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Who's afraid of *Miranda v. Arizona*?[1] In the almost thirty years since the Supreme Court decided *Miranda,* its decision has been praised, criticized, expanded, curtailed, and even threatened with extinction. A decade ago the U.S. Attorney General identified *Miranda* as an insupportable decision ripe for abandonment;[2] over one year ago, the last member of the *Miranda* Court retired;[3] and in recent years, the Court itself has seemed to cast doubt upon the vitality of *Miranda.*[4] Nevertheless, *Miranda* has survived and even — in this era of the Rehnquist Court — flourished.

Why spill more ink then on the topic of *Miranda?* Who cares anymore?

Actually, we all do — or should. Because, as Professor Joseph D. Grano[5] demonstrates in his comprehensive treatment of the policy and doctrinal roots of *Miranda,* the *Miranda* decision rests on principles that reflect general and profound attitudes toward confessions, policing, and the nature of the criminal process. At its most abstract level, *Miranda* heralded a dramatic and still-unresolved impulse to dismantle the traditional distinction between

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

2. John A. Jenkins, *Mr. Power,* N.Y. TIMES, Oct. 12, 1986, § 6 (Magazine), at 19; Philip Shenon, *Meese Seen as Ready to Challenge Rule on Telling Suspects of Rights,* N.Y. TIMES, Jan. 22, 1987, at A-1.

3. The members of the Court at the time of the *Miranda* decision and their dates of retirement are as follows: Chief Justice Warren (1969); Associate Justices Clark (1967), Fortas (1969), Black (1971), Harlan (1971), Douglas (1975), Stewart (1981), Brennan (1990), and White (1993).

4. *See* Duckworth v. Eagan, 492 U.S. 195 (1989) (holding that Miranda warnings are not rendered inadequate as to a suspect who is informed that an attorney will be appointed for him if and when he goes to court); Oregon v. Elstad, 470 U.S. 298 (1985) (holding that failure to administer Miranda warnings does not "taint" admissions made after a suspect has been fully advised of and has waived his Miranda rights); New York v. Quarles, 467 U.S. 649 (1984) (creating a "public safety" exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence).

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police investigation and the adversary courtroom process, treating the former as a species of the latter by inviting lawyers into the stationhouse. Although this impulse has never been given free rein, at its logical extreme it could obliterate important, well-accepted techniques of crime detection.

Much of the debate over the reach of *Miranda* stems from this embedded impulse to subsume policing within the adversary courtroom process. Ironically, the core of the *Miranda* decision itself need not have been so protean; whatever one thinks of the doctrinal foundation of *Miranda,* at most it supports only a fairly narrow result. The transforming possibilities of the decision emerge from subsequent embellishments of the Court's reasoning and from the prescription of a rule that ranges beyond both the question presented in the case and the logic of the answer. Put simply, *Miranda* goes a rule too far, and its overreaching has been the source of much of *Miranda*'s troubled history.

Grano's book invites us to unpack *Miranda.* Let's identify the two strands of its rule and the bases of its reasoning. Let's imagine a world with a narrow *Miranda* rule, and then examine the tensions within the post-*Miranda* world as it actually exists. Grano points the Court toward overruling *Miranda.* But we need not revisit a constitutional decision that, for better or worse, has survived. The debate over the wisdom of that decision has now left the sphere of the Constitution and entered the sphere of disciplinary rulemaking that would enshrine *Miranda* as one of the canons of bar ethics.

The Roots of *Miranda*

Miranda claimed to rest on the Fifth Amendment's prohibition against compelled self-incrimination.[6] The Court acknowledged that the original concept of compelled self-incrimination relates to legal compulsion and thus engrafted on that concept the rule against involuntary confessions.[7] As Grano observes, one may challenge *Miranda*'s assertion that the privilege against self-incrimination and the prohibition on coerced confessions are in fact connected as a matter of law and logic (pp. 131, 134-36). On the other hand, one may view the relationship between self-incrimination and involuntary confessions as dependent: in order to determine whether a suspect validly waived the privilege against compelled self-incrimination, one must determine whether the suspect's waiver was voluntary or not. But whatever the foundation of the connection between the self-incrimination privilege and the involuntariness rule, the real *tour de force* in *Miranda* is the Court's

6. 384 U.S. 436, 439 (1966).

7. 384 U.S. at 458, 467.

expansive redefinition of the concept of impermissible involuntariness.

The Court's analysis in *Miranda* begins by cataloguing a veritable horror show of interrogative misbehavior, ranging from beatings, hangings, and whippings through exhausting incommunicado questioning and forced sleeplessness, all the way to the threatened removal of children and the questioning of a " 'near mental defective.' "[8] To the extent that such misbehavior offended traditional notions of due process, however, it was already explicitly forbidden by the Fifth or Fourteenth Amendments.[9] *Miranda*'s novelty lay in extending the traditional due process limitations on police interrogation by suggesting that all custodial interrogation is inherently coercive, irrespective of its actual circumstances (pp. 135-36).

The law, however, simply did not support the proposition that mere custodial questioning is automatically coercive. So the Court went about seeking to establish this proposition indirectly. First, the Court hinted that the very privacy within which police interrogation occurs creates a presumption of impropriety.[10] Then, the Court seemingly upbraided the police for trying to obtain a confession.[11] Other techniques evidently viewed askance by the Court include "display[ing] an air of confidence in the suspect's guilt,"[12] obtaining a psychological advantage by confronting the suspect outside his home ground, and offering the subject sympathetic rationalizations for the suspected offense.[13] Finally, the Court condemned the familiar "Mutt and Jeff" routine and police officers' use of deception.[14] In short, the Court virtually equated involuntariness with "trad[ing] on the weakness of individuals."[15]

This reasoning comes perilously close to treating any confession as per se involuntary. The Court implicitly seemed to regard as voluntary only those confessions offered after polite police questioning in a setting comfortable for the suspect and after full disclosure by the interrogators. Indeed, it is hard to see why the criticisms of traditional interrogative methods should have been limited to *custo-*

8. 384 U.S. at 446-56.

9. *See, e.g.*, Spano v. New York, 360 U.S. 315, 322-24 (1959) (holding that the interrogation of a formally charged defendant for eight consecutive hours while ignoring his requests to contact his attorney violated the Fourteenth Amendment); Watts v. Indiana, 338 U.S. 49, 53-55 (1949) (holding that the interrogation of a suspect for six days without allowing the suspect the benefit of counsel or a preliminary hearing violated the Due Process Clause of the Fourteenth Amendment).

10. 384 U.S. at 448-50.

11. 384 U.S. at 448-50.

12. 384 U.S. at 450.

13. 384 U.S. at 449-52.

14. 384 U.S. at 452-53.

15. 384 U.S. at 455.

dial questioning, as the police are capable of using deceptiveness and psychological ploys to elicit admissions in a noncustodial setting.

This analysis pointed the Court toward a rule that would have excluded all confessions, or at least all custodial confessions, as evidence in criminal cases. Yet the Court drew back from an automatic invalidation of all confessions, and even suggested that citizens ought to respond to police inquiries made in a noncustodial setting.[16] The reason is not hard to see. A ruling that all confessions — or all confessions induced by some form of pressure or influence — are involuntary would have overthrown a substantial body of prior case law, including the very precedents that had adumbrated the rules on voluntariness. If all custodial confessions are inherently involuntary, then there is no reason to test them for voluntariness. So, after all the hue and cry about police unfairness in obtaining confessions, the Court's cure was to insist that the suspect be "effectively apprised of his rights."[17]

Importing a warnings requirement into the waiving of the privilege against self-incrimination has some appeal as a policy matter, however questionable it may be as a matter of constitutional law. If a waiver must be both knowing and voluntary, a warning can be justified as a prophylactic assurance that the subject has knowledge, thus leaving the issue of voluntariness to a conventional due process analysis of the coerciveness of the circumstances. One might conclude as a legislator or rulemaker, therefore, that the police should advise a suspect that he is under no legal compulsion to speak and that if he does so he might suffer the consequences. A postwarning confession would then be analyzed for voluntariness under the due process test. Such a regime would be generally consistent with the prior voluntariness cases and would reflect only the novelty of insisting on an explicit reminder that the subject may choose not to incriminate himself.

But this reasoning at most only supports cautionary instructions on the right to remain silent and the consequences of failing to exercise that right. Such instructions would reflect the Fifth Amendment privilege on which the Court expressly relied in *Miranda* and would give notice of the scope of the waiver sought by the police interrogators. Had *Miranda* been limited to this kind of notice requirement, it would be defensible as at least addressing the constitutional provision the Court was construing, even if the underlying interpretive effort might be doubtful (pp. 142-43).

With sleight of hand, however, the Court transcended the textual limitations of the right against self-incrimination and intro-

16. 384 U.S. at 477-78.

17. 384 U.S. at 467.

duced a right to the presence of counsel at the interrogation. As a matter of legal doctrine, Grano convincingly demonstrates that this right is insupportable (pp. 157-58, 170-72). Precedent did support — as an independent legal right — the accused's right to counsel in facing the prosecution after the criminal process has begun. That right was founded, not in any concern about coercive police behavior, but in the text of the Sixth Amendment, which mandates the assistance of counsel for defendants in "all criminal prosecutions."[18] Until *Miranda*'s direct progenitor *Escobedo v. Illinois*,[19] courts had applied that right only at the classic adversary stage when the contest moves into the courtroom. The rationale was that a defendant formally charged and engaged in the judicial process against trained advocates should have legal advice. Even *Massiah v. United States*[20] — which established a postindictment right to counsel during questioning — created such a right by reasoning that once formal charges are filed, the state must address the defendant through "a trial, 'in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law.' "[21] Indeed, *Massiah* did not even involve coercive questioning; it reflected a traditional and textual view that the Constitution treats the indictment as a watershed, after which the formal machinery of the judicial process — including the right to counsel, speedy trial, confrontation, and trial by jury — becomes operational.

None of this earlier law suggested, of course, that there is a right to counsel in all criminal investigations or on all occasions when the individual confronts the police. To the contrary, the Court's reasoning before *Escobedo* indicated the opposite because the panoply of Sixth Amendment rights was logically — and, in light of the text, inevitably — triggered by the same event: charging the accused with committing the crime. Expanding the scope of the Sixth Amendment into the precharging period would have yielded such curiosities as a right to speedy trial at the time of investigation, or a right to confront witnesses as police are interviewing them at the scene of the crime, or a right to have counsel present in the grand jury room.

To be sure, earlier cases noted that the presence of counsel at an interrogation is a factual circumstance to be weighed in evaluating whether a confession was coerced.[22] But this presence is relevant merely because counsel would not likely have allowed coercive be-

18. U.S. CONST. amend. VI.

19. 378 U.S. 478 (1964).

20. 377 U.S. 201 (1964).

21. 377 U.S. at 204 (citing Spano v. New York, 360 U.S. 315, 327 (1959)).

22. *See, e.g.*, Haynes v. Washington, 376 U.S. 503, 516-17 (1963).

havior; thus, counsel's presence is probative evidence of the voluntariness of the confession. Consequently, the police would have a substantial incentive to supply counsel to defendants in preindictment interrogations. It is fallacious, nonetheless, to conclude from this evidence — or even presumption — of voluntariness that an independent legal right to counsel exists at an interrogation. Put another way, although counsel's presence may be sufficient to establish voluntariness, it is not necessary to establish voluntariness; voluntariness can be established based on other circumstances.

The obvious conclusion — the conclusion drawn by the dissenters in *Miranda* — is that the majority's creation of a preindictment right to counsel was an artifice designed to eliminate custodial confessions *sub silentio.* As Justice Harlan observed, "if counsel arrives, there is rarely going to be a police station confession."[23] The less obvious effect of *Miranda*'s creation of a preindictment right to counsel was the striking extension of the judicially oriented adversary process into the investigative arena.

Cases decided after *Miranda* underscore the tenuous quality of the extension of a right to counsel into the preindictment period. As Grano observes, the Supreme Court subsequently declined to engage the Sixth Amendment in any other case involving police activity before the start of formal charging proceedings (pp. 153-55). If there was a shrouded Sixth Amendment limb supporting *Miranda,* later cases rendered it very frail indeed.

But *Escobedo-Miranda*'s effort to expand the right to counsel into the preaccusation period did not merely disregard the doctrinal and textual limitations on the Sixth Amendment right to counsel (p. 152). In fact, one can conclude that the expansion was part of a deliberate — if ultimately only partially successful — design to breach those limitations and make policing part of the adversary judicial process.[24]

The Fruits of *Miranda*

In spite of the doctrinal weakness of the right to counsel branch of *Miranda,* it has sprouted much of the post-*Miranda* controversy. The Court has expanded that branch of the *Miranda* doctrine far more than the right to silence branch.

Take waiver, for example. *Michigan v. Mosley*[25] makes clear that when an interrogee requests that questioning cease, police may nonetheless initiate questioning at a later time and even secure a

23. 384 U.S. 436, 516 n.12 (1966).

24. Tellingly, the *Miranda* majority at one point referred explicitly to police interrogation as "a phase of the adversary system." 384 U.S. at 469.

25. 423 U.S. 96 (1975).

valid waiver of the right to silence.[26] In contrast, when an individual requests the right to counsel, a court will not sustain a subsequent waiver of that right unless the individual initiates new discussions.[27] Indeed, police may not initiate questioning even if counsel has been afforded; what is necessary to resume questioning is that the lawyer be present.[28]

As Justice Powell observed in *Edwards v. Arizona*,[29] it is hard to see why there should be a double standard of waiver for the right to silence and the right to counsel.[30] Perhaps the best rationale offered is that a request for counsel indicates a desire to surrender individual decisionmaking authority and implicitly disables future uncounseled waivers. But actually the double standard betrays the fact that the right to counsel prong of *Miranda* does more than simply warn an individual of his rights: it offers that person the ability to transform the preindictment, preaccusatory custodial setting into a forum with the characteristics of the more formal, postaccusatory criminal process.

This not-so-latent transforming impulse in *Miranda* has led several members of the Court considerably further. In *Arizona v. Roberson*,[31] the Court held that the "prophylactic" rule of *Edwards*, which forbids police-initiated questioning of anyone in custody who requests counsel, extends even to questioning by other officers about unrelated investigations.[32] The Court's explicit rationale was that once a suspect "has indicated his inability to cope with the pressures of custodial investigation," he should be insured against questioning on any other topic.[33] Presumably this rule applies even if the second investigation has focused on the suspect only as a subject or possible witness, and even if the second investigation is in its infancy (p. 161). Again, the relentless logic of the *Miranda* right-to-counsel prong drives the Court to hand the suspect in custody the power to transform even unrelated nascent investigations into adversary proceedings.

The logic of *Roberson* is capable of almost infinite expansion. For example, one might argue that once an individual has asked for

26. 423 U.S. at 104 ("[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends . . . on whether his 'right to cut off questioning' was scrupulously honored.").

27. *See* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (holding that an accused, after asserting his right to counsel, is not subject to further interrogation until counsel has been made available to him or the accused, himself, initiates further communication).

28. 451 U.S. at 485.

29. 451 U.S. 477 (1981).

30. 451 U.S. at 489-90 (Powell, J., concurring).

31. 486 U.S. 675 (1988).

32. 486 U.S. at 682.

33. 486 U.S. at 686.

counsel during one interrogation, he should be free from custodial interrogations in the future even if he has been released from the first interrogation. Or, one might advocate an even more extreme position — that people should be able to file notices with the police indicating prospectively that they want counsel if they are ever questioned in custody. Once the complex of *Miranda* rights becomes a device to make all police questioning into a legal adversary proceeding, there is no logical stopping point.

Indeed, some Justices — albeit not a majority — would cut *Miranda* entirely from its roots in the doctrine of coerced confessions by holding that the lawyer for the suspect can trigger the right to counsel even without the suspect's knowledge. In *Moran v. Burbine,*[34] three Justices were prepared to hold that *Miranda* restrained the police generally from interfering with the attorney-client relationship during a period of preaccusatory custodial interrogation, even if the suspect, after being informed of his rights, did not request counsel.[35] In this minority view, the police were obliged, among other things, to inform the suspect that an attorney *not requested by him* had called on his behalf. The denial of this information cannot in a meaningful sense be called coercive, because it does not alter the circumstances of questioning or the pressures felt by the suspect. But the denial is significant if *Miranda* is a means by which police interrogation is transmuted into a quasi-adversary proceeding.

The linchpin of the *Moran* dissenters' view is encapsulated in the rhetorical introduction and coda of the dissent. The trio of dissenting Justices contrasts its view of lawyers as crucial players in an accusatorial society with the view of the majority, which is charged with viewing the lawyer as a "nettlesome obstacle . . . as in an inquisitorial society."[36] Simply put, the *Moran* minority would complete the *Miranda* revolution and obliterate the distinction between a preaccusation police investigation and the postaccusation adversary judicial system. Under this expansive view, the criminal justice process itself would become a judicial adversary process.

As Grano notes, *Moran* is in some ways a watershed, for it marks a point beyond which a majority of the Court was not prepared to venture (pp. 153-54). *Moran* itself finally reaffirms that the Sixth Amendment right to counsel is not an invitation to transform the investigative process but is "applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the 'intricacies . . . of law,' is needed to assure that the prosecution's case encounters 'the cru-

34. 475 U.S. 412 (1986).

35. 475 U.S. at 434-68 (Stevens, Brennan & Marshall, JJ., dissenting).

36. 475 U.S. at 468 (Stevens, Brennan & Marshall, JJ., dissenting).

cible of meaningful adversarial testing.' "[37] As Grano properly notes, the types of decisions faced by a suspect prior to formal accusation are not particularly intricate (p. 169). Thus, *Moran* explicitly repudiates the impulse of *Miranda* to "wrap a protective cloak around the attorney-client relationship for its own sake."[38]

Yet even after *Moran*, the thrust of the *Miranda* right to counsel is not fully blunted. First, even in the wake of *Moran,* cases such as *Roberson* indicate that a request for counsel can trigger broad protection against future interrogation on different subjects, as opposed to the narrow protection afforded by a request for silence. Second, and more important, the ethic of *Miranda's* right to counsel has seeped into the criminal law in other respects, giving rise to a comparatively new series of claims that the attorney-client relationship *of its own force* should afford represented individuals protection, not only against custodial interrogation, but also against any sort of police questioning and even undercover operations. This new, nonconstitutional landscape is where the seed of *Miranda's* revolution in the right to counsel is now planted.

Seedlings of *Miranda*

Grano's deconstruction of *Miranda* spurs him to believe that the case was inherently and fatally flawed (p. 199). But in a sense the thrust of *Miranda's* right to counsel has spread beyond constitutional doctrine. Perhaps those who sought to expand the right to counsel into the stationhouse always knew that they would have to leave the Constitution itself in search of firmer footing for their effort. Indeed, *Miranda* itself draws freely on nonconstitutional sources as support for the expansion of the right to counsel.[39] In *Moran,* the dissenters criticized the Court for disregarding contrary state decisions and the views of the American Bar Association (ABA).[40] Not surprisingly, therefore, it was the ABA rules governing professional conduct that gave rise to the most recent — and far-reaching — effort to transform police investigation into an adversary process.

Grano himself gives fairly short shrift to the effect of *Miranda*-type disciplinary rulemaking (pp. 162-63). But in the practicing world of criminal law, that effect has been profound. In 1988, the Second Circuit surprised many prosecutors with its decision in *United States v. Hammad*[41] that sanctions, evidentiary suppression, or both could result if law enforcement contacts with represented

37. 475 U.S. at 430 (citing United States v. Cronic, 466 U.S. 648, 656 (1984)).

38. 475 U.S. at 430.

39. 384 U.S. 436, 449-52, 486-90 (1966).

40. 475 U.S. at 441 (Stevens, Brennan & Marshall, JJ., dissenting).

41. 846 F.2d 854, *modified,* 858 F.2d 834 (2d Cir. 1988), *cert. denied,* 498 U.S. 871 (1990).

individuals were held to violate the disciplinary rule forbidding counsel from communicating directly with an opposing party represented by counsel. *Hammad,* as originally cast — not in its subsequent modification — seemed to reinvigorate the *Miranda* right to counsel with a vengeance: whenever a suspect retained counsel, he might be immune not only from custodial interrogation, but also from police questioning and even from contact by an undercover agent. Another Second Circuit decision[42] suggested that the "practice of routinely conducting pre-arraignment interviews raises serious constitutional questions," particularly when "the practice is invoked . . . against a defendant who is . . . unrepresented."[43] The Second Circuit suggested that if a suspect could have been represented — even if he did not request to be — he should be shielded from questioning.

These ample readings of the ABA disciplinary rules suggest a regime in which uncounseled interrogation is effectively forbidden, and in which counsel must be provided for all but the most casual interactions between law enforcement agents and the individual. Such a practice would, of course, entail the complete abandonment of the distinction between police investigation and adversary judicial proceedings, merging the former into the latter. This result would complete the revolution originally heralded by *Miranda*'s notion of the right to counsel. Indeed, the arguments advanced to support such a dramatic expansion of the right to counsel under the ABA rules resonate with the *Escobedo-Miranda* arguments of thirty years ago, that textual limitations on the right to counsel should be overlooked because preaccusatory police questioning can be so critical to the eventual outcome of a criminal case. As we have seen, that earlier set of arguments formed the original foundation for *Miranda*'s impulse to subsume police investigation within a drastically expanded concept of the adversary process.

The vitality of *Miranda*'s right-to-counsel branch continues to be debated, therefore — but outside the restraints of constitutional text and, instead, within the framework of the ABA disciplinary rules. Even if the Supreme Court has finally pruned *Miranda*'s right to counsel as a constitutional matter, the case's rationale now fuels bar association arguments for the preindictment, preaccusation presence of counsel for all police questioning. The U.S. Department of Justice has recently promulgated regulations that curtail the application of such broad disciplinary restraints on federal prosecutors.[44] Those regulations are likely to be challenged; in

42. United States v. Foley, 735 F.2d 45 (2d Cir. 1984), *cert. denied,* 469 U.S. 1161 (1985).

43. 735 F.2d at 48.

44. Communications with Represented Persons, 59 Fed. Reg. 39,928 (1994) (to be codified at 28 C.F.R. § 77).

any event, they afford no protection to state and local prosecutors. The wisdom, if not the constitutional underpinnings, of *Miranda*'s protean theory of the right to counsel remains of tremendous current interest to those concerned about how police should be able to investigate crime.

Grano's book, therefore, is not merely a rehearsal of doctrinal discussions now put to rest by the Supreme Court. Rather, it focuses us on a critical disagreement that first emerged in the constitutional setting in the Sixties and has now been raised again in the rulemaking arena in the Nineties. Indeed, the most valuable part of the book may not be its central focus — the discussion of academic arguments about constitutional interpretation — but its prefatory analysis of the policy considerations at stake when some seek to use disciplinary rulemaking to merge police investigation into the adversary process.

Will the American criminal justice system retain its traditional division between police investigation and the postaccusation adversary process, or will the right to counsel serve as the instrument by which police investigation is transformed into a quasi-judicial adversary process? That debate will now leave the auspices of the Constitution and become a subject of bar disciplinary discussions. Resolution of these issues should not be left to the comparative few who make up the councils of the bar associations; they deserve attention in the broader public — or even legislative — arena.