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Miranda Decision Revisited: Did it Give Criminals Too Many Rights?

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MIRANDA DECISION REVISITED: DID IT GIVE CRIMINALS TOO MANY RIGHTS?*

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I. COMMENTS OF STEPHEN J. MARKMAN

In 1963 a teenage girl was kidnapped and raped on her way home from work. The police later apprehended the rapist. Following a brief interview and an identification lineup, he gave a full confession to the police. The confession was later used in securing his conviction. Three years later, in 1966, the Supreme Court overturned Ernest Miranda's conviction.[1] The Court found no ground for concluding that Miranda's confession was not freely given or for doubting that he committed the offense. However, the Court did find error in the failure of the police to comply with a set of restrictions on questioning that had simply not existed prior to the *Miranda* decision. In a unique five to four decision, a decision that I believe could not have been replicated before 1966 or after 1966, the Court departed from recognized constitutional standards and prescribed a new set of non-constitutional procedures for police questioning of suspects in custody.

The *Miranda* decision has continued to define the ground rules for custodial questioning up to the present time. The prescription of these extra-constitutional standards has resulted in a two-fold tragedy. It has been tragic in its effect on the innocent victims of crime by impairing the government's ability to bring criminals to justice. It has also been tragic in its effect on the protection of the rights of persons suspected of crime. The *Miranda* rules are an inept and ineffective means of ensuring fair treatment of suspects in custodial questioning. Their nationwide imposition by judicial fiat has had the practical effect of stifling any efforts to develop more effective means of doing so.

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

Before turning to the evidence on these points, I should briefly explain what I believe are three basic misconceptions about *Miranda*. It is particularly important to have a clear understanding of the radical character of the *Miranda* restrictions because recent reporting frequently has misrepresented this issue. The first misconception is that the *Miranda* rules are required by the Constitution. This misconception is directly refuted both by the Constitution and by the *Miranda* decision. The Constitution does not prescribe interrogation procedures.[2] It only states that a person cannot be compelled to be a witness against himself. In other words, it simply prohibits the actual coercion of suspects or defendants to obtain incriminating statements. The *Miranda* decision emphasized that the procedures it delineated are only one possible approach to guarding against unconstitutional coercion in police questioning, and explicitly encouraged the federal government and the states to continue to search for better, more effective procedures.[3] Numerous more recent decisions of the Supreme Court also have explicitly affirmed that the *Miranda* rules are not constitutional requirements but only a particular set of safeguards whose purpose is to reduce the likelihood of coercion.[4]

The second common misconception is that the *Miranda* rules, even if not constitutionally required, at least serve the important purpose of informing a suspect of his constitutional rights. However, this also is incorrect. The rights to which the *Miranda* warnings relate are primarily non-constitutional restrictions that were created by the *Miranda* decision itself. For example, the right to counsel in custodial interrogation, mentioned in the third and fourth *Miranda* warnings, simply did not exist prior to *Miranda*, and is now clearly regarded by the Supreme Court as a non-constitutional "prophylactic" right.[5] Even the first *Miranda* warning telling a suspect that he has a right to remain silent, is at best, a highly imprecise and misleading way of referring to the Constitution's prohibition of compelling a person to incriminate himself.[6] The Constitution prohibits the government from engaging in coercion, but it does not create a right to remain silent in any broader sense. These are different matters. In particular, there is

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2. U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. *Miranda*, 384 U.S. at 467.

4. *See* Connecticut v. Barrett, ___ U.S. ___, 107 S.Ct. 828, 832 (1987); Oregon v. Elstad, 470 U.S. 298 (1985); New York v. Quarles, 467 U.S. 649 (1984); Michigan v. Tucker, 417 U.S. 433 (1974).

5. *See Barrett*, ___ U.S.___, 107 S.Ct. at 832; Crooker v. California, 357 U.S. 433 (1958); Markman, *Miranda v. Arizona: A Historical Prospective*, 24 AM. CRIM. L. REV. 193, 203-04, 239-41 (1987).

6. *See supra* note 2.

no constitutional rule that a person cannot even be asked questions unless he consents to be questioned. As will be discussed shortly, a rule against asking questions without the suspect's consent is one of the central features of the *Miranda* system and perhaps its most damaging characteristic.

After delivery of the *Miranda* warnings, one might suppose that a police officer could then at least ask a suspect questions. At that point, questioning is still not allowed. This position leads to the third basic misconception about *Miranda*: the belief that it is simply a matter of reciting some warnings to a suspect before asking questions. In fact, even after the *Miranda* warnings have been given, a suspect cannot be asked questions unless he affirmatively consents to be questioned. In legalese, this requirement is referred to as the requirement of a knowing and intelligent waiver. The radical character of this restriction cannot be overstated. It is the essence of what is wrong with *Miranda*. Suppose, for example, that a person was taken into custody on suspicion of committing a murder and was given the *Miranda* warnings by the officer conducting the interview. Suppose further that the officer then said to the suspect, in a wholly inoffensive and non-pressuring way, that he would like to get the suspect's side of the story. If the suspect then freely gave a full confession to the murder, it could not be used at trial, but would have to be concealed from the jury. In the absence of an affirmative waiver, a suspect cannot be questioned at all, no matter how brief, how restrained, and how proper the questioning may be. The practical effect of these innovations is that a significant proportion of criminal suspects simply cannot be questioned at all, because they do not give a waiver or express an interest in talking to a lawyer. This group includes a great many suspects who might be quite willing to talk if they could be asked questions, but who do not submit to questioning when questioning is conditioned on their affirmatively expressing a desire to waive the rights set out in *Miranda* warnings.

A number of empirical studies carried out in the immediate aftermath of *Miranda* indicate that the resulting harm to the effectiveness of police investigation has been extreme. For example, one study in Pittsburgh examined interrogations by police detectives in several major crime categories.[7] Prior to *Miranda*, detectives in Pittsburgh had advised suspects that they had a right not to talk and a right to counsel. Despite this partial use of *Miranda*-like procedures before the *Miranda* decision, the implementation of the full range of *Miranda* restrictions resulted in a major impairment of the police's ability to obtain evidence from suspects. After *Miranda*, over forty percent of suspects could not be questioned at all, in contrast to the pre-*Miranda* situation in which every suspect at least could be questioned. *Miranda* also resulted in a major reduction in admissions of guilt. For example, it cut in half the number of confessions in the homicide and robbery categories. Before *Miranda*, about sixty percent of suspected killers and

7. Seeburger and Wettick, Jr., *Miranda in Pittsburgh - A Statistical Study*, 29 U. PITT. L. REV. 1 (1967). The study was based on files of the Detective Branch of the Pittsburgh Police Bureau, which conducted investigations of homicides and serious felonies.

robbers confessed; after *Miranda*, only about thirty percent did so. Studies in a number of other cities have produced consistent findings concerning the effects of *Miranda*.[8] For example, District Attorney (now Senator) Arlen Specter of Pennsylvania reported that an estimated ninety percent of suspects in Philadelphia made statements to the police prior to *Miranda*. After *Miranda*, the corresponding figure was only about forty percent.

These empirical findings only confirm what common sense would suggest concerning the effect of rules like *Miranda*. Whether guilty or innocent, a person who has been arrested for a crime is the one person in the world who knows the most about the truth or falsity of the charges against him. Rules that often bar the police from seeking the truth from that uniquely knowledgeable individual will necessarily impose a heavy toll on the search for the truth. As Justice Byron White observed in his dissent in *Miranda*,

> In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence there will not be a gain, but a loss, in human dignity.[9]

Justice White's words have proven to be prophetic. In light of subsequent experience, we now are in a better position to assess the magnitude of this loss and can see that it has been very great indeed. Innocent citizens have been victimized by criminals who would have been brought to justice but for the impediments to the pursuit of truth created by the *Miranda* decision. The same point may be seen in another way by considering what would happen if rules were adopted that barred the police from attempting to obtain fingerprint evidence, eyewitness testimony, or any other type of important evidence in half of the cases in which they currently are free to seek it. No one would question that such rules would impair the effectiveness of police investigation and damage the government's ability to protect the public from crime. The *Miranda* rules operate in precisely this way, limiting the law enforcement authorities' ability to obtain one of the most important types of evidence in criminal cases, the confession.

The objection is made that even if the *Miranda* rules do occasionally free criminals and endanger the public, this cost is justified by the risk that questioning will be carried out in an abusive or coercive manner if not stringently restricted. However, any legitimate concern over the possibility of abuse cuts in the opposite direction. The *Miranda* rules do not further the protection of suspects in any sensible or appropriate way, and they have discouraged the adoption of more effective means to that end. As Justice Harlan observed in his *Miranda* dissent, an officer who is willing to abuse a suspect to get a confession and lie about it

8. *See* Markman, *supra* note 5, at 224-225.

9. Miranda v. Arizona, 384 U.S. 436, 542 (1966) (White, J., dissenting).

in court obviously would be just as willing to lie about giving *Miranda* warnings and getting a waiver.[10]

Moreover, even assuming general compliance by the police, the *Miranda* rules are not a rationally conceived set of safeguards. Their practical effect is to divide suspects into two classes: those who stand on their *Miranda* rights, and those who waive these rights and submit to questioning. The effect of *Miranda* on suspects who do not give a waiver is not to protect them from abusive questioning, but to insulate them from any sort of questioning, no matter how brief and restrained. On the other hand, in cases in which suspects do give a waiver, interrogations can be carried out much as they were before *Miranda*. They remain secret proceedings in which the avoidance of overbearing or heavy-handed practices depends on the self-restraint and honesty of the officers conducting the interview. If questions arise later concerning the occurrence of illegalities or improprieties, they are resolved on the basis of swearing matches between the officers and the suspect.

If one is seriously interested in assuring fair treatment of suspects, far better means than the *Miranda* rules are at hand. In particular, videotaping or recording of interrogations would provide suspects with the type of objective protection that is simply lacking under *Miranda* rules. Concerns about protracted grilling of suspects or other overly aggressive practices also could be addressed sensibly in other ways. For example, imposing reasonable time limits on questioning or adopting specific rules concerning permissible behavior in questioning suspects would go beyond the *Miranda* rules in assuring appropriate treatment of suspects, but also would not carry *Miranda's* heavy costs to the effectiveness of police investigation. In sum, *Miranda* is bad law under the Constitution, bad law for protecting the public from crime, and bad law for protecting the rights of suspects.

The challenge facing us today is to develop superior procedures and standards to replace the *Miranda* rules. Congress's enactment of a statute in 1968 that rejected *Miranda*'s restrictions on the use of voluntary confessions,[11] and the Supreme Court's clear view that these rules are in no sense constitutional requirements, create an environment in which this challenge can be met. Moving beyond the *Miranda* decision holds the promise of fundamental benefits in promoting the protection of constitutional rights as well as fundamental benefits in promoting the effective prosecution of crime. It is long past time that our society, burdened by levels of violent crime unparalleled in the western democracies and unparalleled in the history of our country, addressed the excesses of the Warren court criminal justice jurisprudence. Even one innocent person's terrorization or loss of life or limb would be too high a price to pay for *Miranda's*

10. *Id.* at 505, 516 (Harlan, J., dissenting).

11. Crime Control Act of 1968, tit. II, 18 U.S.C. § 3501 (1985); the act reportedly "repealed" *Miranda* and the McNabb-Mallory Rule in federal prosecutions; *see, e.g.*, Markman, *supra* note 5 at 226-29.

perverse procedures, and we will never know fully the enormity of the actual toll. There is nothing *Miranda* preserves in the balance, certainly not any legitimate right of the criminal suspect that offsets this continuing tragedy for civilized society.

II. COMMENTS OF PAUL MARCUS

It is a pleasure to be here today to revisit the Supreme Court's monumental decision in *Miranda v. Arizona*.[12] I think *Miranda* was good law and good policy twenty-two years ago; I feel even more strongly about it today. If anything, history has fully proved the five Justice majority correct; *Miranda* was needed then and has worked extremely effectively in the period since. The debate over *Miranda*, while not wholly irrelevant to our criminal justice system, nevertheless is somewhat problematic. Were it not for a few vociferous law professors and a few even more outspoken and visible members of the Justice Department's staff, frankly, there would not be much debate about *Miranda*.

Police chiefs do not complain about it; former critics who are on the Court do not complain about it; even many of those who strongly disagreed with the decision twenty years ago do not complain about it today. To a certain extent, the debate has passed by *Miranda*, except for the focus given by Attorney General Edwin Meese. Much of the debate today is, and should be, on issues such as identifying the sources of crime; dealing with questions of apprehending criminals and detecting crime; coming up with alternatives for incarceration; dealing with the cost, both societal and financial, of our tremendous drug problem; and trying to keep a lid on a spiraling prison population. Those are the key and vital questions that ought to be debated. Indeed if we really are concerned about victims of crime, one might ask the question for instance, why is it that out of every one hundred serious crimes, murder, rape, robbery, and assault, only forty-eight of them are reported to police. Only twenty-one out of one hundred result in arrest. Only eleven out of one hundred result in cases filed for prosecution. Only eight out of one hundred result in convictions. Only two out of one hundred result in incarcerations. These issues are the kind that ought to be discussed.

Still, to a very real extent, the Attorney General of the United States focuses the debate in the criminal justice system by the sheer power and prestige of his office. For the last two years that focus has been on overruling *Miranda*, and many, including my colleague Mr. Markman, have been a critical part of that focus. If we were to strengthen significantly *Miranda* today, or significantly undercut it or even overrule it, such action would have little impact on the larger questions asked. To a large degree, the debate over *Miranda*, as has been noted by both critics and proponents, is a debate over a symbol, an important symbol, but a symbol nevertheless. It stands for all that we cherish in our system of criminal justice and our system of constitutional rights. It is a symbol indicating

12. *Miranda*, 384 U.S. 436.

that we understand these rights, that everyone has these rights and that these rights will be enforced.

Perhaps the strongest criticism leveled at the *Miranda* case over the last twenty years was the first criticism by Justice Harlan in his dissent.[13] He wrote the great concurring decision in *Katz*,[14] the wiretapping case; he strongly enforced the probable cause requirements in *Spinelli*,[15] which involved unnamed informants; and he wrote the tremendous majority opinion in *Cohen v. California*,[16] where a young man wore a jacket with a nasty obscenity on it. Still Justice Harlan was fundamentally wrong in his criticism of *Miranda*. He strongly disagreed with both the notion of adjudication in *Miranda* and the content of it. The "notion of adjudication" referred to the Supreme Court's enacting a new "code of criminal procedure," rather than deciding a case under the case or controversy requirement. Justice Harlan disagreed with the substance of that code.[17]

If it was a code of criminal procedure, it was a mighty short code because in spite of all the hand wringing and hair pulling over the last twenty years as to the technicalities of *Miranda* and the complications of *Miranda*, the decision itself is really quite simple. All the Court held was, using common sense definitions of custody and interrogation, if suspects are in custody by having their freedom of movement significantly limited and if they are being interrogated by police officers, the statements of the suspects cannot be used at trial to prove their guilt unless the defendants received four warnings. Now this really cannot be all that complicated if every school kid in the country knows them. Surely if you have watched any movie starring Clint Eastwood, Sylvester Stallone, or Eddie Murphy you know the warnings, and they fit on these little three by five cards that all police officers seem to carry. You must be warned that you have a right to remain silent, anything you say will be used against you, you have a right to an attorney, and if you cannot afford an attorney the state will provide you with one. That is really all there is to it; not very complicated, not very complex, certainly not very technical. That is why the huge outcry at the time of the *Miranda* decision surprised me; what does not surprise me is the lack of focused criticism now by the law enforcement community, by and large. The reality is that those warnings are easy to give and most people understand them. Still, it is important to give the warnings both for those who do not understand them and for those who are in a very emotional state. In essense, this demonstrates to the suspect that not only does the police officer understand what his rights are but that the officer is fully prepared to honor those rights.

To a certain extent, the criticism over *Miranda* is itself somewhat technical. There would be few people who would argue that knowing about your rights or

13. Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting).
14. Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring).
15. Spinelli v. United States, 393 U.S. 410 (1969).
16. 403 U.S. 15 (1971).
17. *Miranda*, 384 U.S. at 514 (Harlan, J., dissenting).

being told about your rights is a bad thing. Instead, the argument is that telling people their rights and enforcing those rights somehow interferes with effective interrogation and in any case is contrary to the history and language of the fifth amendment.[18] The response is twofold. First, if giving warnings really does interfere with effective interrogation, it seems we should be interfering with effective interrogation. It is inconceivable to me that people seriously argue that we, as a society, are worse off if individuals are advised of their rights and advised of the right to have an attorney with them when confronted, while in custody, by law enforcement officers. It would appear that such warnings make sense, are a good idea, and as a matter of policy ought to be pursued.

As to the argument concerning the history and language of the fifth amendment, one must defer to the critics for they are probably right; if you look to the language of the fifth amendment, which simply talks about no person being compelled to be a witness against himself, that certainly does not necessarily lead to the conclusion that a suspect in custody, who is about to be interrogated, has to receive four particular warnings. Moreover, it is also very clear that the draftsmen of the fifth amendment, two hundred years ago, probably did not contemplate a warning situation involving an interrogation such as was found in *Miranda*.

However, this argument hardly ends the debate. The question as to the precise language of the fifth amendment is not terribly helpful. The meaning of the fifth amendment changes; the meaning of the Constitution changes and should change. The Constitution is a living and vital instrument of effective government and we are not locked into determining what was compulsion or probable cause two hundred years ago versus today.

It is often stated that this position runs contrary to original intent. This argument is somewhat beside the point, thus making it difficult to understand the great love affair that critics of *Miranda*, as well as other cases, have with the notion of original intent. Apparently the idea is that by discerning the original intent, we then are locked into an interpretation given two hundred years ago. That approaches the nonsensical. Times change, conditions change, and certainly our country has changed dramatically. Original intent serves as a beacon, a source of inspiration as to what we ought to do under the Constitution, and perhaps as a guideline on limits of where this nation should move in the future. To take much more from original intent, however, leads one down a very dangerous path.

It may be asked, "How does one discern original intent?" Was it the intent of the person who drafted the amendment to the Constitution, the people who voted on it, the people who were in Congress at the time, or the general sense of the population at that time? It may prove virtually impossible to discern such intent. Moreover, even if one could, it could well be that our population today would take a very different view of the matter. Certainly the best example of

18. *See supra* note 2.

this is *Gideon v. Wainwright*.[19] Unquestionably the draftsmen of the sixth amendment[20] did not intend that the sixth amendment require counsel be provided at state expense to indigents in felony cases. What was meant, as near as can be determined today, is that if someone charged with a crime had an attorney, that attorney ought not to be barred from participating in a criminal prosecution on behalf of the individual. Yet when *Gideon* was decided in the early sixties, there was no tremendous outcry. It was a decision whose time had come. Original intent or not, in our civilized society, views change so that we needed the result in *Gideon*.

We are left with a question which has faltered in numbers but remains quite intense and has troubled many for the last twenty years. Why is there this opposition to *Miranda*? The history and language of the fifth amendment, which forms the basis of this criticism, are somewhat beside the point. The criticism from opponents is simply that we did something fundamentally wrong in *Miranda*. We ought not to be warning individuals of their right to remain silent and right to have counsel present during interrogation because that will disrupt effective interrogation. If that truly is the criticism, it can be met head-on. As a matter of policy we ought to be proud of advising individuals of their rights. Looking at the history of interrogation in the last twenty years, it is an area where much good has been done, and *Miranda* has had little negative impact. As Justice Frankfurter observed about twenty-five years ago, not the least significant test of the quality of a civilization is its treatment of those charged with crime.

III. REBUTTAL OF MARKMAN

It is not true that the law enforcement community has learned to live with *Miranda*. In fact, the major law enforcement organizations and police organizations have supported Attorney General Meese's position on this issue. As somebody said shortly after the *Miranda* decision, if the Court in *Miranda* had said that before questioning a suspect an officer must whistle Yankee Doodle, the police would have whistled Yankee Doodle and would have learned to live with it. The relevant point is not that the police have learned to comply with *Miranda*. The relevant point is that it has caused a great deal of damage to society. Our solicitude here is not for the police, although they strongly support the Attorney General's position; it is for society and the cost to society has been quite substantial.

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19. 372 U.S. 335 (1963).

20. U.S. CONST. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

The fact that giving *Miranda* warnings is simple is irrelevant to *Miranda*'s cost in the custodial process. *Miranda* has resulted in the transformation of the fifth amendment from a constitutional provision that prohibits coercion of suspects into one that effectively prohibits any questioning of many suspects. This transformation has been carried out without any basis in the text of the amendment. It is the confessions that are never obtained and would have been obtained before *Miranda* that are the cost of this system.

The suggestion that little would change if *Miranda* were repealed is remarkable. One has only to look to the fact that in Philadelphia ninety percent of suspects gave statements to the police prior to *Miranda*, while after *Miranda* only about forty percent of such sessions produced the same results.[21] It is untenable to suggest that this impact is insignficant and that the overruling of *Miranda* would have no impact upon our criminal justice system. The unsolved homicide rate in this country has more than quadrupled since 1966. *Miranda* is not the only factor, but for anyone to suggest that *Miranda* is irrelevant is simply unrealistic.

Miranda is not just the forewarnings. A suspect can be told that he has the right to remain silent, that what is said can be used against him, that there is a right to an attorney, and that an attorney will be provided if necessary. Yet, if following such warnings a suspect is asked about a body found in his residence, and the suspect confesses to the murder, this information will be thrown out of court. It is not enough to warn; it is not enough to explain rights. It is also necessary to obtain an affirmative statement by the individual that he is prepared to speak with the police and that he does not want to consult an attorney. In too many instances this will never occur. An environment is created which discourages confessions and discourages individuals from cooperating with police. When the negative consequences of being candid with the police and the alternatives to doing so are exclusively emphasized to the suspect, it is not surprising that many decline to give an affirmative waiver and refuse to submit to questioning. It is not a matter of just giving four warnings; there is also a matter of the requirement of an intelligent, knowing waiver.

It is said that the language of the fifth amendment does not end the debate. However, for many of us the language of the amendment does end the debate. It is the Constitution of the United States which is supposedly the basis of *Miranda*. Yet neither the intent of the framers and ratifiers of the fifth amendment nor the Constitution provide any basis for *Miranda*. This alone should end the debate. Even if *Miranda* was good policy, it is a policy that should be imposed by legislative authorities, not by courts acting by fiat without any kind of textual basis in the Constitution. The language of the Constitution does change from time to time and there is little dispute that it should. Change is allowed

21. *See Controlling Crime Through More Effective Law Enforcement: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 200-19 (1967).

constitutionally through article five[22] which provides for constitutional amendments. For anyone else to unilaterally change the Constitution is inconsistent with the Constitution. Our system works properly only if it respects procedures for change that are incorporated in article five.

Videotaping of custodial interrogations would provide a superior alternative to *Miranda*. Such a procedure would ensure that individuals are not coerced, are not abused, and are not subject to inappropriate treatment in the questioning process. Yet at the same time, it would allow police to ask questions in a nonabusive, noncoercive manner. This would be true to traditional understanding of the fifth amendment from 1789 until 1966: the idea that compulsion and coercion are unlawful but that voluntary statements and confessions are unobjectionable. This traditional concept has nothing to do with the litany and rituals of the *Miranda* system.

The solicitude of those who support *Miranda* for those individuals who are guilty of criminal activities and walk because the search for truth has been thwarted in the police questioning process is impressive. One wonders if such solicitude would exist if their close friends or family members were victims of crime. The fact is that every day of the week there are people in this country whose loved ones, relatives, and friends are subjected to criminal predation by individuals who would not be walking the streets but for the impediments to the pursuit of truth in the criminal justice process that were created by the *Miranda* decision.

IV. REBUTTAL OF MARCUS

The criticism that somehow Earl Warren magically pulled this new code of criminal procedure out of thin air in *Miranda* is wrong. The fact of the matter is that the Supreme Court has struggled for decades in trying to deal with confessions and the problems associated with confessions. For most of our legal history, and still a factor today, is the issue of whether or not a confession was voluntarily given. That works fine in the brutal cases involving beatings, whippings, and threats. However, the voluntariness test does not work well in cases which are more subtle, where there are physical or verbal threats, where individuals are cut off, or where the suspect is not very bright. The use of the

22. U.S. CONST. art. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year one thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

voluntariness test requires the Court to sit as a group of jurors to determine whether or not the individual knowingly, intelligently, and willingly gave up constitutional rights.

Seemingly out of utter frustration after *Escobedo*,[23] the Supreme Court in *Miranda* had had enough. In the future police officers would have to give warnings in order to get confessions admitted. Thus the question becomes, "Why the great concern?" If police officers simply gave the warnings, with little fuss and bother, the confessions would be admitted. If the objection to *Miranda* is not based solely on the amendment itself or its history, then the focus is on the warnings; *Miranda* somehow interferes with the "art" of interrogation.

We have warnings in a lot of areas. It would be unthinkable that a suspect in a serious felony case would lose the right to counsel simply because he did not affirmatively ask for a lawyer; that is not a waiver. Under *Gideon* the individual has to be told of the right to have an attorney and then the suspect makes a free and willing decision whether to represent himself or have a lawyer.[24] This decision does not seem to have bothered people very much. Yet under *Miranda* there appears to be an argument that by giving the warnings, the system works too well; persons now really understand their rights and therefore may not respond to interrogation. As a matter of policy we must ask ourselves if the individual really understands his rights prior to confessing. This policy is fair, equitable, decent, and civilized. Little evidence exists that such a policy has crippled our criminal justice system. The empirical data of twenty years ago must be open to question. Moreover, within the last twenty years, times have changed individuals' understanding of their rights; law enforcement officers are better trained, better educated, and far more professional. Who is to say what the impact is of the warnings. Additionally, if the argument is that, by having *Miranda*, conviction rates are lower, this argument is just wrong. Conviction rates remain high across the country and the use of confessions has minimal impact except in a given number of cases.

There are arguments that, even if *Miranda* is a good idea, it does not do its job very well, that there are better ways of making sure that people voluntarily give up their rights, and are advised of their rights. Such methods include involving magistrates in the process, having tape recordings, and having time limits of some sort. In this respect the critics may be right and I would encourage efforts in these areas. The Supreme Court in *Miranda* specifically said that the *Miranda* decision was no legal straightjacket and encouraged legislators to take efforts which would both protect individual rights and advise individuals of their constitutional rights.[25] Yet the only major effort that has been done in this area was a blatant and heavy-handed attempt by Congress to legislatively overrule

23. Escobedo v. Illinois, 378 U.S. 478 (1964).
24. Gideon v. Wainwright, 372 U.S. 335 (1963).
25. Miranda v. Arizona, 384 U.S. 436 (1966).

Miranda. Such an effort hardly met the calling for innovative and interesting alternatives by state and federal legislation.

Those who really know what *Miranda* meant twenty years ago and what it means today generally do not oppose *Miranda*. Law enforcement has become accommodated to *Miranda* and there appears to be no valid reason to turn back the clock. Justices who either dissented from *Miranda* or were known to be critical of *Miranda* when it was decided appear to have no yearning to overrule it today. Former Justice Burger wrote: "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."[26] Justice White who actually dissented in *Miranda* has said that *Miranda* confirmed that a suspect has a right to remain silent and to be free of interrogation until he has consulted a laywer. Justice O'Connor is on record stating, "[W]ere 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 from blurring its now clear strictures," and *Miranda* "strikes the proper balance between society's legitimate law enforcement interest and the protection of the defendant's fifth amendment right."[27] Warnings as to silence and counsel make good sense in the criminal justice setting.[28]

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26. Rhode Island v. Innis, 446 U.S. 291, 304 (1980).

27. New York v. Quarles, 467 U.S. 649, 660 (1984).

28. Editor's note: The United States Supreme Court, in a six to two decision announced June 15, 1988 (Justice O'Connor took no part in the consideration or decision of the case), extended the rule of Edwards v. Arizona, 451 U.S. 477 (1981) to prohibit custodial interrogation regarding an *unrelated* investigation once a suspect has requested counsel, unless the accused initiates the communication. Arizona v. Roberson, ____ U.S. ____, 108 S. Ct. 2093 (1988). Justice Stevens, in the majority opinion, reiterated the benefits of the prophylactic *Miranda* warnings: to protect against the inherent coercion of custodial interrogation and to provide a bright-line rule easily applied by law enforcement officers and the courts. Justice Rehnquist, in a dissenting opinion joined by Justice Kennedy, stated his opinion that the per se rule of *Roberson* was unnecessary. "Balance is essential when the Court fashions rules which are preventative and do not themselves stem from violations of a constitutional right." *Id.* at ____, 108 S.Ct. at 2098 (Rehnquist, J., dissenting).