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OPINION OF A SCHOLAR

A Commentary on Inbau and Manak's "*Miranda v. Arizona*—Is It Worth the Cost? (A Sample Survey, with Commentary, of the Expenditure of Court Time and Effort)"

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INTRODUCTION

It is an honor to be invited to respond to a paper written by an esteemed scholar such as Professor Fred Inbau and by an individual such as James Manak, both of whom have demonstrated a consistent concern with the problem of crime.¹ I have comments on a number of points within their article, but my remarks shall be limited to rebutting their two central contentions: first, that *Miranda* consumes an inordinate amount of judicial resources; and second, that *Miranda* frustrates the extraction of confessions and interferes with crime prevention and detection.

I. THE EXPENDITURE OF RESOURCES

The authors survey the "amount of time and effort that was being expended by various appellate courts in disposing of *Miranda* issue cases."² Their objective is to demonstrate that a "considerable" amount of judicial time and effort has been expended "not only on *Miranda* itself, but also upon its progeny ever since that decision in 1966."³ The basic intent of their survey was to determine whether *Miranda* "is worth the cost in court time and effort."⁴

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1. See Inbau & Manak, *Miranda v. Arizona—Is it Worth the Cost? (A Sample Survey, with Commentary, of the Expenditure of Court Time and Effort)*, 24 CAL. W.L. REV. 185 (1988).

2. *Id.* at 186. The authors did not specify the criteria for a *Miranda* issue case. They also did not provide comparative data in terms of the time expended on the litigation of other criminal procedure issues. *Id.* at 187.

3. *Id.* at 187.

4. *Id.* at 186.

The authors conclude that the number of *Miranda* issue cases decided by the Supreme Court has increased along with a substantial proliferation in the number of words and pages contained in the decisions.⁵ However, the number of Supreme Court cases addressing *Miranda* issues hardly constitutes a huge expenditure of effort.⁶ From 1966 through 1986, the Supreme Court decided forty-four such cases, an average of slightly more than two per year.⁷

Inbau and Manak also contend that there has been a "substantial increase" in the number of words and pages in the *Miranda* decisions.⁸ The number of words and pages in a *Miranda* decision results from a number of variables, most of which are unrelated to the complexity of the *Miranda* issues in a case (e.g., which justice or judge wrote the opinion). Scrutiny of the authors' data does not suggest that the *Miranda* rule is burdensome. From 1966 through 1986, substantive *Miranda* issues were considered in forty-four cases, comprising a total of 606 pages and 160,000 words in the official United States Reports.⁹ This is an average of roughly thirteen pages per case, a rather modest total for a Supreme Court decision. In the same period, the United States circuit courts decided 980 *Miranda* issue cases consisting of 2,155 pages, or an average of slightly over two pages per case.¹⁰

It is true that the number of pages in the Supreme Court *Miranda* decisions increased in the 1984-1986 period. However, there was a decline in the average number of pages contained in the three cases that were decided between 1986 and June 1987.¹¹ The earlier increase thus must be viewed over time before any reliable figure can be derived. In addition, a comparative analysis of decisions in other areas might reveal that an ideological conflict on the Court has increased the length of other civil liberties and criminal procedure rulings.

Thus, judging by the authors' indicators, it is not certain whether an inordinate amount of time and effort is being consumed on *Miranda* issues.¹² The judicial time and effort devoted to protecting the integrity of the fifth amendment is a social bene-

5. *Id.* at 189.

6. The number of Supreme Court cases dropped to zero in 1970; increased to three in 1971; declined to zero in both 1972 and in 1973; and continued to fluctuate over time. *Id.* at 200 (Appendix #1).

7. *Id.* at 188.

8. *Id.* at 189.

9. *Id.* at 188-89.

10. *Id.* at 189.

11. *Id.* at 189, 200.

12. The authors did not present data on state and federal trial courts which they contend would have produced "staggering figures." *Id.* at 190.

fit, rather than a cost. Reinforcing the *Miranda* rule also serves to impress the police with their general obligation to respect a suspect's constitutional rights.

At any rate, the authors do not demonstrate that *Miranda* requires the employment of additional judges, diverts time from other more pressing concerns, or that if the *Miranda* rule is replaced by a voluntariness test, that a significant amount of time and resources would be saved. The application of the voluntariness test between 1884 and 1964¹³ resulted in a bewildering array of inconsistent decisions.¹⁴ During this period, the Court shifted its rationale for the voluntariness test from the insurance of reliable confessions,¹⁵ to due process,¹⁶ to fairness,¹⁷ and finally to the regulation of police practices.¹⁸ This unsuccessful attempt to define standards for determining the voluntariness of confessions consumed an inordinate amount of effort, and there is little likelihood that a reversion to the voluntariness test would prove to be any less problematic.¹⁹

The authors suggest that the purportedly burdensome *Miranda* case-load has resulted from the inability of the judiciary to resolve the myriad of technical issues presented by the *Miranda* decision.²⁰ The unsettled and expansive nature of the *Miranda* rule, however, has resulted from the sustained effort by those opposed to *Miranda* to undermine the integrity of the decision and its progeny.²¹ A prime example is the judicial creation of a "public safety" exception which permits the police to refrain from providing *Miranda* warnings to an individual under custodial interrogation in situations in which there is a perceived threat to public safety.²² There is no support for this exception in the *Miranda* decision, and if expansively interpreted, it could justify police failure to provide the *Miranda* warnings in cases in which the police

13. The authors appeared to favor the voluntariness test. *Id.* at 199.

14. Ogletree, *Are Confessions Really Good for the Soul? A Proposal to Minimize Miranda*, 100 HARV. L. REV. 1826, 1833 (1987). (Thirty-five cases were decided in a "relatively short period" following *Brown v. Mississippi*, 297 U.S. 278 (1936).)

15. *Hopt v. Territory of Utah*, 110 U.S. 574, 584 (1884), *see also* *Wilson v. United States*, 162 U.S. 613 (1896).

16. *Brown v. Mississippi*, 297 U.S. 278 (1936).

17. *Lisenba v. California*, 314 U.S. 219 (1941).

18. *Watts v. Indiana*, 338 U.S. 49 (1949).

19. Ogletree, *supra* note 14, at 1833-34.

20. "It was once thought that after the initial impact of *Miranda*, the various issues that might arise from it would soon be resolved by the Supreme Court in other cases. . . . [T]he facts are to the contrary." Inbau & Manak, *supra* note 1, at 189.

21. *See generally* Office of Legal Policy, United States Department of Justice, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION (1987) (The Markman Report).

22. *New York v. Quarles*, 467 U.S. 649 (1984).

are attempting to locate kidnap victims, poisoned foodstuffs, caches of drugs or arms, or where a potentially dangerous co-conspirator is at-large.

The Court's focus on *Miranda* issues is also a response to the persistent attempts by the police to evade the letter of *Miranda*. These efforts, in turn, are often viewed sympathetically by those members of the Court who refuse to accept the settled nature of the *Miranda* rule. In *Rhode Island v. Innis*,²³ Innis was arrested for robbery and murder, read his *Miranda* rights, and placed in a squad car with three police officers. Two of the officers expressed their fear that there were handicapped children "running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves."²⁴ The suspect then led the police to the location of the shotgun in a nearby field.²⁵ The Supreme Court ruled that this was not the "functional equivalent" of interrogation²⁶ and that this was "nothing more than a dialogue between two officers to which no response from the respondent was invited."²⁷

The test for interrogation established under *Innis* invites the police to make "innocent" comments and to engage in "private" conversations, and in "inoffensive" conduct in the hopes that the accused will "spontaneously" waive his *Miranda* rights. Justice Stevens in his dissent in *Innis*²⁸ argued that the Court's decision:

[C]reates an incentive for police to ignore a suspect's invocation of his rights in order to make continued attempts to extract information from him. If a suspect does not appear to be susceptible to a particular type of psychological pressure, the police are apparently free to exert that pressure on him despite his request for counsel, so long as they are careful not to punctuate their statements with question marks. And, if contrary to all reasonable expectations, the suspect makes an incriminating statement, that statement can be used against him at trial.²⁹

Thus, in summary, the "costs" of *Miranda* are exaggerated. Inbau and Manak fail to demonstrate that the decision creates an inordinate expenditure of judicial time or resources, or that the voluntariness test would place a lighter burden on the courts. The continued litigation of *Miranda* issues, to a significant extent, is a

23. 446 U.S. 291 (1980).

24. *Id.* at 294-95.

25. *Id.* at 295.

26. *Id.* at 302. The determination of the functional equivalent of interrogation under *Innis* is based on the foreseeability by the police that their words or conduct are reasonably likely to elicit an incriminating response. *Id.* at 301.

27. *Id.* at 302.

28. *Id.* at 307 (Stevens, J., dissenting).

29. *Id.* at 313-14 (footnote omitted).

result of a concerted effort to undermine the integrity of *Miranda* and its progeny.³⁰

II. THE IMPACT OF *Miranda*

Although it appears reasonable for Inbau and Manak to conclude that the *Miranda* warnings discourage the extraction of confessions,³¹ there are various Supreme Court cases in which defendants received *Miranda* warnings and then confessed.³² It is clear that *Miranda* did not succeed in "equalizing the balance"³³ between the accused and the police.³⁴ Studies indicate that "the *Miranda* warnings are almost wholly ineffective, and this obtains even when the suspect is intelligent, and the interrogation is polite, non-custodial, and at the suspect's home."³⁵

Miranda is based on a rational-legalistic model in which the police fully and effectively read suspects their *Miranda* rights and the suspects knowingly, intelligently and voluntarily determine whether to waive their *Miranda* rights.³⁶ The psychological processes that produce confessions, however, are unconscious and irrational. A suspect's invocation of silence, for instance, often is complicated by the fact that, psychologically, silence is viewed as an admission of guilt and as preventing the individual from correcting the police perception that he is guilty.³⁷ Reviewing the dynamics of the confession process, psychologist Edwin Driver concluded that the ability of suspects to assert their *Miranda* rights will likely be overcome by the negative implications of silence; the humiliation and loss of self-esteem resulting from arrest; the desire to assert a sense of autonomy and control; and police manipulation of the environment of interrogation.³⁸ Driver concluded that "subtle forces loosed in thoroughly 'legal' interrogations after warnings are duly given appear at least equal to physical duress in influencing behavior."³⁹ These pressures are so much a part of the

30. I in no way suggest that this is a conspiracy. This effort results from the complex and subtle relationship between the police, prosecutors, the judiciary and public officials.

31. *Id.* Inbau & Manak, *supra* note 1, at 194.

32. See generally *Michigan v. Mosley*, 423 U.S. 96 (1975); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).

33. Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1616 (1967).

34. *Id.*

35. Griffiths, *A Postscript to the Miranda Project: Interrogation of Draft Resisters*, 77 YALE L.J. 300, 318 (1967).

36. Lowen, *Confessions by the Accused—Does Miranda Relate to Reality?*, 62 KY. L.J. 794, 817 (1984).

37. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 57 (1968).

38. *Id.* at 60.

39. *Id.* at 61.

institution of interrogation “that ameliorating safeguards seem futile; [and] effective measures to right the imbalance created by the ‘inherently coercive’ atmosphere might be no less than tantamount to the abolition of the institution.”⁴⁰

The *Miranda* exclusionary rule has had a negligible impact on the ability of the police to obtain confessions. One study of over 7,000 cases in which various motions to suppress were filed⁴¹ found that motions to suppress confessions were granted in only about five percent of the cases in which such motions were filed (0.16% of all cases in which a motion to suppress some form of evidence was filed).⁴² Only five convictions were lost because of the suppression of a confession (0.017% of all cases in the study).⁴³ Thomas Y. Davies, in his seminal empirical research on the exclusionary rule, concluded that “*the general level of the rule’s effects on the criminal prosecution is marginal at most.*”⁴⁴

The *Miranda* rule’s limited impact, in part, reflects the fact that the Court has eviscerated the decision to the point of evaporation. In case after case, the Court has “applied a balancing test rather than a strict, bright-line rule and the rights of suspects consistently have come up short when weighed against the interests of law enforcement. The Court’s balancing approach has resurrected the voluntariness test and reopened the door to case-by-case adjudication.”⁴⁵

Custodial interrogation appears to have been limited to coercive incommunicado police interrogation and the Court has created a public safety exception to the *Miranda* warnings. The *Miranda* warnings do not have to be read in any particular order or form and the Supreme Court has refused to extend *Miranda* to require that the police inform suspects of the inadmissibility of a prior statement or that an attorney is present or available to assist them. The definition of interrogation has been limited to express questioning or its functional equivalent—words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from a suspect. Waiver is determined by the scrupulous honor and initiation standards, both of which appear to permit the police flexibility in seeking waivers from suspects

40. *Id.*

41. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585.

42. *Id.* at 606. Twelve of the 458 motions to suppress confessions in the study were granted. *Id.* at 601.

43. *Id.* at 600.

44. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 1983 AM. B. FOUND. RES. J. 611, 622.

45. Ogletree, *supra* note 14, at 1839.

who have invoked their right to silence and to counsel. Finally, the Court has permitted the use of confessions obtained in violation of *Miranda* for the impeachment of defendants who take the stand in their own defense.⁴⁶

The Court's limitations on *Miranda* must be viewed in the context of its general expansion of police powers. The Court's rulings have facilitated crime prevention and detection and have reduced the need for the police to obtain confessions. For instance, there is a broadening of police powers to stop, question, and search:⁴⁷ the Court has established a good faith exception to the exclusionary rule,⁴⁸ and has established the inevitable discovery rule,⁴⁹ and the Court has relaxed the requirements for determining probable cause in the warrant procedure.⁵⁰

Despite the ineffectiveness of *Miranda* in protecting suspects' fifth amendment rights, as stated, Inbau and Manak advocate a return to the voluntariness test.⁵¹ The voluntariness test was abandoned precisely because of its incoherence and ineffectiveness.⁵² Typical is *Davis v. North Carolina*,⁵³ in which the United States Supreme Court reversed the decisions of a North Carolina trial court and supreme court and of two federal courts that admitted a confession of rape/murder into evidence.⁵⁴ The confession had been obtained from an individual described by the Court as an "impoverished Negro with a third or fourth grade education"⁵⁵ who had been held incommunicado and interrogated for sixteen days⁵⁶ while being kept on a limited diet.⁵⁷ On the basis of Davis' confession, he was convicted and sentenced to death.⁵⁸ The Supreme Court majority concluded that "Davis' confessions were the involuntary product of coercive influences and thus were constitutionally inadmissible into evidence."⁵⁹ On the other hand, Justice

46. Lippman, *Miranda v. Arizona: Twenty Years Later*, 9 CRIM. JUST. J. 241, 280-81 (1987).

47. See generally Lippman, *Stop and Frisk: The Triumph of Law Enforcement Over Private Rights*, 24 CRIM. L. BULL. 24 (1988).

48. *United States v. Leon*, 468 U.S. 897 (1984).

49. *Nix v. Williams*, 467 U.S. 431 (1984).

50. *Illinois v. Gates*, 462 U.S. 213 (1983).

51. Inbau & Manak, *supra* note 1, at 199. The authors reliance on *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) to justify the voluntariness test for confessions is misplaced. The *Schneckloth* Court limited its holding to fourth amendment rights. 412 U.S. at 242-45.

52. White, *Defining Miranda: A Reply to Professor Caplin*, 39 VAND. L. REV. 1, 11 (1986).

53. 384 U.S. 737 (1966).

54. *Id.* at 739.

55. *Id.* at 742.

56. *Id.* at 745, 749-50.

57. *Id.* at 746.

58. *Id.* at 738.

59. *Id.* at 752.

Clark, with whom Justice Harlan joined in dissent,⁶⁰ argued that Davis was not subjected to "sustained or overbearing pressure"⁶¹ and "was simply questioned for about an hour each day There was no protracted grilling. Nor did the police officers operate in relays."⁶² The voluntariness test required review by five courts in this case.

In sum, the *Miranda* rule has not frustrated the extraction of confessions; and a return to the voluntariness test is a prescription for an ineffective, unwieldy and case-by-case approach to confessions. It is undeniable that *Miranda* jurisprudence has become ambiguous, complex and difficult for all but the most sophisticated police officer to comprehend. The solution does not lie in *Miranda's* reversal, qualification, or legislative abrogation. *Miranda* is not solely an effort in "egalitarian philosophy" designed to protect the poor, uneducated or unintelligent;⁶³ it is the threshold requirement for a knowing, voluntary and intelligent exercise of a suspect's fifth amendment rights. *Miranda*, however, has failed to insulate defendants from the coercive pressures of incommunicado interrogation, and it must be *strengthened* rather than *weakened*. The boundaries of *Miranda* must be clearly drawn and those rules which require a weighing and balancing of facts must be replaced by "bright-line" rules.⁶⁴ Consideration should also be given to the mandatory provision of counsel for suspects undergoing custodial interrogation.⁶⁵

CONCLUSION

It should be recognized that whatever the future of *Miranda*, any modification or strengthening of the rule will have a limited impact on the problem of crime. Given the small percentage of crimes which are reported, the minuscule number of these offenses which lead to arrest and the insignificant number in which confessions are crucial to a resolution, the practical importance of *Miranda* is easily exaggerated.

The debate over the *Miranda* rule, to a large extent, is a symbolic conflict over the future direction of American criminal procedure. It is vital that the *Miranda* rule be preserved (if not strengthened). The further erosion or abandonment of *Miranda*

60. *Id.* at 753.

61. *Id.* at 755.

62. *Id.*

63. Inbau & Manak, *supra* note 1, at 185.

64. *See Berkemer v. McCarty*, 468 U.S. 420 (1984) (standard for determining custodial interrogation prior to arrest).

65. *See generally* Ogletree, *supra* note 14.

may provide the rationale and momentum for the Supreme Court's retreat from a due process model and toward the adoption of a crime control model of criminal procedure in which individual rights are subordinated to state efficiency.⁶⁶ If successful in their efforts to undermine *Miranda*, the critics will next employ the same type of contentions to argue for the erosion of the warrant requirement, the right to counsel and the exclusionary rule. Thus, the future direction of American criminal procedure may be at stake in the debate over *Miranda*—we must not abandon our rights in the interests of saving time, money, or resources. The latter values have no place in constitutional litigation over civil liberties issues. Such economic considerations will inevitably have a concrete, practical appeal which will appear to outweigh the seemingly abstract benefits derived from the protection of individual rights. However, to engage in this type of "economic analysis" is an intellectually disingenuous enterprise which is a prescription for incipient totalitarianism. In addition, the claim that *Miranda* is handcuffing the police has no basis in fact.

Inbau and Manak refuse to accept settled constitutional doctrine and want to return to a period characterized by police abuse of suspects during interrogation. Surveying the global violations of human rights, it is clear that serious abuses often occur during incommunicado police interrogation. To abrogate *Miranda* is to weaken judicial oversight and to adopt the type of largely unregulated interrogation practices which characterize those countries which engage in the gross and consistent violation of individual human rights.⁶⁷

66. See generally H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149-246 (1968). The due process model emphasizes the protection of individual civil liberties in order to minimize the possibility of unjust or arbitrary convictions; while the crime control model emphasizes the broader societal interest in crime detection and prevention and requires that procedural protections for the accused be limited in order to insure the efficient prosecution and conviction of individuals guilty of having committed criminal offenses. *Id.*

67. See generally Lippman, *The Protection of Universal Human Rights: The Problem of Torture*, 1 *HUM. RTS. Q.* 25 (1979).

