Remembering the 'Old World' of Criminal Procedure: A Reply to Professor Grano

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Recommended Citation
REMEMBERING THE "OLD WORLD"
OF CRIMINAL PROCEDURE:
A REPLY TO PROFESSOR GRANO

Yale Kamisar*

When I graduated from high school in 1961, the "old world" of criminal procedure still existed, albeit in its waning days; when I graduated from law school in 1968, circa the time most of today's first-year law students were arriving on the scene, the "new world" had fully dislodged the old. Indeed, the force of the new world's revolutionary impetus already had crested.

Some of the change that the criminal procedure revolution effected was for the better, but much of it, at least as some of us see it, was decidedly for the worse. My students, however, cannot make the comparison; to them the old world has no flesh, and the new world is all they know. For those to whom a world without Miranda is as antiquarian as a world without satellites or video cassette recorders, the question of whether we made wrong choices, or of whether we should re-embrace some of what we so precipitously and often casually discarded, does not call for serious analysis.¹

Although, as will soon become clear, I disagree with much of what Professor Joseph Grano had to say in his introductory essay² to the Truth in Criminal Justice Series—eight Reports on various aspects of constitutional criminal procedure issued by the Justice Department's Office of Legal Policy—I share his view that the University of Michigan Journal of Law Reform rendered an important service by publishing the Reports in their entirety.³ And I am sure Professor Grano agrees with

2. See supra note 1.
me (although he will agree with little else that I have to say) that the Journal made another important contribution to the national debate over the quality and future development of American criminal justice by inviting and publishing responses to some of the Reports by three of the more prolific and most insightful commentators on criminal procedure: Donald Dripps, James Tomkovicz, and Larry Yackle.

Working in a crisp, trenchant manner that readers of his work have come to expect, Professor Dripps explores the differences that divide liberal and conservative commentators on criminal procedure, questions the premises on which each group of commentators relies, explains his disquiet with the view that "original-meaning jurisprudence" should guide criminal procedure doctrine, and maintains that the overriding concern in this area should be "protect[ing] individuals' interest in freedom from unjust punishment, rather than any abstract interest in truth for its own sake."4 Although Dripps forcefully criticizes Grano and other "conservative thinkers" in the field, he does so primarily on different grounds, or in a different way, than I do.

Professor Tomkovicz has emerged as the leading commentator on, and the most powerful champion of, the Massiah5 doctrine, a rule supplementing Miranda and one that became a much more potent force under the Burger Court than it had ever been in the Warren Court era. In his current Article,6 Tomkovicz explores the use of rhetoric in scholarship and presents a vigorous defense of Massiah in the face of a heavy attack by the Office of Legal Policy. He regards the debate over Massiah as one that concerns the resources and capabilities of an individual accused of crime within an adversarial system. He maintains that "[i]f adversary system fair play requires trial counsel to be a multipurpose equalizer, then a modern criminal justice system that has expanded the adversary contest into pretrial realms must expand the entitlement to assistance into those realms to ensure the preservation of fair play values."7

Author of one of the most thoughtful and illuminating books

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7. Id. at 682.

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ever written on this difficult subject, Professor Yackle vigorously challenges the Office of Legal Policy claim that the best solution to the problems of the federal habeas corpus jurisdiction would be its abolition as a postconviction remedy for state prisoners. He identifies the fundamental role of the Bill of Rights in the American political order and places federal habeas corpus within that framework, rejects arguments that the habeas jurisdiction overburdens federal dockets with stale claims, and criticizes the Office of Legal Policy, inter alia, “for linking its assault on the writ to Supreme Court precedents that cannot be fully explained by references to the Report’s perspective on the criminal justice system.”

I agree with much of what Professors Dripps, Tomkovicz, and Yackle have to say and I am tempted to spell out why. But they will have to speak for themselves—and they do so very well. I have taken on a different assignment. The Journal has asked me to respond to Professor Grano and I have been unable to resist the opportunity to do so.

Mapp and Miranda have not fared as well as their supporters hoped, but better than they feared. So far they have survived. Where there is life there is hope—hope that someday the Court will “reclaim the Warren Court’s torch.” Professor Grano wants to dash that hope.

He does not want the Rehnquist Court merely to continue to “chip away” at Mapp and Miranda. He wants the Court to smash these landmark cases—and to bury the

10. Id. at 732.
13. See infra note 15.
14. Actually Grano not only wants the Court to overrule Mapp, but (as does the Office of Legal Policy Report he endorses) to abolish the 75-year-old “fourth amendment exclusionary rule” (or “federal exclusionary rule”) as well, i.e., the rule barring the use of illegally obtained evidence in federal prosecutions. See Grano, Introduction, at 411-13 (discussing his and the Office of Legal Policy’s unhappiness with the exclusionary rule); see also id. at 423 (contemplating a “new world” of criminal procedure without, inter alia, Miranda or the fourth amendment exclusionary rule). If, as Grano maintains, “Mapp helped to set the stage for the gradual displacement of truth as the primary goal of American criminal procedure,” id. at 395-96 n.3, the federal exclusionary rule helped set that stage much earlier.

The fourth amendment exclusionary rule was not an “innovation” of the Warren Court, but a rule established by the White Court, in Weeks v. United States, 232 U.S.
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There is a chance that his wish may be fulfilled.

In the last few years three new Justices have been appointed to the Supreme Court: Antonin Scalia, Anthony Kennedy, and David Souter. In their short time on the Court, neither Justice Scalia nor Justice Kennedy has given any reason to believe that he is enamored of the Warren Court's "revolution" in American criminal procedure. Nor, when he was a state

383 (1914), and reaffirmed by the Taft, Hughes, Stone, and Vinson Courts. Among its supporters were such luminaries as Holmes, Brandeis, and Frankfurter. See, e.g., Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (Holmes, J.) ("The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.").

Although in Wolf v. Colorado, 338 U.S. 25 (1949), the Court, per Frankfurter, J., declined to impose the exclusionary rule on the states as a matter of constitutional law, it did say of the federal exclusionary rule: "Since [Weeks] it has been frequently applied and we stoutly adhere to it." Id. at 28. Moreover, although Justice Jackson sided with Frankfurter in Wolf, in another case decided the same day he underscored the need for the federal exclusionary rule, seeing no "inconsistency" in adhering to the federal rule, yet leaving the states free to adopt or reject the rule. See Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

Although the Mapp Court, the Court that overruled Wolf, was a divided one, as Professor Telford Taylor has pointed out:

[That division] did not concern the merits of the exclusionary rule. The disagreement concerned only the [fourteenth amendment] question: should the states be left free to apply or not to apply the exclusionary rule according to state law? That is the issue on which the justices divided, and there is not a word in [Justice Harlan's dissenting opinion] suggesting that the rule is intrinsically bad.


A constitutional rule mandating the exclusion of evidence in state cases was not a feature of the "old world" of criminal procedure, but the fourth amendment exclusionary rule definitely was. Nevertheless, because Grano often treats the Mapp rule and the federal exclusionary rule interchangeably, I shall do the same for the purposes of this Article. But there is a difference, one that Grano sometimes overlooks. Thus, in assailing the fourth amendment exclusionary rule he observes: "Under our federal system . . . one would have thought that [weighing the costs and benefits of excluding illegally seized evidence] was a question for the state courts to decide for themselves." Grano, Introduction, at 411. This may be a reason to overrule Mapp, but not to overrule Weeks.

15. Professor Grano observes:

[A] considerable amount of chipping away at existing doctrine . . . has occurred, but most of the primary precedent remains in place, waiting in repose for a Court with an inclination to repair the minor damage and reclaim the Warren Court's torch. Overruled cases are difficult, though by no means impossible, to disinter, but cases that merely distinguish previous cases, especially when done unconvincingly, are themselves easy to distinguish away.

Grano, Introduction, at 401.

At another point, Grano comments: "Despite the importance of stare decisis, the danger that a future Court will build upon Miranda's premises is just one reason why the Report is correct in suggesting that the Department of Justice should work to have Miranda overruled." Id. at 408 n.56 (citation omitted).
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judge, did the newest Justice, Souter, display any enthusiasm for that "revolution."  

Moreover, now that Justice William Brennan has left the Court, no member of the Mapp or Miranda majorities still sits. The departure of Justice Brennan signifies more than one less vote for Mapp and Miranda. Brennan was widely regarded as the leading voice of liberalism on the Court and (a view held by many of his critics as well as his admirers) as one of the most influential and effective Justices in the Court's history.

At this crucial time, Professor Grano's attack on the Warren Court should not go unanswered. At first blush, at least, his arguments seem so powerful and so persuasive (at least they are likely to seem so to those unfamiliar with the pre-Warren Court era, the "old world" of criminal procedure) that they cannot be ignored.

The problems of search and seizure and confessions have been with us for a long time. Indeed, so much has been said about these subjects in the last forty years that it is hard to say anything new (although that has not deterred many of us). But because so much has been said about these subjects it may be useful to recall what has been said that is of value. The judgments that constitutional criminal procedure issues require "are too large, too ungoverned by a commanding text or clear institutional dictates, to be laid solidly to rest"—especially in these portentous times.

**IMPEDING THE "SEARCH FOR TRUTH"**

In his introductory essay, Professor Grano looks back on the "old world" of criminal procedure, the pre-Warren Court era, with considerable fondness. I do not. Grano bemoans the fact

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17. Few criminal procedure professors remember or take seriously the warning Judge (later Justice) Cardozo issued 65 years ago: "To what [has been] written [about the exclusionary rule], little of value can be added." People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926). Of course, in this very opinion Cardozo proceeded to write some of the most memorable lines ever written on the subject.

that the Warren Court seemed to forget that the search for truth is the primary goal of American criminal procedure. I would put it somewhat differently—the Warren Court remembered that the ascertainment of truth is not the only goal of American criminal procedure.¹⁹

Grano quotes with approval an observation by Roscoe Pound: "Legal procedure is a means, not an end; it must be made subsidiary to the substantive law as a means of making that law effective in action."²⁰ I would agree that criminal procedure is a means, not an end, but add: therefore, it must be made subsidiary to the values and principles found in the Bill of Rights as a means of making those constitutional provisions effective in action.

There is nothing new or unusual about subordinating the search for truth to other values and policies. As Charles McCormick, one of our greatest commentators on the law of evidence, once observed, the privileges that shield confidential communications between attorney and client, husband and wife, physician and patient, and priest and penitent (and, one might add, the identity of the police informant)—

... do not in any wise aid the ascertainment of truth, but rather they shut out the light. Their sole warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.²¹

If the sentiment of loyalty that attaches to the attorney-client privilege, or the desire to promote full disclosure by the client, overrides the search for truth, what is so bizarre about regarding fourth amendment values and policies as more

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¹⁹. As Justice Brennan pointed out in one of his last criminal procedure opinions (and, happily, one for a majority of the Court), "various constitutional rules limit the means by which the government may conduct [the] search for truth in order to promote other values embraced by the Framers and cherished throughout our Nation's history." James v. Illinois, 110 S. Ct. 648, 651 (1990); see also Tomkovicz, supra note 6, at 682 & n.209.


²¹. C. McCormick, Evidence 152 (1st ed. 1954). As far back as the reign of Elizabeth I, Wigmore tells us, the attorney-client privilege, the oldest of the privileges for confidential communications, "already appears as unquestioned." 8 J. Wigmore, Evidence § 2290 (3d ed. 1940).
important than the ascertainment of truth? If the search for truth may be obstructed in the name of an attorney-client or marital relationship, what is so odd about doing so in the name of constitutional guarantees?

Professor Grano assails *Miranda* and its progeny for disregarding the value of truth in the confession context. He has considerably more affection for the due process "totality of the circumstances"—"voluntariness" test than he does for *Miranda*. But the pre-*Miranda" voluntariness" test also "impede[d] the search for truth." "Even the earliest [involuntary confession] cases adumbrate an enlarged test of due process transcending the simple one of untrustworthiness."

As the voluntariness test developed over the years, and it became increasingly clear that the Court was applying a "police methods" as well as a "trustworthiness" rationale, the concern that an "involuntary" or "coerced" confession was likely to be unreliable became less important. On the eve of *Miranda*, as Illinois Supreme Court Justice Walter Schaefer noted at the time, although the concern about unreliability "still exert[ed] some influence" in involuntary confession cases, it had "ceased to be the dominant consideration."

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23. See *id.* at 397-408.

In Watts v. Indiana, 338 U.S. 49 (1949) and two companion cases, the Court, per Frankfurter, J., reversed three convictions without disputing the accuracy of Justice Jackson's protest that "[check]ed with external evidence, they [the confessions in each case] are inherently believable, and were not shaken as to truth by anything that occurred at the trial." *Id.* at 58. And three years later, in Rochin v. California, 342 U.S. 165 (1952), relying heavily on the rationale of the coerced confession cases to exclude evidence produced by "stomach pumping," the Court, per Frankfurter, J., emphasized that involuntary confessions "are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true." *Id.* at 173.

27. W. Schaefer, *The Suspect and Society* 10 (1967) (based on lecture delivered before *Miranda*). "Indeed," added Justice Schaefer, "the Supreme Court has sometimes insisted upon the exclusion of confessions whose reliability was not at all
Professor Grano does say: "Of course, if the Constitution actually required [impediments to truth], the sacrifice of truth would have to be accepted as necessary to further the compelling goal of constitutional compliance." And he might argue that the Constitution actually requires the exclusion of a coerced confession in a criminal case, even one whose reliability is not in doubt, because the Constitution contains a specific prohibition against compelling a person to be "a witness against himself" in "any criminal case."

But this argument will not succeed. The pre-Miranda due process "voluntariness" doctrine was not based on the self-incrimination clause and the courts that applied and developed this test did so without regard to the privilege against self-incrimination. The privilege might as well not have been there.

The privilege against self-incrimination was not deemed applicable to the states until 1964 and by that time the Supreme Court had decided some thirty state confession cases without it. Moreover, even if the privilege had been deemed applicable to the states, the law governing "coerced" or "involuntary" confessions still would have developed without it. For until the Court decided Miranda, the case that

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29. U.S. CONST. amend. V.
31. "The crux of Miranda," as Professor Stephen Schulhofer has noted, "was not so much the now-famous warnings but rather the Court's holding that: 'all the principles embodied in the [Fifth Amendment] privilege apply to informal compulsion exerted by law enforcement officers during in-custody questioning . . . .'" Schulhofer, Confessions and the Court, 79 MICH. L. REV. 865, 878 (1981) (quoting Miranda v. Arizona, 384 U.S. 436, 461 (1966)).

As for the Miranda warnings, as Professor Schulhofer has pointed out elsewhere: If the [Miranda] Court was correct in the [earlier steps] of its analysis, and I submit that it was, then far from handcuffing the police, the warnings work to liberate the police. Miranda's much-maligned rules permit the officer to continue questioning his isolated suspect, the very process that the Court's [earlier analysis] found to be a violation of the fifth amendment.

... Whether or not they went far enough, Miranda's warnings unquestion-
troubles Grano so much, the prevailing view was that the privilege did not apply to custodial interrogation.32

The cramped reading of the privilege that prevailed in the "old world" of criminal procedure does not seem persuasive today. As California Chief Justice Roger Traynor observed on the eve of Miranda: "It is casuistic to pretend that because the police have no legal authority to compel statements of any kind, there is nothing to counteract and hence no need of a privilege against self-incrimination during police interrogation." Nevertheless, for many decades this kind of legal reasoning had kept the privilege outside the stationhouse. Thus, as late as the spring of 1966 one could still say, as Chief Justice Traynor did, that "[t]he fifth amendment has long been the life of the party in judicial or legislative proceedings, but it has had no life it could call its own in the prearraignment stage."33

The courts that applied the "voluntariness" test in the decades preceding Miranda did believe that the Constitution actually compelled (a) the exclusion of "involuntary" confessions and (b) the reversal of convictions based on such confessions—but they thought that such results were compelled by what might be called "straight due process," not by the privilege against self-incrimination.35 These courts "appl[ied] the Due Process Clause to its historic function of

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33. Traynor, supra note 25, at 674 (footnotes omitted).

34. Id.

35. See Rogers v. Richmond, 365 U.S. 534, 540-41 (1961) (Frankfurter, J.) (fourteenth amendment due process cases "have made clear that convictions following the admission . . . of confessions which are involuntary . . . cannot stand"; "in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed"); Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944) (Black, J.) ("The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession.").
assuring appropriate procedure before liberty is curtailed or life is taken—without regard to how "relevant and credible" the evidence produced by unconstitutional police methods might be.

If a confession had been obtained by police methods that rendered it involuntary—and thus violated due process—it had to be excluded, however verifiable, and if the trial court had not done so the conviction could not stand. It was that simple. (But why isn't it that simple when physical evidence is obtained in violation of due process because the police have failed to comply with the protection against unreasonable search and seizure?)

No doubt the many trial courts that excluded "involuntary" but reliable confessions and the many appellate courts that reversed convictions based on such confessions assumed that

37. As the Court, per Frankfurter, J., pointed out in Rochin v. California, 342 U.S. 165, 172-73 (1952): "It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principle that the States may not base convictions upon confessions, however much verified, obtained by coercion." See also supra note 35.
38. See supra notes 35 & 37.
39. Although it had refused to vindicate Dr. Wolf's rights in Wolf v. Colorado, 338 U.S. 25 (1949), by reversing his conviction, "the Court had apparently treated the police behavior [that turned up the evidence] in Wolf as violating the defendant's Fourteenth Amendment rights; that is to say, 'rights basic to a free society' or 'implicit in the concept of ordered liberty' had been invaded." Allen, Federalism and the Fourth Amendment: A Requiem for Wolf, 1961 SUP. CT. REV. 1, 9. Although the type of illegal search that occurred in Wolf is not described, let alone discussed, it appears to have been a "routine" rather than an "aggravated" one. See Kamisar, Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts, 43 MINN. L. REV. 1083, 1101-02 (1959).

It is now, and has long been, clear that the Court does not apply a "watered-down" version of the fourth amendment to the states, but one whose scope applies to the states via the fourteenth amendment to the same extent it applies to the federal government. See, e.g., Ker v. California, 374 U.S. 23, 33-34 (1963). But I have always thought that, although it declined to impose the exclusionary rule on the states as a matter of fourteenth amendment due process, Wolf equated the substantive protection against unreasonable searches and seizures provided by the fourteenth amendment with the specific guarantees of the fourth. See the detailed discussion in Kamisar, supra, at 1101-08.

A decade after Wolf, Justice Frankfurter protested that that case did not mean that every search or seizure violative of the fourth amendment would make the same conduct on the part of state officials a violation of the fourteenth amendment. See Elkins v. United States, 364 U.S. 206, 233, 237-40 (1960) (Frankfurter, J., dissenting). But even before Mapp, most members of the Court disagreed; they read Wolf as applying the substantive scope of the fourth amendment in its entirety to the states. See Justice Stewart's opinion for the Court in Elkins, id. at 212-15. See also Justice Clark's opinion for the Court in Mapp v. Ohio, 367 U.S. 643, 650-51 (1961).
such consequences were self-evident or inescapable. But they are not. Such results are *not* "actually compelled" by the Constitution, if one means by that term *explicitly or necessarily* required by the Constitution.

The "voluntariness" test and its accompanying baggage is as much a "judge-made" or "judicially created" doctrine as is the search and seizure exclusionary rule. The Constitution does not specifically mention "confessions" or "admissions," neither "involuntary" nor any other kind. Nor does the document say explicitly that a conviction based on an "involuntary" confession cannot stand.\(^4\) It certainly does not say that a conviction resting in part on a coerced confession cannot stand regardless of how much untainted evidence remains to support the conviction.\(^4\)

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In 1936 [the year the Court decided its first state coerced-confession case, Brown v. Mississippi, 297 U.S. 278 (1936), holding that a conviction based on an "involuntary" confession denied the defendant due process of law,] it was far from evident why the due process clause required anything more of state criminal proceedings than a regular and fair trial, giving the defendant a regular and fair opportunity to contest his guilt under state evidentiary rules, including the rule which the Supreme Court of Mississippi held allowed admission of the Brown confessions.

Although there is (or at least until recently there was) wide agreement that the "due process"-"voluntariness" test started out as a rule protecting against the danger of untrustworthy confessions, see, e.g., 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.2(b) (1984); C. MCCORMICK, supra note 21, at 225; 3 J. WIGMORE, supra note 21, at § 822, in Colorado v. Connelly, the Court, per Rehnquist, C.J., made the surprising statements that all the state confession cases the Court had considered in the last 50 years "have focused upon the crucial element of police overreaching," that the purpose of excluding confessions is to "substantially deter future violations of the Constitution," and that even though a confession made by someone in defendant's condition "might be proved to be quite unreliable ... this is a matter to be governed by the evidentiary laws of the forum ... and not by the Due Process Clause of the Fourteenth Amendment." 479 U.S. 157, 163, 166-67 (1986) (upholding the admissibility of a confession made by a mentally ill person). Although this view of the "voluntariness" test strengthens my argument, I cannot believe that the Court will adhere to this view in future cases. Nor should it. "[A] total deconstitutionalization of traditionally important reliability issues is unjustified." Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEXAS L. REV. 231, 276 (1988); see also Benner, *Requiem for Miranda: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U.L.Q. 59, 136-37 (1989).

41. This rule, the so-called "rule of automatic reversal," has governed coerced-confession cases "[a]t least since Malinski v. New York [324 U.S. 401, 404 (1945)]." Allen, supra note 39, at 45; see also, e.g., Haynes v. Washington, 373 U.S. 503, 518-19 (1963); Payne v. Arkansas, 356 U.S. 560, 567-68 (1958); Haley v. Ohio, 332 U.S. 596, 599 (1948). Among other things, the rule is designed to discourage the prosecution from supplementing other evidence by introducing a confession of questionable
If the confession it produces turns out to be a trustworthy one, coercion does advance the search for truth at trial. Why can’t the criminal justice system make use of an “involuntary” confession if it is so impressively corroborated that there is no doubt about its trustworthiness? In theory, at least—the same theory that critics of the search and seizure exclusionary rule are quick to invoke—permitting the use of such confessions would not leave the guaranty against unconstitutional police interrogation methods without alternative means of protection. Putting aside consideration of “judicial integrity,” why are the alternatives to barring the use of a trustworthy but “involuntary” confession more feeble than the alternatives to suppressing illegally obtained physical evidence?

In the three decades that the “involuntariness” doctrine reigned supreme, various state laws made it a crime to deny a lawyer the opportunity to meet with an arrestee or to fail to notify a suspect’s relatives that he had been arrested. Other state laws penalized police officers who sought to elicit confessions by violence, threats of violence or other objectionable means. And, of course, false imprisonment and assault are torts. Why didn’t these “alternative remedies” suffice?

Those who balk at imposing the search and seizure exclusionary rule on the states remind us that it “is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found.” But the same may be said for the prohibition against the use of “involuntary” but reliable confessions. This rule, too, directly serves only to protect the victim of police lawlessness who actually confesses and (because I am only discussing “involuntary” confessions that are reliable) only the person whose


Although the “rule of automatic reversal” has long applied to “involuntary” confession cases, the Rehnquist Court may, of course, abolish it. But at this point I am only discussing the “old world” of criminal procedure, the pre-Warren Court world, and a “rule of automatic reversal” in coerced-confession cases was a feature of that world.

42. See Dripps, supra note 4, at 631.
43. For a sampling of such state statutes, see Justice Frankfurter’s plurality opinion in Culombe v. Connecticut, 367 U.S. 568, 586 n.29 (1961).
44. See id. at 586 n.28.
confession "checks out." (Most victims of impermissible interrogation practices never do confess, or never make a confession that leads to a prosecution). 46

Suppose five suspects are "brought in for questioning." Suppose further that after each one is held incommunicado overnight and subjected to a long stretch of intensive questioning, two confess, but only one confession "checks out." Why not admit the verifiable confession and remand the defendant—together with those who were mistreated but never confessed and the one who confessed but was released when his confession did not check out—"to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford"? 47

Of course, the Court rejected, or never seriously considered, these "alternative approaches" to the "involuntary" confession problem. But why? So far as I am aware, the Court never really spelled out why. But if pressed to do so, I am confident that the Court would have offered one or more of the following reasons:

(a) "The natural way" to respond to a constitutional violation is to "nullify" it;
(b) We are unwilling to give even tacit approval to official defiance of constitutional rights by permitting the use of evidence obtained in violation of those rights;
(c) We are unwilling to let the government profit from its own wrongdoing;
(d) The Court's aid should be denied in order to maintain respect for the Constitution and to preserve the judicial process from contamination by "partnership" in police lawlessness;
(e) To declare that in the administration of criminal justice the end justifies the means—to say that government officials may act lawlessly in order to secure the conviction of a private criminal—is a pernicious doctrine; and,

46. According to the most careful study ever made of such arrests, about 17 out of every 18 persons "arrested for investigation" and interrogated were ultimately released without charge—despite the fact that the police had "probable cause" to arrest in approximately half the cases. See DISTRICT OF COLUMBIA COMMISSIONERS' COMM. ON POLICE ARRESTS FOR INVESTIGATION, REPORT AND RECOMMENDATIONS 34 (1962) ("The Horsky Report"). Generally, the longer a person was held the less likely he was to be charged. See id. at 39.

(f) The alternative remedies suggested are likely to be so infrequently or sporadically enforced that they must be deemed inadequate, if not largely illusory.

But these arguments for barring the use of "involuntary" but trustworthy confessions are the very arguments proponents of the search and seizure exclusionary rule have made for decades—and are the very reasons that led the Court to adopt such a rule in 1914 and to reaffirm the rule many times thereafter.\textsuperscript{48}

Although Professor Grano is most reluctant to "sacrifice truth" in the administration of criminal justice, at one point he does suggest certain exceptions to his basic position: "a serious concern about convicting the innocent, condoning or encouraging official misconduct, countenancing violations of the defendant's dignity, or encouraging some other evil of comparable gravity."\textsuperscript{49} I fail to see why the search and seizure exclusionary rule does not fall within one of the italicized exceptions.

In 1955, Roger Traynor wrote the opinion of the California Supreme Court that overturned longstanding precedent\textsuperscript{50} and adopted the exclusionary rule as a matter of state law. He subsequently explained why:

My misgivings about [the admissibility of illegally seized evidence] grew as I observed that time after time [such evidence] was being offered and admitted as a routine procedure. It became impossible to ignore the corollary that illegal searches and seizures were also a routine procedure subject to no effective deterrent; else how could

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\item For a discussion of Weeks v. United States, 232 U.S. 383 (1914), which promulgated the fourth amendment or federal exclusionary rule, and the federal search and seizure cases decided in the next 35 years—until the year of the Wolf case—see Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition?", 16 CREIGHTON L. REV. 565, 591-93, 598-606 (1983); see also supra note 14.
\item Unfortunately, the fourth amendment exclusionary rule no longer rests on what might be called a "principled basis" (e.g., avoiding the "condonation" or "ratification" of the unconstitutional police conduct that produced the challenged evidence), but on an empirical proposition. See infra text accompanying notes 71-74.
\item Grano, \textit{Introduction}, at 404 (emphasis added).
\item People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955). \textit{Cahan} overruled People v. Mayen, 188 Cal. 237, 205 P. 435 (1922); People v. Le Doux, 155 Cal. 535, 102 P. 517 (1909); and later cases based upon them, which admitted illegally seized evidence. Thirteen years prior to \textit{Cahan}, Justice Traynor wrote the opinion in People v. Gonzales, 20 Cal. 2d 165, 124 P.2d 44 (1942), a case which upheld the admissibility of illegally seized evidence and relied on \textit{Mayen} and \textit{Le Doux}.
\end{enumerate}
\end{footnotesize}
illegally obtained evidence come into court with such regularity? It was one thing to condone an occasional constable's blunder, to accept his illegally obtained evidence so that the guilty would not go free. It was quite another to condone a steady course of illegal police procedures that deliberately and flagrantly violated the Constitution of the United States as well as the state constitution.

... It was the cumulative effect of such routine that led us at last . . . to reject illegally obtained evidence. It had become all too obvious that unconstitutional police methods of obtaining evidence were not being deterred in any other way.51

HOW COGENT IS PROFESSOR GRANO'S CRITICISM OF THE SEARCH AND SEIZURE EXCLUSIONARY RULE?

According to Grano, the Mapp case, inter alia, "helped to precipitate the now dominant public perception . . . that the criminal justice system releases defendants on 'technicalities,' . . . and converted search and seizure law into an arcane subject that consumes half of the standard criminal procedure course in many law schools."52 I question both claims.

I do not deny that there is, and there has long been, a "public perception" that many guilty criminals are being released on "mere technicalities." But how did this come about? For decades police officials and prosecutors have been telling the public this.53 So have many politicians (who assume, probably correctly, that their chances of getting reelected are enhanced if they attack the courts for being "soft" on crime). So have many members of the press (who too often cannot resist oversimplifying or sensationalizing the crime problem).

To be sure, these critics of the exclusionary rule have had a

52. Grano, Introduction, at 395 n.3.

receptive audience. Here, as elsewhere, the more complicated life becomes, the more people are attracted to simple solutions. Here, as elsewhere, it is tempting "to reconcile the delusion of our omnipotence with the experience of limited power" by explaining seeming failure in terms of incompetence, even betrayal.

After leading the public to believe that many guilty criminals are going free on "mere technicalities," a goodly number of these very same critics of the courts turn around, act as if they had not helped to shape this public perception, and then cite the public's lack of respect for the exclusionary rule (or some other rule they have assailed) as one more reason for abolishing it.

I think it fair to say that the "costs" of the exclusionary rule are "much lower . . . than is commonly assumed." Indeed, according to probably the most comprehensive study of the available empirical data, the evidence "consistently indicates that the general level of the rule's effects on criminal prosecutions is marginal at most." (Thoughtful members of the public must wonder why—if so many criminals are going free on "technicalities"—the prison population has doubled in the last ten years; why 1990 saw "the largest growth in 65 years of prison population statistics"; and why more than thirty


55. 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.2 (a), at 22 (2d ed. 1987) [hereinafter 1 W. LAFAVE, SEARCH AND SEIZURE].

56. Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, 1983 AM. B. FOUND. RES. J. 611, 622; see also Dripps, supra note 4, at 625 (according to "national samples of contemporary data . . . successful suppression motions have become quite rare, indeed exotic") and Professor Dripps' review of empirical studies, id. at n.142.

One may retort, as Justice White did for the Court in United States v. Leon, 468 U.S. 897, 908 n.6 (1984), that although many researchers have concluded that "the impact of the exclusionary rule is insubstantial . . . the small percentages . . . mask a large absolute number of felons who are released because the cases against them were based in part on illegal searches or seizures." But "raw numbers are not as useful for policy evaluation as percentages. In a system as large as the American criminal justice system . . . almost any nationwide measurement or estimate will look large if expressed in raw numbers." Davies, supra, at 670.

Moreover, "[f]or every prosecution aborted by the constitutional exclusionary rules, roughly a hundred founder because of numbingly prosaic procedural problems. The guilty go free primarily because justice takes too long and because the witnesses do not testify when the trial finally occurs." Dripps, supra note 4, at 634 (footnotes omitted).

Remembering the "Old World"

states are under court order because of overcrowded prisons?)

In any event, if the law of search and seizure is too technical, this is an attack on the content of the law, not the remedy for effectuating it. If the law of search and seizure is too unrealistic or unprincipled, it ought to be changed, not defied or disregarded.

Moreover, I think it fair to say that the police have a great deal more room to maneuver under the fourth amendment than they did when the California Supreme Court decided Cahan in 1955 or when the U.S. Supreme Court decided Mapp in 1961. Thirty years ago the police may have been unduly restricted (at least theoretically) by unrealistic and out-of-date substantive search and seizure rules, but it is hard to see how anyone can so describe the law of search and seizure today.

Dillingham, Director, Bureau of Justice Statistics). Donald P. Lay, Chief Judge of the United States Court of Appeals for the Eighth Circuit, has noted that "[f]rom 1983 to 1988, there was a 51 percent increase in total jail population." Lay, Our Justice System, So-Called, N.Y. Times, Oct. 22, 1990, at A19, col. 2.

58. See Applebome, Texas Prisons Stop Accepting Inmates Under Federal Order, N.Y. Times, Jan. 17, 1987, at § 1, p. 8, col. 1 (noting that 32 states and 3 territories are under such orders); Lay, supra note 57, ("26 percent of jails were under Federal or state court order or consent decree to limit the number of inmates."); Malcolm, States' Prisons Continue to Bulge, Overwhelming Efforts at Reform, N.Y. Times, May 20, 1990, § 1, at 1, col. 3 (stating that 37 states are under court order).

59. A good example is the fate of the Gouled rule (first articulated in Gouled v. United States, 255 U.S. 298, 309-11 (1921)), a doctrine that placed items of "evidentiary value only" beyond the reach of the police even when they acted on the basis of "probable cause" or pursuant to an otherwise valid warrant. As did a number of commentators, I denounced the Gouled rule because "it departs from the fundamental principles pervading search and seizure law." Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories," 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 171, 177 (1962). Shortly after Mapp imposed the exclusionary rule on the states, Professor Fred Inbau addressed a large group of prosecuting attorneys. In the course of criticizing Mapp, he warned prosecutors "who come from the states that have been admitting illegally seized evidence" that they would "experience some real jolts" if such federal doctrines as the Gouled rule "are applied to your own cases.


If the fourth amendment, as construed by the courts, did prohibit the seizure of items of "evidentiary value only," thus carving out a "zone" that the police could never enter, abolition of the exclusionary rule would not have given the police lawful authority to enter the zone. The proper response, if criticism of the Gouled rule was valid (and it was), was not to overrule Mapp or Weeks, but to abolish the Gouled rule—which the Court subsequently did. See Warden v. Hayden, 387 U.S. 294 (1967) (Brennan, J.) (distinction between "mere evidence" and instrumentality of crime or contraband finds no support in the fourth amendment); see also Berger v. New York, 388 U.S. 41, 44 & n.2 (1967).
The Burger and Rehnquist Courts have made their presence felt. 60

60. There are many cases. A good sampling is the following: Illinois v. Rodriguez, 110 S. Ct. 2793 (1990) (police may search a dwelling on the "apparent authority" of a third party who lacks actual authority to consent); Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481 (1990) (in order to help deter and detect drunk driving, police may stop all motorists at sobriety checkpoints absent any individualized suspicion); Alabama v. White, 110 S. Ct. 2412 (1990) (illustrating how little is needed to constitute "reasonable suspicion" to stop suspect's car and to question her); Maryland v. Buie, 110 S. Ct. 1093 (1990) (police may conduct "protective sweep" of entire house in which a valid arrest is made if they have "reasonable suspicion" that the area to be swept harbors a dangerous criminal); California v. Greenwood, 486 U.S. 35 (1988) (police examination, for evidence of crime, of contents of opaque sealed plastic trash bags left for collection was not a fourth amendment "search"); New York v. Burger, 482 U.S. 691 (1987) (police inspection of automobile junkyard for stolen property without warrant or individualized suspicion, but pursuant to a statute covering vehicle dismantlers, was permissible); California v. Ciraolo, 476 U.S. 207 (1986) (police aerial surveillance of a fenced-in backyard not a fourth amendment "search"); Illinois v. LaFayette, 462 U.S. 640 (1983) (police could search through shoulder bag at stationhouse inventory of arrestee's effects, even though inventory objectives could be achieved "in a less intrusive manner"); Illinois v. Gates, 462 U.S. 213, 232, 238, 244 n.13 (1983) (abandoning the existing probable cause structure in favor of a "totality-of-the-circumstances" test; Court stresses that probable cause is a "fluid concept. . . not readily, or even usefully reduced to a neat set of legal rules" and that it "requires only a probability or substantial chance of criminal activity"); Florida v. Royer, 460 U.S. 491 (1983) (certain police-citizen "contacts" or "encounters," such as asking a person at an airport to show her driver's license and airline ticket, are not fourth amendment "seizures"); United States v. Ross, 456 U.S. 798 (1982) (if police have probable cause to believe an automobile contains contraband, they may conduct warrantless searches of closed containers found in the locked car trunk); New York v. Belton, 453 U.S. 454 (1981) (even though police lack any reason to believe that a car contains evidence of crime, if they have adequate grounds to make a custodial arrest of the car's occupants, they may conduct a search of the entire interior of the car, including closed containers found within that zone, even after the occupants have been removed from the car and handcuffed); United States v. Robinson, 414 U.S. 218 (1973) (police may conduct a thorough search, not merely a frisk, of a person incident to a valid custodial arrest for a traffic offense even though such a search is justified neither by the need to prevent destruction of evidence nor the fear that the motorist is dangerous); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (suspect may effectively consent to an otherwise unlawful search even though he was never informed, and there is no showing that he was aware, of his right to refuse the officer's request).

Many years ago, Judge (later Justice) Benjamin Cardozo uttered his oft-quoted criticism of the exclusionary rule: "The criminal is to go free because the constable has blundered." But in recent years the Court has so narrowed the scope of the protection against unreasonable search and seizure, so reduced the need to act pursuant to a search warrant, so softened the standard of "probable cause," and so increased the occasions on which the police may act on the basis of "reasonable suspicion" or in the absence of any individualized suspicion at all that the time has come to revise Cardozo's famous epigram. Nowadays it is more accurate to say that if the criminal goes free it is because the constable has flouted the fourth amendment, not because he has made an honest blunder.

As for Professor Grano's assertion that the adoption of the exclusionary rule "converted search and seizure into an arcane subject," I believe he has it backwards. I think it more accurate to say that in those states that used to admit illegally seized evidence the law of search and seizure was more arcane before the exclusionary rule than afterwards. And this body of law would have remained arcane if the exclusionary rule had not made its presence felt.

As Professor Edward Barrett, who was more sympathetic to the needs of law enforcement than most law professors, observed thirty-five years ago:

[Prior to the adoption of the exclusionary rule in California,] the police were under no substantial pressure to seek clarification of [the rules governing arrest, search, and seizure]. The issue of legality became crucial so seldom that the police had, in effect, broad discretion in determining the procedures to follow, subject only to community pressures, particularly those by the press, which rarely focused upon any but the most obvious abuses.

... [T]he California situation was most unsatisfactory... [and t]he possibilities of the situation improving appeared slight. Law enforcement groups preferred the ambiguity of [ill-defined and] seldom-litigated rules and had no real incentive to take the risks involved in seeking

62. See supra note 60.
legislative action. And there was little evidence that other groups would take the initiative. 63

When the police need to search a home, what facts constitute "exigent circumstances" enabling them to bypass the warrant procedure? When they arrest a motorist, can they search the entire passenger compartment incident to the arrest? Can they search the car trunk as well? When, without bothering to obtain a warrant, may the police open closed containers—or force open a locked suitcase—found in the trunk of a car?

These questions, and a host of others, were ones the police should have been asking themselves before their states adopted an exclusionary rule or had such a rule imposed on them by the U.S. Supreme Court. There was a body of law governing these situations—a body of law more abstruse and obscure than it is today. 64 And the police were supposed to be thinking about, and complying with, that body of law in preexclusionary rule days. But there is considerable evidence that they were not—that they did not know or care what that law was. As one high-ranking New York police officer explained:

Before [Mapp required New York courts to exclude illegally seized evidence] nobody bothered to take out search warrants. Although the Constitution requires warrants in

63. See Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan, 43 CALIF. L. REV. 565, 577, 587 (1955). Although Barrett was, on balance, opposed to the exclusionary rule, he nevertheless articulated some justifications for the exclusionary rule as effectively as any of the rule's proponents; see also Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 255, 260 (1961), reprinted in POLICE POWER AND INDIVIDUAL FREEDOM 87, 92 (C. Sowle ed. 1962), writing on the eve of Mapp:

The law of arrest and illegal searches is undeveloped in states without the [exclusionary] rule. Many legal questions about proper police conduct cannot be answered in New York because the New York courts admit illegally obtained evidence and hence have little chance to pass on questions of police behavior. The questions have not been resolved by legislation. As a by-product of California's recent acceptance of the rule, great clarification and modification of the law of arrest and search and seizure has taken place. The task is not done unless there is an easy opportunity for litigation.

64. In recent years the Court has been impressed with the need to provide the police with straightforward or "bright line" rules that usually resolve doubts in their favor. See, e.g., the Belton, Robinson and Ross cases, all discussed briefly supra note 60. The reaction to this development has been mixed. Compare Alschuler, Bright Line Fever and the Fourth Amendment, 45 U. PITT. L. REV. 227 (1984) with LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith," 43 U. PITT. L. REV. 307 (1982).
most cases, the Supreme Court had ruled that evidence obtained without a warrant—illegally if you will—was admissible in state courts. So the feeling was, why bother?\footnote{Zion, Detectives Get a Course in Law, N.Y. Times, Apr. 28, 1965, at 50, col. 1 (nat’l ed.). When Leonard Reisman, then the New York City Deputy Police Commissioner in charge of legal matters, made these remarks at a post-\textit{Mapp} training session on the law of search and seizure, he was unaware that a New York Times reporter was in the audience.}

If, in the weeks and months following \textit{Mapp}, many law enforcement officers discovered for the first time that the law of search and seizure was complex and difficult, it was only because it had been that way \textit{all along}. The exclusionary rule did not \textit{make} the law complicated and difficult—it did not, to use Grano’s language, “\textit{convert} search and seizure law into an arcane subject.” The rule only made a difficult and complex body of law \textit{relevant}.

Professor Grano maintains that the law of search and seizure is filled with “hair-splitting intricacies” that “more often than not have little to do with the fourth amendment’s essential role in a free society” and that these intricacies “are the direct result of the exclusionary rule . . . .”\footnote{Uviller, The Acquisition of Evidence for Criminal Prosecution: Some Constitutional Premises and Practices in Transition, 35 \textit{VAND. L. REV.} 501, 502 (1982).} Once again, I submit, he is confusing the \textit{content} of the law of search and seizure with the \textit{remedy} if that body of law is violated.

If the law of search and seizure is unrelated to the fourth amendment’s essential role, the fault lies with the courts that have misinterpreted the fourth amendment, not with the exclusionary rule. If the law of search and seizure is too intricate or rigid, abolishing the exclusionary rule would not lift the restrictions or eliminate the intricacies. Only a change in the \textit{substantive} law of search and seizure can do that.

It may be, as Grano believes, that sometimes the police are not permitted to make an arrest or conduct a search when

\footnotetext{65. Zion, Detectives Get a Course in Law, N.Y. Times, Apr. 28, 1965, at 50, col. 1 (nat’l ed.). When Leonard Reisman, then the New York City Deputy Police Commissioner in charge of legal matters, made these remarks at a post-\textit{Mapp} training session on the law of search and seizure, he was unaware that a New York Times reporter was in the audience.}

they ought to have the authority to do so. If that is the case, however, abolishing the exclusionary rule would not give the police the lawful authority to act. It would only remove whatever incentive they have not to act when, under the prevailing law, they should not.

As Professor Monrad Paulsen observed on the eve of Mapp:

The exclusionary evidence rule says nothing about the content of the law governing the police . . . . To defend the rule is not to defend any particular formulation regulating the activities of law enforcement . . . . The rule merely states the consequences of a breach of whatever principles might be adopted to control law enforcement officers.

Police officers are not controlled more rigorously by the exclusionary evidence rule than they are by force of their own respect for the law.67

Evidently Professor Grano is unhappy about having to spend more than twenty hours of his criminal procedure course on the complexities of search and seizure law.68 I am quite sympathetic. I teach the same course and use the same casebook.69 (But what else should a professor expect when he adopts a casebook co-authored by someone who has written a four-volume treatise on the subject?)70

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67. Paulsen, supra note 63, at 87; see also Mondale, The Problem of Search and Seizure, 19 BENCH & B. MINN. 15, 16, 17 (Feb. 1962). As Walter Mondale, then a young state attorney general five years out of law school, told a group of Minnesota police officers distressed and befuddled by the Mapp decision:

[T]he Mapp case did not alter or change one word of either the state or national constitutions . . . . [I]t does not reduce police powers one iota. It only reduces potential abuses of power. The adoption of the so-called “exclusionary rules” does not affect authorized police practices in any way. What was a legal arrest before, still is. What was a reasonable search before still is.

... The very fact that these [post-Mapp search and seizure] institutes are being held is eloquent testimony ... of the basic wisdom of the Court’s decision. We are doing today, because of the Court’s ruling, what we should have done all along. We are studying ways in which we can bring our police methods and procedures into harmony with the constitutional rights of the people we serve.

68. See Grano, Introduction, at 412.


70. See 1 W. LaFave, SEARCH AND SEIZURE, supra note 55. Professor LaFave has a greater stake in the exclusionary rule than any of us. If the exclusionary rule is abolished, what does he do for a living? If the exclusionary rule goes, so does his four-volume treatise—and the substantial royalties that go with it. But I can testify that LaFave was a strong proponent of the exclusionary rule long before he had a proprietary interest in it.
I am tempted to ask Grano how much time he would spend teaching the law of search and seizure if there were no exclusionary rule. But the more relevant question is: How many hours of police training and instruction would be devoted to this vast subject if there were no exclusionary rule? How much time did the police devote to the subject in those jurisdictions that, prior to Mapp, had no exclusionary rule? If former New York City Police Commissioner Michael Murphy is a credible witness, in one state at least, and a very large one at that, one may infer that they spent no time at all:

I can think of no decision in recent times in the field of law enforcement which had such a dramatic and traumatic effect as [Mapp] . . . . As the then commissioner of the largest police force in this country I was immediately caught up in the entire problem of reevaluating our procedures, which had followed the Defore rule [a 1926 decision of the highest court of New York permitting law enforcement officials to use illegally seized evidence in criminal prosecutions], and modifying, amending, and creating new policies and new instructions for the implementation of Mapp . . . . [Decisions such as Mapp] create tidal waves and earthquakes which require rebuilding of our institutions sometimes from their very foundations upward. Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function. Hundreds of thousands of man-hours had to be devoted to retraining 27,000 men. 71

Why did Mapp have “such a dramatic and traumatic effect” on law enforcement? Why did it necessitate “retraining sessions”? What were the old training sessions like? Were there any search and seizure training sessions prior to Mapp? What does it mean to say that the police department had to “implement” Mapp? How does one “implement” a decision that simply imposes a remedy for a violation of a body of law the police were supposed to be obeying all along? Doesn’t the commissioner mean that because of Mapp he had to establish policies and instructions for the implementation of the fourth

amendment?

What did the commissioner mean when he observed that before *Mapp* his department "followed the *Defore* rule"? *Defore* permitted the prosecution to *use* illegally seized evidence, but it did not authorize the police to *conduct* illegal searches. It did not tell the police that they should not or need not familiarize themselves with the law of search and seizure. The *Defore* rule was based largely on the premise that New York did not need to adopt the exclusionary rule because existing alternative remedies (such as tort actions and internal police discipline) were adequate to effectuate the guaranty against illegal searches and seizures.72 Doesn't the commissioner's reaction to *Mapp* constitute dramatic evidence that these alternative remedies were woefully inadequate? Why else did *Mapp* "create tidal waves and earthquakes"?

### THE EXCLUSIONARY RULE AND ITS ALTERNATIVES

Professor Grano tells us that he often asks his students "whether they would continue to support the exclusionary rule from a policy standpoint if they were convinced that a fully effective alternative safeguard for fourth amendment rights was available"—and he is distressed to learn that many of them still would.73 I am not sure what Grano means by "available." *Theoretically* available? *Presently* available—actually in operation? If he means the latter, then I have to say that a majority of the present Court would probably give Grano the answer he wants.

I believe that originally and for much of its life the federal exclusionary rule rested not on an empirical proposition, but on what might be called a "principled basis" (to avoid "ratifying" the unconstitutional police conduct that produced the proffered evidence, to keep the judicial process from being contaminated by partnership in police misconduct, and to assure the police and the public alike that the Court took the fourth amendment seriously).74 Unfortunately, this is not, or

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no longer, the prevailing view. The “deterrence” rationale (and its concomitant “interest balancing”) has gained the ascendancy.

According to the present Court, the exclusionary rule is not “a necessary corollary of the Fourth Amendment”;\(^7\) it is only “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”\(^7\) Under this view, whether the exclusionary rule should be applied in a particular case “presents a question, not of rights, but of remedies”—a question to be answered by weighing the “potential injury” of the rule against its “potential benefits.”\(^7\)

To put it unkindly, as dissenting Justice Brennan did, “[b]y remaining within its redoubt of empiricism and by basing the [exclusionary] rule solely on the deterrence rationale, the Court has robbed the rule of legitimacy.”\(^7\)

What are some of the implications of the present Court’s way of thinking about the exclusionary rule? Shortly after he stepped down from the Supreme Court, Justice Potter Stewart observed:

>[T]he Constitution requires only that there be some effec-
tive remedy to ensure that agents of the government obey the fourth amendment. Thus exclusion is constitutionally required only if without it there would be no adequate means to ensure that the government obeys the fourth amendment.\(^7\)

\(^7\) United States v. Leon, 468 U.S. 897, 905 (1984) (White, J.) (adopting a so-called “good faith” exception, actually a “reasonable mistake” exception, to the exclusionary rule).

\(^7\) No doubt the 1914 Weeks Court expected, or at least hoped, to affect police behavior, but there is no suggestion in any of the early federal exclusionary rule cases that the rule’s survival was to depend on proof that it significantly influences police behavior.

\(^7\) United States v. Calandra, 414 U.S. 338, 348 (1974) (grand jury witness may not refuse to answer questions on the ground that they are based on the fruits of an unlawful search)).

\(^7\) See Calandra, 414 U.S. at 348-49, 354.

\(^7\) Id. at 906 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974) (grand jury witness may not refuse to answer questions on the ground that they are based on the fruits of an unlawful search)).

\(^7\) Leon, 468 U.S. at 943 (Brennan, J., dissenting).

As I have already indicated, I do not believe this was what might be called the "original understanding" of the exclusionary rule or that it is the proper way to think about the exclusionary rule. But I do not have any votes. Of those who do, I have little doubt that five or more agree with Justice Stewart.

Thus, if a majority of the present Court were convinced that a fully effective safeguard for fourth amendment rights were in place and operating (if, for example Congress enacted a statute "replacing" the exclusionary rule with a streamlined tort remedy establishing a fairly substantial minimum level of damages), I doubt that the exclusionary rule would survive. A majority of the present Court would likely conclude that, both from a constitutional and a policy standpoint, the "extreme sanction of exclusion," as the Leon Court called the exclusionary rule, is no longer necessary or appropriate—that it can no longer "pay its way."

But if I were one of Professor Grano's students, I would ask him some questions in return. The first would be: If you were convinced that no effective alternative to the fourth amendment exclusionary rule presently exists, would you continue to oppose it?

The effectiveness (or ineffectiveness) of alternatives to the exclusionary rule in the real world, the only one we have, has been the subject of a vast literature. The overwhelming consensus is that civil suits, criminal prosecution, injunctions, review boards, and internal police discipline are sadly inadequate.

As Professor Dripps points out, in a number of respects the Office of Legal Policy Report on the Search and Seizure Exclusionary Rule supports the general consensus:

80. Leon, 468 U.S. at 926.
81. Id. at 907 n.6.
83. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, TRUTH IN CRIMINAL JUSTICE...
Since 1971, plaintiffs have filed an estimated 12,000 Bivens actions [suits for damages against federal officers]. In only five cases have the defendants actually paid damages, and it is not known whether any of these involved illegal search and seizure. With respect to suits under 42 U.S.C. § 1983 [against state and local law enforcement officers or the governmental unit that employs them], the Department's research discovered "fewer than three dozen reported fourth amendment cases over the past 20 years." The Report identifies two obvious reasons for the failure of civil plaintiffs to enforce the fourth amendment: first, juries sympathize with the police and not with criminals; second, search and seizure activity, however unconstitutional, ordinarily does not cause the kind of actual damages that our tort system compensates.

With respect to internal discipline, the Justice Department documents only seven investigations into fourth amendment violations by its agents since 1981; none resulted in the imposition of sanctions. The Department did obtain two criminal convictions for violations of fourth amendment rights, but the defendants were subsequently pardoned by the President.84

Justice Stewart did say that the fourth amendment "requires only that there be some effective remedy" for its violation, but he went on to say that the various alternatives to the exclusionary rule presently available are so inadequate that "the exclusionary rule is necessary to keep the right of privacy secured by the fourth amendment from 'remain[ing] an empty promise.'"85 As for the currently available alternatives to the exclusionary rule:

They punish and perhaps deter the grossest of violations, as well as governmental policies that legitimate these violations. They compensate some of the victims of the

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84. Dripps, supra note 4, at 629 (footnotes omitted).
85. Stewart, supra note 79, at 1389 (quoting Mapp v. Ohio, 367 U.S. 643, 660 (1961)).
most egregious violations. But they do little, if anything, to reduce the likelihood of the vast majority of fourth amendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice. For those violations, a remedy is required that inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the fourth amendment. There is only one such remedy—the exclusion of illegally obtained evidence.

Professor Grano finds it "difficult to believe that we are so intellectually impoverished . . . that we lack the capability of devising an effective, alternative approach [to the exclusionary rule]."86 But the problem is not a lack of imagination or intellectual capacity. Rather, it is a lack of political will.

There is no shortage of theoretically possible ways, aside from the exclusion of evidence, to make the fourth amendment viable. Commentators have been underscoring the inadequacies of existing tort remedies or criminal sanctions against transgressing police and calling for studies of the problem or proposing meaningful alternatives to the exclusionary rule for a long time—some before Grano was born.87 But what has

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86. Id. at 1388-89.
87. Grano, Introduction, at 413.
88. A notable example is Professor Jerome Hall's famous 1936 article, The Law of Arrest in Relation to Contemporary Social Problems, 3 U. Chi. L. Rev. 345 (1936). Hall plumped for an effective statutory remedy against the governmental unit that employed the misbehaving officer. Twenty years later, Professors Edward Barrett and Caleb Foote made similar proposals. See Barrett, supra note 63, at 592-95; Foote, supra note 82, at 493.

Away back in 1922, Dean Wigmore, perhaps the leading critic of the exclusionary rule, offered alternatives: "both a civil action by the citizen thus disturbed and a process of criminal contempt against the offending officials"—"contempt of the Constitution," he called it. Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A.B.A. J. 479, 481, 484 (1922). In 1939, William Plumb also accompanied his attack on the exclusionary rule with suggested alternatives. He emphasized the need to "devise more effective means of enforcing civil judgments against the [lawless] officers, by garnishment or otherwise" and the need to "translate" the "paper" criminal penalties against misbehaving police "into effective actuality," suggesting "some summary proceeding in the nature of contempt, in which the court would take the initiative . . . without the intervention of the prosecutor." Plumb, Illegal Enforcement of the Law, 24 Cornell L.Q. 337, 386-88 (1939). In 1957, still another critic of the exclusionary rule, Virgil Peterson, offered still another alternative—that in each jurisdiction a civil rights office be established, independent of the regular prosecutor, "charged solely with the responsibility of investigating and prosecuting alleged violations of the Constitution by law enforcement officials." Peterson, Restrictions in the Law of Search and Seizure, 52 Nw. U.L. Rev. 46, 62 (1957).
come of these studies and proposals?

Forty-seven years elapsed between the time the federal courts adopted the exclusionary rule (Weeks) and the time the rule was imposed on the states (Mapp). In all that time, so far as I have been able to discover, none of the many states whose courts permitted the use of illegally obtained evidence developed an effective alternative safeguard.\(^9\)

Is there any reason to think that today’s or tomorrow’s politicians are, or will be, any less fearful of crime and any more concerned about protecting people under investigation by the police than the politicians of any other generation? Is there any reason to think that the lawmakers of our day are any more willing than their predecessors to invigorate tort and criminal remedies against law enforcement officials who commit excesses in their overzealous efforts to contend with “criminals” and “suspected criminals”?\(^9\)

There is ample cause to believe that the Mapp Court’s view that alternatives to the exclusionary rule “have been worthless and futile” is still valid.\(^9\) So far, nothing else has worked. That is “good reason for maintaining a healthy skepticism about any proposal to abandon the exclusionary rule in favor of some other supposed remedy.”\(^9\)

If I were a student of Professor Grano’s, I would ask him another question: If you were convinced that large numbers of police view the exclusionary rule as if it were the fourth amendment and that they would regard “repealing the rule”


One reason the California Supreme Court adopted the exclusionary rule in 1955 was the failure of any effective alternative safeguard to emerge and the unlikelihood that it ever would. Consider Traynor, supra note 51, at 324:

In California six years elapsed between Wolf v. Colorado and [California’s adoption of the exclusionary rule], and all during that time we were painfully aware of the right begging in our midst. We remained mindful of the cogent reasons for the admission of illegally obtained evidence and clung to the fragile hope that the very brazenness of lawless police methods would bring on effective deterrents other than the exclusionary rule. . . . [But] it became all too clear in our state that there was no recourse but to the exclusionary rule. . . . [A] like reflection of nation-wide import must also have been developing in the Supreme Court of the United States.

\(^90.\) Cf. Suro, An Old Refrain, Crime, Sounded in New Contests, N.Y. Times, Oct. 16, 1990, at A22, col. 1 (late ed. final) (“Talking tough [about crime] is as popular as ever, but it is not enough this year because virtually all politicians are doing it.”).

\(^91.\) See sources cited supra note 82; see also Dripps, supra note 4, at 628-30.

\(^92.\) 1 W. LAFAVE, SEARCH AND SEIZURE, supra note 55, at § 1.2(c).
as an indication that the fourth amendment is no longer a serious matter, would you still oppose the rule?

Anecdotal evidence indicates that the police have great difficulty disentangling the exclusionary rule from the fourth amendment itself. Thus, shortly after Mapp was decided, a St. Paul officer argued that his prior unconstitutional conduct had not been improper because the courts of his state had accepted evidence—had "okayed" what he and his colleagues had done. 93 And at least two of the nation's leading police chiefs, William Parker of Los Angeles and Michael Murphy of New York, viewed the exclusionary rule (which has nothing to say about the content of the law governing the police) as a rule that imposed new substantive restrictions on searches and seizures 94—"dramatic testimony to the hollowness of the Fourth Amendment in the absence of the rule." 95

More recently, the implications of this anecdotal evidence were confirmed by an intensive study of New York police perceptions and attitudes about the exclusionary rule. 96 According to this study (the only one of its kind, so far as I know), there is—

strong evidence that, regardless of the effectiveness of direct sanctions, police officers could neither understand nor respect a Court which purported to impose constitutional standards on the police without excluding evidence obtained in violation of those standards.

... [M]ost police officers interpret the Wolf case as not having imposed any legal obligation on the police since, under that decision, the evidence would still be admissible no matter how it was obtained.

... No matter what sanctions may be imposed in its stead,

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93. See Kamisar, supra note 53, at 442-43.
94. See United States v. Leon, 468 U.S. 897, 954 n.13 (Brennan, J., dissenting); Davies, supra note 56, at 629-30; Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?, 62 JUDICATURE 66, 72-73 (1978).
95. Davies, supra note 56, at 630 n.112.
96. Loewenthal, Evaluating the Exclusionary Rule in Search and Seizure, 49 UMKC L. REV. 24 (1980). The author of the study, who teaches police officer students at John Jay College of Criminal Justice of the City University of New York, conducted many interviews with police commanders on all levels, as well as with the police officer students. He was also a participant-observer on 40 tours of duty concerning various phases of police work. Id. at 29.
police officers are bound to view the elimination of the exclusionary rule as an indication that the fourth amendment is not a serious matter, if indeed it applies to them at all.

... Since the rule has become functionally identified with the fourth amendment, the removal of the rule is likely to be interpreted as an implicit condoning of violations of the fourth and fourteenth amendments, no matter what substitute remedies may be applied.97

Finally, if I were one of Professor Grano's students, I would ask him one more question (or two more closely related questions): If your goal is to uproot rules that "impede the discovery of reliable evidence at the investigative stages of the criminal justice process,"98 how would you achieve that objective by replacing the exclusionary rule with "a fully effective alternative safeguard for fourth amendment rights?" If the alternative to the exclusionary rule were truly effective, wouldn't it restrain the police from violating the fourth amendment in advance?

It is hard to improve on the late John Kaplan's comments on the fourth amendment exclusionary rule:

From a public relations point of view, it is the worst possible kind of rule because it only works at the behest of a person, usually someone who is clearly guilty, who is attempting to prevent the use against himself of evidence of his own crimes... If there were some way to make the police obey, in advance, the commands of the Fourth Amendment, we would lose at least as many criminal convictions as we do today, but in that case we would not know of the evidence which the police could discover only

97. Id. at 29-30. Although a recent study of Chicago narcotics officers, Comment, The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers, 54 U. CHI. L. REV. 1016 (1987) (authored by Myron W. Orfield, Jr.), did not focus primarily on police attitudes toward the exclusionary rule, its findings are consistent with Professor Loewenthal's study. Many of the officers interviewed, for example, expressed the view that the exclusionary rule was "necessary as a limit on police behavior." Id. at 1051.

98. Professor Grano notes, quoting the prefatory statement of Attorney General Edwin Meese III with apparent approval, that "the Truth in Criminal Justice Series was prompted by 'grave concern' that '[o]ver the past thirty years... a variety of new rules have emerged that impede the discovery of reliable evidence at the investigative stages of the criminal justice process...'." Grano, Introduction, at 402.
through a violation of the Fourth Amendment. It is possible that the real problem with the exclusionary rule is that it flaunts before us the price we pay for the Fourth Amendment.\footnote{J. Kaplan, Criminal Justice 215-16 (2d ed. 1978).}

I take it that Professor Grano supports a rule that would make the police obey the commands of the fourth amendment \textit{in advance}. (What else does one mean by a “fully effective alternative safeguard for fourth amendment rights?”) I fail to see how such an alternative rule would “denigrate[] the primacy of truth as a goal of the criminal justice system”\footnote{In the course of attacking the exclusionary rule, Professor Grano states: “[I]t may not be an exaggeration to say that no other rule of criminal procedure more effectively denigrates the primacy of truth as a goal of the criminal justice system.” Grano, Introduction, at 412.} any less than the exclusionary rule does.

Wouldn’t an effective tort remedy impair the government’s “ability to identify [a criminal] as the perpetrator of an offense and to obtain and use evidence establishing his guilt” just as much as the exclusionary rule?\footnote{Cf. Markman, Foreword: The Truth in Criminal Justice’ Series, 22 U. Mich. J.L. Ref. 425, 428 (1988) (“To bring the incapacitative and specific deterrent effects of the system into play against a criminal, the authorities must have the ability to identify him as the perpetrator of an offense and to obtain and use evidence establishing his guilt.”).} More generally, wouldn’t a \textit{meaningful} tort remedy, or any other \textit{effective} means of controlling unconstitutional police activity, “sacrifice truth” and \textit{subordinate} the goal of apprehending and punishing criminals to fourth amendment interests just as much as the exclusionary rule?

Professor Grano contemplates a “new world,” one without the exclusionary rule.\footnote{See Grano, Introduction, at 423.} In that new world, the convictions of “guilty” defendants would not be overturned because of fourth amendment violations, but (if the effective alternative rule were \textit{really} effective) only because such criminals would not be illegally arrested or unlawfully searched in the first place.\footnote{See Tribe, Constitutional Calculus: Equal Justice or Economic Efficiency? 98 Harv. L. Rev. 592, 609-10 (1985); \textit{see also} Dripps, supra note 4, at 622, 628.} The criminal would not be “set free” because the privacy of his home or person had been infringed—but he would remain free all along because (lacking adequate grounds

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\caption{Graph showing the relationship between the exclusionary rule and the primacy of truth.}
\end{figure}
to arrest him or to search his home, and restrained by an effective tort remedy), the police would not infringe his privacy in the first place.

Come to think of it, there is much to be said for such a world—but I doubt that many law enforcement officials would have anything good to say about it. They would probably be too busy complaining about the costs of that new-fangled "fully effective alternative safeguard for fourth amendment rights." Once again, however, they would really be complaining about the costs of the fourth amendment.

SHOULD THE POLICE BE PERMITTED (AS THEY WERE IN THE "OLD WORLD" OF CRIMINAL PROCEDURE) TO CONTINUE TO QUESTION SUSPECTS IN THE FACE OF THEIR REQUESTS TO CONSULT A LAWYER?

Professor Grano reminds us that some thirty years ago, in Crooker v. California and the companion case of Cicenia v. LaGay, the Court upheld the admissibility of the challenged confessions even though in both cases the police had denied the suspects' requests to contact a specific attorney.

Crooker arose as follows: After he was taken to the police station, Crooker stated that he wanted a lawyer before he would talk with the police. The police told him that he could contact an attorney "after our investigation was concluded." Crooker then named a friend who was a lawyer and who "would probably handle the case for him" and asked whether he could call that person. Again he was rebuffed. Again he was told that he would be allowed to call the lawyer only after the police were "through with the investigation." Although it is not clear from the majority opinion, it seems that during the eight or nine hours he was held until five o'clock in

104. Cf. Comment, supra note 97, at 1018 (officers "believed an alternative tort remedy would 'overdeter' the police in their search and seizure activities").
105. See Grano, Introduction, at 397-98.
108. These facts are set forth in the state supreme court opinion, 47 Cal. 2d 348, 351-52, 303 P.2d 753, 756 (1956), and in Justice Douglas's dissent, 357 U.S. at 441-42. The facts are treated more summarily in the opinion of the Court.
the morning, when he was placed in jail and permitted to sleep, Crooker made "repeated requests" for a lawyer and that all such requests were denied.\textsuperscript{109}

For the police to persist in questioning him after preventing his attempts to contact a specific lawyer, maintained Crooker, was both unfair and coercive.\textsuperscript{110} A 5-4 majority, per Clark, J., was not impressed. As Professor Grano notes,\textsuperscript{111} the majority retorted that the rule suggested by Crooker would have "a devastating effect" on law enforcement, "for it would effectively preclude police questioning—\textit{fair as well as unfair}—until the accused was afforded opportunity to call his attorney."\textsuperscript{112} Had issue been joined? The Court seemed to think so.

Why, in 1958, did the Court consider the police questioning to which Crooker was subjected "fair" and "noncoercive?" I think it came down to this: The Court believed, or simply assumed, that precluding or postponing police questioning until a suspect's request for counsel was honored would have a devastating effect on the administration of criminal justice. (On the eve of \textit{Miranda}, however, law enforcement officials would have been delighted to settle for this.)\textsuperscript{113} Therefore,

\textsuperscript{109} Five years later, dissenting in \textit{Haynes v. Washington}, 373 U.S. 503, 525 (1963), the author of the \textit{Crooker} opinion, Justice Clark, looked back on that case as one where "petitioner's repeated requests for an attorney were denied . . . ." Moreover, dissenting in \textit{Crooker}, Justice Douglas describes the case as one where, after the initial requests for an attorney were denied, "[t]his demand for an attorney was made over and over again" prior to the time Crooker confessed. 357 U.S. at 442 (Douglas, J., dissenting).

\textsuperscript{110} \textit{Crooker}, 357 U.S. at 437-38.

\textsuperscript{111} \textit{Grano, Introduction}, at 397-98.

\textsuperscript{112} \textit{Crooker}, 357 U.S. at 441. Mr. Crooker was a college graduate who had attended the first year of law school, during which time he had studied criminal law. \textit{See id.} at 435, 438. Thus, but for \textit{Cicenia}, decided the same day, \textit{Crooker} could be read narrowly as a case where the possibility of coercion produced by police denial of a specific request to consult with counsel was negated by the suspect's intelligence and education. \textit{See id.} at 438. But Mr. Cicenia had not attended law school nor graduated from college. Nevertheless, without discussing his intelligence or education, the \textit{Cicenia} Court quickly disposed of the contention that his confession was "vitiated by police refusal to permit him to confer with counsel during his detention" on the ground that that contention "is disposed of by \textit{Crooker v. California} . . . decided today." Cicenia v. LaGay, 357 U.S. 504, 508 (1958).

\textsuperscript{113} At least in pre-\textit{Miranda} days (when the rights of a suspect were much less known), very few suspects \textit{initiated} a request for \textit{retained} counsel—and that was the narrow right Crooker was urging. Moreover, in those few instances where requests for an identified lawyer were made, in at least some jurisdictions they were usually honored as a matter of practice. \textit{See W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY} 393-94 (F. Remington ed. 1965) (reporting on the practice in Midwestern cities); \textit{Hearings on S. 486 and H.R. 7525 Before the Senate Comm. on
concluded the Court, it had to allow police questioning to continue in the face of suspects' requests for counsel and in order to do so it had to characterize such questioning as “fair” and “noncoercive.”

The Crooker and Cicenia cases, Grano reminds us, “illustrate the old world” of criminal procedure. Indeed they do.

Evidently, Grano supports both the reasoning and the result in those cases. Although he does not say so explicitly, he strongly implies that, so far as the law of confessions is concerned, Crooker and Cicenia not only represent a “different world,” but a better one.

One need not be an admirer of Miranda to condemn Crooker and Cicenia. I venture to say that even the late Judge Henry Friendly, perhaps the most formidable critic of Miranda, and the Warren Court’s approach to criminal procedure generally, would have balked at the reasoning and the result in Crooker and Cicenia.

Although I take a much more expansive view of the right to counsel, Judge Friendly drew a distinction between (a) requiring the government to provide counsel for a suspect or even to advise him that he had a right to a lawyer (which he did not think was mandated by the sixth amendment) and (b) requiring the government to take a “neutral” stance and thus prohibiting its agents from frustrating a suspect’s effort to contact a lawyer (which, he thought, might be enough to

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It is not amiss to note that the overwhelming consensus of the empirical studies available is that even when, as Miranda requires, suspects are advised, or at least are supposed to be advised, of their right to a lawyer before and during police questioning and of their right to a lawyer at state expense if they cannot afford to hire one, many continue to confess without bothering to obtain the assistance of counsel. See, e.g., Medalie, Zeitz & Alexander, Custodial Police Interrogation in Our Nation’s Capital: The Attempt to Implement Miranda, 66 Mich. L. Rev. 1347, 1352 n.23 (1968) (of 185 persons arrested for homicide, only 31 (17%) made a telephone request for counsel); see generally authorities discussed infra note 164.

115. Id. at 398.
116. Thus, Grano informs us that he “pause[s] over” Crooker and Cicenia in class because these cases “demonstrate that the criminal justice system not so long ago proceeded from quite different assumptions, that we did have choices along the way, and that today's way of thinking—the students' automatic way of thinking—was not predestined to prevail.” Id. He also tells us that when his students “are incredulous to learn” that he favors “removing counsel, both retained and appointed, from the interrogation room,” he refers to Crooker and Cicenia. Id.
117. See H. Friendly, Benchmarks 235-84 (1967).
satisfy the sixth amendment).\textsuperscript{118}

The same "neutrality" stance is reflected in the first draft—the pre-\textit{Miranda} draft—of the American Law Institute's \textit{Model Code of Pre-Arraignment Procedure}:

Although we do not believe that the state has an affirmative obligation to insure that persons in custody will not incriminate themselves, this does not mean that the state has a right to tip the scales the other way and prevent a person in custody from seeking aid and assistance at every step of the investigation if he wishes to have it. And although the state has no obligation to refrain from inquiry if a prisoner is lawfully in custody and available for inquiry, the state has no right at any time to take positive steps to insure that that inquiry will be carried on under conditions which deprive a person of legal and moral support and advice.\textsuperscript{119}

Not infrequently, as a member of the Advisory Committee to the Model Pre-Arraignment Code, I criticized the Reporters for being too insensitive to the rights of suspects. I recall their views now to demonstrate that even those who take what I consider to be a rather cramped view of the fifth and sixth amendments would not support \textit{Crooker} and \textit{Cicenia}.

Although I have done so up to this point, one need not analyze the \textit{Crooker} rule in terms of the right to counsel. One may also appraise it in light of the pre-\textit{Escobedo}, pre-\textit{Miranda} "voluntariness" test. Whether or not one believes that custodial police interrogation \textit{without more} is "inherently coercive" or, more accurately, that such interrogation generates enough tension and pressure to constitute "compulsion" within the meaning of the fifth amendment,\textsuperscript{120} what about the circumstances in which Mr. Crooker found himself? Isn't persistent stationhouse questioning in the face of a suspect's


\textsuperscript{119} A \textit{MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE} 186 (tent. draft no. 1, 1966), (commentary to § 5.07) [hereinafter \textit{MODEL CODE}].

clear and repeated expressions of unwillingness to talk to the police without first consulting a lawyer "inherently coercive"? Doesn't continued interrogation under such circumstances significantly undermine the average person's resolve?\(^{121}\)

Send the message that he is cut off from the outside world unless and until he answers his captor's questions? Impress upon him that his ultimate freedom and fate are in the hands of his captors?\(^{122}\)

During its long reign, the terminology of the pre-Miranda "voluntariness" test remained the same—the courts continued to use such language as "voluntariness," "coercion," "free will," "unconstrained choice," "breaking the will" and "overbearing the mind"—but the meaning of these elusive terms changed. As Justice Harlan pointed out in his *Miranda* dissent, there was "a continuing re-evaluation on the facts of each case of how much pressure on the suspect was permissible"\(^{123}\) and "the overall gauge has been steadily changing, usually in the direction of restricting admissibility."\(^{124}\)

Even before the "voluntariness" test was largely displaced, first by *Escobedo* and then by *Miranda*, I doubt that *Crooker* and *Cicenia* were still "good law." I have in mind *Haynes v. Washington*,\(^{125}\) the last of the pre-*Escobedo*, pre-*Miranda* cases to apply the "voluntariness" test, where, during the sixteen-hour period between the time of his arrest and the time he signed a written confession, the suspect "several times" asked the police to allow him to call his wife, only to be told each time that he would not be permitted to do so unless and until he "cooperated" with the police and admitted his involvement in the case.\(^{126}\) In invalidating the resulting

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121. Mr. Crooker was not the "average defendant," but a college graduate who had attended one year of law school. See supra note 112. As the companion case of *Cicenia v. LaGay* indicates, however, even if Mr. Crooker had been an average defendant, the result would have been the same. See id.
122. Section 5.04(b) of the pre-*Miranda* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE draft classifies "persistent questioning" of a suspect after he has "made it clear that he is unwilling to make a statement or wishes to consult counsel before making a statement" as one form of "unfair inducement of statements." MODEL CODE, supra note 119, at 45. A note on § 5.04(b), id., explains that "[p]ersistence in interrogation in the face of such a clear expression of will would clearly appear to be coercive."
124. Id. at 508 (Harlan, J., dissenting).
126. Id. at 504.
confession, a 5-4 majority, per Goldberg, J., observed:

Confronted with the express threat of continued incommunicado detention and induced by the promise of communication with and access to family, Haynes understandably chose to make and sign the damning written statement; given the unfair and inherently coercive context in which made, that choice cannot be said to be the voluntary product of a free and unconstrained will, as required by the Fourteenth Amendment.\(^1\)

As I see it, the Court could have described Crooker's plight essentially the same way it described Haynes'. Indeed, all other things being equal, repeated denials of a suspect's request to call a lawyer strike me as more likely to undermine a person's resolve—more likely to bring home to him the intimidating nature of incommunicado detention—than repeated denials of a suspect's request to contact his spouse. As the Court has since observed:

[T]he lawyer occupies a critical position in our legal system because of his unique ability to protect... a client undergoing custodial interrogation... 

... Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts.\(^2\)

In any event, I do not see how one can reconcile the Court's approach in *Haynes* with its reasoning five years earlier in *Crooker* and *Cicenia*.\(^3\) More important, Justice Clark, the author of the *Crooker* opinion, did not see how *Crooker* and

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\(^1\) Id. at 514.

\(^2\) Fare v. Michael C., 442 U.S. 707, 719 (1979) (Blackmun, J.). I realize that the Court made these remarks in a case applying and explaining the *Miranda* doctrine, but it seems to me that it is a sound observation whatever test a court is using for admitting confessions. A lawyer has always had a "unique ability" to protect a person in the hands of the police; she has always been regarded as the prime protector of a suspect's rights.

\(^3\) See Note, *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 1004 (1966) (pre-Miranda) ("[U]nless *Haynes v. Washington* is 'limited to its facts' or otherwise explained, the grant of a request for counsel may be required by the voluntariness test.").
Haynes could be reconciled either. Dissenting in Haynes, he protested:

The Court concludes . . . that the police, by holding petitioner incommunicado and telling him that he could call his wife after he made a statement and was booked, wrung from him a confession he would not otherwise have made, a confession which was not the product of a free will. In Crooker v. California . . . however, we found no coercion or inducement, despite the fact that the petitioner's repeated requests for an attorney were denied and "he was told that 'after [the] investigation was concluded he could call an attorney.'”

Some rules of the "old world" of criminal procedure might have been better than those we have today. But not the Crooker-Cicenia rule. I think it unlikely that the Court will overrule Miranda, at least in the foreseeable future. But even if it does I believe it highly unlikely that the Court will revivify Crooker and Cicenia. I doubt that we shall ever pass that way again. Nor should we.

IS MIRANDA “INCOMPATIBLE” WITH THE APPROACH TAKEN IN THE MORE RECENT CONFESSION CASES?

According to Professor Grano, the “philosophical premises” underlying Miranda and “the recent cases that have been chipping away at Miranda” are “contradictory” and “incompatible.” To make his point, Grano compares and contrasts language in the recent case of Moran v. Burbine with passages in a decision that preceded Miranda by two years, Escobedo v. Illinois (but strangely, not with any language in Miranda itself).

Burbine recognized the need for, and the importance of,
police questioning as "a tool for effective enforcement of criminal laws." It declined to adopt a rule "requiring the police to inform the suspect of an attorney's efforts to contact him" when the suspect had waived his rights (including the right to counsel) and was unaware that a relative of his had asked a lawyer to meet with him. The Court concluded that the "minimal benefit" such a rule would add to the suspect's protection was outweighed by the "substantial cost" it would impose on society.

_Escobedo_, on the other hand, does contain some sweeping language indicating an unwillingness to accommodate competing interests. Thus, the _Escobedo_ Court rejected the argument that if a right to counsel were provided prior to indictment, the number of confessions obtained by the police would be significantly reduced, retorting:

This argument, of course, cuts two ways. The fact that many confessions are obtained during this period points up its critical nature as a "stage when legal aid and advice" are surely needed. . . . The right to counsel would indeed be hollow if it began at a period when few confessions were obtained.

At another point, as Grano notes, the _Escobedo_ majority observed:

We have learned the lesson of history . . . that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrin-

137. Id.
138. The _Escobedo_ opinion has an accordion-like quality. At some places the language of the opinion is quite confining, so much so that it arguably limits the case to its special facts. At other places, however, the opinion does launch a broad attack on the use of confessions in general and does threaten (or promise) to eliminate virtually all police interrogation. For a summary of the wide disagreement over the probable meaning of _Escobedo_—and over what it ought to mean—see Y. Kamisar, _Police Interrogation and Confessions: Essays in Law and Policy_ 161-62 (1980) [hereinafter Kamisar Essays].
140. See Grano, Introduction, at 407.
Because Grano never quotes from *Miranda*, only from *Escobedo*, how does he establish that the premises of *Miranda* and the recent confession cases are “contradictory” and “incompatible”? He assures us that “*Miranda* and its progeny . . . are essentially dependent upon the thinking reflected in *Escobedo*” and that the language in *Escobedo* “reflects the thinking that underlies *Miranda*.142 But he never supports, or even tries to support, that assertion. I don’t think he can. I think that the *Escobedo* language he quotes only reflects the thinking in *Escobedo*, not that in *Miranda*.

Although many hoped that the *Miranda* Court would beat a general retreat from *Escobedo*, which the *Miranda* Court did not do, it did turn away from the expansive language and far-reaching implications of *Escobedo*. *Miranda* did not build on the thinking in *Escobedo* as much as it displaced it. Although the *Miranda* Court moved in the same general direction as *Escobedo*, it chose a different path. Its “use of ‘custodial interrogation’ actually mark[ed] a fresh start in describing the point at which the Constitutional protections begin.”143

This is not something I am saying for the first time in response to Professor Grano. Rather, it is something that seemed fairly clear to me a quarter of a century ago, the year *Miranda* was decided:

As I read *Miranda*, it is not simply a bigger and better (or worse, depending upon your viewpoint) *Escobedo*. It is quite different. *Escobedo* assigns primary significance to the amount of evidence of guilt available to the police at the time of questioning; hence there is much talk about “prime suspects,” “focal point,” and the “accusatory” stage. *Miranda*, on the other hand, attaches primary significance to the conditions surrounding or inherent in the interrogation setting; hence it includes much talk of “police-

141. 378 U.S. at 488-89 (footnote omitted).
dominated” or “government-established atmosphere” that “carries its own badge of intimidation,” “compulsion inherent in custodial surroundings,” “subjugating the individual to the will of his examiner,” “putting the defendant in such an emotional state as to impair his capacity for rational judgment,” and the like . . . . [Absent the requisite inherent pressures] the person subjected to police questioning is not entitled to the Miranda warnings—no matter how much the police have “focused” on him or to what extent they regard him as the “prime” suspect, the only suspect or “the accused” . . . Miranda has not enlarged Escobedo as much as it has displaced it.

. . . . I think Miranda is a better, tighter, more carefully thought-out opinion. The Miranda Court had the benefit of a number of first-class briefs, a number of probing, illuminating law review articles and notes, and the very valuable commentaries to the first draft of the American Law Institute's Model Code of Pre-Arraignment Procedure. In the two years between Escobedo and Miranda, there was a tremendous concentration of thought and energy on the problem, a very significant clarifying and sharpening of the issues.144

Many Court observers were greatly troubled, one might even say alarmed, by the sweeping language and broad implications of Escobedo. They voiced concern that Escobedo's reliance on the sixth amendment “apparently makes available to any suspect a full-blown right to counsel at the incipient accusatory stage when police interrogation shifts from general inquiry to a probe focusing upon him.”145 They feared that the Court


Although, as discussed earlier, in contrasting the Warren and Burger Courts’ approach to police interrogation, Professor Grano equates the thinking in Escobedo with that in Miranda, at another point in his Introduction he observes: “While Miranda rights, including the Miranda right to counsel, are premised on fifth amendment considerations, Escobedo . . . relied on the sixth amendment right to counsel . . . . In retrospect, the Court perceived that Escobedo, like Miranda, really should have been decided on fifth amendment grounds.” Grano, Introduction, at 408-09.

145. Traynor, supra note 25, at 669 (pre-Miranda).
might be in the process of shaping "a novel right not to confess except knowingly and with the tactical assistance of counsel." The admissibility of "volunteered" statements seemed in doubt.

The recent Burger Court confession cases did not put these fears to rest. *Miranda* did. "[T]he Court could have developed *Escobedo* into a doctrine . . . mandating that no waiver of rights would be accepted unless the accused had first consulted with counsel." The Burger Court did not cut off that development; *Miranda* did. *Escobedo* manifested what not a few would call "extremist 'thinking.'" The Burger Court did not revise that thinking; *Miranda* did.

Perhaps because a total denial of access to a suspect as a source of evidence "was unsalable to a majority of the Court and, in the end, was probably unbearable to everyone," the *Miranda* Court sought to strike a balance between the interests of the police and the rights of suspects. It may be said, and it has been, that *Miranda* failed to achieve a sensible or a "principled" balance—that it produced "at best a tense, temporary, ragged truce" that should satisfy nobody.

But, whatever may be said about *Escobedo*, I do not think it can be said of *Miranda*, as Grano suggests, and as another leading critic of the case flatly asserts, that "the Court boldly and improperly resolved the contradictions in the law of confessions by giving it a single focus—protection of the suspect"—that the Court failed to consider or to try to accommodate the needs of the police:

> Although one would gain little inkling of it from the hue and cry that greeted that much-maligned case . . . *Miranda* marked a "compromise" between the old "voluntariness"

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149. *Id.* at 526.
151. A 12-page section of the *Miranda* opinion, 384 U.S. 436, 479-91 (1966), responds to the argument that "society's need for interrogation outweighs the privilege," *Id.* at 479. In this section, the *Miranda* majority maintains that the experience in some other countries indicates that the danger to law enforcement in restrictions on interrogation is "overplayed" and observes that, despite the fact that its practice has been to give suspects some of the warnings now required by *Miranda*, the FBI has compiled a record of effective law enforcement.
test (and the objectionable police interrogation tactics it permitted in fact) and extreme proposals that—as the fear (or hope) was expressed at the time—would have “killed” confessions. On the eve of Miranda there may have been reason to believe that “the doctrines converging upon the institution of police interrogation [were] threatening to push on to their logical conclusion—to the point where no questioning of suspects [would] be permitted” [quoting Justice Schaefer], but Miranda fell well short of that point.

Miranda did not, and did not try to, “kill” confessions. It left the police free to hear and act upon “volunteered” statements, even though the “volunteer” had been taken into custody and neither knew nor was informed of his right to counsel and to remain silent; it allowed the police to conduct “[g]eneral on-the-scene questioning” or “other general questioning of citizens” [quoting Miranda], even though the citizen was both uninformed and unaware of his rights; and, even when the proceedings moved to the station house, and police interrogators were admittedly bent on eliciting incriminating statements from the prime suspect, it allowed them to obtain waivers of the privilege and the assistance of counsel without the advice or presence of counsel, without the advice or presence of a judicial officer, and evidently without any objective recordation of the proceedings.152


See also Benner, supra note 40, at 161 (“Confronted with the storm of controversy that [Escobedo] created, the Court retreated in Miranda, and struck a compromise”; this compromise permitted the police to obtain waivers of all suspects’ rights and thus “transformed the debate about self-incrimination into a debate about waiver”); Frankel, supra note 148, at 529 (criticizing Miranda for “leaving an opening” which “predictably meant” that confused, unintelligent or unsophisticated suspects would confess); Herman, The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation, 48 OHIO ST. L.J. 733, 736 (1987) (“In place of a flat prohibition [against custodial interrogation], the [Miranda] Court compromised”; “[t]his compromise was intended to limit custodial interrogation to those suspects who were willing to submit to it”); Saltzburg, Miranda v. Arizona Revisited: Constitutional Law or Judicial Fiat, 26 WASHBURN L.J. 1, 23 (1986) (“Miranda is more of a compromise than most critics would care to admit.”); Schulhofer, Reconsidering Miranda, supra note 31, at 460 (“The Miranda decision, of course, was a compromise”; “it stopped far short of barring all pressured or ill-considered waivers of fifth amendment rights.”). But cf. Stuntz, Self-Incrimination and Excuse, 88 COLUM. L. REV. 1227, 1264-68 (1988).
To be sure, a number of Burger and Rehnquist Court confession cases have "chipped away" at *Miranda*, as Grano characterizes it,\textsuperscript{153} but it is not at all clear, as he maintains, that *Moran v. Burbine* is one of them. A footnote in the *Miranda* opinion does seem to say that preventing an attorney from consulting with his client would constitute a violation of the sixth amendment right to the assistance of counsel,\textsuperscript{154} but at that point the *Miranda* Court was discussing *Escobedo* and in that case the suspect repeatedly asked to speak to his lawyer and was aware of the fact that the police were preventing his lawyer from talking to him.\textsuperscript{155} This realization may well have underscored the police domination of the situation and undermined the suspect's resolve.\textsuperscript{156}

The *Miranda* Court wrote a sixty-page opinion based on the premise that police-issued warnings can adequately protect a suspect's rights. It is hard to believe that that Court would consider the now-familiar warnings insufficient when—even though a suspect has been adequately advised of his rights and has effectively waived them, thus expressing a willingness to talk to the police without a lawyer—a lawyer whose services the suspect has not sought has, unbeknown to him, entered the picture.

It may be forcefully argued that a rule complementing the *Miranda* doctrine should bar the admissibility of a confession obtained in *Burbine*-like circumstances, but I do not think that *Miranda* requires such a result. The *Burbine* Court's reading of *Miranda* is not the only possible interpretation of that

\textsuperscript{153} Some readers may wonder why a statement "volunteered" by a person taken into police custody is admissible even though that person has not been warned of his rights. The reason is that absent police interrogation, the pressures and anxieties generated by arrest and detention do not rise to the level of "compulsion" within the meaning of the privilege. Absent the requisite "compulsion" there is no need to dispel or to neutralize the pressures of the police environment by giving the *Miranda* warnings. Thus, as Justice White pointed out in his *Miranda* dissent, a suspect "may blurt out (an admissible) confession . . . despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission." 384 U.S. at 533 (White, J., dissenting).


\textsuperscript{155} See 384 U.S. at 465 n.35. For a detailed discussion of this footnote, see KAMISAR ESSAYS, *supra* note 138, at 217 n.94.


\textsuperscript{156} See KAMISAR ESSAYS, *supra* note 138, at 217 n.94.
landmark case, but I think it is a plausible and defensible one. Speaking for six members of the Court, Justice O'Connor observed:

Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.

... Because the proposed modification ignores the underlying purposes of the *Miranda* rules and because we think that the decision as written strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights, we decline the invitation to further extend *Miranda*'s reach.157

In any event, and more important for present purposes, did the *Burbine* Court read *Miranda* the way Grano reads *Escobedo*, or did it view *Miranda* quite differently? One may plausibly read the passages from *Escobedo* quoted by Grano as indicating that that case operated on the assumption that the rights and needs of the suspect are paramount to all others. But the *Burbine* Court viewed *Miranda* (quite properly, I believe) as a case that rejected "the more extreme position" urged by the ACLU and instead sought to strike a balance between the need for police questioning and the need to protect a suspect against impermissible compulsion. Observed Justice O'Connor for the Court:

*Miranda* attempted to reconcile these opposing concerns by giving the defendant the power to exert some control over the course of the interrogation. Declining to adopt the more extreme position [advocated by the ACLU] that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation... the Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means. Police questioning... could continue in its traditional form, the

Court held, but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators.

. . . . As any reading of Miranda reveals, the decision, rather than proceeding from the premise that the rights and needs of the defendant are paramount to all others, embodies a carefully crafted balance designed to fully protect both the defendant's and society's interests.  

I realize that some might say that the Burbine Court's characterization of Miranda is merely "revisionist history." I am confident that that charge can be rebutted but it is hard to do so without discussing and quoting at considerable length from the Miranda opinion, the briefs, the oral argument, and the contemporaneous literature. In brief, I can say this much: Long

158. Id. at 426-27, 433 n.4. Miranda's major weakness (or saving grace, depending upon one's viewpoint) is that it permits suspects in police custody to waive their rights without actually obtaining any guidance from counsel.

In oral argument, in the course of questioning a defense lawyer in a companion case to Miranda, Justice Stewart suggested that a suspect "need[ed] a lawyer before he could waive them [his rights]" and that a suspect could not waive his rights "without the advice of counsel." See extracts from the oral argument in Y. Kamisar, W. LAFAVE & J. ISRAEL, supra note 26, at 441, 443. The lawyer agreed that "this is the worst place for waiver" because "[t]he party alleging waiver has control of the party alleged to have waived." Id. at 443-44. Nevertheless, he concluded that the suspect's rights could be waived without the advice of counsel, adding: "I think we do have to recognize some of the realities of law enforcement." Id.

The ACLU amicus brief maintained repeatedly that effective protection of a custodial suspect's rights required the "presence of counsel" (emphasis added), not merely a warning as to the availability of counsel. See Kamisar, A Dissent from the Miranda Dissents, 65 MICH. L. REV. 59, 67 n.47 (1966), reprinted in KAMISAR ESSAYS, supra note 138, at 41 n.11. Although the Court must have considered this contention—it was heavily influenced by other portions of the ACLU brief—it rejected it without any explicit discussion. This aspect of the case did not go unnoticed. For example, the day after Miranda, ACLU spokesperson Aryeh Neier complained that the case "doesn't go far enough" because "a person must have the advice of counsel in order to intelligently waive the assistance of counsel." Kamisar, supra, at 67, reprinted in KAMISAR ESSAYS, supra note 138, at 47-48.

For a forceful argument that the ACLU lawyers had the right idea and that "all suspects in custody should have a nonwaivable right to consult with a lawyer before being interrogated by the police," see Ogletree, Are Confessions Really Good for the Soul? A Proposal to Mirandize Miranda, 100 HARV. L. REV. 1826, 1842 (1987). See also Frankel, supra note 148, at 529, maintaining that, because the Miranda Court deemed a nonwaivable right to consult with a lawyer too great a blow to law enforcement, "it was driven to stultify itself by leaving an opening which predictably meant that the defendant who is naive, confused, unintelligent or careless would confess to the police while others would not."
before *Burbine* was decided, I viewed *Miranda* essentially the same way the *Burbine* Court did.¹⁵⁹

**WILL (SHOULD) THE COURT OVERRULE *MIRANDA*?**

Professor Grano recalls that shortly after *Miranda* was handed down I reported that the decision had "‘evoked much anger and spread much sorrow among judges, lawyers and professors.’"¹⁶⁰ Where, Grano wonders, have all those judges, lawyers, and professors gone?¹⁶¹

A major reason *Miranda* caused much anger and sorrow *at first* is that many feared—as did the *Miranda* dissenters—that the landmark decision would strike law enforcement a grievous blow. Few press accounts of the case failed to quote from Justice White’s bitter dissent, in the course of which he asserted:

The rule announced today will measurably weaken the ability of the criminal law to perform [its] tasks... There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence, will now... either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.

... In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him... The real concern is... [the impact of the decision] on those who rely on the public authority for protection and who without it can only engage in violent self-help... There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.¹⁶²

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¹⁵⁹. *See, e.g.*, *supra* text accompanying note 152.
¹⁶¹. *See id.* at 399-400.
¹⁶². 384 U.S. at 541-43 (White, J., joined by Harlan and Stewart, JJ.,
No one could be sure what the effects of *Miranda* would be. No less staunch a supporter of the Warren Court's "revolution" in criminal procedure than A. Kenneth Pye warned at the time that "[i]f the fears of the dissenters prove justified, it may be necessary to reconsider whether society can afford the luxury of the values protected and implemented in [Miranda]."163 As twenty-five years of life with *Miranda* has demonstrated, however, the *Miranda* dissenters' fears did not prove justified:

By the early 1970s, well before the Supreme Court began trimming *Miranda*, the view that *Miranda* posed no barrier to effective law enforcement had become widely accepted, not only by academics but also by such prominent law enforcement officials as Los Angeles District Attorney Evelle Younger and Kansas City police chief (later FBI Director) Clarence Kelly. Justice Tom Clark, who filed an impassioned dissent in *Miranda*, later confessed "error" in his "appraisal of [its] effects upon the successful detection and prosecution of crime."164


The best-known earlier studies are Project, Interrogations in New Haven: The Impact of Miranda, 76 YALE L.J. 1519, 1571, 1589 (1967) (the Yale Study) (*Miranda* warnings "had little impact" on suspect's behavior; "in almost every case" police had adequate evidence to convict without interrogation); Office of the District Attorney, County of Los Angeles, Results of Survey Conducted in the District Attorney's Office of Los Angeles County Regarding the Effects of the Dorado and Miranda Decisions upon the Prosecution of Felony Cases 3-4 (Aug. 4, 1966) (confession rates not reduced by recent decisions; if a person "wants to confess," *Miranda* or *Miranda*-type warnings are "not likely to discourage him"); Medalie, Zeitz & Alexander, supra note 113 (rate of statements given to police "remarkably uniform" before and after *Miranda*; "little has changed since *Miranda*"); Seeburger & Wetrick, Miranda in Pittsburgh—A Statistical Study, 29 U. PITT. L. REV. 1 (1967) (confessions did drop significantly after *Miranda*, but clearance and conviction rates remained virtually unchanged).

Most of the empirical studies mentioned above, as well as some others, are summarized and evaluated in A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 101-49 (study draft no. 1, 1968), and in O. STEPHENS, supra, at 168-200; see also L. BAKER, MIRANDA: CRIME, LAW AND POLITICS 180-81, 404-05 (1983).

The Office of Legal Policy Report does maintain that *Miranda* has had a major
Professor Grano does not attempt to refute Professor Stephen Schulhofer's assessment of *Miranda*’s impact on law enforcement. Nor does he challenge Professor Welsh White’s view that “[t]he great weight of empirical evidence supports the conclusion that *Miranda*’s impact on the police’s ability to obtain confessions has not been significant.”

Indeed, Grano takes no notice of any of the empirical studies relied on by Schulhofer, White, and other commentators who have reached similar conclusions.

More recently, a special committee of the American Bar Association’s Criminal Justice Section reported that “[a] very strong majority of those surveyed—prosecutors, judges, and police officers—agree that compliance with *Miranda* does not present serious problems for law enforcement” and that “[p]rosecutors, too, generally have little quarrel with *Miranda.*” Professor Grano does quote this language from the special committee report, but he does so *without comment.* He never tells us whether he accepts or rejects the findings and conclusions of this report.

Evidently Grano takes notice of this report for a very limited purpose—to support his point that the anger and sorrow that *Miranda* once evoked has now dissipated. But the special committee report sheds some light on *why* the initial hostility to *Miranda* has faded away.

Another reason that *Miranda* evoked more dismay in the 1960s than it does today is the confusion and uncertainty it generated in its early years. For example, did it extend to questioning “on the street”? Did it apply, or would the

adverse effect on law enforcement, see REPORT NO. 1, PRETRIAL INTERROGATION, supra note 24, at 510-12, but I think that Professor Schulhofer effectively refutes this contention. *See* Schulhofer, Reconsidering *Miranda*, supra note 31, at 457-58. He points out that all three district attorney studies relied on by the Office of Legal Policy recorded *Miranda*’s effects “before police had an opportunity to adjust interviewing methods and investigative practices to *Miranda*’s requirements.” He notes, too, that the coauthor of the Pittsburgh study, the only academic study relied on by the Office of Legal Policy, “emphatically denies that it provides support for the Justice Department’s claim of damage to law enforcement.”

165. White, supra note 164, at 19 n.99.

166. *See* supra note 164.

167. SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOCIETY, CRIMINAL JUSTICE SECTION, ABA, CRIMINAL JUSTICE IN CRISIS 28-29 (1988).


169. *See* Pye, supra note 163, at 212; *see also* Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 MICH. L. REV. 1320, 1383 (1977) (footnotes omitted):

The police officers with whom I have spoken generally acknowledge that
Court soon apply it, to a person interviewed in his own home or office by an IRS agent? That uncertainty has largely been dispelled. It is now fairly clear that absent special circumstances (such as arresting a suspect at gunpoint or forcibly subduing him), police questioning “on the street” or in a person’s home or office or “roadside questioning” of a motorist detained pursuant to a traffic stop is not “custodial”; as a general matter the *Miranda* doctrine has been limited to the police station or an equivalent setting.

If, as seems to be the current state of affairs, *Miranda* is not adversely affecting law enforcement work to any significant degree; the police have learned to “live with” that once much-maligned and much-misunderstood case, the opinion has not, to put it mildly, been given an expansive reading; and the Court now views the decision as a serious effort to strike a proper balance between the need for police questioning and the importance of protecting a suspect against impermissible compulsion, why overrule it?

As sociologists are fond of telling us, the instrumental effects of governmental action may be slight compared to the response which it entails as a symbol. The authors of the Justice Department’s Office of Legal Policy Report make no secret of

announcement of the *Miranda* warnings causes little difficulty if the warnings requirement is limited to interrogation of arrested persons at the police station or in similar settings (e.g., a patrol car). Difficulties have arisen primarily in situations involving questioning “on the street.” In those cases, it is difficult to determine at what point the interrogation becomes custodial and thus requires *Miranda* warnings.


171. See generally 1 W. LAFAVE & J. ISRAEL, *supra* note 40, at § 6.6 (e), (f) (1984 & Supp. 1989); cf. Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (warning requirement need not be imposed on “normal consent searches” because they occur on highways, homes or offices and “under informal and unstructured conditions” “immeasurably far removed from ‘custodial interrogation.’”

Indeed, as Oregon v. Mathiason, 429 U.S. 492 (1977) and California v. Beheler, 463 U.S. 1121 (1983) (per curiam) demonstrate, even police station questioning designed to produce incriminating statements is not necessarily “custodial interrogation.” In *Mathiason*, the suspect went to the station house on his own after an officer requested that he meet him there and he agreed to do so. 429 U.S. at 493. *Beheler* is more troublesome because there the suspect was said to have “voluntarily agreed to accompany” the police to the station house. 463 U.S. at 1122.

172. Indeed, some police have even grown to like it. Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950, 954 (1987), reports that “support for *Miranda* runs high even in the law enforcement community, and news stories about police reaction to the Justice Department report have carried such headlines as ‘Police Chiefs Defend Miranda Against Meese Threats’ and ‘Ed Meese’s War on Miranda Draws Scant Support.’”

the fact that they are bent on toppling Miranda "because of its symbolic status as the epitome of Warren Court activism in the criminal law area."173

Miranda is a symbol. But which way does that cut? As the author of a book-length account of the case and its aftermath has noted "[i]t was perhaps as a symbol that Miranda had the most salutary impact."174 Symbols are important, especially "the symbolic effects of criminal procedure guarantees"; "they underscore our societal commitment to restraint in an area in which emotions easily run uncontrolled."175 Even one of Miranda's harshest critics recognizes that the case may be seen as "a gesture of government's willingness to treat the lowliest antagonist as worthy of respect and considera-

Moreover, what does overruling Miranda entail? How could the public forget a doctrine that has been part of the popular culture for twenty-five years? How could the public forget that a custodial suspect has certain rights and that the police are supposed to advise him of those rights when that message has been so frequently repeated in mystery novels, television dramas and comic strips?177

How can we tell the many police officers who have spent their entire professional lives in the post-Miranda era to go about their business henceforth as if the most famous criminal procedure case in American history had never been decided? (And what kind of message would that send?) How, in a Miranda-less stationhouse, would (should) the police respond if a suspect asks them whether she has to answer their questions?178

Would overruling Miranda, as Professor White fears, "convey the message that restraints on police interrogation have been largely abandoned"?179 Or would the police, as Professor

173. REPORT NO. 1, PRETRIAL INTERROGATION, supra note 24, at 565.
174. L. BAKER, supra note 164, at 407.
175. Schulhofer, Reconsidering Miranda, supra note 31, at 460; see also Maclin, supra note 31, at 588-89 (1990); White, supra note 164, at 21-22.
176. Caplan, supra note 150, at 1471; see also L. BAKER, supra note 164, at 407.
177. See L. BAKER, supra note 164, at 404; Israel, supra note 169, at 1384.
178. Dissenting in Escobedo (as they were to dissent in Miranda), Justice White, joined by Clark and Stewart, JJ., recognized that if a suspect "is told he must answer and does not know better, it would be very doubtful that the resulting admissions could be used against him." Escobedo v. Illinois, U.S. 478, 499 (1964) (White, J., dissenting).
179. White, supra note 164, at 22.
Israel suggests, continue to advise people of their rights because "[e]ven without Miranda, an important factor in determining whether a confession was voluntary would be whether the warnings had been given?" Even if the police would continue to give warnings in the event Miranda were overruled, would they be the same Miranda warnings or some abbreviated or diluted version? At this point in our history, would overruling Miranda cause more confusion and uncertainty than Miranda did in the first place? Where, wonders Professor Grano, have Miranda’s critics of yesteryear gone? Maybe they haven’t gone anywhere. Maybe they have just grown older and wiser.

180. Israel, supra note 169, at 1386 n.283; see also Escobedo, 378 U.S. at 499 (White, J., dissenting): “When the accused has not been informed of his rights at all the Court characteristically and properly looks very closely at the surrounding circumstances. I would continue to do so.”