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Joe Grano: The 'Kid from South Philly' Who Educated Us All (In Tribute to Joseph D. Grano)

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JOE GRANO: THE "KID FROM SOUTH PHILLY" WHO EDUCATED US ALL

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No serious student of police interrogation and confessions can write on the subject without building on Professor Joseph D. Grano's work or explaining why he or she disagrees with him (and doing so with considerable care). Nor is that all.

Although best known for his trenchant and provocative writing on confessions, especially his 1993 book, which collects many of his earlier articles in greatly revised form, Professor Grano is also the author of a number of important articles on other aspects of criminal procedure. Indeed, he wrote several significant articles before ever tackling any of the many difficult problems raised by the law of confessions.

Grano's first article, written when he was an Instructor in Legal Research and Writing at the University of Illinois College of Law, addressed several difficult right to counsel issues: whether a criminal defendant had a right to conduct his own defense at his trial (or, to put it another way, whether a trial judge could "force" a lawyer upon a defendant), whether a defense lawyer could waive

*See infra note 28.

1. See infra note 28.

his client's objections to unconstitutional governmental conduct, and various problems raised by the claim of ineffective assistance of counsel. These issues, as Grano observed, "were generally ignored" until the right to appointed counsel had been established in Gideon v. Wainwright.

Although not quite as good as some of his later work, Grano's "first article" showed many of the qualities that were to characterize his scholarship for the next three decades: strong powers of analysis; exhaustive reading of the relevant literature and meticulously careful reading of the relevant cases; clear, crisp, vigorous writing; impressive use of historical materials and the available empirical data; a propensity to tackle hard questions; and a willingness, in the end, to leave no doubt where he stood—but only after taking pains to state the best arguments against his ultimate position as well as he could.


5. In subsequent years, Grano made admirable use of comparative criminal procedure materials. See Grano, supra note 1, at 6-10, 16-17, 49-50, 100-01, 128-33.

6. In his Minnesota Law Review article, Grano maintained that a constitutional right should be waivable only when a fair trial is possible without it and that often this will not be the case when the right to the assistance of counsel is waived. This led him to conclude that waiver of trial counsel should not be permitted. See Grano, The Right to Counsel, supra note 3, at 1197-1208.

Five years later, a 6-3 majority of the Supreme Court disagreed. See Faretta v. California, 422 U.S. 806 (1975). Last year, however, in Martinez v. Court of Appeal of California, 528 U.S. 152 (2000), the Court, per Stevens, J., concluded, without a dissent, that "neither the holding nor the reasoning in Faretta requires [a state] to recognize a constitutional right to self-representation on direct appeal from a criminal conviction." Id. at 692. No one, observed Justice Stevens, not even the Faretta majority, "attempts to argue that as a rule pro se representation is wise, desirable or efficient." Id. at 691. Stevens noted that recently a critic of
A year later, shortly after he had joined the University of Detroit law faculty, Grano published his second article—an extremely thoughtful piece on various search and seizure problems. One of the Supreme Court decisions Grano focused on was *McCray v. Illinois,* which had rejected the argument (as the Supreme Court described it) that “the Constitution somehow compels [a state] to abolish the informer’s privilege . . . and to require disclosure of the informer’s identity . . . [whenever] it appears that the [officer] made the arrest or search in reliance upon facts supplied by an informer they had reason to trust.” After a careful review of the history and rationale of the informer’s privilege, Grano sharply criticized *McCray.* He argued persuasively that it was not only wrong as a matter of policy, but “based primarily on a wrong reading of two centuries of precedent.”

Those who are only familiar with Grano’s strong criticism of some of the Warren Court’s most famous criminal procedure cases—and thus think of him only as a proponent of greater police-prosecution powers—will be surprised to learn that in his 1971 search and seizure article Grano maintained that “police perjury is a more significant threat than courts are willing to acknowledge,” and that therefore “procedural rules are needed that discourage rather than facilitate perjury.”

Grano also told us: “Once an issue is brought before a court, no room exists for callous indifference to proper results because the

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*Faretta* had argued that “the right to proceed *pro se* at trial in certain cases is akin to allowing the defendant to waive his right to a fair trial.” *Id.* at 691 n. 9. As indicated above, Professor Grano made essentially the same argument thirty years ago.

8. 386 U.S. 300 (1967).
9. *Id.* at 312.
11. *Id.* at 456.
12. *Id.* As Grano noted in his article, he had just completed a year’s work in the Philadelphia prosecutor’s office, handling almost exclusively motions to suppress evidence. *See id.* at 409.
defendant is obviously guilty. It would be better openly to permit police perjury and illegal searches than to make a farce of judicial proceedings."\(^{13}\)

Three years later, when still an Assistant Professor of Law at the University of Detroit, Grano wrote a robust article on the Court’s pretrial identification cases. I have always considered it the best article—the most thoughtful, most powerful, most insightful and most comprehensive—ever written on the subject.\(^{14}\)

Although, as Professor Grano emphasized, mistaken identification has probably been the single greatest cause of conviction of the innocent,\(^{15}\) the Supreme Court did not come to grips with this problem until the closing years of the Warren tenure. Then the Court seemed to make up for lost time. In a 1967 trilogy of cases, *United States v. Wade*, *Gilbert v. California*, and *Stovall v. Denno*,\(^{16}\) the Court leapfrogged case-by-case analysis of various pretrial identification situations and applied the right to counsel to identification in one dramatic move. Because absent a defense lawyer’s presence, the pretrial lineup “may not be capable of reconstruction at trial,”\(^{17}\) the Court deemed counsel’s presence essential to “avert prejudice and assure a meaningful confrontation at trial.”\(^{18}\)

Although nothing in the Warren Court’s reasoning suggested that a lineup held before a defendant is formally charged is less riddled with dangers or less difficult for a suspect to reconstruct without the presence of counsel than one occurring after this point,

\(^{13}\) *Id.* at 440.

\(^{14}\) See Joseph D. Grano, *Kirby, Biggers and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?,* 72 MICH. L. REV. 717 (1974). Grano’s article was also one of the largest ever written on the subject. It was eighty-one pages long and contained 485 footnotes.


\(^{17}\) *Wade*, 388 U.S. at 236.

\(^{18}\) *Id.*
in *Kirby v. Illinois*19 the Burger Court announced that the lineup decisions only applied to post-indictment identification. A year after *Kirby*, the Court struck the *Wade-Gilbert* rule another heavy blow. Although the availability of the photographs at trial provides no protection against the suggestive manner in which they may have been originally shown to the witness or the comments that may have accompanied the display, the Court held in *United States v. Ash*20 that the *Wade-Gilbert* right to counsel did not apply to a pretrial photo-identification procedure—even though it took place after the suspect had been indicted and even though the suspect could have appeared in a lineup.

Taken together, *Kirby* and *Ash* badly crippled the original lineup decisions. Grano recognized that "[t]he change in judicial temperament reflected in *Kirby* and *Ash* may have been inevitable, given the political climate and the sudden vacancies that developed on the Supreme Court."21 Nevertheless, he found it somewhat surprising that the [Burger] Court chose the identification cases to mark the first major retreat in the criminal procedure area. Unlike the confession, wiretapping, and search and seizure cases, which furthered societal values not usually related to guilt or innocence, the early identification cases explicitly sought to protect the innocent from wrongful conviction. Certainly it cannot be argued that society's newly declared war against crime will benefit by increasing the risk that innocent persons will be convicted.22

Despite *Kirby* and *Ash*, abuses in photographic displays and in preindictment lineups are not beyond the reach of the Constitution—*in theory*. Under what is sometimes called the

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22. Id.
Stovall-Simmons totality of circumstances test, one may still convince a court that the circumstances surrounding her identification present so substantial a likelihood of "irreparable misidentification" as to violate due process. However, as Grano's criticism of this test makes clear, in practice—and once again his comments are likely to surprise those who view Grano only as a police-prosecution-oriented commentator—the "totality of circumstances" test offers the defendant precious little help:

The Stovall-Simmons totality-of-circumstances test requires a case-by-case evaluation of identification procedures. This approach has several shortcomings. First, it leaves the police with too much discretion. The lack of guiding rules or standards not only fails adequately to protect the innocent from improper suggestion, but also works, ultimately, to impede confident and effective law enforcement. Second, the Stovall-Simmons test manifests an unrealistic and naive faith in the willingness of trial and appellate courts to rectify errors in identification procedures. This criticism implies no disrespect for the judiciary; it merely suggests that our rules should comport with psychological realities. Those closely associated with prosecutors and appellate courts must be aware of the potent, almost indomitable psychological pressure to find means for preserving convictions, particularly in ugly cases. Because that pressure is so compelling, the Supreme Court should have anticipated that courts generally would use every conceivable method to avoid finding due process violations except in the most outrageous situations.

Quite obviously, the chaotic due process decisions neither sufficiently protect against mistaken identifications

25. Grano, supra note 14, at 780.
nor adequately develop guidelines for law enforcement. An approach yielding concrete standards would be preferable from everyone’s perspective.  

In 1979, Professor Grano, now a full professor of law at Wayne State University, wrote two leading articles on police interrogation and confessions. Each one examined and rethought basic premises underlying the law of confessions. With the publication of these articles, the “kid from South Philly,” only eleven years out of law school, became a major figure in constitutional-criminal procedure. In his American Criminal Law Review article, Grano argued that the Supreme Court should overturn a state court’s ruling banning the use of a confession that the defendant made in a patrol wagon. (The Court agreed.) Grano also argued, quite persuasively, I think (and once again, the Court has agreed), that, absent special circumstances in other settings, Miranda should be limited to the police station:

Obviously some potential for compulsion exists in every police-citizen encounter. Unless Miranda is to apply to all such encounters, it should be applicable only when the potential for compulsion reaches some legally sufficient threshold level. . . .

26. Id. at 781.
28. Joseph D. Grano, Wayne R. LaFave, 1993 U. ILL. L. REV. 181, 185 (1993). In his tribute to former mentor Wayne LaFave, Grano reminisced about his youth, recalling that he had grown up in “an ethnic, working class neighborhood of South Philadelphia,” and described himself as the “kid from South Philly.” Id.
32. Grano, Rhode Island v. Innis, supra note 27, at 44.
Custodial stationhouse questioning is the context in which Miranda's parade of horribles is most likely to be found. Indeed, as the Miranda Court observed, police manuals suggest the interrogation room as the best place to deprive the suspect of every psychological advantage...  

Of course, prophylactic rules are designed to make difficult case-by-case evaluations unnecessary. To require courts to distinguish, in terms of potential compulsion, one question, or a few questions, from a more intimidating process of interrogation, would defeat the whole purpose of Miranda. It is one thing, however, to conclude that Miranda, to be effective, must apply to all custodial stationhouse questioning, no matter how brief or protracted, how benign or menacing, it is quite another to conclude that all questioning, in any custodial context dominated by the police, must be subject to Miranda. The stationhouse is unique not only in its isolation of the defendant but also in the interrogation procedures it permits. In other custodial contexts, where the potential for abusive and compelling interrogation is not as great, the nature of the police conduct at issue becomes more important. In these contexts, the difference between non-threatening 'questioning' and potentially compelling ‘interrogation’ cannot be easily dismissed; indeed, refusal to consider this distinction is really to assert that custody alone determines the need for Miranda's prophylaxis.  

Grano believed the frequently voiced claim that our system of criminal justice is accusatorial contributes to sloppy thinking. As he put it years later, he shared the view of criminal procedure comparativist Myron Damaska that this claim "is not so much analytically precise as it is hortatory and rhetorical, aimed at mobilizing consent and at winning points in legal argumentation."  

33. Id.  
34. Id. at 46-47.  
35. Grano, supra note 1, at 47. Grano also agreed with Justice Walter
Although he recognized that the fifth and sixth amendments "assume, and thus mandate, an accusatorial mode of judicial criminal proceedings," he was quick to point out that our system also has "inquisitorial attributes," such as police interrogation and the investigative grand jury.

As for those (like me) who complained about the wide disparity between the inquisitorial practices in the "gatehouse" (the police station) and the accusatorial protections in the "mansion" (the courtroom), Grano made a plausible argument that the dichotomy "is a product not of schizophrenia but of historical compromise."

Building from scratch, we could construct a system that more consistently and more rationally accommodates these competing tensions. We might, for example, ... remove the interrogation process from police control, where it is largely invisible and often abused, and place it in the sunlight of open court. Such reforms, however, are precluded by the evolutionary development of constitutional doctrine, now too ingrained to be altered. Even judicial examination of the accused at the preliminary examination, which persisted in New York into the mid-nineteenth century, is now everywhere recognized as unacceptable. The tightening of constitutional controls on the judicial process, however, occurred simultaneously with the development of extrajudicial procedures to perform the needed investigatory function. Indeed, the possibility cannot be dismissed that the judicial process became more rigid only because the Schaefer that talk about our accusatorial system seems "more suitable for Law Day speeches than for analytical judicial opinion." See id.

36. Grano, supra note 27, at 22.
37. See id. at 23. See also Grano's criticism of liberal rhetoric in the text at infra notes 60-61.
system became more flexible in its prejudicial stages.\textsuperscript{40}

Professor Grano often chafed at the restraints imposed on the police by the Warren Court. Nevertheless, as his discussion of the \textit{Massiah} doctrine\textsuperscript{41} demonstrates, he was independent-minded; he was willing to go wherever his analysis of a rule took him, whether or not it diminished police power. Dissenting in \textit{Brewer v. Williams},\textsuperscript{42} the "Christian Burial Speech" case, Justice White rejected the notion that the right involved in \textit{Massiah} "is a right not to be \textit{asked} any question in counsel's absence rather than a right not to \textit{answer} any questions in counsel's absence."\textsuperscript{43} Grano retorted that "Justice White could not be more wrong in his criticism."\textsuperscript{44}

The whole point of \textit{Massiah} is the prevention of the state from taking advantage of an uncounseled defendant once sixth amendment rights attach. The Christian burial speech was an attempt to take advantage of Williams . . . . The attempt itself violates the constitutional mandate that the system proceed, after some point, only in an accusatorial manner.\textsuperscript{45}

Indeed, although Justice Stewart, writing for a 5-4 majority in \textit{Brewer v. Williams}, had revivified \textit{Massiah},\textsuperscript{46} Grano pointed out that

\begin{itemize}
\item 40. Id. at 27-28.
\item 41. See \textit{Massiah v. United States}, 377 U.S. 201 (1964). \textit{Massiah} holds that once adversary proceedings have commenced against an individual (for example, he has been indicted or arraigned), government efforts to "deliberately elicit" incriminating statements from him violate the individual's right to counsel and bar the use of any resulting statement regardless of whether it was voluntarily made. See \textit{Massiah}, 377 U.S. at 205-07; see also \textit{Brewer v. Williams}, 430 U.S. 387 (1977).
\item 42. 430 U.S. 387 (1977).
\item 43. Id. at 435-46. Justice White also rejected the view that \textit{Massiah} involved a "right not to be \textit{asked} questions" that "must be \textit{waived} before the questions are asked." Id.
\item 44. Grano, \textit{Rhode Island v. Innis}, supra note 27, at 35.
\item 45. Id.
\item 46. Justice Stewart also wrote the opinion of the Court in \textit{Massiah}.
\end{itemize}
by indicating Williams could have waived his sixth amendment rights without notice to his lawyer, even Stewart had probably read the Massiah doctrine too narrowly:

[A] strong argument can be made that [the majority opinion in] Williams did not go far enough. Since the point of Massiah is either to prohibit altogether extrajudicial proceedings against the accused once sixth amendment rights attach, or to inject the rights of the adversarial system into such extrajudicial proceedings, a simple waiver of rights should not be acceptable. Rather, the Court should rule . . . that no effort to elicit information from the defendant should occur unless the police seek to notify counsel. In cases where no lawyer exists to be notified, a waiver should be required to meet the standards that govern waiver of the right to counsel at trial. Any other standard undermines Massiah's rationale. 47

Grano also showed his independence of mind by rejecting the Office of Legal Policy's criticism of two great right to counsel cases, Johnson v. Zerbst48 and Gideon v. Wainwright. 49 When, in the late 1980s, the Office of Legal Policy of the U.S. Department of Justice issued the Truth in Criminal Justice Series50—a series of reports that

47. Grano, Rhode Island v. Innis, supra note 27, at 35.
48. 304 U.S. 458 (1938) (continuing the sixth amendment to entitle indigent persons accused of serious federal offenses to appointed counsel).
49. 372 U.S. 335 (1963) (holding that the fourteenth amendment requires states to offer appointed counsel to indigent persons accused of crimes carrying the possibility of significant prison sentences).
50. The reports were prepared under the supervision of Assistant Attorney General (now Michigan Supreme Court Justice) Stephen J. Markman, then in charge of the Office of Legal Policy, and were submitted to Attorney General Edwin Meese III, and then circulated within the Justice Department. See Stephen J. Markman, Foreword: The Truth in Criminal Justice Series, 22 U. Mich. J. L. Ref. 425, 430 & n. 10 (1989). The reports "represent advice and information presented to the Attorney General and should not be taken as reflecting the official position of the Department of Justice, of any Attorney General, or of any other departmental component or entity." Id. at 430.
reexamined and criticized the law of pretrial interrogation, the fourth amendment exclusionary rule, and other features of criminal procedure said to impede the search for truth—Grano heaped much praise on the Series.\textsuperscript{51} But, he could not go along with one of the report's criticism of Johnson and Gideon as unwarranted departures from the "original understanding." He explained why, even as he reaffirmed his belief in "original meaning jurisprudence:"

It is appropriate in constitutional interpretation to ask what ends or purposes the framers and ratifiers were trying to achieve. The purpose underlying the sixth amendment, in my view, was to assure the accused, through legal assistance, a meaningful opportunity to confront his accusers and to present a defense, a purpose that cannot be achieved for indigent defendants unless the state provides the opportunity to obtain legal assistance.

To argue that the framers did not understand the amendment as providing a right to appointed counsel is to miss the point, at least partially. Too often the assumption is made that original meaning jurisprudence depends exclusively upon either an examination of the subjective intentions of the framers or an inquiry into the framers would have resolved the particular dispute at issue. In this regard, the teaching of Judge Bork on the judge's role in constitutional interpretation is instructive:

\begin{quote}
[It is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. . . . The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic
\end{quote}

invasions of personal privacy . . . . The evolution of doctrine to accomplish that end [i.e., making the framers’ values effective] contravenes no postulate of judicial restraint.

Judge Bork’s judicial philosophy, which permits the evolution of doctrine to effectuate the framers’ values and purposes, should not be confused with the philosophy, reflected in much of what passes as constitutional law today, that permits courts to add to the Constitution values and principles never ratified by the people.52

One of my favorite Grano pieces (even though he takes a few swings at me and others “who worship at Miranda’s shrine”)53 is his essay review of the third edition of the Inbau-Reid-Buckley police interrogation manual.54 Grano underscores the basic tension that exists between the tactics recommended by the police manual he is reviewing and the underlying principles of cases like Escobedo and Miranda. At one point he observes:

If orchestrated properly, the warnings and waiver will occur not simply in the inherently compelling atmosphere of the stationhouse but in a room purposefully designed to increase the suspect’s anxiety. While those who invoke their

52. Id. at 396-97 n. 5 (quoting from Judge Bork’s concurring opinion in Ollman v. Evans, 750 F.2d 970, 995-96 (D.C. Cir. 1984) (en banc) (newspaper column protected by first amendment against libel suit).


Miranda rights will be spared the inherent pressures of questioning, their luckless counterparts who decide to match wits with the police will be subject to pressures that make the inherent compulsion of a simple question, such as 'Where were you last night?', pale by comparison. If we take seriously Miranda's reasoning, we should not feel comfortable with the authors' 'professional interrogator.' Conversely, if we approve the authors' goal of training professionals for successful interrogation, we should be candid in recognizing our disapproval of Miranda's premises. Without hypocrisy, we cannot have it both ways.55

As usual, Grano leaves no doubt where he stands: "[W]e have no reason to read the fifth amendment as prohibiting police interrogation, as protecting against the inherent pressure of custodial interrogation, or as prohibiting the tactics the authors suggest to increase the suspect's anxiety in the police station."56 Grano recognizes, of course, that the police interrogation manual's tactics "are inconsistent with Miranda's premises, but it is those premises, not [the manual's] tactics, that lack persuasive justification."57

Do we believe in the philosophy underlying Escobedo and Miranda? Grano doubts that many of us really do.58 If we did, "we would have to regard [the interrogation manual he is reviewing] as a blueprint for police illegality."59 But, "[i]t is no such thing. The book is a manual for successful interrogation that a free, civilized, and just society can and should endorse without apology."60

Grano's essay review of the Inbau-Reid-Buckley interrogation manual is something every student of confessions should read,

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55. Grano, supra note 53, at 675.
56. Id. at 689.
57. Id. at 689.
58. See id. at 690.
59. Id.
60. Id.
especially those who believe that the tactics typically utilized by police interrogators are "morally offensive" or fail to accord with "autonomy and dignity." Grano may not change their minds, but at the very least he should make them rethink how they arrived at their conclusions.

[Despite language in *Miranda* to the contrary] our morality does not consider the tactics of successful interrogation an affront to human dignity. *Miranda* also indicated that the fifth amendment seeks to maintain a "fair state-individual balance" and to require the government "to shoulder the entire load." The concept of fairness, however, like the concept of dignity, requires analysis. . . . [O]ur morality does not consider it "unfair" for the state to succeed in obtaining a confession or a conviction. Likewise, only a sporting theory of justice could favor equality between the suspect and the state for its own sake. It also is fiction to say that our legal system requires the government to shoulder the entire load. We require the defendant to stand in lineups for identification, to provide fingerprints, blood, and handwriting samples, to submit to psychiatric examinations, to provide pretrial discovery of certain defenses and witnesses, and sometimes even to respond to subpoenas for documents. We also permit grand juries to subpoena targets of their investigations.61

His essay review of the interrogation manual is probably the best example of his tough-mindedness and his ability to dissect stirring rhetoric. Consider the following:

[D]espite the frequent incantations of the phrase, . . . there is no right of silence. The fifth amendment right is a right not to be *compelled* to become a witness against oneself. The right of silence exists only in the limited sense

61. *Id.* at 686-87.
that the state cannot compel a person to answer.

This is not just a semantic quibble. If a right of silence as such existed, we could not justify protecting that right only for those in custody, for the fifth amendment applies to the noncustodial as well as the custodial suspect . . . If the fifth amendment guaranteed a right of silence, even wiretapping and the use of informants could raise troubling issues. Certainly the use of a suspect's silence as evidence would not be impermissible only when the police provided antecedent Miranda warnings.

Probably Grano's most ambitious and most interesting article—certainly his best-known—is his 1985 article questioning the constitutional legitimacy of "prophylactic rules" in criminal procedure. As Grano explains it, a prophylactic rule is one that "functions as a preventive safeguard to ensure that constitutional violations will not occur. What distinguishes a prophylactic rule [such as Miranda] from a true constitutional rule is the possibility of violating the former without actually violating the Constitution."

Did the Miranda Court promulgate prophylactic rules? Grano concedes that "the Miranda opinion itself was somewhat ambiguous," but "Miranda's progeny remove any doubts concerning its prophylactic nature." After a long journey, and

62. Id. at 688-89.
64. Id. at 105.
65. Id. at 106.
66. Id. at 109-10. At this point, Grano notes, inter alia, that although "involuntary statements, in the due process sense, and 'compelled' statements, in the fifth amendment sense, cannot be used for any purpose, not even to impeach the defendant's credibility at trial," the Court has permitted statements obtained "in violation of Miranda . . . to be used for impeachment purposes." Id. at 110. Moreover, the "fruit of the poisonous tree analysis differs depending upon whether the police violate the Fifth Amendment or only Miranda." Id. As Professor Grano notes, in Oregon v. Elstad, 470 U.S. 298, 306 (1985), "the Court
after considering and rejecting many possible justifications, Grano concludes that the Miranda rules constitute one of "a small core of prophylactic rules [that] can be neither justified as an exercise of judicial rulemaking at the nonconstitutional level nor reinterpreted to express actual constitutional requirements," and thus "must be outside the scope of the federal courts' Article III lawmaking authority."68

Grano's "prophylactic rules" article shows a thorough understanding of all the relevant cases and an impressive mastery of all the relevant literature (indeed, so far as I can tell, knowledge of every article remotely bearing on his subject). The "prophylactic rules" article demonstrates that Grano is not only a leading criminal procedure commentator, but a fine constitutional scholar as well. Among other things, he discusses, at considerable length and with considerable skill, the teachings of Erie v. Tompkins,9 constitutional common law,7 see id. at 125-29 (discussing Erie R. R. v. Tompkins, 304 U.S. 64 (1938)).,71 the implied power of federal courts,72 and the federal question implications of specific constitutional provisions.73

Along the way, Professor Grano takes on (and certainly holds his own against) two of the nation's most renowned constitutional law experts, Henry P. Monaghan and William W. Van Alstyne. What I find admirable about Grano is that before publishing his article exploring and rejecting Professor Monaghan's thesis that prophylactic rules can be justified as constitutional common law,74 stated that the Miranda rule 'sweeps more broadly than the Fifth Amendment itself' and 'may be triggered even in the absence of a Fifth Amendment violation.'" Id. at 110-11.

67. Professor Grano's "prophylactic rules" article is sixty-five pages long and contains more than 400 footnotes, many of them quite long.
68. Grano, supra note 63, at 163-64.
69. See id. at 125-29 (discussing Erie R. R. v. Tompkins, 304 U.S. 64 (1938)).
70. Id. at 129-36.
71. See id. at 130-33.
72. See id. at 137-47.
73. See id. at 147-56.
74. See Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword:
and considering but differing with some of Professor Van Alstyne’s views on the implied power of the federal judiciary, he sought, and received, comments from both professors on an early draft of his article. This is the way scholars ought to proceed.

I think his “prophylactic rules” article best illustrates Grano’s strong powers of analysis. Although others have lumped them together, Grano rightly draws a distinction between prophylactic rules and “deterrent remedies,” such as the Fourth Amendment exclusionary rule. The latter remedies apply “only after an actual constitutional violation has occurred.” I think he also correctly distinguishes between prophylactic rules, which the Court believes (at least it did at the time Grano’s article was written) may be imposed on the state courts and the so-called supervisory power of federal courts, and prophylactic rules and procedures mandated by a constitutional provision, such as the Sixth Amendment right to the assistance of counsel, which is violated if an indigent defendant is denied counsel at trial even if the trial is otherwise fair. “An instrumental function does not identify a rule as prophylactic,” points out Grano, “because constitutional provisions themselves may have an instrumental purpose.”

For many years I thought, as did others, that when the Court ruled in the 1967 case of United States v. Wade that the right to counsel applied to pretrial lineups, it promulgated a prophylactic


76. In the opening footnote to his article, Grano thanks Professors Monaghan and Van Alstyne for their “helpful comments.” Grano supra note 63, at 100.

77. See Grano, supra note 63, at 103-04.

78. Id. at 104.

79. See id. at 104-05.

80. See id. at 115-16.

81. Id. at 115.

82. See supra note 16 and accompanying text.

83. The Court subsequently limited Wade’s holding to lineups held after the defendant had been indicted, although nothing in Wade’s reasoning suggested
JOE GRANO EDUCATED US ALL

rule. For one thing, the Wade Court used language that sounded like it was applying a prophylactic rule. It told us, for example, that "[s]ince it appears that there is grave potential . . . for prejudice . . . in the pretrial lineup which [absent defense counsel's presence] may not be capable of reconstruction at trial," counsel's presence is essential to "avert prejudice and assure a meaningful confrontation at trial." Moreover, the Court was careful to point out that "[l]egislative or other regulations . . . which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the [pretrial lineup] stage as 'critical.'"

Nevertheless, Grano's 1985 article convinced me that Wade's right to counsel requirement is not a prophylactic rule after all:

Prior to Wade, the Court had interpreted the sixth amendment right to counsel provision as applying not only at trial but also at all "critical stages" of the prosecution. Pointing to the uncertainties of eyewitness identification . . . [the Wade Court] held that a post-indictment lineup is a critical stage at which the defendant is entitled to be represented by counsel. Such a holding . . . seems to be of the pure Marbury variety . . .

Neither [the Court's concern about the defendant’s interest in a fair trial] nor the suggestion that legislative protections might obviate the need for counsel . . . proves that the Court promulgated a prophylactic rule. The sixth amendment critical stage doctrine depends upon fair trial considerations, and the fairness concern itself follows from the sixth amendment’s instrumental purpose of guaranteeing a fair trial . . . The right to counsel requirement in Wade is rooted squarely in the sixth amendment’s right to counsel provision and the Court’s reliance on this provision is no less apparent because of its

such a narrow reading. See supra note 19 and accompanying text.

84. Wade, 388 U.S. at 236.
85. Id. at 239.
expressed concern for the fairness of the defendant's trial.

Similarly, for purposes of categorizing Wade, the Court's suggestion that legislative safeguards might obviate the need for counsel is not determinative. Under Wade, denial of counsel at lineups as they are presently conducted actually violates the sixth amendment. Lineups conducted under different conditions, like procedures to analyze fingerprints or blood samples, may not jeopardize a fair trial and accordingly may not be critical stages for right to counsel purposes. Any constitutional rule that is factually dependent is subject to change as the facts change. Thus, although the Court in Wade, like in Miranda, made an overture to the legislature, the Court in Wade, unlike in Miranda, decreed what the Constitution actually requires, at least in present circumstances. Under conditions as they now exist, a violation of the right to counsel at lineups is a violation of the Constitution itself.86

What about the Massiah rule?87 As Grano observed, this rule (which bars the use of any resulting statement, regardless of whether it was voluntarily made, when the government deliberately elicits incriminating statements from a defendant against whom adversary proceedings have commenced),88 "seems to be a first cousin of the Miranda rule."89 Not surprisingly, therefore, then-Justice Rehnquist once maintained that Massiah "rests on a prophylactic application of the Sixth Amendment right to counsel that . . . entirely ignores the doctrinal foundation of that right."90 Grano disagrees. He argues, quite convincingly, that as the Court originally perceived the rule and as it has since described it, a violation of the rule is nothing less than a violation of one's Sixth

86. Grano, supra note 63, at 119-21.
87. See supra note 41.
88. See id.
89. Grano, supra note 63, at 122.
Amendment right to counsel. The Court may have interpreted the Sixth Amendment incorrectly when it promulgated the Massiah rule, concedes Grano, but such a charge “is significantly different from a charge that the Court has acted illegitimately.”

The publication of his 1985 “prophylactic rules” article left no doubt that Grano had become the nation’s leading critic of Miranda. This position was reinforced by the publication of three other articles in the next three years—the aforementioned 1986 essay review of the new edition of the Inbau-Reid-Buckley interrogation manual; a 1987 article attacking the basic premises of Miranda and calling for a return to a modified voluntariness test; and a 1988 forceful reply to articles by Stephen J. Schulhofer and David Strauss, two University of Chicago Law School professors who attempted to refute the charge that Miranda represents an illegitimate exercise of judicial power.

Professor Grano subsequently summarized these articles as follows:

I have maintained that Miranda not only is wrong but also sufficiently pernicious, in terms of its underlying rationale if not its practical consequences, to warrant overruling despite the strong commitment we should have to stare decisis. Most fundamentally, I have argued that

91. See Grano, supra note 63, at 122-23.
92. See id. at 123 n.133.
93. Id.
94. See supra notes 53-62 and accompanying text.
Miranda represents an exercise of judicial authority not conveyed by Article III, given the Court's current view that Miranda violations often are not constitutional violations. In addition, I have argued that while this legitimacy objection can be overcome by concluding that all Miranda violations indeed are constitutional violations, no plausible interpretation of the word "compelled" in the Fifth Amendment can support such a conclusion. From the perspective of mere policy, I have argued that Miranda's negative view of police interrogation and confessions is misguided and even dangerous. I have also tried to demonstrate that Miranda has led to a jurisprudence that emphasizes formalism over substance.\textsuperscript{97}

"Consistency" in the confessions area can be achieved, maintained Grano, "only by drastically extending Miranda or by overruling it."\textsuperscript{98} "Compromise and inconsistency," he added, "should not be equated. In the name of compromise, what we really have is a Court that pays homage to cases that challenge the legitimacy of police interrogation, but that protects police interrogation from those very same cases."\textsuperscript{99}

Grano's 1988 reply to Schulhofer's and Strauss' defense of Miranda's prophylactic rules is a good illustration of how patiently and fairly Grano treats his opponents. He presented the views of Schulhofer and Strauss as carefully and effectively as he could before trying to pick apart their arguments—which he proceeded to do with his customary vim and vigor. I think Grano welcomes, and enjoys, doing battle with his "liberal" counterparts. I know he is very good at it.

I happen to share the Schulhofer-Strauss view that sometimes (such as the time the Miranda Court took a long, hard look at the voluntariness test and all its inadequacies) prophylactic rules are

\textsuperscript{98} \textit{Id.} at 23.
\textsuperscript{99} \textit{Id.}
both necessary and proper. Nevertheless, I have to say that when Professor Grano grappled with Professors Schulhofer and Strauss he certainly held his own, once again, against two extraordinarily formidable opponents.

Grano's unhappiness with Miranda had been experienced earlier by most members of Congress. Two years after Miranda, (and the very year Grano graduated from law school), Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968, a provision of which (usually known as §3501, because of its designation under Title 18 of the United Code) purported to substitute the old "due process"—"totality of circumstances"—"voluntariness" test for Miranda in the federal courts. The provision remained more or less dormant for three decades before the Fourth Circuit upheld the provision, in Dickerson v. United States, only to be reversed by the Supreme Court.

Eleven years before the Fourth Circuit held, "against the express wishes of the Department of Justice," that §3501 was a valid exercise of Congress' power to overrule Miranda, Grano urged the Department of Justice to invoke and to defend §3501.  


102. 166 F.3d 667 (4th Cir. 1999).

103. See 120 S. Ct. 2326 (2000).

104. Dickerson, 166 F.3d at 695 (Michael, C.J., dissenting).

He found the argument that Congress could and did reject the *Miranda* rules "plausible both because prophylactic rules have all the characteristics of rules based on the Court's so-called 'supervisory power,' and because Congress unquestionably has authority to reject rules based on the supervisory power."106

Unfortunately—as fate would have it—when the assault on *Miranda* finally came in the late 1990s, a serious illness prevented Grano from playing an active role. The torch passed to Professor Paul Cassell, who won a stunning victory in the Fourth Circuit and then defended §3501 (this time unsuccessfully) in the Supreme

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106. Grano, *supra* note 105, at 405. Some years later, Grano had second thoughts about the § 3501 argument:

> While its logic is essentially sound, the [§ 3501] argument's ramifications give cause for concern. If Congress may reject *Miranda* merely by prescribing what is tantamount to a rule of evidence for federal courts, the question of a state's authority to do the same thing cannot be avoided. No less than Congress in the federal system, state legislatures and state courts have ultimate authority for prescribing the rules of evidence in the various states, provided, of course, that they stay within constitutional bounds. *Miranda* is an odd duck as a Supreme Court decision, however, if every jurisdiction that it affects may reject it simply by enacting a rule of evidence. The only way to avoid this unsatisfactory result under the argument being considered is to conclude that state institutions somehow lack the rule-making authority that Congress has, but such a conclusion seems arbitrary and equally unsatisfactory. Under either alternative, therefore, the argument that Congress can direct the federal courts to disregard *Miranda* leads to unattractive results when *Miranda*'s status in the states is considered.

This is not to suggest that the statutory argument is flawed, for the proposition that Congress can reject a judicially created rule of evidence for the federal courts is not controversial. The problem is that the Court in *Miranda* was speaking primarily to the states, only one of the four cases that constitute *Miranda* having resulted from a federal conviction. Because the reasoning of the statutory argument seems correct, however, at least given the Court's current understanding of *Miranda*, the statutory argument really raises once again the question of the Court's authority to impose *Miranda* on the states in the first place. *See* Grano, *supra* note 1, at 203-204.
Court.\textsuperscript{107} 
Professor Cassell readily acknowledges his debt to Professor Grano. On the eve of the Supreme Court oral arguments in \textit{Dickerson}, Cassell wrote a long article spelling out why he thought the Court should uphold §3501.\textsuperscript{108} He dedicated the article to Joe Grano, "whose brilliant book . . . makes the compelling doctrinal case against \textit{Miranda}."\textsuperscript{109} 

(I would put it somewhat differently. I agree that Grano wrote a brilliant book, based to a considerable extent on a series of brilliant articles, but I would say his book makes a plausible doctrinal case against \textit{Miranda} and a better case than anyone else had made up to that time. A better case than I thought anyone could make. (You can’t do much better than that.))

Grano must have been deeply disappointed by the \textit{Dickerson} Court’s “reaffirmation” of \textit{Miranda}. For no one had been a more persistent critic of that case. Moreover, Grano must have been jolted by the fact that Chief Justice Rehnquist wrote the opinion of the Court. (I know I was).

As Grano observed, by enacting §3501, “Congress succeeded in expressing its hostility to what the Supreme Court had done, but everyone really understood that a constitutional amendment, not a mere statute, is required to overturn a decision based on the

\begin{footnotesize}
\textsuperscript{107} Because neither the defendant in the \textit{Dickerson} case nor the Department of Justice would defend the constitutionality of §3501 in the Supreme Court, the Court “invited Professor Paul Cassell to assist our deliberations by arguing in support of the judgment below.” \textit{Dickerson}, 120 S. Ct. at 2335 n. 7.


\textsuperscript{109} \textit{Id} at 175. A short time thereafter, Professor Michael O’Neill published an even longer article in defense of §3501, \textit{Undoing Miranda}, 2000 BYU L. REV. 185 (2000). He dedicated his 108-page article to several people, “most of all, to Joseph Grano, without whose seminal scholarship this piece would not have been possible.” \textit{Id} at 185.
\end{footnotesize}
Constitution.”110 But then Justice Rehnquist’s description of *Miranda* as prophylactic in his opinion for the Court in *Michigan v. Tucker*,111 “sparked renewed interest in the statute.”112

In *Tucker*, in the course of holding admissible the testimony of a witness whose identity had been discovered by questioning the defendant in violation of *Miranda*, the Court, per Rehnquist, J., maintained that the *Miranda* Court itself had recognized that the now-familiar warnings “were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.”113 Furthermore, Rehnquist told us, the *Miranda* Court pointed out that the suggested safeguards—what the *Tucker* opinion called “the procedural rules” or the “prophylactic standards ... laid down by the Court in *Miranda*”114—“were not intended to ‘create a constitutional straightjacket,’ but rather to provide practical reinforcement for the right against compulsory self-incrimination.”115

Dissenting, Justice Douglas protested (and rightly so) that Justice Rehnquist had taken language from *Miranda* out of context.116 Douglas conceded that *Miranda* does say that the warnings need not be given, but *only if* equally effective alternative safeguards are in place117 and “[t]here is no contention here that other means were adopted.”118

Justice Douglas, then in his thirty-fifth year on the Court, reminded his younger colleague: “The Court is not free to prescribe

110. Grano, *supra* note 1, at 202. The Senate debate and subcommittee hearings on what became of §3501 is replete with manifestations of hostility (and contempt and ridicule) toward the Supreme Court. See Kamisar, *Can (Did) Congress “Overrule” Miranda?*, *supra* note 100, at 894-909.
114. *Id.* at 444-46.
115. *Id.* at 444.
116. *See id.* at 462-63.
117. *See id.* at 463.
118. *Id.*
preferred modes of interrogation absent a constitutional basis. We held the "requirement of warnings and waiver of rights [to be] fundamental with respect to the Fifth Amendment privilege," and without so holding we would have been powerless to reverse Miranda's conviction."\(^{119}\)

Despite Justice Douglas's forceful dissent, what I would call the mischievous language (and others would call the encouraging language) in *Tucker* did not go away. Indeed the language became quite significant. In such cases as *New York v. Quarles*\(^{120}\) (recognizing a "public safety" exception to the *Miranda* warnings) and *Oregon v. Elstad*\(^{121}\) (declining to apply the "fruit of the poisonous tree" doctrine to a second confession),\(^{122}\) the Court built on the language in the *Tucker* opinion and reiterated *Tucker*'s way of looking at, and thinking about, *Miranda*.

Because of *Tucker* and its progeny, a successful defense of the constitutionality of §3501 (the federal statutory provision purporting to overrule *Miranda*), a defense that seemed almost hopeless at the time the statute was enacted, began to look like a distinct possibility. Then came *Dickerson*.

To the surprise of many, Chief Justice Rehnquist—who had contributed mightily to the disparagement of *Miranda*—quickly dismissed the way some opinions of the Court (including opinions by Rehnquist himself!) seemed to have deconstitutionalized *Miranda*.\(^{123}\)

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119. *Id.* at 462-63. A decade later, dissenting in *Oregon v. Elstad*, 470 U.S. 298, 370-71 (1985), which declined to apply the "fruit of the poisonous tree" doctrine to a second confession obtained from a suspect whose *Miranda* rights had not been honored the first time, Justice Stevens made a similar point.


122. *See supra* note 119 and accompanying text.

123. After observing that "[r]elying on the fact . . . that we have repeatedly referred to the *Miranda* warning as 'prophylactic' and 'not themselves rights protected by the Constitution,' the Court of Appeals [for the Fourth Circuit] concluded that the protections announced in *Miranda* are not constitutionally required," 120 S. Ct. at 2333, the Chief Justice continued, "[w]e disagree with the Court of Appeals' conclusion, although we concede there is some language in
The arguments for viewing Miranda as a constitutional decision, the Chief Justice now concluded, were quite strong—almost overwhelming: "[F]irst and foremost," Rehnquist told us, is that "both Miranda and two of its companion cases applied the rule to proceedings in state courts." Moreover, since then we have "consistently applied" the rule to the states and it is "beyond dispute that we do not hold a supervisory power over the courts of the several States." (Of course, this is why Grano had argued that Miranda, as the Court had characterized it in the 1970s and 80s, was an illegitimate decision.)

What about the language in Miranda informing us that the decision "in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have that effect"—language that then-Justice Rehnquist had used to downgrade and deconstitutionalize Miranda? The Chief Justice now told us, in a footnote, that "a review of our opinion in Miranda reveals that this language only means that the Constitution does not require the specific safeguards set forth in Miranda, or any other particular procedure, not that the Constitution does not require some safeguard beyond the totality-of-circumstances test "that is effective in securing Fifth Amendment rights."

I think it is no exaggeration to say that the Chief Justice's opinion in Dickerson, written a quarter-century after he wrote the opinion of the Court in Tucker, reads almost as if he had recently reread Justice Douglas's dissent in Tucker and, on further reflection, decided that Douglas was right after all.

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some of our opinions that supports the view taken by that court." Id.
124. Id.
125. See id.
126. Id.
127. 384 U.S. at 467.
128. See Tucker, 417 U.S. at 444.
129. Dickerson, 120 S. Ct. at 2334 n.6.
130. Id.
131. Not all Court watchers were as surprised as I was to see Chief Justice Rehnquist voting to reaffirm Miranda. Professor Craig Bradley, a former
Chief Justice Rehnquist did tell us that "Miranda, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule Miranda ourselves." But, Rehnquist's opinion of the Court left much unsaid.

The Court seemed to agree with Professor Cassell's contention that "a legislative alternative to Miranda" that provided "an adequate substitute for the warnings required by Miranda" would

Rehnquist clerk and a close student of Rehnquist's work, did not find Rehnquist's vote unexpected. He points out, inter alia, that in Dickerson Rehnquist "show[ed] the kind of leadership [of the Court] that he has long admired in previous chief justices." Craig Bradley Behind the Dickerson Decision, TRIAL, Oct. 2000, at 80. Rehnquist, adds Professor Bradley, had especially in mind Chief Justice Charles Evans Hughes, who was "willing to modify his own views to hold or increase his majority." Id. Moreover, Chief Justice Rehnquist may have regarded Dickerson as an occasion for the Court to maintain its power against Congress, id.: "[F]or the Supreme Court to overrule Miranda itself is one thing; to stand by while Congress does it is quite another. In Dickerson, the majority... sent a strong Message to Congress: 'Stay off our Turf!'"

Another law professor who was not surprised by Chief Justice Rehnquist's vote in Dickerson is Stephen Saltzburg. As I have noted elsewhere, see Yale Kamisar, Your-Sort-of Right to Remain Silent, NAT'L L.J., July 17, 2000, p. A-18, on April 19, 2000, the day of the oral arguments in Dickerson, Professor Saltzburg predicted, in a conversation with me and other lawyers, that the Court would vote 7-2 to reaffirm Miranda and that the Chief Justice would write the majority opinion. As did Professor Bradley, Professor Saltzburg stressed that Chief Justice Rehnquist had increasingly assumed a leadership role and did not want to see three decades of Miranda jurisprudence (and more than fifty cases interpreting Miranda) "go up in smoke." Moreover, added Saltzburg, the Chief Justice can live with Miranda—and he is confident the police can do so as well—now that the case has been downsized in various ways and riddled with exceptions.

132. Dickerson, 120 S. Ct. at 2329.
133. Id. at 2335. Actually, at different places, the Court seemed to formulate the test for an adequate legislative alternative differently. At one point, it referred to Professor Cassell's contention that §3501 "complies with the requirement that a legislative alternative to Miranda be equally as effective in preventing coerced confessions" (a relatively easy objective to satisfy). See id. However, at another point, the Court spoke of "Miranda requir[ing] procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored" (a much harder task if one is
pass constitutional muster. But, it shed no light on what particular legislative alternative would constitute a suitable substitute for the *Miranda* warnings.\footnote{134}

Other than to note (and then to dismiss the fact) that, as the court below took into account, "we have repeatedly referred to the *Miranda* warnings as 'prophylactic,'"\footnote{135} the Court had nothing to say about the nature of "prophylactic" rules or the limits, if any, on the Court's power to promulgate such rules. Relying heavily on the writings of Professor Grano, Professors Wayne LaFave, Jerold Israel, and Nancy King have made a valiant effort to distinguish "per se" rules from "prophylactic" ones,\footnote{136} noting that "the prophylactic rule is designed to operate as a preventative measure" and "its purpose is to safeguard against a potential constitutional violation, rather than to identify what constitutes a constitutional violation."\footnote{137} However, the *Dickerson* Court looked back on *Miranda* as a case that sought to minimize the possibility of overlooking an involuntary confession and thus (under the LaFave-Israel-King analysis at any rate) seemed to view the *Miranda* warnings as *per se* rules rather than prophylactic ones.\footnote{138}


135. *Dickerson*, 120 S. Ct. at 2333.

136. See WAYNE R. LAFAVE, JEROLD H. ISRAEL, AND NANCY J. KING, CRIMINAL PROCEDURE §§ 2.9(d), 2.9(e) (2d ed. 1999).

137. Id. at § 2.9(e) at 672-73.

138. In *Miranda*, the *Dickerson* Court told us, "[w]e concluded that the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.'" *Dickerson*, 120 S. Ct. at 2331 (quoting *Miranda* v.
What, if anything, did Dickerson's reaffirmation of Miranda and its recognition of the case as a “constitutional decision” do about the philosophical tension between the approach taken in the Warren Court's famous confession cases and the approach taken by the Burger and Rehnquist Courts? As already touched upon, Professor Grano saw a strong, indeed an irreconcilable, philosophical tension between cases like Escobedo and Miranda (which seemed not at all concerned about the damage to law enforcement wrought by ever-growing restrictions on police interrogation) and post-Warren Court cases, such as Moran v. Burbine, which underscored the need for police questioning as an essential tool for enforcing the criminal laws. Grano deplored the "doctrinal instability":

The commentators who defend Miranda are fully aware that its holding shortchanged its philosophical premises, for they invariably complain that the decision did not go far enough in the restrictions it imposed on the police. Indeed, even Miranda's critics concede that given its premises, logic and intellectual honesty require the conclusion that valid waivers are not possible in the custodial context.

If Miranda's holding was dishonest in terms of its premises, the Court's more recent cases are even more so in failing to repudiate that decision . . . .

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Arizona, 384 U.S. 436, 439 (1966)). Dickerson also observed that the Miranda Court had “noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession.” Id. at 2335. 139. See supra notes 53-62, 98-99 and accompanying text.

140. 475 U.S. 412 (1986). See also id. at 422-23, 426-27. In Burbine, a 6-3 majority held that a confession preceded by an otherwise valid waiver of Miranda rights should not be excluded either because the police misled an inquiring attorney (whose services were requested by the suspect's sister) when they told her they were not going to question the suspect she called about or because the police failed to inform the suspect of the attorney's efforts to contact him. See id.

141. See Grano, supra note 105, at 406-08.
is doctrinally unstable, with two lines of irreconcilable cases coexisting to give the Court a choice between allowing or disallowing the police to have the necessary tools for effective interrogation....

The precepts of principled jurisprudence require the Court to resolve the irreconcilable tension between \textit{Miranda} and the more recent cases. Either the Court should take \textit{Miranda} seriously, which would mean both extending \textit{Miranda}'s restrictions even further and rejecting the Court's more recent cases, or it should repudiate the thinking that demands such a result. If police interrogation is to survive, the Court must do the latter. To repudiate \textit{Miranda}'s underlying thinking honestly and persuasively, however, the Court must overrule that decision, for devoid of its philosophical assumptions, \textit{Miranda}'s holding is incomprehensible.\textsuperscript{142}

As we now know, the Court did not overrule \textit{Miranda}. But I very much doubt that the Court will extend \textit{Miranda}'s restrictions any further or reject any of the post-\textit{Miranda} decisions that have down-sized that landmark case.\textsuperscript{143} In short, I do not believe \textit{Dickerson} will do anything to reduce the doctrinal instability that so pervades this area and so agitates Professor Grano. Indeed, I fear that future cases will demonstrate that \textit{Dickerson} has only aggravated the doctrinal instability in the confessions area (or should one say, doctrinal incoherence).

Consider \textit{Oregon v. Elstad}, which declined to apply the "fruit of the poisonous tree" doctrine to a second confession obtained from a suspect whose \textit{Miranda} rights had not been honored the first time.\textsuperscript{144} The case seems to be based on the premise that a failure to administer the \textit{Miranda} warnings is not a violation of a

\textsuperscript{142} Grano, \textit{supra} note 1, at 218.

\textsuperscript{143} For a useful discussion of the various ways in which \textit{Miranda} has been riddled with qualifications and exceptions, see Alfredo Garcia, \textit{Is Miranda Dead, Was It Overruled, Or Is It Irrelevant?}, 10 ST. THOMAS L. REV. 461 (1998).

\textsuperscript{144} See \textit{Elstad}, 470 U.S. at 370-71.
constitutional right (as would be a violation of the Fourth Amendment or "police infringement of the Fifth Amendment itself") and thus "should not breed the same irremediable consequences" as a violation of a constitutional right. In the wake of Dickerson, defense lawyers will now argue that because the premise of Elstad—Miranda is not a constitutional ruling—is no longer operative, Elstad should be overruled. Will they succeed?

To take another example, consider the so-called "impeachment" cases, Harris v. New York and Oregon v. Hass, which held that a defendant who takes the stand in his own defense can be impeached by statements taken from him in violation of Miranda. These cases seemed to be based on a distinction between statements merely obtained in violation of Miranda and statements obtained in violation of Fourteenth Amendment Due Process or the Self-Incrimination Clause. Now that Dickerson is on the books,

145. Id. at 309: "If errors are made by law enforcement officers in administering the prophylactic Miranda procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." The Court continued:

Respondent's contention that his confession ... must be excluded as "fruit of the poisonous tree" assumes the existence of a constitutional violation ... But a procedural Miranda violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the "fruits" doctrine. ... As in [the instant case], the breach of the Miranda procedures in Tucker involved no actual compulsion. ... Since there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine ... that fruits of a constitutional violation must be suppressed.

Id. at 305-08.
146. Id. at 309.
147. 401 U.S. 222 (1971).
149. See Hass, 420 U.S. at 722. The Court subsequently made it clear that neither testimony given by a person in response to a grant of legislative immunity, nor statements that were "involuntary" or "coerced," could be used for impeachment purposes. See New Jersey v. Portash, 440 U.S. 450 (1979); Mincey v. Arizona, 437 U.S. 385 (1978).
defense lawyers will argue that statements obtained in violation of \textit{Miranda} can no longer be regarded as any less unconstitutional than statements that infringe traditional "voluntariness" standards. But again, will they succeed?

I venture to say that in the years ahead, defense lawyers are likely to discover that the Chief Justice wrote an opinion reaffirming \textit{Miranda} as it has been shaped in the past three decades. (Although he comes at it from a different direction, I think Grano would join me in referring to \textit{Miranda} as it has been misshaped in the past three decades.) What has been reaffirmed, at least as far as the Chief Justice is concerned, and probably a majority of the Court as well, is not \textit{Miranda} as it first arrived on the scene in 1966, but \textit{Miranda} with all its exceptions attached—or, as Villanova Law School's Laurie Magid described it in a recent conversation with me, \textit{Miranda} with all its exceptions "frozen in time."

If I am right, defense lawyers trying to restore \textit{Miranda} to its original vigor will discover that although the premises on which a number of \textit{Miranda}-debilitating cases are based seemed to have been repudiated, the exceptions to \textit{Miranda} are going to remain in place. They are also likely to discover that language in \textit{Dickerson} that may not have seemed significant at the time the opinion was handed down will take on considerable importance in future cases.

I am afraid that lawyers trying to reinvigorate \textit{Miranda} in light of \textit{Dickerson} will be reminded that, what Chief Justice Rehnquist calls "the sort of modifications represented by [the] cases [interpreting \textit{Miranda} narrowly]"—what some, including me, would call cases drawing distinctions between \textit{Miranda} violations and "real" constitutional violations,\footnote{150. \textit{Dickerson}, 120 S. Ct. at 2335. Consider the following: These decisions [those carving out exceptions to \textit{Miranda}] illustrate the principle—not that \textit{Miranda} is not a constitutional rule—but that no constitutional rule is immutable. No court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it, and the sort of modifications represented by these cases are as much a normal part of constitutional law as the original decision. \textit{Id.} at 2335.

151. See Albert W. Alschuler, 	extit{Failed Pragmatism: Reflections on the Burger}}
logic, are no longer defensible after *Dickerson*—are, to quote the Chief Justice's opinion in *Dickerson* again, "as much a normal part of constitutional law as the original decision."152

If Grano did not persuade a majority of the *Dickerson* Court, his writings seemed to have had a considerable impact on Justice Scalia, who, joined by Justice Thomas, wrote a long, forceful dissent. As Grano had done, Justice Scalia denounced the *Dickerson* majority for operating on the premise that the Court has the power—what Justice Scalia called "an immense and frightening antidemocratic power" that "does not exist"153—"not merely to apply the Constitution but to expand it, imposing what it regards as useful 'prophylactic' restrictions upon Congress and the States."154 Continued Scalia:


Justice Scalia made a number of points that were similar to those made by Professor Grano in his various writings. Some

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152. See supra note 150. It may well be that the significant number of "exceptions" *Miranda* has had to bear is a principal reason why it is still alive after three and a half decades.

153. 120 S. Ct. at 2337 (Scalia, J., dissenting).

154. *Id.*

155. *Id.* at 2343.
examples follow. Observed Scalia:

If [the majority's argument that *Miranda* must be a constitutional decision immune to congressional modification because it has been applied to the States since its inception] is meant as an invocation of *stare decisis*, it fails because though it is true that our cases applying *Miranda* against the States must be reconsidered if *Miranda* is not required by the Constitution, it is likewise true that our [post-*Miranda* cases] based on the principle that *Miranda* is *not* required by the Constitution will have to be reconsidered if it *is*. So the *stare decisis* argument is a wash...

... What is most remarkable about the *Miranda* decision—and what made it unacceptable as a matter of straightforward constitutional interpretation in the *Marbury* tradition—is its palpable hostility toward the act of confession *per se*, rather than towards what the Constitution abhors, *compelled* confession... The Constitution is not, unlike the *Miranda* majority, offended by a criminal's commendable qualm of conscience or fortunate fit of stupidity...

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156. *Id.* Cf. *Grano*, *supra* note 1, at 205-06:

[By emphasizing inherent compulsion over potential compulsion as the decision's rationale, the Court could conclude that *all Miranda* violations are, after all, constitutional violations. As a preliminary matter, this stratagem would not avoid problems relating to *stare decisis*, for the Court has rejected this reading of *Miranda* on several occasions. Indeed, the Court has based specific holdings on the premise that *Miranda* is only prophylactic. If anything, the doctrine of *stare decisis* counsels against an interpretation of *Miranda* that would require these later cases to be overruled...]


[Why should we not rejoice that Escobedo's lack of intelligence, rational judgment, or sophistication enabled the police to obtain reliable...]

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HeinOnline -- 46 Wayne L. Rev. 1266 2000
Neither am I persuaded by the argument for retaining Miranda that touts its supposed workability as compared with the totality-of-the-circumstances test it purported to replace. Miranda’s proponents cite ad nauseam the fact that the Court was called upon to make difficult and subtle distinctions in applying the “voluntariness” test in some 30-odd due process “coerced confession” cases in the 30 years . . . [preceding] Miranda. It is not immediately apparent, however, that the judicial burden has been eased by the “bright-line” rules adopted in Miranda. In fact, in the 34 years since Miranda was decided, this Court has been called upon to decide nearly 60 cases involving a host of Miranda issues, most of them predicted with remarkable prescience by Justice White in his Miranda dissent. . . .

Evidence to prove his guilt? Why would we prefer to increase the likelihood that defendants like Escobedo will prevail over their interrogators and thereby increase their chance of winning erroneous acquittals at trial? . . .

Confessions law will begin to make sense only when we have the courage to rebut [such arguments as the claim that police interrogation tactics that play on the weakness of a suspect are morally offensive] without hedge or apology. In the context of police interrogation, it simply is not morally offensive to “take advantage of the psychological vulnerabilities of a citizen. . .

Nothing in our Constitution or our morality precludes the police, within limits, from trying to outsmart the suspect and to increase the pressure on him to tell the truth. Indeed, our morality actually approves such interrogation efforts.

See also the extracts from this Grano article that appear in the text at supra notes 61-62. Consider, too, Gerald Caplan, Questioning Miranda, 38 VAND. L. REV. 1417, 1441-43, 1471-73 (1985).

158. Dickerson, 120 S. Ct. at 2346-47. Cf. Grano, supra note 1, at 207: The argument that Miranda’s rigidity has brought clarity to the law may also be rebutted on its own terms. Much as Justice White predicted in his Miranda dissent, Miranda has generated considerable litigation concerning the meaning of custody and interrogation and the requirements for a valid waiver. Even worse, Miranda’s rigidity has prompted courts to apply black-letter principles with little thought to the underlying Fifth Amendment issue that is responsible for the entire
But even were I to agree that the old totality-of-the-circumstances test was more cumbersome [than *Miranda*], it is simply not true that *Miranda* has banished it from the law and replaced it with a new test. Under the current regime, which the Court today retains in its entirety, courts are frequently called upon to undertake both inquiries. That is because . . . voluntariness remains the constitutional standard, and as such continues to govern the admissibility for impeachment purposes of statements taken in violation of *Miranda*, the admissibility of the “fruits” of such statements, and the admissibility of statements challenged as unconstitutionally obtained despite the interrogator’s compliance with *Miranda*. . . .

Enterprise. The result has been a judicial formalism that cannot be a source of pride to American jurisprudence.

In *Dickerson*, Chief Justice Rehnquist told us that “experience suggests that the [pre-*Miranda*] totality-of-the-circumstances test which § 3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner.” *Dickerson*, 120 S. Ct. at 2336. However, during the oral arguments in *Dickerson*, the Chief Justice seemed less sanguine about the workability of *Miranda*. At one point, when counsel for Mr. Dickerson stated that “the benefit of the *Miranda* rule is that it in most instances provides clear-cut evidence for the court,” the Chief responded: “Well, you say it provides clear-cut evidence. I looked into the number of cases that we have had construing *Miranda*, and there are about 50 of them, so that to say that it’s easily applied is a just myth.” *New York Times*, April 20, 2000, p. A24.

159. *Dickerson*, 120 S. Ct. at 2347. Cf. Grano, *supra* note 1, at 207:
[A]s previously discussed, *Miranda* has not, in any event, freed the police and the courts from having to grapple with voluntariness issues. Because of the Court’s impeachment doctrine, for example, a defendant who wants to preclude any use of his statement at trial can require the court to rule on voluntariness issues. In addition, and perhaps more significantly, the voluntariness doctrine still governs what the police may do to encourage truth telling after a custodial suspect provides a *Mirand*a waiver. . . . [Thus,] police and courts must still struggle with voluntariness issues. It may not be an exaggeration to say, therefore, that *Miranda* merely added a rigid set of procedural requirements that must be satisfied before the voluntariness test takes over.
Professor Grano once said that "one need only attend academic conferences on criminal procedure to discover how discrete and insular 'conservatives' are in academia." I think he exaggerated a bit, but even if he were right, he went a long way toward making up in talent, energy and, power what professors of his persuasion lacked in numbers.

Conservative law professors need people like Joe Grano. But, we liberal professors need people like him too. He challenges us. He provokes us. He makes us (or at least should make us) rethink our positions. And sometimes, no matter how strongly we felt about an issue at first, the force of his reasoning made us change our position, or at least revise it. This is how Joe educated us all.

160. Grano, supra note 105, at 399. "The same phenomenon exists," he added, "in constitutional law, of which criminal procedure is really a part." Id.