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THE OPINION OF A SCHOLAR

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

On June 13, 1966, the Supreme Court of the United States, in a five to four decision in *Miranda v. Arizona*,[1] established a requirement that before anyone in police custody may be interrogated, the interrogator must advise the suspect that: 1) he has a right to remain silent; 2) anything he says may be used against him; 3) he has a right to a lawyer; and 4) if he cannot afford a lawyer one will be provided free. Only after a "knowing and intelligent" waiver of those rights could the interrogation proceed. Moreover, if at any time thereafter the suspect decides he no longer wants to talk, or if he says he wants a lawyer, the interrogation must cease. The Court also added that any statements made without warnings or a waiver are not admissible as evidence.

Miranda was the product of the Warren Court's pursuit of its egalitarian philosophy. The rationale was that the rich, the educated, and the intelligent person who is taken into police custody very probably knows from the outset that he has the privilege of silence, whereas the poor, the uneducated, or the unintelligent suspect is unaware of the privilege. Consequently, in fairness to all, every custodial suspect must be advised of the right to silence. Moreover, in order to ensure that such suspects become fully aware of that right, they should also be told that they are entitled to have a lawyer present. Contrary to the generally prevailing impression, even within the legal profession itself, the Court's pre-

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

scribed warning regarding the right to a lawyer was not based upon the *sixth* amendment provision that "[i]n all criminal *prosecutions*, the accused shall enjoy the right . . . to have the assistance of counsel *for his defense*." (emphasis added). Rather, the inclusion of the right to a lawyer as part of the *Miranda* warnings was only to supplement the *fifth* amendment provision that "No person . . . shall be *compelled* in any criminal case to be a witness against himself." (emphasis added).

The frequency with which *Miranda* issue cases have surfaced in the appellate court reports on the federal as well as state level, prompted the authors and their colleagues at *Americans for Effective Law Enforcement, Inc.* to arrange for a survey to be conducted for the purpose of permitting some assessment to be made of the amount of time and effort that was being expended by the various appellate courts in disposing of *Miranda* issue cases.[2] The basic interest of the survey was to determine whether *Miranda* is worth the cost in court time and effort, particularly in view of the fact the Supreme Court's mandate was only a prophylactic rule for reducing the likelihood of a violation of the self-incrimination privilege, rather than a substantive rule to safeguard against the risk of false confessions being used as evidence in criminal prosecutions.[3]

A cursory view of the numerous federal and state *Miranda* issue cases decided by the various appellate courts readily revealed the enormity of a nation-wide survey, if one were to be attempted. Moreover, it probably would be no more revealing than a sample survey. It was decided, therefore, that a survey would be made of the *Miranda* issue decisions rendered from the date of that decision in 1966 through 1986 by: a) the Supreme Court of the United States; b) the federal circuit courts of appeal; and c) the intermediate appellate courts of California.[4] In addition to ascer-

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2. AELE is a national not-for-profit, tax exempt educational organization, established in 1966 (*prior* to *Miranda*). Its primary purposes are (1) to assist law enforcement by conducting legal training programs for upper level personnel, and providing publications and consultations for the law enforcement community regarding the legal aspects of police procedures and activities, and (2) to file "friend of the court" briefs in the United States Supreme Court and lower appellate courts in support of vital police practices supportable by constitutional principles. To date, eighty one briefs have been filed in the United States Supreme Court alone. AELE's Executive Director is Wayne W. Schmidt who supervises the brief writing program as well as the general operations of AELE.

3. For a concise explanation of the prophylactic rule concept in the *Miranda* context, *see* Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U.L. REV. 100, 106-11 (1986). *See also* Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Criminal Law*, 84 MICH. L. REV. 662 (1986).

4. The survey was made possible by the Cranston and Catherine Spray Trust. Under its terms, the annual income may be used to provide stipends to one or more stu-

taining the number of cases, a count was made of the approximate number of words contained in the opinions.

In our report on the results of the survey, the authors do not profess that the results are meaningful in a comparative statistical sense. In other words, no effort was made to compare the number of *Miranda* issue cases with cases involving confession voluntariness *per se*, or with any other group or groups of criminal cases decided upon either constitutional grounds or prophylactic rules. Our only objective was to demonstrate, without resort to comparisons, that a "considerable" amount of court time and effort has been expended, not only upon *Miranda* itself, but also upon its progeny ever since that decision in 1966.

I. Sample of the Survey

Before presenting a detailed summary of the survey results, we submit, for illustrative purposes, the brief facts and figures on three recent cases, one each from the Supreme Court, a United States Circuit Court of Appeals, and a California Appellate Court:

A. Oregon v. Elstad[5]

While being questioned in his home by a police officer who had a warrant for his arrest on a burglary charge, the defendant made an incriminating statement without having received the *Miranda* warnings. He was also unaware of the warrant. Later at the police station, the warnings were given and the defendant made a full confession. His conviction was reversed by the Oregon Court of Appeals upon a finding that there was an insufficient break in the events between the initial unwarned statement and the confession obtained in the police station. On certiorari, the United States Supreme Court, six to three, reversed the Oregon court, and ruled that the initial uncoerced questioning without the warnings did not disable the defendant from subsequently waving his rights after the warnings were administered to him.

The various opinions in *Elstad*, all devoted to the *Miranda* is-

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dents of Northwestern University School of Law "to conduct research in support of effective law enforcement". The student primarily responsible for this particular survey and report was Matthew L. Mahoney, class of 1988, to whom the authors are deeply grateful for his very able assistance. We are also grateful to a number of other students who assisted us in the early stages of the survey.

In addition to our gratitude for student assistance on the survey, we also express our appreciation to Lawrence C. Marshall, Assistant Professor of Law at Northwestern, for examining our original manuscript and offering his criticisms and suggestions. We relieve him, however, of any responsibility for the conclusions and views expressed in this paper.

5. 470 U.S. 298 (1985).

sue, consumed 72 printed pages, 25,000 words, and contained citations to 149 cases.

B. *Bradburn v. McCotter*[6]

A habeas corpus petitioner's statement that he made after a Nevada arrest expressing an interest in waiting until he arrived in Texas to get a court appointed lawyer did not amount to even an equivocal request for counsel in Nevada. This case also dealt with a failure to exhaust state remedies.

Of the 3.5 pages in the opinion, 2.5 were devoted to the *Miranda* issue. The total number of words was 2,220, of which 1,680 pertained to *Miranda.*

C. *People v. Prysock*[7]

Upon arrest for a 1978 murder, the defendant received *Miranda* warnings which his counsel argued were inadequate, thus rendering the defendant's subsequent confessions inadmissable as evidence. The suppression motion was denied, and upon trial the defendant was convicted. Upon appeal, a California appellate court reversed. The California Supreme Court, five to two, denied review. Upon a grant of certiorari, the United States Supreme Court reversed, six to three, and established the principle that the warnings need not be a "a virtual incantation of the precise language contained in *Miranda.*"[8]

The defendant was retried and again convicted. The conviction was affirmed by the same appellate court that had reversed the original conviction. It held, two to one, that the warnings met the requirements prescribed by the United States Supreme Court and that the confession was also a voluntary one. The case ended with a four to three denial of review by the California Supreme Court.

In the final appellate court opinions in *Prysock*, the *Miranda* issue consumed 15.5 pages and 8,500 words out of a respective total of 29.5 and 16,000.

II. Summary of Survey Results

In *Miranda v. Arizona* itself, the majority and minority opinions consisted of 106 pages and approximately 30,000 words. From 1966 through 1986, substantive *Miranda* issues were considered in forty-four cases, for a total of 606 printed pages in the

6. 786 F.2d 627 (5th Cir. 1986).
7. 127 Cal. App. 3d 972, 180 Cal. Rptr. 15 (1982).
8. 453 U.S. 355 (1981).

official United States reports, consisting of approximately 160,000 words. The government prevailed in thirty-one of the cases and the contesting party in thirteen.

(Since 1986 through June 1987, the Supreme Court rendered three additional *Miranda* decisions, in which the government prevailed in all of them. The opinions in the three new cases cover forty-six pages and contain approximately 12,000 words. The total number of cases, therefore, exclusive of *Miranda* itself, amounts to forty-seven, with 652 pages and 172,000 words.)[9]

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. The prediction was that there would be an eventual diminution of litigation over *Miranda*'s requirements not only in the Supreme Court, but also in lower federal appellate courts, and in the state appellate courts as well. As reasonable as that assumption may have been, the facts are to the contrary. The accompanying charts, Appendices 1[10] and 2[11] demonstrate that the number of *Miranda* issue cases decided by the Supreme Court has actually increased during the twenty year period since its inception, along with substantial increases in the number of pages and words in the opinions disposing of them.

In the United States Circuit Courts of Appeals, *Miranda* issues were discussed in 980 cases decided during the period 1966-1986. The opinions consisted of 2,155 pages and approximately 1,200,000 words. The prosecution prevailed in 803 cases, the defense in 177.[12]

The California courts of appeal decided 363 cases from 1966 through 1986, for a total of 905 pages and approximately 450,000 words, dealing solely with substantive *Miranda* issues.[13] The prosecution prevailed in 281 cases, the defense in 82.

III. COMMENTARY

No attempt was made, nor did we think it was even possible, to ascertain the extent to which *Miranda* issues have encroached

9. For the count of the number of pages devoted to Supreme Court opinions the researchers used the official United States Reports, except with respect to the most recent cases that were unavailable in the official reports. For those the Lawyers' Edition decisions were used, with allowance made for the fact that its double column pages were approximately 1.6 times less than those in the United States Report.

10. *See infra* Appendix I at 200.

11. *See infra* Appendix II at 200.

12. The federal appellate court cases that were surveyed were those appearing in the federal reporter. Not included in the survey, therefore, are the decisions of the Court of Appeal for the District of Columbia that appear in the Atlantic Reporter.

13. The California Reporter was the source for the page count.

upon the time and efforts of the *trial courts* on either the federal or state level. We submit that the results of any such survey, if feasible, would have produced staggering figures, especially in view of the fact that defense counsel in confessions cases almost invariably inject the *Miranda* element into their objections to the admissibility of confessions. Furthermore, the number of appellate court cases is some indication, of course, of what has been occurring in the trial courts.

As is true with regard to the trial court expenditure of time and effort, there is no way by which the overall *monetary costs* produced by *Miranda* could be assessed. Without doubt, however, such costs must be very substantial.

A. An Example of the Judicial Time and Effort Devoted to Miranda

An excellent, though certainly not a rare illustration of the extent of judicial time and effort devoted to *Miranda* issues is the California case of *People v. Beheler*,[14] decided by its fifth district appellate court in December 1982. *Beheler* involved the question as to whether the confessor to participation in a 1980 attempted robbery-murder was in "custody" at the time he made his initial statements about the circumstances of the killing, during which three other young men were present.

Shortly after the crime, the defendant had a neighbor telephone the police to report the killing. Upon police arrival at the neighbor's home, the defendant stated that he wanted to discuss "the circumstances surrounding the shooting." He acknowledged being present, but stated that his stepbrother shot the victim for "no apparent reason." Defendant further stated that the pistol used in the shooting had been hidden by his companions in defendant's backyard (where it was found later). Defendant was asked if he had any objection to going to the police station, and he was told that he was not under arrest. He agreed to go "so that the investigation could be brought to a conclusion as soon as possible."

Without being advised of *Miranda* rights, the defendant was interviewed for less than thirty minutes at the police station, after which he was permitted to return home. Five days later, however, he was arrested. He then received the warnings of his rights, which he waived. Upon questioning, he admitted going with his stepbrother and two other young men to the place where the killing occurred. Their mission, he stated, was to rob a narcotics ped-

14. This case is unreported officially. *See infra* notes 15 and 16 and accompanying text.

dler at gunpoint.

At the defendant's trial for aiding and abetting first degree murder, the trial court admitted into evidence all of the defendant's statements, including the initial ones made in his neighbor's home prior to his subsequent arrest. He was convicted, but the California appellate court reversed, holding that the prosecution had not met its burden of establishing that the defendant was not in custody during the initial interview.

By a four to three margin the California Supreme Court denied review.[15] The state filed a thirty-four page petition for certiorari to the United States Supreme Court. Appended to the brief was the thirty-eight printed page opinion of the California appellate court, although that opinion, under a California procedure, had been ordered "not to be published in official reports."[16] The United States Supreme Court, in a four page majority opinion, summarily reversed the California appellate court.[17] Three Justices dissented, and in a two page opinion they expressed the view that the Court should receive briefs or oral arguments on the merits of the cases. They were persuaded by the fact that the California appellate court had written a thirty-eight page opinion, "most of which was devoted to an analysis of the question whether, under all the relevant facts, the respondent was in 'custody'."

Although there is no way to accurately assess the cost of time and effort expended in the *Beheler* case, it is reasonable to presume the cost assessment would be a substantial one, and particularly so if the United States Supreme Court had ordered a review of briefs or oral arguments.

B. Confusion Regarding Miranda

Following are brief reports of two cases that illustrate the considerable confusion over *Miranda* issues within the judiciary as well as among law enforcement personnel, which confusion has an impact, of course, upon the ultimate cost factor which we are discussing.

United States v. Mesa,[18] decided by the Third Circuit Court of

15. *See* note in *People v. Beheler*, 200 Cal. Rptr. 195 (Cal. App. 5th Dist. 1984) which upheld the defendant's conviction upon a retrial, with the sentence reduced to manslaughter.

16. Section 976 of the California Civil Code and Criminal Rules provides for several situations in which no opinions of the appellate courts are to be published in the state's official reports. Among them are decisions that do not establish a new rule of law or apply an existing rule to a set of facts significantly different from the facts in already published opinions.

17. 463 U.S. 1121 (1983).

18. 638 F.2d 582 (3d Cir. 1980).

Appeals in 1980, involved the twin issues of "custody" and "interrogation" within the meaning of *Miranda*'s mandate. The defendant had been a fugitive on an arrest warrant for the shooting of his daughter and his common law wife. He was located by the FBI in a motel room where he had barricaded himself. An FBI agent called to him repeatedly on a bullhorn, urging him to come out. He refused, but agreed to talk on a mobile phone to an FBI negotiator. Their conversation was recorded and in it the suspect made some incriminating statements, after which he peacefully surrendered. A United States district court suppressed the statements on the ground that they were made in a custodial situation, without the suspect having received the *Miranda* warnings. On appeal the circuit court reversed in a two to one decision. The chief judge concluded that "where an armed suspect who possibly has hostages barricades himself away from the police, he is not in custody [within] the meaning of the *Miranda* rule." Another judge concluded that the FBI agent's conversation with the suspect did not constitute interrogation, and for that reason the warnings were not required. The third judge dissented because he concluded that there was *both* custody and interrogation, thus necessitating the warnings.

If, as in *Mesa*, three federal appellate court judges come to three different conclusions as to whether "interrogation" and "custody" existed in a specific case situation, is it not unreasonable to expect law enforcement officers to make the required appraisals under conditions where they do not have the luxuries of time for deliberation or the availability of library facilities and the skill to use them?

The next and last case illustration involved the *Miranda* requirement of "waiver" following the issuance of the warnings. In *People v. Braeseke*,[19] the defendant, while in custody of the Oakland, California police as a suspect in a triple murder, received the *Miranda* warnings and waived his rights. However, upon being confronted with some incriminating physical evidence, he refused to talk without an attorney being present. Respectful of *Miranda*'s mandate, the California police ceased their questioning of him. They then proceeded to book him for the crime. After he had been questioned as to his name, address, date of birth, and the name of next of kin, he asked one of the investigating officers if he could speak "off the record." The officer agreed. Braeseke soon confessed the crime and also revealed the location of the rifle used in the killings.

19. 602 P.2d 384, 159 Cal. Rptr. 684 (1979).

Upon appeal from Breaseke's conviction, the California Supreme Court, in a 1979 decision, held five to four, that the "off the record" request did not constitute a waiver of his previously asserted right to remain silent. The confession and the evidence derived from it (the rifle) were ruled inadmissible. The prosecution filed a petition for certiorari in the United States Supreme Court. After a grant of the petition, the case was remanded to the California Supreme Court "to consider whether its judgment was based on federal or state grounds, or both."[20] The California Supreme Court certified that its judgment was "based upon *Miranda v. Arizona* and the fifth amendment to the United States Constitution."[21] Further review was denied by the United States Supreme Court.[22]

Braeske was retried and convicted upon evidence obtained (after some initial resistance from a TV network) of incriminating statements Braeseke made while in jail after his first conviction during an interview with Mike Wallace on CBS's "60 Minutes" TV program. Braeseke's unsuccessful defense at his second trial was the influence of an hallucinogenic drug ("angel dust") at the time of the killings.

C. *Considering the Future of Miranda*

In considering the future of *Miranda*'s mandate, the following factors are deserving of special consideration:

1. The Miranda warnings are not constitutionally required. An interrogation without them does not violate the fifth amendment's prohibition against *compelling* a person to incriminate himself. This was the holding of over thirty state supreme courts and a federal circuit court prior to *Miranda*.[23]

The Supreme Court, itself, in several cases subsequent to *Miranda*, clearly evidenced the fact that the decision was a prophylactic underpinning of the fifth amendment self-incrimination privilege rather that a constitutionally required set of rules. For instance, in *Harris v. New York*, a *Miranda*-flawed confession was

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20. 466 U.S. 932 (1980).

21. 618 P.2d 149, 168 Cal. Rptr. 603 (1980).

22. 451 U.S. 1021 (1981).

It is of interest to note that the Supreme Court has abandoned the practice of remand to determine whether a state case was decided upon either state or federal grounds. The Court now automatically assumes that the basis was a federal one whenever the case cites a federal decision or the federal Constitution, unless there is a clear statement in the opinion to the contrary. *See* Michigan v. Long, 463 U.S. 1032 (1983).

23. The citations to the cases are in F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 169-70 (2d ed. 1967).

declared usable for impeachment purposes,[24] and in *Michigan v. Tucker*, the Court held that derivative use could be made of a *Miranda* invalid statement that led to evidence of the suspect's guilt.[25] The decisions in those cases and others of a similar nature would not be sustainable if the requirements of *Miranda* were constitutionally mandated.[26]

2. A further indication of the lack of a constitutional basis for *Miranda* is the fact that in the majority opinion itself, the Court invited Congress and the state legislatures to devise some suitable alternative to *Miranda*, although the Court was not very explicit as to what would be acceptable to it.[27] In accordance with the perceived invitation, Congress in the 1968 Omnibus Crime Bill provided an alternative, and so did the Arizona legislature in 1969. Essentially this legislation declared that voluntariness was the test of confession admissibility, but that in determining the issue of voluntariness, consideration should be given to whether the suspect had been advised of his right to silence and to a lawyer. However, the presence or absence of those factors would not be conclusive with respect to voluntariness.

No case has been presented to the Supreme Court, or to any other court of review, that would test the validity of either the congressional or Arizona enactment.[28] On a number of occasions, and as subsequently reiterated, one of the authors of this paper has suggested that a suitable case should be presented to the Supreme Court for review of either the federal or state provision.

3. The issuance of the *Miranda* warnings offers encouragement to many criminal offenders to refuse to talk. Although no figures are available—or indeed, even ascertainable—to substantiate that statement, a common sense case illustration should render adequate support. A person who has committed a criminal act would be taking a very risky chance if he declines the invitation to remain silent and to request a lawyer. If he makes the kind of waiver the Supreme Court prescribed—a "knowing and intelligent" one—and submits to an interrogation, the conclusion seems

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24. 401 U.S. 222 (1971). A decision to the same effect is Oregon v. Hass, 420 U.S. 714 (1975).

25. 417 U.S. 433 (1974).

26. One of the cases discussed earlier in this paper, Oregon v. Elstad, may also be considered supportive of the same conclusion. *See supra* note 5 and accompanying text.

27. 384 U.S. 436, 490 (1966). Also consider the following: "It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore, we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted." *Id.* at 467.

28. *But see* United States v. Crocker, 510 F.2d 1129 (10th Cir. 1975).

inescapable that he is not intelligent. Rarely will there be any gain; he will surely incur the risk of a damaging admission, or even a full confession, and a consequent criminal charge and possible conviction.

Prior to *Miranda*, if a suspect, either custodial or non-custodial, said he did not want to talk, or that he wanted a lawyer, a competent interrogator could frequently persuade him to talk anyway, and, if guilty, to also confess. *Miranda* resulted in a nullification of this previous legally permissible interrogation tactic for seeking to ascertain evidence of guilt—or, on occasions, the establishment of the suspect's innocence (as where, for instance, he reveals to the interrogator a provable alibi).[29]

4. Despite the requirements for warnings by interrogators regarding the fifth amendment privilege, no warnings are required under the fourth amendment as a condition to the consensual search of a person or his possessions. There is an incongruity here, because the fourth amendment *specifically prohibits unreasonable searches* whereas the fifth amendment contains *no* prohibition against non-compulsory interrogations.

In a 1973 Supreme Court search and seizure case, the majority opinion stated that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning," and that "[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies."[30] The same may be said of the interrogation process.

Although this search and seizure case did not involve a custodial suspect, in a later case the Supreme Court held that even when a suspect is in custody, no warning need precede a consensual search;[31] and other courts have applied that rule with regard to suspects in police station custody.[32]

5. There is a gross misconception, generated and perpetuated by fiction writers, movies, and television, that if criminal investigators carefully examine a crime scene, they will almost always find a clue that will lead them to the offender; and that, furthermore, once the criminal is located, he will shunt aside his self-preservation instinct and readily confess or otherwise reveal guilt, as by attempting to escape. This however, is pure fiction. As a matter of fact, the art and science of criminal investigation has not yet de-

29. This technique was described in F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 111-12 (1st ed. 1962). In the succeeding edition, published after *Miranda* in 1967, it had to be omitted, of course.

30. Schneckloth v. Bustamente, 412 U.S. 218, 232 (1973).

31. United States v. Watson, 423 U.S. 411 (1976).

32. Among the cases are United States v. Heimforth, 493 F.2d 970 (9th Cir. 1974); United States v. De Marco, 488 F.2d 828 (2d Cir. 1973).

veloped to a point where the search for and the examination of physical evidence will always, or even in most cases, reveal a clue to the identity of the perpetrator or provide the necessary legal proof of guilt. In criminal investigations, even of the most efficient type, there are many, many instances where physical clues are entirely absent, and the only approach to a possible solution of the crime is the interrogation of the criminal suspect himself, as well as of others who may possess significant information.[33]

6. Once a lawyer enters upon an interrogation scene, he will very rarely do anything more than instruct his client to keep his mouth shut. As the late Supreme Court Justice Jackson stated in a 1948 case, "[t]o bring in a lawyer means a real peril to the solution of the crime . . . Any lawyer worth his salt will tell the suspect . . . to make no statement to police under any circumstances."[34]

7. The majority opinion in *Miranda* attributes to the Federal Bureau of Investigation a practice consistent with what the Court mandated in that case for *all* police interrogators. It suggested that "the practice of the FBI can readily be emulated by state and local law enforcement agencies."[35] Two basic flaws are present in that conclusion. First, as Justice Harlan, one of the four dissenting Justices, pointed out, the FBI's interrogation practices were considerably short of *Miranda's* formalistic rules: "For example, there is no indication that FBI agents must obtain an affirmative 'waiver' before they pursue their questioning. Nor is it clear that one invoking his right to silence may not be prevailed upon to change his mind. And the warning as to appointed counsel apparently indicates only that one will be assigned by the judge when the suspect appears before him . . . ."[36]

Second, again as stated by Justice Harlan, "[t]here is some basis for believing that the staple of FBI criminal work differs importantly from much crime within the ken of local police. The skill and resources of the FBI may also be unusual."[37] Unquestionably, the national police responsibilities and case problems are vastly different from those that confront the state and local police, and particularly the police in large urban areas with their multitudinous volume of burglaries, robberies, rapes, murders, and other types of personal and property offenses. Offenses of that nature do

33. For an extensive discussion of the practical necessity for interrogations in the police investigative process, see the Introduction to F. INBAU, J. REID, & J. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986).

34. Watts v. Indiana, 338 U.S. 49, 59 (1948).

35. 384 U.S. at 486.

36. *Id.* at 521.

37. *Id.* at 521 n.19.

not lend themselves to solution by investigative procedures alone, even when supplemented by the most sophisticated scientific aids; there is the indispensable need in a high proportion of such crimes for the interrogation of persons suspected of committing them.

8. The diminution of the use of brutality, threats of brutality, and other unconscionable police interrogation practices is sometimes attributed to the advent of *Miranda*. According to some of the worshipers at the shrine of *Miranda*, the rules laid down in that case have actually improved police practices by impelling police resort to acceptable investigative procedures, and especially those that utilize scientific methods for the procurement of evidence leading to the perpetrator and eventually to a successful prosecution. *Miranda* is undeserving of that tribute. As already stated, scientific methods, for a number of reasons, are only applicable to a small proportion of criminal offenses, and there are severe practical limitations even upon conventional investigative procedures when used alone, without the aid of interrogation opportunities.

Prior to *Miranda*, the movement was under way to improve the quality of police interrogation practices, and, most certainly, shunting aside the earlier "third degree" device. Moreover, there was, and continued increasingly to be the utilization of, or announced intention to invoke civil rights statutes to prosecute police who indulge in practices of that nature.[38] That was a development totally unrelated to the *Miranda* mandate.

9. It is an undeniable fact that a very high proportion of criminal offenders are from the ranks of the poor, the uneducated, or the unintelligent. Many of them are entitled to compassion and to whatever rehabilitation society has to offer. The time to display that compassion, however, is *after* a determination has been made as to whether the suspect with such an unfortunate background actually committed the criminal offense for which he is suspected. He is hardly a fit subject for rehabilitation if his unlawful conduct is undetected, or if he has been unwilling to admit committing such conduct. He or she is hardly amenable to rehabilitation as long as there is a denial of the wrongdoing; and *Miranda* is a roadblock to admissions.

A criminal offender who has "beaten the rap" because of the benefit bestowed upon him by *Miranda* is bound to have a lessened respect, or even contempt, for the legal system that permits such an escape chute. This, too, we suggest has a psychological

38. The federal criminal action statutes are 18 U.S.C. §§ 241, 242 (1981); the civil action one is 42 U.S.C. § 1983 (1981). For an example of a state statute see Ill. Rv. Stat., Ch. 38, § 12-17.

disadvantage with respect to attempts at rehabilitation.

One further point with regard to the underlying social philosophy of *Miranda*: a very high percentage of the *victims* of crime are from the ranks of the poor, the uneducated, or the unintelligent. It is of no comfort to them to be told by the police investigators that they had been handicapped in their efforts because of court rulings requiring warnings to arrested suspects of their rights to silence and to a lawyer—warnings that are required so as to equalize humanity; in other words, to even things out as regards the poor and the rich, the uneducated and the educated, the unintelligent and the intelligent. This is not likely to produce tears in the eyes of victims who have been raped or robbed, or whose home has been burglarized while they were away at work earning a living. Such a reaction is also not to be expected when the victims are subsequently told that their offenders had been brought to trial but were acquitted, or had their convictions reversed, because they were either not warned of those rights or that the rights were not properly administered.

10. An additional and seldom mentioned factor of relevance to the issue as to whether *Miranda* should be abandoned is the attitude of some prosecuting attorneys who must rely heavily upon a confession as an element in their proof of guilt. In such instances they realize that their probability of success is highly enhanced if they can place a law enforcement officer on the witness stand to recite the ritual of *Miranda* warnings that were issued to the defendant while a suspect, coupled with the waiver he made of them. To a prosecutor, therefore, *Miranda* may serve as a valuable prosecutorial tool. What is overlooked or ignored, however, are the countless number of cases that never reach the prosecutorial stage because of the acceptance by suspects of the invitation to remain silent or to have a lawyer present during the interrogation. Then, too, there are the occasions when a prosecutor decides not to use a confession as evidence because of his perception, at times unfounded, that the police failed to give the proper warnings or else neglected to even give them because of a possible misjudgment by the police that they were not required under the particular case circumstances.

Irrespective of whether the number of *Miranda* issue cases decided by the Supreme Court is considered to be relatively "many" or relatively "few," the stark fact remains that the Court has decided forty-seven *Miranda* cases, exclusive of the original decision. The opinions in those cases consumed 652 printed pages in the official court reports, and they totaled approximately 172,000

words. Also, in one 1985 case alone, *Oregon v. Elstad*,[39] the opinions contained references to 149 cases. All of this represents a considerable burden, especially when consideration is given to the research required into the various issues presented, the conference time of the Justices, their own independent contemplations, and the preparation and finalization of the opinions to be published. The Court should extricate itself from this self-inflicted burden of time and effort, which could be better devoted to cases involving matters of far greater importance than the prophylactic rules of *Miranda's* mandate. An auxiliary benefit would be an end to the mischief created by *Miranda* for the police and prosecutors as well as for the many trial and appellate courts.[40]

There should be no further delay in remedial action by the Supreme Court. As earlier indicated, an appropriate circumstance would be a case pertaining to the constitutional validity of the relevant provision of the 1968 Congressional Omnibus Crime Act or its 1969 Arizona counterpart.[41] Direct action toward *Miranda's* demise would be far preferable to the slower "erosion" process about which a few of the Justices have complained. The erosion route would only perpetuate further erosion of valuable court time and effort.

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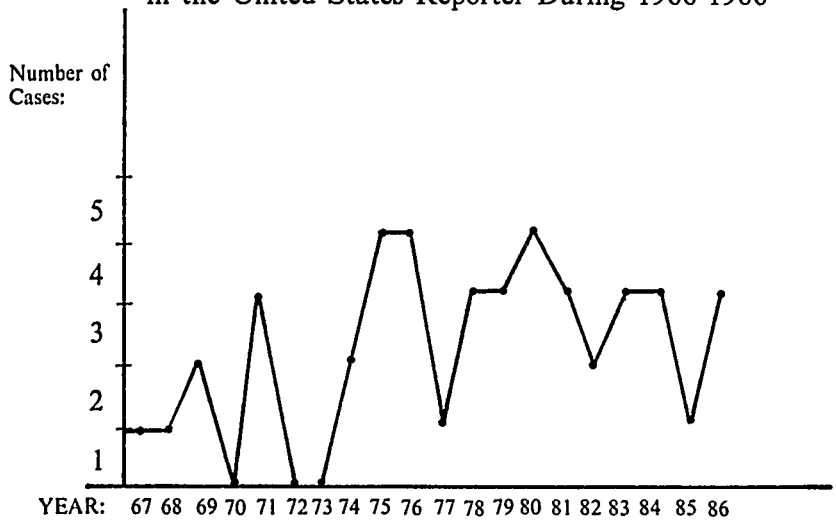
39. 470 U.S. 298 (1985).

40. For examples of the mischief, see among other cases, the case of John W. Hinkley, Jr., the attempted assassin of President Reagan, discussed in Inbau, *Over-Reaction—The Mischief of Miranda v. Arizona*, 73 J.C.L. & CRIM. 797, 809 (1982), republished in revised form, in THE PROSECUTOR (Winter 1985 issue, at p.7).

41. These two enactments were discussed *supra* at 194. They are 18 U.S.C. § 3501 (1969) and ARIZ. REV. STAT. § 13-3988 (1978).

Appendix #1

Number of Supreme Court Cases on *Miranda* Issues in the United States Reporter During 1966-1986



Appendix #2

Number of Pages in the Supreme Court's *Miranda* Issue Cases in the United States Reporter During 1966-1986