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MIRANDA PROJECT INTRODUCTION

Bruce Berner

Good afternoon and welcome to the Miranda Project, the 2005 edition of the Seegers Lectures. I am Bruce Berner, your moderator, currently also sentenced as Associate Dean at VUSL. We have three distinguished panelists with us today whom I will introduce separately and briefly. Each will speak ten to fifteen minutes and we will all entertain questions at the conclusion of the three talks.

The initial conception of today's program was an attempt to anticipate the fortieth anniversary of the decision, *Miranda v. Arizona*, which occurs in 2006. The idea was that the writings which spring from today can be published and be available widely in early 2006 to launch the retrospective on this most intriguing decision.

I will take just a few minutes of our time to create a brief backdrop of the case and the man in the middle of it. For me, the single most important work in understanding the big-picture issues in the American criminal justice system was Herbert Packer's article on the Two Models of the Criminal Process—the Crime Control Model and the Due Process Model. Each of these artificial constructs was thoroughgoing—everything about the Crime Control Model was designed to bring crime down and punish violators at whatever cost, including convicting some unfortunate innocents. Conversely, the Due Process Model was obsessed with absolute and continuing fairness so that no innocent was ever wrongly convicted. And this, too, operated at any cost, the chief one being the release of high numbers of guilty persons. Packer noted that if the Crime Control Model looked like a conveyor belt, the Due Process Model looked like an obstacle course.

The media often act as if each of us is on one of these two teams and engage in continuous combat. Thoughtful people, too, sometimes fall into this trap. The truth is that almost all of us are schizophrenic—we want Crime Control *and* we want Due Process. And so what we should have is not a war (a war on crime, a war on drugs, a war on police brutality) but a conversation. Indeed, it is one of the great ongoing conversations in this strangely configured republic from the deep recesses of the uncommonly brilliant mind of little Jimmy Madison.

The conversation ebbs and flows. In the 1960s, during the Warren-Court revolution, it flowed toward Due Process—in dramatic fashion. *Mapp v. Ohio* in 1961, applying the exclusionary rule as the remedy for fourth amendment violations, *Gideon v. Wainwright* in 1963, guaranteeing

publicly paid counsel to criminal defendants who could not afford it, and *Fay v. Noia* in 1963, opening the federal courts to habeas corpus petitions from state convicts were among the most important of these many decisions expanding our notions of the rights of accused persons. Miranda is obviously not the first case nor is it, I would argue, even the most practically significant. But, for some reason it was the lightning rod. Then. Since. Now. It was always Exhibit A in the campaign either to enshrine or to impeach Earl Warren. Perhaps this was because gaining confessions is seen as critical to Crime Control. Perhaps it was because the opinion seemed to reach so far beyond any supporting text in the Fifth Amendment for such an outcome. Perhaps it was because it was the most shocking of the Warren Court's new and controversial juridical method of applying prophylactic rules—not like the parents who investigate the following morning to see if their teenagers behaved the night before, but like the parents who ground them ahead of time to remove all doubt. And the rule continues to be controversial today despite overwhelming evidence that the police have adapted to it and can often work around it much more easily than scores of other Warren Court rules.

As to Ernesto Miranda himself, his story is sad from beginning to end. As Felix Frankfurter was fond of saying, it is important to note that some of the most important political and legal principles in this country were formed in cases involving persons who were not very important and/or not very nice. There is, to me, something majestic about that. Born in 1941, in trouble from early childhood in Mesa, Arizona, Miranda was arrested by Phoenix police in 1963 and, after several hours of interrogation, confessed to kidnapping and rape. He was convicted. The conviction was overturned in the famous decision bearing his name. He was retried without the confession, found guilty, and went to jail. After some time, he was released on parole, rearrested a few times and, in 1976, killed in a barroom brawl. In a magnificent irony, police arrested a suspect in Miranda's killing, gave him the by now familiar warnings—"You have the right to remain silent, etc."—and the suspect exercised that right. No one was ever formally charged with Miranda's killing.