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Defending Miranda*

by Paul Marcus**

INTRODUCTION

I write to defend the Supreme Court's decision in *Miranda v. Arizona*.¹ It may seem odd to feel the need to defend a well-established Supreme Court decision issued more than twenty years ago. In recent years, however, a strongly critical drive led by representatives of the United States Justice Department² has received much publicity in the call to overrule *Miranda*. I believe *Miranda* is good law, is good policy, and has an important and positive impact on our society. Before turning specifically to the Court's decision, however, it is important to consider generally the debate over the use of confessions in criminal cases. After all, that really is what *Miranda* is all about.

What are we to do about confessions? Some would say they are a vital part of our criminal justice system and all should be done to encourage them. Indeed, on a panel recently with a police chief of a major metropolitan area, I heard the chief speak about how *Miranda* has interrupted the developing "art of interrogating and eliciting confessions." I am not sure exactly what the "art" is, but he spoke in glowing terms of confessions as the cornerstone of our criminal justice system.

*This essay is based upon a lecture given in March 1988, at the University of Wyoming College of Law.

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1. 384 U.S. 436 (1966).

2. In February 1986, the Office of Legal Policy of the United States Justice Department issued a lengthy report discussing the use of confessions in criminal cases. See U.S. DEPT. OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (Feb. 12, 1986) [hereinafter JUSTICE DEPT. REPORT]. The Report concluded by noting that

Miranda v. Arizona was a decision without a past. . . . *Miranda v. Arizona* is a decision without a future. . . . [It] drifts on twenty years later, a derelict on the waters of the law. There is every reason to believe that an effort to correct this situation would be successful. . . . The potential benefits from success in this effort are very great.

Id. at 114-15.

Others, on the other hand, such as Dean Wigmore, have been more circumspect in their review of confessions. He has stated that "any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof, must itself suffer morally thereby."³ And, as Justice Goldberg pointed out in *Escobedo v. Illinois*.⁴

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.⁵

Actually, most people, and I put myself in this group as well, fall somewhere between the harsh criticism of the use of confessions found in Dean Wigmore's writings, and Justice Goldberg's opinion in *Escobedo*, and the kind of trusting heavy reliance that my police chief friend would place on confessions. I suspect most of us would have little difficulty in relying heavily on the confession if we were absolutely convinced that it was given in a free and voluntary sense, with the suspect making a knowing and informed decision to speak.

DISCUSSION

The Voluntariness Test

In much of our history, the only real question in connection with confessions was simply the voluntariness issue: did the defendant freely and knowingly speak? The voluntariness test, of course, arose under the due process clause. For most of our history, and the rule continues today, the test has been as stated by Justice Frankfurter:

Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.⁶

The voluntariness test works very well in the extreme and revolting cases which, unfortunately, we have seen throughout our history. An example is *Brown v. Mississippi*,⁷ where the suspect was hanged by a rope to the limb of a tree, whipped, whipped again, and told that the whippings would continue until he confessed. He confessed. His confession was certainly involuntary. Consider also *Brooks v. Florida*,⁸ where the defendant was ordered confined for thirty-five days in a very small cell with no fur-

3. *Escobedo v. Illinois*, 378 U.S. 478, 489 (1964) (quoting 8 J. WIGMORE, EVIDENCE at 309 (3rd Ed. 1940)).

4. 378 U.S. 478 (1964).

5. *Id.* at 488-89 (footnote omitted).

6. *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

7. 297 U.S. 278 (1936).

8. 389 U.S. 413 (1967).

nishings and was given a restricted diet consisting entirely of peas and carrots in a soup form three times daily. The defendant confessed after spending fourteen days incommunicado. His confession was also ruled involuntary. Alas, such cases are not necessarily ancient history. While *Brown* was a 1936 case and *Brooks* a 1967 case, there are also more recent cases such as *Leon v. State*,⁹ decided in 1982. There the police "threatened and physically abused [the defendant] by twisting his arm behind his back and choking him until he revealed where [the victim] was being held."¹⁰ In these extreme cases the voluntariness test seems to work reasonably well.¹¹

What of cases, however, in which we do not see physical violence, where the threats and pressure involved are more subtle, or where there is genuine confusion as to whether or not the suspect really understands the guaranteed rights? Consider, for instance, *Lynumn v. Illinois*.¹² The suspect there was arrested for dealing in narcotics. The officer told her that she could receive ten years for this offense and her children would be taken away. She testified at the trial, that the arresting officer told her that "after I got out they would be taken away and strangers would have them, and if I could cooperate he would see that they weren't; and he would recommend leniency and I had better do what they told me if I ever wanted to see my kids again."¹³ The two children were three and four years old. Recall also cases such as *Jurek v. Estelle*,¹⁴ where the defendant was arrested at one o'clock in the morning, was kept away from his family for almost two full days, was not given an attorney, was moved three to four times during this period, and the evidence showed that he had a verbal I.Q. of sixty-six.

In cases like *Lynumn* and *Jurek*, the voluntariness test becomes much more difficult to apply. Moreover, the voluntariness test really requires the appellate courts to sit essentially as jurors to determine whether or not the facts bear out the conclusion that the defendant's statement was freely and openly given. In addition, sole reliance on the due process provisions of the fifth and fourteenth amendments neglects treatment of other constitutional provisions which affect the use of confessions. Illegal searches under the fourth amendment which result in confessions — every law student's nightmare, the fruit of the poisonous tree problem¹⁵ — affect the admissibility of the statements.¹⁶ The sixth amendment right to coun-

9. 410 So. 2d 201 (Fla. Dist. Ct. App. 1982).

10. *Id.* at 202.

11. The court in *Leon*, surprisingly, held that the confession had been voluntarily given, as the purpose of the police action was to find the victim and save his life, not to get a confession. *Id.* at 203.

12. 372 U.S. 528 (1963).

13. *Id.* at 531.

14. 593 F.2d 672 (5th Cir. 1979), *rev'd en banc*, 623 F.2d 929 (1980).

15. *Wong Sun v. United States*, 371 U.S. 471 (1963), in its reliance on "tainted fruit" and "purged" and "attenuated" evidence, remains a considerable source of confusion and terror in the basic criminal procedure course.

16. In *Dunaway v. New York*, 442 U.S. 200 (1979), the defendant was unlawfully arrested and taken to the police station. There he was given his *Miranda* warnings, and he confessed. The confession was found to be inadmissible under the fourth amendment because it was the direct result of the illegal detention.

sel is also very important because it deals with the issue of a suspect's right to confer with an attorney in connection with questioning.¹⁷ And focusing exclusively on the due process clause neglects the fifth amendment privilege against self-incrimination.¹⁸

The Decision in Miranda

In the late 1950s and early 1960s Justices of the Supreme Court were frustrated. They were hearing a large number of confession cases focusing on voluntariness rules. The Court attempted to deal with confession problems in a host of different ways, such as by requiring prompt appearances before magistrates¹⁹ and giving guidelines with respect to the use of physical force in connection with confessions.²⁰ Still, nothing worked in a great many cases. The cases kept coming, the fact patterns were egregious, and ultimately, seemingly in utter frustration, five members of the Court decided to adopt a rule.

Now there are some, and Justice Harlan is certainly among them, who bristle at having a rule. After all, our Supreme Court is not permitted to give policy recommendations or advisory opinions because of the case or controversy requirement.²¹ Justice Harlan railed against what he referred to as the Supreme Court's "new code" of criminal procedure in *Miranda*.²² Still, it seems to me, that having a clear and straightforward rule has served both suspects and law enforcement officials well. Indeed, I have always been puzzled by the firestorm created by *Miranda*. Police officers were given virtual "carte blanche." If they gave the *Miranda* warnings, the odds were excellent that the confession would be admissible. *Miranda* should also have encouraged legislative activists. The Court told legislators that following *Miranda* would essentially insure that confessions will be admissible. Yet legislators were encouraged to experiment and provide rights that are equal to those provided under *Miranda*. The Court specifically stated that:

We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individuals while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the [*Miranda*] safeguards must be observed.²³

17. See, e.g., *Massiah v. United States*, 377 U.S. 201 (1964); *Brewer v. Williams*, 430 U.S. 387 (1977).

18. The fifth amendment privilege against self-incrimination was incorporated to apply against the states in *Malloy v. Hogan*, 378 U.S. 1 (1964), just two years before *Miranda*.

19. Resulting in the so-called McNabb/Mallory rule. See *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

20. See, e.g., *Beecher v. Alabama*, 389 U.S. 35 (1967) [hereinafter *Beecher I*]; *Beecher v. Alabama*, 408 U.S. 234 (1972) [hereinafter *Beecher II*].

21. U.S. CONST. art. III, §2.

22. 384 U.S. at 516 (Harlan, J., dissenting).

23. *Id.* at 467 (majority opinion).

It appears, however, that legislative activists have declined the Court's invitation to search for increasingly effective ways of protecting the accused's rights while promoting efficient enforcement of our criminal laws.²⁴

What, then, did the Supreme Court write in *Miranda*? Was the holding confusing, lengthy, complicated, difficult to understand? Not at all. The holding in *Miranda* is straightforward and simple and has been printed on thousands of little cards that police officers carry around with them all the time. What the Court said was that under the fifth amendment privilege against self-incrimination, if two preconditions are met, warnings have to be given in connection with police interrogation. What are the preconditions? First, this ruling does not apply unless the person is in custody, unless that individual's freedom of movement has been limited in a significant way.²⁵ So when the IRS agents come to your house, and in that informal setting ask you some questions, *Miranda* simply does not apply.²⁶ When you go to the police station, on a purely voluntary basis, not being directed to come there, *Miranda* does not apply because you are not in custody.²⁷ Second, the confession must be one which was given in response to interrogation. Now it does not have to be formal questioning — it can be actions designed to elicit a response — but there has to be some form of interrogation.²⁸ So, when the suspect is being fingerprinted or photographed and blurts something out, *Miranda* does not apply.

If the suspect is in custody and is interrogated, in order for the statement to be admissible against the defendant to prove his guilt at trial,²⁹ he has to be given four warnings. The warnings do not have to be in set form,³⁰ nor do they have to be in writing. Still, the gist of these warnings must be given: (1) you have the right to remain silent; (2) anything you say can and will be used against you; (3) you have a right to have an attorney with you during the questioning; and (4) if you can't afford an attorney, we'll get you one for free.

That is it. That is all *Miranda* requires. All the warnings can fit on a little three by five card; every school child watching television or the

24. The only attempt to legislatively overrule *Miranda* resulted in a codification of the voluntariness test. See 18 U.S.C. § 3501 (1982).

25. Generally, the determination of whether an interrogation was "custodial" is a question of fact which is to be made on a case-by-case basis. See *United States v. Phelps*, 443 F.2d 246, 247 (5th Cir. 1971). The most important facts are those which indicate that the accused had, or did not have, an objectively reasonable belief that he was not free to leave the interrogation. *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); see also *Oregon v. Mathiason*, 429 U.S. 492, 496 (1977) (Marshall, J., dissenting).

26. See *Beckwith v. United States*, 425 U.S. 341 (1976).

27. See *Mathiason*, 429 U.S. at 492.

28. See *Rhode Island v. Innis*, 446 U.S. 291 (1980).

29. A major limitation is that the earlier statement can be used at trial to challenge the defendant's contrary trial testimony, to impeach or discredit the testimony. See *Harris v. New York*, 401 U.S. 222 (1971).

30. See *California v. Prysock*, 453 U.S. 355 (1981).

movies knows the warnings.³¹ Those are the rules, nothing more technical than that.

Why then do we hear this great furor? Why is it that *Miranda* has generated controversy which continues twenty years after it was decided and we hear calls for the overruling of *Miranda*? First, I believe that this great controversy, in fact, is not much of a controversy. The furor is not much of a furor; the calls to overrule *Miranda* are relatively few and far between. Essentially, you hear these calls from a few law professors³² and a few individuals in the Reagan administration's Justice Department.³³ You do not generally hear them from police officers, police chiefs or prosecuting attorneys throughout the United States. Criminal justice professionals who have studied the issues, by and large, appear to support *Miranda*, or at least they do not strongly ask for its overruling. As I will point out later,³⁴ even some vociferous critics of *Miranda* have essentially stopped their criticism and accepted the reality that the opinion is here to stay.

The Criticism

I will focus here on the three principal points made by critics of *Miranda*: first, that it is not soundly based constitutional law, looking to the language and the history of the fifth amendment; second, that the system does not work, the warnings have become rote, and there are better ways of handling the problem; third, that it really works too well, that fewer people confess, and the fears at the time of *Miranda* still apply.

The fifth amendment provides in part that: "No person shall be compelled in any criminal case to be a witness against himself." The chief argument traditionally put forth by the critics of *Miranda*, and especially Justice Harlan, is that neither the text of the fifth amendment nor its historical development prior to 1966 supports the rule in *Miranda*. The fifth amendment language, of course, provides little direct support for *Miranda*, but instead raises all sorts of questions: does the constitutional principle apply only to the trial setting, does it apply only to physical compulsion, does it involve pretrial confrontations? Few have argued that the language itself strongly supports the conclusion that compulsion under the fifth amendment is somehow synonymous with coercion under the voluntariness test of the Due Process Clause.³⁵

31. Ample precedent exists to demonstrate the point. From the sphere of television, see *Miami Vice*, *Police Story*, and *Jake and the Fatman* for particularly careful renditions of the warnings. From the world of cinema, see Mel Gibson in *Lethal Weapon*, Eddie Murphy in *48 Hours*, and Sylvester Stallone in *Nighthawks*, where prominent recitations of the warnings were featured.

32. See Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985); Grano, *Miranda v. Arizona and the Legal Mind: Formalism's Triumph over Substance and Reason*, 24 AM. CRIM. L. REV. 243 (1986).

33. See JUSTICE DEPT. REPORT, *supra* note 2.

34. See *infra* notes 52, 59-62 and accompanying text.

35. This point is made forcefully by the author of the JUSTICE DEPT. REPORT, *supra* note 2. See Markman, *Miranda v. Arizona: A Historical Perspective*, 24 AM. CRIM. L. REV. 193 (1986).

It is also fair to say that the historical development concerning the fifth amendment lent little direct support to the *Miranda* ruling. It was only a few years before *Miranda* that the self-incrimination clause was even applied to the states.³⁶ Prior to 1966, the interpretation issues surrounding the self-incrimination clause primarily revolved around situations in which defendants were literally compelled to speak by threat of physical coercion or specific penalty.³⁷

Some critics also contend that *Miranda* does not work well in enforcing constitutional principles. Undoubtedly this is correct to some extent, for conviction rates remain high and confession use continues throughout the nation.³⁸ Moreover, it is asserted, there are better ways of handling the problem in terms of devices which will insure that confessions are not compelled: set time limits on interrogations, video taping of interrogations, and the infusion of neutral magistrates into the questioning process.³⁹

The final argument, and perhaps the major one offered by most critics of *Miranda*, is to the contrary: *Miranda* impedes effective law enforcement because it works far too well. The critics argue that there is empirical evidence to support the view that *Miranda* has caused fewer confessions to be used, hampering the investigation of serious crimes. In addition, the argument is made that it is difficult to discern the extent of the damage because the widespread communication of information about *Miranda* has led to individuals being unwilling to talk, totally apart from any police conduct relating to interrogation.⁴⁰

In Defense

I want now to take the opportunity to respond to the points which have been raised. First, as to whether *Miranda* is soundly based constitutional law, I believe that it is.⁴¹ It is undoubtedly true that the language of the fifth amendment, as written, does not directly support the holding in *Miranda*. It is also true that historically the founders did not explicitly, or even implicitly, seem to have in mind the requirements set forth in *Miranda*. Still, these conclusions should not be dispositive. The Constitution is not a detailed set of writings requiring us to fix on specific words with a precise meaning of provisions which never changes. What we look to is a living, vital Constitution which can change during the course of a lifetime, and certainly during the course of a 200-year history. Perhaps it is true that the drafters' original intent was not to have the *Miranda*

36. See *Malloy*, 378 U.S. at 1.

37. See JUSTICE DEPT. REPORT, *supra* note 2.

38. The major studies respecting confession use and *Miranda* warnings are now quite dated. Moreover, even as to these studies, great debate has raged as to their reliability. See Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987); Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda"*, 54 U. CHI. L. REV. 938 (1987).

39. See JUSTICE DEPT. REPORT, *supra* note 2.

40. See Markman, *supra* note 35.

41. See generally White, *Defending Miranda: A Reply to Professor Caplin*, 39 VAND. L. REV. 1 (1986).

result; so be it. *Original intent* can indeed be looked to as a beacon or as a source of inspiration as to where we should be going and where we have been.

We have never, however, felt locked in by *original intent* and properly so for several reasons. It is rarely clear what *the* original intent was. Are we looking to the states of mind of the draftsmen of the actual amendment, those who voted for it, those who were in Congress at the time, the majority of the population at the time? Also, times change, conditions change, and we certainly will not lock ourselves in forever to a particular and narrow reading of the Constitution. Probably the clearest example of this is *Gideon v. Wainwright*.⁴² Undoubtedly the drafters never imagined that an individual would have to be told of a right to have a lawyer present during court proceedings, pretrial proceedings, and post-trial proceedings, and that the state would provide an attorney. Fundamental fairness and a changing sense of sixth amendment requirements, however, have altered that view. Even Chief Justice Rehnquist, a strong opponent of broad readings of the Constitution, has affirmed *Gideon*.⁴³

For some, the major problem with *Miranda* is that warnings are required, and that it is the warnings regarding remaining silent and having a lawyer present which are the chief culprits. It is clear, however, that we require warnings in other settings with hardly a blink of the eye. Again, *Gideon* is an excellent example of this point. We would never imagine that an individual could waive her right to counsel without having first been expressly advised that she had a right to her own lawyer or a state provided attorney. While it is also true that the Supreme Court has refused to extend warning requirements to other areas,⁴⁴ those other areas do not

42. 372 U.S. 335 (1963).

43. *Scott v. Illinois*, 440 U.S. 367 (1979). See also Chief Justice Burger's comment regarding unarticulated rights in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-80 (1980):

The State argues that the Constitution nowhere spells out a guarantee for the right of the public to attend trials, and that accordingly no such right is protected. The possibility that such a contention could be made did not escape the notice of the Constitution's draftsmen; they were concerned that some important rights might be thought disparaged because not specifically guaranteed. . . .

But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees. The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

Id.

44. Note especially the Court's refusal to require warnings in connection with consent searches. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

deal with an individual's own words, coming out of her own mouth, which would seem to necessitate a requirement of a warning that you do not have to talk and you can have the assistance of counsel.

It is also argued that *Miranda* does not work. It is difficult for me to take this argument too seriously. As a matter of common sense and instinct, we all know that it does work.⁴⁵ Essentially we all now know that we have the right to remain silent and we have a right to an attorney; the *Miranda* warnings reinforce this knowledge. Moreover, one of the key points with regard to the effectiveness of the warnings is not simply focusing on the defendant's understanding of his rights. While information about the warnings is widespread, undoubtedly some defendants do not understand the rights or lose sight of them during a period of great emotion. More to the point, however, is the question of whether the police are willing to communicate to the defendant that they, the police officers, not only know the suspect's right, but by reciting those rights are willing to enforce and respect those rights.⁴⁶

Miranda has done its job, it has communicated constitutional rights to individuals, and it reiterates those rights in highly emotionally charged settings. Moreover, I suppose I would ask the question that if *Miranda* does not work, what would? Would one replace *Miranda* with a specific statute talking about time limits, video tapes, perhaps the infusion of an independent magistrate? Perhaps such statutes would work well, although I am not at all convinced they would work better than *Miranda*. *Miranda* specifically invited the legislatures of the states and the federal government to experiment in the area. Have we seen such statutory approaches? Not at all.⁴⁷ What we have seen has been a blatant and heavy-handed attempt to legislatively overrule *Miranda* and return to the voluntariness test.⁴⁸ Is that the test that we want, voluntariness, a case-by-case approach? The voluntariness test easily disposes of the physical violence cases. Unfortunately, it is much less easily applied to the defendant who is not very intelligent, the highly tense situation, the mentally ill defendant, or cases of official deception.

If the objection truly is that *Miranda* works too well, the critics prove too much. If those critics mean that individuals understand their rights now and may exercise those rights based upon a knowing and rational understanding of the constitutional principles, that is precisely what our Constitution stands for. We ought to applaud such a result. If those critics mean that conviction rates have dropped tremendously and that we see

45. We instinctively know that *Miranda* works because the information concerning fifth amendment warnings has been communicated to virtually each and every citizen of the United States. Moreover, as pointed out by numerous supporters of *Miranda*, as well as a few critics, there has been no major impact of *Miranda* on conviction rates throughout the United States. See *supra* note 38 and *infra* notes 49, 50 and 52 and accompanying text.

46. See generally Schulhofer, *supra* note 38.

47. Former Attorney General Meese is about the only official who has recently advocated a legislative attempt to overrule *Miranda*. See JUSTICE DEPT. REPORT, *supra* note 2.

48. With the passage of 18 U.S.C. § 3501 which provides in part, "a confession . . . shall be admissible in evidence if it is voluntarily given."

many fewer confessions forming the basis for convictions, to be charitable I would say the evidence, at best, is mixed.⁴⁹

Most of the studies cited by the critics are old, and much has changed in the last twenty years in terms of police officer training, court systems, and perceptions of individual rights. Conviction rates remain high; confession use appears to remain high. Indeed, as strong a critic of *Miranda* as Professor Caplan has indicated in a recent interview that essentially no one really knows what the impact of *Miranda* has been. Professor Caplan put the matter in rather striking terms: "So there's a lot of bull-shit out there, because lawyers like to quote statistics when they don't have answers."⁵⁰ Then District Attorney of Philadelphia, Arlen Spector, was highly critical of *Miranda* in testimony before a congressional committee in 1966.⁵¹ Twenty years later, Spector, now a United States Senator from Pennsylvania, noted that "whatever the preliminary indications were twenty years ago, I am now satisfied that law enforcement has become accommodated to *Miranda* and therefore I see no reason to turn the clock back."⁵² Indeed, Senator Spector's administrative assistant explained that the Senator's sharp criticism in 1966 "was based on statistics gathered during a period of obvious transition, a time when the police were still in the process of getting used to *Miranda*."⁵³

The imagined horrors put forth twenty years ago, and which continue to be raised today, about how the use of *Miranda* will cripple the criminal justice system have not come to pass. Instinctively we know *Miranda* has worked and its impact on the criminal justice system has not been detrimental.⁵⁴

CONCLUSION

The Supreme Court has not been overwhelmingly technical in applying *Miranda* when determining when a suspect is in custody.⁵⁵ The Court has not required any rigorous adherence to the precise wording of the warnings in *Miranda*.⁵⁶ If a suspect takes the stand and then lies at trial about a prior confession, that prior confession can be used to impeach him.⁵⁷ The fact, albeit the disputed fact, is that *Miranda* works and works well. Those who were most critical when *Miranda* was first written have either tempered their criticism or have withdrawn it.⁵⁸ Former Chief Justice Burger

49. See generally Schulhofer, *supra* note 38.

50. "The impact of the case has been ideological rather than empirical." Quoted in Thompson, *Miranda Decision Still Stands After 20-Year Debate*, L.A. Daily J., June 13, 1986, at 1.

51. *Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Crim. Law, Sen. Comm. on the Judiciary*, 90th Cong., 1st Sess. 200-19 (1967).

52. Quoted in Kamisar, *Landmark Ruling's Had No Detrimental Effect*, Boston Globe, Feb. 1, 1987, at A27.

53. Kamisar, *No Evidence of Harmful Effect*, L.A. Daily J., Feb. 13, 1987, at 1.

54. See *supra* note 45.

55. *Berkemer*, 468 U.S. at 420 (routine traffic stop is not custodial).

56. *Prysock*, 453 U.S. at 355.

57. *Harris*, 401 U.S. at 222.

58. See, e.g., Senator Spector's comments, *supra* notes 51-53 and accompanying text.

stated: "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date."⁵⁹ Justice White wrote: "We reconfirm these views . . . [that] under *Miranda* [a suspect has a right] to remain silent and to be free of interrogation 'until he had consulted with a lawyer.'"⁶⁰ Justice O'Connor stated: "Were the court writing from a clean slate, I could agree with its holding [narrowing *Miranda*]. But *Miranda* is now the law and, in my view, the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures."⁶¹ She said again that *Miranda* as written, "strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights."⁶²

Twenty years ago when *Miranda* was handed down the strongest critics of the decision were federal and state legislators who viewed the holding with tremendous alarm. I suppose it is a sign of how far we have come in accepting the basic principle behind *Miranda* that I can note that it is precisely those legislators who now embrace *Miranda* in a very different setting. I refer here to the efforts to expand *Miranda* to the non-custodial income tax investigation setting. Fifty-one senators recently introduced a bill which, if passed, would require revenue agents to allow investigated taxpayers the right to record the interviews.⁶³ The bill would also require that the agent "explain the audit process to the taxpayer and such taxpayer's rights under such process. If the taxpayer indicates in any manner and at any time during the interview that he wishes to consult with an attorney . . . such interview shall be discontinued. . . ." The bill, known as the "Omnibus Taxpayers' Bill of Rights Act", is widely supported by, among others, Senators D'Amato, Hatch, Helms, and McCain. In addition, many nonpolitical groups throughout the country have urged support for a model bill which would require the IRS to give *Miranda*-type warnings to taxpayers.⁶⁴

In short, if the most stringent of the critics of twenty years ago agree that *Miranda* works and agree that it ought not to be changed, we should agree as well. Indeed, to a very large extent, the substance of the debate over *Miranda* is irrelevant. The questions, it seems to me, ought to be what do we do about spiraling drug use, how do we identify and apprehend criminals, how do we process them in our system quickly, and what do we do about a prison population that is exploding in numbers. *Miranda* is essentially irrelevant to these matters. Soon after he stepped down as head of the National Crime Commission, now Harvard Law Dean James Vorenberg explained the impact of *Miranda* on the crime rate:

59. *Innis*, 446 U.S. at 304.

60. *Edwards v. Arizona*, 451 U.S. 477, 485 (1981).

61. *New York v. Quarles*, 467 U.S. 649, 660 (1984) (O'Connor, J., concurring in part and dissenting in part).

62. *Moran v. Burbine*, 475 U.S. 412, 424 (1986).

63. S. 1774, 100th Cong., 1st Sess. (1987).

64. This "Bill of Rights" has been widely disseminated throughout the United States. I recently received a copy in conjunction with a written fund raising effort by a well-known charitable foundation.

When one considers that many of the crimes committed in this country are not reported to the police at all, that only one-fourth or one-fifth of the crime that is reported leads to arrest, and that only a small proportion are cases where a confession is crucial to solution; and when one also takes into account that in many cases since *Miranda* the suspect still confesses and that in many cases before *Miranda* he did not, what you are left with is "maybe a fraction of 1 percent of all crime that might be affected by a change in the *Miranda* rule."⁶⁵

Miranda was good law twenty years ago, in 1966, and it should be kept, reaffirmed, and strengthened. *Miranda* communicated rights to individuals and made clear to law enforcement officials that they are bound by specific professional standards. It was good law and policy then, as it is today.

65. Quoted in Kamisar, *supra* note 53.