</sup> In fact, most criminal cases, even for serious offenses, were resolved not by a formal trial but by a guilty plea.<sup>60</sup> Having the motion and the plea handled and disposed of together was much more efficient.

This change took place in steps. Initially, all pretrial motions were heard in a special motions court. In 1970, a new policy required nonmajor pretrial motions to be heard at the time of trial and to be handled by the trial attorney. Because most defendants in nonmajor cases pleaded, most cases could be disposed of with a plea after a denied motion to suppress, or with waiver of the motion as part of the plea bargain. Motions in homicide and other major cases were still scheduled separately because "the complexity [of such cases] require[d] a separate hearing."<sup>61</sup>

Soon, however, even this policy of separation was changed. More and more of the pretrial evidence motions in major and homicide cases began to be handled by the trial attorney. The belief was the attorney could become familiar

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should be excluded from consideration by the fact-finder. *See Jackson v. Denno*, 378 U.S. 368 (1964).

Moreover, for confessions, the lack of compliance with *Miranda* was a factor for the jury to consider in determining whether the confession was secured voluntarily. *See Davis v. North Carolina*, 384 U.S. 737 (1966); *see also Stovall v. Denno*, 388 U.S. 293 (1967) (holding constitutional standards established by *United States v. Wade*, 388 U.S. 218 (1967), not retroactive; standards should be considered, however, as an element of due process going to the validity and reliability of identifications).

55. NAT'L DIST. ATT'YS ASS'N, NATIONAL PROSECUTION STANDARDS Standard 1.1 (2d ed. 1991) [hereinafter PROSECUTION STANDARDS].

56. *See* Martin H. Belsky, *The Retaliation Doctrine: Promoting Forensic Misconduct*, 50 ALB. L. REV. 763, 795 (1986).

57. *See* Belsky, *supra* note 1, at 1350.

58. Even the strongest defenders of defendants' rights concede most criminal trials involve guilty defendants. *See, e.g.,* Alan M. Dershowitz, *Forward* to JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT at x-xi (1985).

59. *See Santobello v. New York*, 404 U.S. 257, 260 (1971) (stating plea bargaining is "essential component of administration of justice" and "to be encouraged").

60. *See* PROSECUTION STANDARDS, *supra* note 55, at 198 (addressing pressure to reduce caseload and appropriateness of negotiated pleas to reduce load).

61. SPECTER, *supra* note 32, at 222.



with the case from the very beginning.<sup>62</sup> Additionally, it was believed, a prosecutor would fight for the suppression motion much more avidly because he knew that without that piece of evidence he could lose the case.<sup>63</sup>

This policy of assignment of the trial attorney to a motion hearing soon evolved into assignment of pretrial evidence motions to the time of trial. Because most pretrial suppression of evidence motions were denied, the immediate next step could then be a guilty plea. The testimony given at the pretrial hearing, before the same judge, could be incorporated or summarized.<sup>64</sup>

Having pretrial motions scheduled for the time of trial and handled by the trial prosecutor also led to more pleas. Defense attorneys sought better deals in return for waiver of pretrial motions. Prosecutors, seeking to dispose rapidly of more cases, were more willing to offer better deals at the time of trial.<sup>65</sup>

Of course, in some cases, the pretrial motion was followed by a trial. Even in those few cases in which a trial occurred, however, at-trial scheduling was more practical. If there was a bench trial, again the testimony and evidence at the pretrial hearing could be incorporated by reference.<sup>66</sup> If there was a jury trial, you could immediately proceed to jury selection. There was no need to switch courtrooms, change prosecutors, or change judges. Delay was thereby reduced.

The change in procedure to dispose of motions was paralleled by the change in their importance, especially of confession motions. Police learned more about the various constitutional doctrines and either learned to live with them and apply them better,<sup>67</sup> or learned how to mouth the appropriate responses.<sup>68</sup>

Adjudication of constitutional rights in a pretrial suppression hearing no longer became a question of the application of a set of constitutional principles. It merely became another place where the fact-finder (here the judge) was to determine credibility.<sup>69</sup>

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62. For efficiency, it also became increasingly common to have pretrial motions heard by the trial judge, usually just prior to a trial or a plea. There is a constitutional right to have the validity of a confession made outside the presence of the jury, but not necessarily by a separate judge from the trial judge. See *Jackson v. Denno*, 378 U.S. 368 (1964).

63. For an example of this "passion," see NISSMAN & HAGEN, *supra* note 31, at 77, 93.

64. The Constitution requires there be a "factual basis" for a plea of guilty. *North Carolina v. Alford*, 400 U.S. 25, 38 n.10 (1970). One common method to assure such a factual basis is to rely on the pretrial information, including the testimony at any pretrial hearing. See ABA STANDARDS FOR CRIMINAL JUSTICE Standard 14-1.6(b) commentary at 14-35 (1979).

65. For a discussion of the reasons prosecutors accept pleas, including backlog and potential difficulties with the evidence, see PROSECUTION STANDARDS, *supra* note 55, at 222-23 (1977).

66. Philadelphia was rather unique in the large number of cases tried by jury trial waiver. See Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1083-84 (1984); see also Stephen J. Schulhofer, *No Job Too Small: Justice Without Bargaining in the Lower Criminal Courts*, 1986 AM. B. FOUND. RES. J. 519, 557-60. The process was that a defendant would waive his or her right to a jury and also stipulate to evidence, including the evidence presented at the pretrial hearing.

67. See Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 456-58 (1987).

68. See Rudovsky, *supra* note 51, at 246-47.

69. Credibility also became an issue with other constitutional doctrines. For physical evidence, the question was reliability and source of prior information—probable cause and "reliable



Having observed this phenomenon, I was not surprised when Chief Justice Burger indicated *Miranda* had no practical impact on police departments.<sup>70</sup> Police departments were learning to live with it, and the impact on the criminal justice system was negligible.<sup>71</sup> *Miranda* had become a symbol, rather than a practical problem.<sup>72</sup>

With this background, shared in part by my colleague Professor Grano, it is understandable why I am continually surprised by Professor Grano's belief that *Miranda* is still a problem—that it still “dictat[es] the terms of the debate,”<sup>73</sup> and that the ideas of *Miranda* and *Escobedo v. Illinois*,<sup>74</sup> if taken seriously, naturally lead to the “next step”—the “end[ing of] police interrogation altogether.”<sup>75</sup>

### III. MIRANDA AND ITS CONTINUING IMPACT

Professor Grano challenges—as he has done often<sup>76</sup>—the philosophical and historical bases for *Miranda*. He argues against the “*Miranda*-type mentality” that disfavors any confession evidence at all. He implies doctrines like those

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informants” or whether evidence was in “plain view” (“dropsy cases”). See Belsky, *supra* note 37, at 235-62 (reviewing decisions and rules for searches and seizures). For identifications, the problem was whether an identification in court was tainted by an improper showup, photographic identification, or lineup prior to trial. *Id.* at 262-80 (reviewing rules and decisions for identifications).

70. See *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring).

71. See *Criminal Justice in Crisis*, in A.B.A. SECTION ON CRIMINAL JUSTICE, SPECIAL COMMITTEE ON CRIMINAL JUSTICE IN A FREE SOCIETY 28 (1988) (reporting a large majority of police, prosecutors, and judges agree *Miranda* has had little impact on law enforcement).

72. See Belsky, *supra* note 1, at 1347-55.

73. Symposium, *supra* note 15, at 122.

74. *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Escobedo* was the predecessor to *Miranda* that had a very limited holding requiring counsel be made available when there is a specific request for one. *Id.* at 490-91.

75. Symposium, *supra* note 15, at 123-24. Professor Grano concedes there might be no present impact on police practices, but he warns:

Someday there will be a different Supreme Court; some day the liberals will be back in the Court. If we don't repudiate *Miranda*, someday someone is going to take it seriously. One commentator has said that it's time to “Mirandize” *Miranda*. That means it's time to outlaw police interrogation. You will see a real effect on law enforcement if we go that far.

*Id.* at 124.

In his original paper prepared for the Symposium, Professor Grano was much more forceful. In that paper he expressed concern there has not been an attack on the philosophical assumptions, or doctrines, attached to the various *Miranda*-related cases. Changes, he indicates, have been made “in the margins,” which means “the eventual demise of police interrogation as law enforcement institution only will be delayed.”

76. See, e.g., Joseph D. Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1 (1979) [hereinafter Grano, *Constitutional Premises*]; Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 683-84 (1986).

detailed in *Miranda* are still tying the hands of police.<sup>77</sup> Although I disagree with his argument, my greater concern is that his attack lends some credence to a continuing belief that *Miranda* has some practical procriminal effect.<sup>78</sup>

*Miranda*'s symbolic value to police, other law enforcement authorities, and their supporters should not be underestimated. The perception was widely accepted that we had now in our laws a "liberal" and "hypertechnical" set of protections, as expressed by *Miranda*, *Mapp v. Ohio*,<sup>79</sup> *United States v. Wade*<sup>80</sup> and other decisions.<sup>81</sup> Moreover, these rules showed we were "bending over backwards" to be "fair" to defendants in our criminal justice system.<sup>82</sup> This led to political and popular calls for a return to "law and order."<sup>83</sup>

The public and political pressure led to demands for, and receipt of, more resources for police departments, prosecutor offices, and other elements of the criminal justice system.<sup>84</sup> It also led to more sympathetic decisions from judges and juries.<sup>85</sup> There has been, in fact, little negative impact from *Miranda* to counter-balance these real benefits to police and prosecutors. Police questioning as an investigation tool has not diminished.<sup>86</sup> Police departments and prosecutors soon came to realize the factual issues of the voluntariness of a confession were the same before and after *Miranda*.<sup>87</sup>

77. At the symposium, Professor Grano cited some examples of "trickery and tactics" he finds inoffensive but argues the academic defenders of *Miranda* would find offensive. See Symposium, *supra* note 15, at 122-23.

78. Symposium, *supra* note 15, at 116 (Defense Attorney Raymond Rosenberg noting "the public perceives *Miranda* as a great hindrance to law enforcement").

79. *Mapp v. Ohio*, 367 U.S. 643 (1961).

80. *United States v. Wade*, 388 U.S. 218 (1967).

81. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 94 (1967) [hereinafter 1967 COMMISSION].

82. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATT'Y GEN. ON THE LAW OF PRE-TRIAL INTERROGATION (Jan. 1987), excerpted in YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 546-47 (7th ed. 1990) (regarding *Miranda* as the "epitome of Warren Court activism in the criminal law area"); see also Belsky, *supra* note 1, at 1341-42 ("handcuffing" of police by liberal rules).

83. See BAKER, *supra* note 2, at 200-12; see also CLARK, *supra* note 20, 206 ("[M]any would have us think that nothing is more important to crime control than a reversal of the *Miranda* rule.").

84. See NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME 29 (1973) (stating public fears meant more willingness to spend more money to combat crime; increase in expenditures for all parts of criminal justice system).

85. See Note, *Waiver of Rights in Police Interrogations: Miranda in the Lower Courts*, 36 U. CHI. L. REV. 413-47 (1969).

86. See, e.g., Richard J. Medalie et al., *Police Interrogation in the Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); see also Yale Kamisar, Edward L. Barrett, Jr., *The Critic with 'That Demand of Judiciousness Demanded of the Court Itself,'* 20 U.C. DAVIS L. REV. 191, 210-11 (1987).

87. At the symposium, Professor Stanley Ingber noted many of the tricks or cajolery that many hoped—and Professor Grano feared—would be eliminated by *Miranda* have in fact survived. The only difference now is that warnings have to be given and a waiver received—and then the tricks can commence. Symposium, *supra* note 15, at 120. See Note, *supra* note 85, at 431-32

Professor Grano also gives credence to another aspect of the myth of *Miranda*: that it helps the unsophisticated and poor.<sup>88</sup> In fact, the warnings and waiver requirement can act as a smoke screen to cover the real voluntariness issues surrounding interrogation.<sup>89</sup>

Before *Miranda*, and after, the educated or sophisticated defendant simply would not talk—not because warnings were or were not given, but because he or she was sophisticated. The accused would wait for a lawyer to come so the only way they could get a confession out of the individual would be by overt coercion, which was not allowed even pre-*Miranda*.<sup>90</sup>

Before *Miranda*, and after, the unsophisticated defendant would often talk, usually with little or no active encouragement, and with little need for any physical coercion and response. He or she would talk, not because warnings were or were not given, but because of the atmosphere of the police station, or the interrogation, or other factors.<sup>91</sup>

The focus on *Miranda*'s alleged negative impact on police and law and order has also served as a diversion from any real look at the day-to-day operations of police departments.<sup>92</sup> Professor Grano does accept the fact that police officers should not always be trusted and that videotaping of interrogations would show how most confessions are voluntarily secured.<sup>93</sup> Such taping has of course been vigorously opposed by law enforcement agencies.<sup>94</sup>

The focus of police has not been reform of police practices but a challenge to the liberal courts. The exclusionary rule, of course, has very limited impact. If a defendant is not arrested, or if evidence is not challenged, there is effectively no remedy for improper police tactics.<sup>95</sup> Efforts to provide for control of police administrative discretion and for limiting immunity from civil liability for

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(noting study showed that pre-*Miranda* tactics being used and not being found sufficient by courts to find waiver or confession involuntary).

88. Symposium, *supra* note 15, at 112; see Joseph D. Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859, 914 (1979); see also Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 711 (1969).

89. See Note, *supra* note 85, at 421-22.

90. See Caplan, *supra* note 88, at 1421.

91. Professor, and former prosecutor, H. Richard Uviller seems to argue that because warnings and waiver make no difference, we should eliminate the *Miranda* requirements. H. RICHARD UVILLER, *TEMPERED ZEAL* 194-96 (1988).

Taking the exact opposite position is Professor, and former public defender, Charles Ogletree. Professor Ogletree argues that defendants should have a nonwaivable right to counsel before any questioning. Charles Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1842-44 (1987).

Professor Ogletree's proposal is the "next step" described by Professor Grano at the symposium. See *supra* text accompanying notes 18, 75.

92. See 1967 COMMISSION, *supra* note 81, at 93-94 (reporting although focus by police officers and citizens is on court decisions that hamper police, most police actions are unreviewed).

93. Symposium, *supra* note 15, at 127.

94. *Id.* at 129.

95. See ABA STANDARDS FOR CRIMINAL JUSTICE, *THE URBAN POLICE FUNCTION* 1-139, 1-149 to 1-150 (1980) (discussing nonimpact of exclusionary rules in the absence of prosecution, and the failure of existing remedies to control police abuse).

improper police tactics<sup>96</sup> have been challenged as interfering in police activities and have been unsuccessful.<sup>97</sup>

#### IV. *MIRANDA* AND FEDERALISM

Professor Grano also notes that he believes the "second Warren Court" and its decisions like *Miranda* reflected a disregard for federalism.<sup>98</sup> To the contrary, the practical effect of the Warren Court's decision in *Miranda* has been to promote federalism. Most criminal trials are in the state court system. Therefore, as noted earlier, in most cases the state judge determines all the factual issues—such as whether the warnings were given; if so, what were they; was there a waiver; and what were the circumstances of the waiver.<sup>99</sup>

Using the potential impact of *Miranda* and similar decisions as an indication of the need for deference,<sup>100</sup> recent Supreme Court cases have provided for increasing and almost unquestioning acceptance<sup>101</sup> of state court decisions<sup>102</sup> and state waiver in federal habeas corpus cases.<sup>103</sup> These cases have been viewed as confirmations of our system's faith in federalism.<sup>104</sup>

In the early days of *Miranda*, the argument in the state courts was often whether or not the federal standards were being appropriately implemented.<sup>105</sup> Soon the focus shifted to the practical: whether a warning was given and a valid waiver of rights obtained. *Miranda* merely shifted the focus of the "swearing contest."<sup>106</sup>

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96. See *id.* at 1-151 to 1-157.

97. See, e.g., *Rizzo v. Goode*, 423 U.S. 362, 371 (1976) (criticizing lower court for meddling in internal affairs of police department of Philadelphia); see also G. Flint Taylor, *Municipal Liability Litigation in Police Misconduct Cases from Monroe to Praprotnik and Beyond*, 19 CUMB. L. REV. 447 (1988).

98. Symposium, *supra* note 15, at 110-11; see Joseph D. Grano, *Miranda v. Arizona and the Legal Mind: Formalism's Triumph over Substance and Reason*, 24 AM. CRIM. L. REV. 243 (1986).

99. See Belsky, *supra* note 37, at 232-33.

100. See *Stone v. Powell*, 428 U.S. 465, 493 & n.35 (1976) (noting deference to state courts and judges is appropriate for exclusionary rule).

101. See *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (holding a habeas petitioner must show "cause and prejudice" to excuse a procedural default).

102. See *Sumner v. Mata*, 449 U.S. 539, 547-52 (1981) (reasoning state court fact-finding is entitled to very strong presumption of correctness).

103. See *Stone v. Powell*, 428 U.S. 465 (1976); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

104. See, e.g., Richard A. Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Proceedings*, 64 IOWA L. REV. 233 (1979).

105. See John Gruhl, *State Supreme Courts and the U.S. Supreme Court's Post-Miranda Rulings*, 72 J. CRIM. L. & CRIMINOLOGY 886, 888 (1981).

106. See Note, *supra* note 85, at 447; see also Gruhl, *supra* note 105, at 893 (arguing factual determinations are a way to evade *Miranda*); cf. *Walter v. Schaefer*, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 7 (1956) (stating local courts focus on a particular case and not abstract legal or procedural issues and have a tendency to favor law enforcement).

With the erosion of *Miranda* by later United States Supreme Court decisions,<sup>107</sup> a distinct minority of state courts<sup>108</sup> began looking to their own constitutions to provide for increased protections for civil rights.<sup>109</sup> *Miranda* was considered a minimum level of protection. State appellate courts were free to provide for increased protections in their court systems.<sup>110</sup> Despite this power, the state courts do not today take an independent stand. Most follow the lead of the Supreme Court.<sup>111</sup>

*Miranda*, in fact, became a symbolic vehicle for limiting state court "liberalism." As a result of protest of various law enforcement agencies and interest groups, some state political leaders, and then elected judges in some state courts, began feeling the political and social pressure that they should go no further than *Miranda*.<sup>112</sup>

*Miranda* was to be sufficient. There was no need for additional rights. The protections in *Miranda* and its progeny became the federal maximum rather than the minimum.<sup>113</sup> Because its practical effect was negligible, its continued existence as a symbol meant fewer attempts at providing increased protections at the state level.

## V. MIRANDA AND ITS CONTEXT

Professor Grano also challenges the constitutional interpretation that led to *Miranda* and similar decisions.<sup>114</sup> He argues the purposes of the Fifth Amendment were to stop compulsion and to protect against coercion.<sup>115</sup> The purpose of the Sixth Amendment was to protect a defendant in the adversary—that is judicial—setting.<sup>116</sup>

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107. See Gruhl, *supra* note 105, at 889-93.

108. See KAMISAR et al., *supra* note 82, at 49.

109. See Ronald K.L. Collins, *Foreword: The Once "New Judicial Federalism" & Its Critics*, 64 WASH. L. REV. 5, 6 (1989).

110. See William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1977).

111. See Gruhl, *supra* note 105, at 912-13.

112. See Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure in 1984: Death of the Phoenix?*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 166, 169 (Bradley D. McGraw ed., 1985) (noting California Victims Bill of Rights limits exclusion of evidence under state constitution); see also *Florida v. Casal*, 462 U.S. 637 (1983) (Chief Justice Burger noting with satisfaction a 1982 amendment to the Florida Constitution prohibiting state courts from going further than the United States Supreme Court in interpreting analogous provisions of the state constitution).

113. See *People v. Holland*, 520 N.E.2d 270 (Ill. 1987), *aff'd*, 493 U.S. 474 (1990); see also *People v. Oates*, 698 P.2d 811, 819, 822 (Colo. 1985) (Erikson, C.J., dissenting) (stating the Colorado Supreme Court should not depart from United States Supreme Court decisions on constitutional rights).

114. See also Grano, *Constitutional Premises*, *supra* note 76; Grano, *supra* note 88; Joseph D. Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988) [hereinafter Grano, *Schulhofer Reply*].

115. Symposium, *supra* note 15, at 109.

116. *Id.* at 109, 122, 132.

Professor Grano rejects the whole theoretical basis for *Miranda*. *Miranda*'s premise is that in today's highly organized, culturally (and also racially) stratified community, there is something inherently coercive in the custodial situation. This psychological or social coercion is, in impact, the same—both legally and practically—as physical coercion or compulsion explicitly prohibited<sup>117</sup> by the Fifth Amendment.<sup>118</sup>

Professor Grano rejects the inherent or psychological coercion basis for a limit on interrogation.<sup>119</sup> There is a difference in kind, he argues, between psychological coercion—including trickery and deception—and physical compulsion.<sup>120</sup> He, of course, has said the Court in *Miranda* was simply wrong in conclusively presuming that custodial interrogation is compulsion.<sup>121</sup>

Professor Grano has created a false conflict between the old voluntariness standard and the *Miranda* standard.<sup>122</sup> Without getting into the subtleties of when a suspect is in custody,<sup>123</sup> the television image of police questioning is not too far removed from the truth.<sup>124</sup>

The ordinary police investigation takes place in a room with one or more police officers present at a table asking questions. In almost all cases of a challenge to a defendant's statement, the issue is the same: whether the confession, including the waiver of rights, was freely, voluntarily, and intelligently given. This credibility and factual judgment determines admissibility, and almost always does so in favor of admission. Issues as to custody, the nature and scope of warnings, and the identity of the interrogator may reach the appellate courts, but, for over twenty years, they have had minimal impact on the day-to-day resolution of pretrial motions.<sup>125</sup>

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117. *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936).

118. See *Miranda v. Arizona*, 384 U.S. 436, 457-58, 467 (1966). Casting this in a more negative light, Professor Caplan argues:

*Miranda* was a child of the racially troubled [1960s] and our tragic legacy of slavery. . . . Crime was not understood as the offshoot of individual will but as a byproduct of one's status as poor or black or both. . . . *Miranda* popularized the principle of warning one's adversary, of assisting him in defending himself, and of envisioning the criminal not as a foreigner but as a neighbor down on his luck.

Caplan, *supra* note 88, at 1470-71.

119. Symposium, *supra* note 15, at 109.

120. *Id.* at 109, 122-23; see Grano, *supra* note 88, at 881, 922-23.

121. See Grano, *Schulhofer Reply*, *supra* note 114, at 180-81.

122. See Symposium, *supra* note 15, at 109, 111; see also Grano, *supra* note 88.

123. See G. Michael Deacon, *Custodial Interrogations*, 81 GEO. L.J. 891, 995-97 (1993); see also Belsky, *supra* note 37, at 212-16.

124. For example, in a recent episode of the television program *Law and Order*, the two detectives used the "Mutt and Jeff," "Good Cop/Bad Cop" tactic described in *Miranda*. The questioning was in a small room with the detectives rotating. While one detective questioned the suspect, the other detective, his supervisor, and an assistant district attorney observed through a two-way mirror. See also Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979).

125. See Belsky, *supra* note 1, at 1356-57.

Professor Grano has philosophical concerns about *Miranda*. The philosophy of that case is totally consistent with the practical experience of those who have observed, run, or experienced interrogations.

Questioning is almost always in an inherently coercive atmosphere. A sophisticated defendant, lawyer, or police officer are, as Professor Grano has indicated, covered by the *Miranda* doctrine.<sup>126</sup> Those individuals, however, had and have the ability to resist the coercive atmosphere with or without warnings. *Miranda's* application is just not relevant to them. The impact was to be on the unsophisticated and uneducated defendant.<sup>127</sup>

Is someone who is psychologically intimidated any less coerced than someone who is hit? If Professor Grano really makes this argument, then he should take a look at child abuse, spouse abuse, or rape. In those crimes, a more enlightened look at common-law offenses and defenses has forced us to accept that force is more often psychological, rather than physical.<sup>128</sup>

Professor Grano also attacks the more general constitutional doctrine barring admission of any involuntary confession, whether coerced by physical or psychological force. "[A]dmissibility was never perceived as having anything to do with the privilege against self-incrimination."<sup>129</sup> The Fifth Amendment privilege, he argues, was only concerned with the forced taking of an oath and was not concerned with extra-judicial interrogation.<sup>130</sup> The rule barring admissions that

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126. See Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 108 (1985) (arguing *Miranda* does not allow review as to whether a defendant knew his or her rights if warnings are not given).

127. I have stressed this is merely a philosophical argument. In fact, because the standards for waiver are now the same as for voluntariness, I believe there is virtually no impact at all on the unsophisticated and uneducated defendant.

128. Perhaps the most famous example of the new enlightened attitude about coercion is in the area of rape and other sexual offenses. The older "accepted" view was that rape only occurred after actual violence that was actively resisted. See ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 211 (3d ed. 1982). Today, resistance is not required to show nonconsent. All the facts and circumstances, including the psychological circumstances, are to be reviewed to determine if there was no consent, that is—that there was coercion. See, e.g., *Reynolds v. State*, 664 P.2d 621, 626-27 (Alaska Ct. App. 1983) (holding it is no longer a requirement of resistance to show coercion and nonconsent); *People v. Barnes*, 721 P.2d 110, 112 (Cal. 1986) (holding specific circumstances show coercion and nonconsent); *Commonwealth v. Thayer*, 479 N.E.2d 213, 216 (Mass. App. Ct. 1985) (holding defendant's expectations are irrelevant; only issue is factual consent); see also Toni M. Massaro, *Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985) (addressing role of mental health experts in showing syndrome; changing law of sexual assault and requirements to show nonconsent and impact of rape).

See generally Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986) (addressing improper and out-moded "sexist" definition of rape and nonconsent focused on physical coercion). See also Kathleen Waits, *The Criminal Justice Systems' Response to Battering: Understanding the Problem, Forging the Solutions*, 60 WASH. L. REV. 267, 280-81, 300 (1985) (discussing consent in spouse abuse cases).

129. Symposium, *supra* note 15, at 124.

130. See *id.*



were involuntary is, at best, an evidentiary rule from the common law and not from any constitutional base.<sup>131</sup>

Again, I believe Professor Grano misses the point. He is right that the bar against coerced confessions has a common-law evidentiary basis.<sup>132</sup> Categorizing doctrines as either common-law evidentiary or common-law constitutional, however, is artificial. The Constitution was based on our English common-law background. Its interpretation must similarly be based on that background.<sup>133</sup> This is especially true of the provisions of the Bill of Rights, which were included to preserve certain fundamental common-law rights and privileges against a powerful government.<sup>134</sup> The privilege against self-incrimination was only the "tool"—the Constitutional vehicle—the Court used to apply long accepted constitutional principles to confessions.<sup>135</sup>

Going back to the English common-law precedents of the eighteenth century,<sup>136</sup> and the Supreme Court cases in the 1930s,<sup>137</sup> coercion and voluntariness had always been factors for review and determination about the use of a confession. Whether warnings about the rights involved were given, and whether the accused had the assistance of counsel, were also factors that could and should be considered in determining voluntariness.<sup>138</sup> Requiring such warnings and a waiver, when prior attempts to assure noncoercion did not work, was only the next step.<sup>139</sup>

If due process is to have any procedural meaning whatsoever it must mean the existence of an element of fairness, whether called fundamental or ordered, and this is essentially the argument against coerced confessions—both psychological and physical.<sup>140</sup>

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131. *Id.* at 133.

132. See JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 226 (4th ed. 1992); 3 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 822 (3d ed. 1970).

133. See DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 6-7 (1990).

134. See KERMIT L. HALL ET AL., AMERICAN LEGAL HISTORY 94 (1991).

135. *Miranda* may have "expanded the right [against self-incrimination] beyond all precedent, yet not beyond its historical spirit and purpose." LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 38 (1968). The drafters of the Constitution, Levy indicates, reviewing the Star Chamber and High Commission in British history, were concerned about trustworthiness, fairness, and also privacy and autonomy—all elements in the *Miranda* decision. *Id.*

136. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.2, (2d ed. 1992).

137. See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936) (holding conviction and sentence were void for want of the essential elements of due process where authorities contrived a conviction resting on confessions obtained by violence).

138. See *Davis v. North Carolina*, 384 U.S. 737, 740 (1966) (stating lack of warnings and lack of waiver are "significant factor[s] in considering voluntariness of statements," even if *Miranda* does not apply). The standard of voluntariness evolved from state cases and pre-*Miranda* federal cases. *Id.*

139. See Symposium, *supra* note 15, at 132 (comments of Professor Christopher Slobogin).

140. See *Turner v. Pennsylvania*, 338 U.S. 62 (1949).

Professor Grano also denigrates *Miranda*'s attachment of a right to counsel at the time of custodial interrogation.<sup>141</sup> The issue is not as simplistic as that articulated by Professor Grano. *Miranda* was not merely based on a desire to expand the Sixth Amendment right to counsel.<sup>142</sup>

The question was never the expansion of the judicial setting to include the station house. Rather, the concern was the need to dispel the compelling atmosphere of the interrogation.<sup>143</sup> The *Miranda* Court did not want a "constitutional straight-jacket."<sup>144</sup> The prophylactic rules, including the right to counsel, were only required until the Court was shown "other procedures which are at least as effective" in assuring the privilege against self-incrimination.<sup>145</sup>

The idea was that an accused, in an in-custody situation, needed a non-governmental assistant to give objective and independent advice about what to do.<sup>146</sup> In our system, the person that our society and certainly our courts look to be independent of the state is counsel.<sup>147</sup> Only such an individual, even if only a public defender who will never see the accused again,<sup>148</sup> can assure lack of coercion.<sup>149</sup>

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141. Symposium, *supra* note 15, at 131. Professor Grano notes *Miranda*, unlike *Escobedo v. Illinois*, 378 U.S. 478 (1964), is focused on the Fifth Amendment privilege against self-incrimination and not the Sixth Amendment right to counsel. Symposium, *supra* note 15, at 111. He states, however, "similar considerations influenced both doctrines" and he will not attempt to "further separate Fifth and Sixth Amendment policy arguments." *Id.*

142. Grano, *Constitutional Premises*, *supra* note 76, at 25-28.

143. *Miranda v. Arizona*, 384 U.S. 436, 458 (1966). Professor Grano suggests we can replace the right to counsel and silence with a videotape or equivalent record. Symposium, *supra* note 15, at 129, 134, 137. There are, of course, serious doubts about whether this system would work to protect an individual's rights. See Ogletree, *supra* note 91, at 1843 n.94. Even putting aside these doubts, this alternative has been vigorously opposed by police, prosecutors, and other investigatory agencies. See Symposium, *supra* note 15, at 129; see also Andrew L. Frey, *Modern Police Interrogation Law: The Wrong Road Taken*, 42 U. PITT. L. REV. 731, 735-36 (1981).

144. *Miranda v. Arizona*, 384 U.S. at 467.

145. *Id.*

146. *Id.*; see Symposium, *supra* note 15, at 127 (comments of Judge Norma Holloway Johnson).

147. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Preamble, para. 2 (1989) ("As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.").

The public, even if public opinion polls indicate its distaste for lawyers, still has this image of a lawyer providing information and objective advice. Sometimes, this can be carried to ridiculous extremes. In 1971, I was assigned to go with a group of police officers and detectives on a search for evidence in a homicide case. If the evidence was present, the owner of the evidence was to be arrested. It was, and he was. Upon being arrested, he was warned of his rights. He turned to me and asked if I was an attorney. I explained that I was, but that I was an Assistant District Attorney—a prosecutor. He stated that because I was an attorney, I could tell him what to do. Should he talk? I told him again that I was an attorney for the government and then I warned him of his *Miranda* rights again. Again, he asked me what to do. I warned him again. Finally, after two more sets of inquiries and warnings, I told him to ask for an attorney—his own attorney. He looked at me, smiled, and said he really didn't need his own—another—attorney. He then waived his rights and made a very incriminating statement.

148. It was not and is not uncommon in a police investigation to "call in" the available public defender. In a modern public defenders' office, it is not uncommon for a different defender or

Professor Grano assumes the presence of counsel will almost always interfere with questioning.<sup>150</sup> First, whether this is a good or bad thing,<sup>151</sup> few counsel have been and will be involved in the interrogation process or even be requested. Most defendants will respond to the natural pressures to appear cooperative,<sup>152</sup> and will waive their rights. Second, when there is an issue about whether an accused was unwilling to talk and wanted counsel, the present *Miranda* rules, as noted earlier, retain the same voluntariness standard as previously required and merely shift it to the issue of the waiver of counsel and other rights.<sup>153</sup>

Finally, Professor Grano totally disregards those situations, which are not uncommon, when counsel will *advise* a client to give a statement. My intention is not to imply that counsel do not advise their clients to be quiet until together they can figure out the best strategy. There are many occasions when the best strategy is for the client to never say anything.<sup>154</sup> Still, in my experience, counsel will often recognize it is to the client's benefit that a statement be given as early in the process as possible.<sup>155</sup>

Initial investigation is on the scene and informal, and at least today<sup>156</sup> not covered by *Miranda*.<sup>157</sup> By the time someone is brought in for questioning in a formal custodial situation as described in *Miranda*, the investigators are usually at the point of figuring out the level of responsibility. The defendant can very often save his case, make his case less serious, or assure a lower sentence by cooperating with the police in the presence of counsel. Often, the worse thing

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even a private counsel to, in fact, later represent this individual at a pretrial hearing or trial. Nancy Albert-Goldberg & Marshall J. Hartman, *The Public Defender in America*, in *THE DEFENSE COUNSEL* 67, 74-80 (William F. McDonald ed., 1983); Shelvin Singer & Elizabeth Lynch, *Indigent Defense Systems*, in *THE DEFENSE COUNSEL*, *supra*, at 103, 112-13 (staged or horizontal representation); see NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, *COURTS* Standard 13.5, at 263 (1974). Of course, as noted earlier, this same compartmentalization of counsel duties occurred in prosecutors' offices. See *supra* notes 30, 53 and accompanying text.

149. *Miranda v. Arizona*, 384 U.S. 436, 474 n.44 (1966).

150. Symposium, *supra* note 15, at 137; see Grano, *Constitutional Premises*, *supra* note 76, at 25-28; see also *Miranda v. Arizona*, 384 U.S. at 537-38 (White, J., dissenting).

151. *Miranda* itself argued that in an investigatory rather than accusatory system, police should rely more on independent investigation and not on confessions. *Miranda v. Arizona*, 384 U.S. at 442-43; see Belsky, *supra* note 1, at 1349.

152. See Kent Greenawalt, *Perspectives on the Right to Silence*, in *CRIME, CRIMINOLOGY, AND PUBLIC POLICY* Essays in Honour of Sir Leon Radzinowicz 235, 250 (Roger Hood ed., 1974).

153. See *supra* text accompanying notes 5-8, 125.

154. See Belsky, *supra* note 1, at 1357 n.99.

155. From a strategic standpoint, the earlier a statement is given, the more likely it will be believed, if not by the police then at least by the fact-finder. This, of course, is the premise behind the common-law *res gestae* exception to the hearsay rule and the now "present sense impression" exception. See *FED. R. EVID.* 803(1)-(2).

156. Cf. *Orozco v. Texas*, 394 U.S. 324, 326 (1969) (holding admissions obtained through questioning by defendant at scene without informing him of his *Miranda* rights violated self-incrimination clause of Fifth Amendment).

157. *LAFAVE & ISRAEL*, *supra* note 136, § 6.6(e), at 321-22; see *Beckwith v. United States*, 425 U.S. 341 (1976); see also *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973) (informal on-the-street nature of consent searches indicate noncustodial situation and no need for warnings).

that happens is counsel's presence elevates the level of the interrogating agency—from that of a police to that of a prosecutor.<sup>158</sup>

The only possible negative consequence of having counsel present when there is a statement being given is that counsel will help the accused express his or her position in the most articulate, yet still truthful, way.<sup>159</sup> I do not believe this is really a negative consequence. First, because the premise is that a lawyer will assist in framing a truthful statement, as compared to an accused faced with potentially coercive pressures,<sup>160</sup> there is an increased likelihood of a truthful statement in such a circumstance.<sup>161</sup> Moreover, providing for assistance to get out the truth is, in the most positive sense, the whole basis for the constitutional right of counsel.<sup>162</sup>

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158. Few burglary cases are solved. See EDWIN H. SUTHERLAND & DONALD R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 27 (6th ed. 1960) (reporting only 21% of burglary cases are cleared by arrest). When someone is picked up for questioning, there usually is some evidence tying that individual to the burglary. The likelihood of an on-the-scene arrest in a burglary is not high. The more likely scenario, when there is any scenario at all, is that an individual is arrested when stolen items are found. Even if an individual is caught at the scene, the evidence or identification or circumstances observed are so incriminating that any statement has to help out the accused. A statement can be the only way to explain the objective evidence tying the person to the crime. Because it can be used at trial, an early "admission" will often enable an accused to change the accusation from burglary to receiving stolen goods, or lead to plea negotiations as to charge or sentence.

Even in a serious homicide case, the victim is usually someone associated with the accused. See *id.* at 21. By the time someone is picked up for questioning, the police know a homicide has occurred and have substantial support for a case premised on the involvement of the accused. Without any explanation and on the cold record, the initial charge will often be murder. At this point, counsel can and often does advise the client to tell his version of the events. This "admission" can often be the only basis for arguing there was no crime at all because of excuse or justification, or that the level of charge should be reduced to manslaughter, for example. This can be used in present discussions with police, later discussions with the prosecutor, and even trial. Similarly, the most likely reason someone would be arrested for a sexual assault is because of a victim's identification or physical evidence. Giving "his side of the story" (usually consent) can establish a defense early on in the prosecution.

159. I do assume, and I believe I am right, that almost all attorneys will follow the ethical prohibition about assisting a client to lie, especially when that lie will affect evidence that could be presented to a court. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1989) (stating lawyers shall not assist in criminal or fraudulent conduct); *id.* Rule 3.3(a)(2) (stating lawyers must disclose to court to avoid assisting in a criminal or fraudulent act); *id.* Rule 3.3(a)(4) (stating lawyers shall not knowingly offer false evidence to a tribunal); *id.* Rule 3.4(b) (stating lawyers must not falsify evidence or assist or counsel a witness to testify falsely).

160. The original basis for the rule barring involuntary confessions was that such influences made it probably untrue. See STRONG et al., *supra* note 132, § 226. The likelihood of truth or falsity, of course, is not the present test of voluntariness. See *Rogers v. Richmond*, 365 U.S. 534 (1961).

161. See Symposium, *supra* note 15, at 117 (Attorney Raymond Rosenberg indicates confessions prior to *Miranda* were often so obviously orchestrated by the police that "[d]efense counsel won as many cases with confessions as [they] lost").

162. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

## VI. CONCLUSION

Professor Grano rejects any "practical" analysis that argues *Miranda* has not served as a hindrance to law enforcement. Rather, he argues that "ideas matter" and "the ideas reflected in *Miranda* . . . are . . . misguided ones, wrong ones, bad ideas."<sup>163</sup> I agree that ideas matter, and I also believe the ideas in *Miranda* matter. Because all the concerns expressed by Professor Grano and others about the negative implications for police and criminal justice have not been supported by history and evidence, we should focus on these "ideas"—that is, the symbolism of *Miranda*.

In my earlier article, I was skeptical about the positive symbolic impact of *Miranda*. I still believe *Miranda*'s existence continues to mask decreasing protections for suspects in criminal cases.<sup>164</sup> It also can be used as a means to reduce pressure to reform police practices.<sup>165</sup>

I also believe the continued existence of *Miranda* reduces pressure on courts and juries to punish—through civil damage actions—improper police conduct.<sup>166</sup> Civil remedies against police departments and individuals<sup>167</sup> would more likely be successful, and the state more likely forced to take action to avoid large dollar judgments, if the police and political leaders did not have the symbolic existence of another remedy—exclusion of evidence because of *Miranda* and related decisions.<sup>168</sup>

Nevertheless, taking a look again at *Miranda* and what it stands for, I am now convinced its symbolism is important. Professor Grano's continuing attack led me to rethink what that symbolic impact was. My questions were answered by another participant at the Drake Symposium: Judge Norma Holloway Johnson. She stated *Miranda* has had a very positive impact on the ordinary citizen, particularly one who is in a minority status:

We're talking about a sense of command: a person accused of a crime having the sense she is treated as a human being as a result of this decision by

163. Symposium, *supra* note 15, at 123.

164. Belsky, *supra* note 1, at 1360.

165. See Ingber, *supra* note 14, at 273.

166. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

167. See *Carlson v. Green*, 446 U.S. 14 (1980).

168. Let me give an illustration. Early in the 1970s, there was a demonstration in the City of Philadelphia. The police department rounded up a number of demonstrators against the Vietnam War. They were taken to the police station, handcuffed, fingerprinted, and put into cells. They were told their constitutional rights, and in some cases waived them; and in other cases were said to have waived them. Charges of disorderly conduct were brought, and after a jury trial, the defendants were acquitted. The City, the police, and individual police officers were then sued civilly.

The major argument made by the City was although the defendants may disagree with what happened, they were fully protected in their constitutional rights. There was probable cause for the arrest, they were fully warned of their rights, they had the opportunity to challenge their arrest and any statements that were made, and they had a trial in which they were acquitted. The federal judge was convinced. He stated "due process was afforded" in accordance with all the recent cases in the Supreme Court. There was no "injury" and therefore no damages. *Miranda*, and its brothers and sisters—used as symbols—worked.

the Supreme Court. I think there is a feeling of fairness that many minority people never felt before they received these rights. . . . So I'm talking about a sense of humanity. People beginning to feel like, "Okay I might go on and tell them what I did, and I may never lie about it again. I may not ever say you didn't advise me of my rights, but at least I'm happy to know I'm being treated like a human being."<sup>169</sup>

Judge Johnson and others in the day-to-day and nontheoretical criminal justice battleground have indicated *Miranda*'s continued existence has led to better training of police<sup>170</sup> and an even better and more considerate attitude by police.<sup>171</sup> Moreover, the case forced changes in our system—in dealing with indigent defendants and providing for more oversight by political and other entities.<sup>172</sup>

Ideas do matter and the ideas—humanity, equality, self-worth—that make up *Miranda*'s continuing legacy, indicate its present value.

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169. Symposium, *supra* note 15, at 118-19 (comments of Judge Norma Holloway Johnson); see *id.* at 135 (Judge Johnson also noting positive impact of *Miranda* on juveniles and their parents. "[J]ust the knowledge of their rights has a good effect upon them.").

170. Symposium, *supra* note 15, at 135.

171. *Id.* at 134-35 (remarks of an ACLU lawyer); *id.* at 119 (remarks of James Adams, former prosecutor and now law professor at Drake University Law School).

172. *Id.* at 138-39 (remarks of a prosecutor).