Miranda at Forty

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During the Warren Court era, a heady period of expansive jurisprudence,[1] *Miranda v. Arizona* was especially noteworthy because the United States Supreme Court used that decision to dramatically revise its confessions jurisprudence.[2] *Miranda* extended the privilege against self-incrimination to custodial interrogations and represented an effort by the Court to gain control of the police and their investigatory procedures by regulating the interrogations process—and, specifically, by requiring the police to administer a *Miranda* warning to suspects before engaging in custodial interrogation.[3] The decision also had the effect, perhaps unintended, of educating the public regarding its rights, as subsequent movies and television shows depicted the police administering the *Miranda* warnings.

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1. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); United States v. Wade, 388 U.S. 218 (1967); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

2. 384 U.S. 436 (1966).

3. *Id*. at 444–45.

In some respects, the *Miranda* decision was relatively uncontroversial because the Court did little more than require the police to inform suspects of their rights and prescribe procedures for the waiver of those rights. But *Miranda*'s holding was not inevitable. In the Court's later decision in *Schneckloth v. Bustamonte*, the Court held that suspects can consent to searches of their persons or property even though they have not been informed that they have a Fourth Amendment right to refuse consent.[4] A critic of *Schneckloth* might legitimately question how suspects can validly waive Fourth Amendment rights that they do not know they possess and why the police should not be required to inform suspects of their rights before seeking a waiver. *Miranda*, at least, avoids this criticism by requiring that suspects receive such information.

As will be developed more fully below, despite the limited nature of the *Miranda* decision and the advantages that flow from its media impact, *Miranda* was not a panacea for the Court's confessions jurisprudence. In *Miranda*, the Court tried to sort out a muddled area of jurisprudence, but it is not clear that the Court succeeded.

I. PRE-*MIRANDA* CONFESSIONS JURISPRUDENCE

In the years leading up to *Miranda*, the Court struggled to find its footing in the confessions area. For decades, the Court evaluated confessions under the due process requirements of the Fifth and Fourteenth Amendments. For example, in *Brown v. Mississippi*, the Court rejected confessions that were obtained by whipping defendants with a leather strap that had buckles attached to it, as well as by hanging men by their necks from a tree.[5] In concluding that the confessions were coerced, the Court held that the "rack and torture chamber may not be substituted for the witness stand" without violating due process.[6]

Although the Court applied due process analysis in a number of cases following the *Brown* decision,[7] the test never proved to be entirely satisfactory. A number of Justices expressed concern about the fact that too many confessions cases devolved into swearing matches regarding what the police had done, and whether the defendants had been coerced into involuntary confessions.[8] As Justice Douglas noted in one dissent,

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4. 412 U.S. 218, 248–49 (1973).
5. 297 U.S. 278, 281–82 (1936).
6. *Id.* at 285–86.
7. *See* Haynes v. Washington, 373 U.S. 503, 513–14 (1963); Lynumn v. Illinois, 372 U.S. 528, 534 (1963); Spano v. New York, 360 U.S. 315, 321–24 (1959); Ashcraft v. Tennessee, 322 U.S. 143, 154 (1944).
8. *See* RUSSELL L. WEAVER, LESLIE W. ABRAMSON, RONALD BACIGAL, JOHN M. BURKOFF, CATHERINE HANCOCK & DONALD E. LIVELY, CRIMINAL PROCEDURE 433 n.3 (2d ed. 2004).

the "trial on the issue of coercion is seldom helpful," with the police "usually testify[ing] one way, the accused another."[9] He concluded that the nature of the process gives defendants "little chance to prove coercion at trial."[10]

As the Court's dissatisfaction with the due process test grew, the Court began searching for alternative ways to deal with confessions issues. In *McNabb v. United States*[11] and *Mallory v. United States*,[12] the Court relied on a federal statute[13] and the Federal Rules of Criminal Procedure[14] to establish the proposition that a criminal defendant must be arraigned "without unnecessary delay" and that a confession obtained during the delay might be excluded from a subsequent prosecution.[15] However, this so-called *McNabb-Mallory* rule never developed into a constitutional rule, and Congress attempted to overrule it by subsequent legislation.[16] By the time of the subsequent legislation, the *McNabb-Mallory* rule had been effectively supplanted by the *Miranda* decision.

Then, the Court flirted with the possibility of using the Sixth Amendment right to counsel as a way to deal with custodial interrogations. This approach involved a radical reinterpretation of the right to counsel, which had previously been viewed as applying only at the trial stage.[17] Although counsel must be appointed sufficiently far in advance of trial to allow for adequate preparation, the right was not applicable to preindictment interrogations.[18] The case of *Cicenia v. Lagay* presented the Court with an extraordinary opportunity to extend the right to counsel to custodial interrogations.[19] In that case, not only did Cicenia request the right to speak with his attorney, the attorney was present at the stationhouse

9. *See* Crooker v. California, 357 U.S. 433, 443–44 (1958) (Douglas, J., dissenting, joined by Warren, C.J., Black & Brennan, JJ.), *overruled by* Miranda v. Arizona, 384 U.S. 436 (1966).
10. *Id.* at 444.
11. 318 U.S. 332, 344–45 (1943), *superseded by statute*, 18 U.S.C. § 3501, *as recognized in* United States v. Pugh, 25 F.3d 669, 675 (8th Cir. 1994).
12. 354 U.S. 449, 455 (1957), *superseded by statute*, 18 U.S.C. § 3501, *as recognized in* United States v. Pugh, 25 F.3d 669, 675 (8th Cir. 1994).
13. 18 U.S.C. § 595 (1945) (current version at 18 U.S.C. app. R. 5(a) (2000)).
14. FED. R. CRIM. P. 5(a).
15. *Mallory*, 354 U.S. at 455.
16. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701(a), 82 Stat. 197, 210 (codified as amended at 18 U.S.C. § 3501 (2000)).
17. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932).
18. *Id.*
19. 357 U.S. 504, 506–07 (1958), *overruled by* Miranda v. Arizona, 384 U.S. 436 (1966).

demanding to speak to him, and remained at the stationhouse throughout the entire afternoon trying to meet with his client.[20] The police precluded Cicenia from speaking to his attorney by secluding him in a room, and ultimately preventing the two from speaking until after Cicenia confessed. Although the Court expressed distaste for the police practices in the *Cicenia* case, it upheld the conviction on grounds that defendant's right to counsel was not violated: "New Jersey is not alone in its rule that an accused has no right to consult with counsel during the period between arrest and arraignment."[21]

In the landmark decision *Massiah v. United States*, the Court shifted course and used the Sixth Amendment right to counsel to exclude a confession that was obtained from a criminal defendant who had been indicted and for whom counsel had been appointed.[22] When the police surreptitiously interrogated Massiah through an informant, the Court held that his Sixth Amendment right to counsel had been violated.[23]

The Court extended *Massiah* in *Escobedo v. Illinois.* *Escobedo* involved a defendant who was implicated in a murder, taken into custody, and transported to the police station.[24] The police rejected Escobedo's repeated requests to speak with his attorney, and they also rejected his attorney's requests to speak with him until the police had completed their interrogation.[25] Applying a "critical stage" analysis,[26] the Court held that the right to counsel applied to the interrogation because, otherwise, defendant's confession could prejudice his trial, and rights "may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes."[27] *Escobedo* held that the right to counsel attaches when "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect."[28]

II. THE *MIRANDA* REVOLUTION

In *Miranda*, the Court took its confessions jurisprudence in an entirely different direction, and ultimately retreated from *Escobedo* (but not *Massiah*), basing its decision on the Fifth Amendment privilege against self-incrimination rather than on due process or the Sixth Amendment

20. *Id*. at 505.
21. *Id*. at 510 n.4.
22. 377 U.S. 201, 206 (1964).
23. *Id*.
24. Escobedo v. Illinois, 378 U.S. 478, 479 (1964).
25. *Id*. at 481.
26. *Id.* at 486.
27. *Id.* (quoting Hamilton v. Alabama, 368 U.S. 52, 54 (1961)).
28. *Id.* at 490.

right to counsel.[29] As with the Court's decision to extend the Sixth Amendment right to counsel in *Massiah*, this extension of the privilege against self-incrimination was problematic in terms of prior precedent. The privilege against self-incrimination had not previously been applied to custodial interrogation situations that occurred prior to the commencement of the adversary process.

Miranda was a striking decision because the Court relied extensively on police interrogation manuals advocating the use of psychological techniques rather than torture. For example, the manuals advised police to isolate suspects in private situations—the stationhouse—where the police have all the advantages[30] and where the "atmosphere suggests the invincibility of the forces of the law."[31] During the interrogation process, the police are urged "to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details."[32] The suspect's guilt is taken as fact, and the interrogator encourages the suspect to confess by directing

> his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women.[33]

The police are also instructed to

> minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.[34]

If these techniques do not succeed, the interrogator is instructed to resort to more aggressive techniques such as the "Mutt and Jeff" technique.[35]

While the Court did not view these psychological techniques as rendering confessions involuntary in traditional terms, it did conclude that such tactics exact "a heavy toll on individual liberty and trade[] on

29. Miranda v. Arizona, 384 U.S. 436, 439 (1966).
30. *Id.* at 450 (citing CHARLES E. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1956)).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* (citations omitted).
35. *Id.* at 452.

the weakness of individuals."[36] The Court emphasized that such interrogation techniques produce "inherently compelling pressures."[37] In an effort to provide "adequate protective devices" against these psychological tactics and prevent a suspect from being forced to incriminate himself, the Court required police to administer the *Miranda* warning and comply with the procedures outlined in its decision.[38] In other words, the police were required to respect a suspect's assertion of his right to remain silent and his right to counsel.

III. THE PROBLEMS WITH *MIRANDA*

It is not clear that the *Miranda* decision has turned out to be a panacea to the confessions problem. For one thing, there was an important disconnect in *Miranda.* Although the Court spent a good deal of time discussing interrogation manuals and psychological techniques in its opinion, there was no evidence that the manuals had been relied upon or used against any of the defendants whose cases were consolidated before the Court. As Justice Clark noted in his concurrence:

> The materials [the Court] refers to as "police manuals" are, as I read them, merely writings in this field by professors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection.[39]

Indeed, issues related to the manuals were raised in amicus briefs rather than by the parties to the case. Moreover, *Miranda* did not involve proof that any of the confessions before the Court were either coerced or unreliable. Indeed, there was evidence to the contrary. As Justice Harlan argued in dissent, "These confessions were obtained during brief, daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion. . . . There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation."[40]

Because there was no proof of coercion in *Miranda* itself, or necessarily in other cases where the police failed to give the *Miranda* warnings, it was easy to argue that unwarned confessions should not be suppressed. While the Court has generally reaffirmed *Miranda*, the Court did attempt to distinguish *Miranda* in its subsequent decision in *Michigan v. Tucker*.[41] In *Tucker*, the Court held that a voluntary confession should not

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36. *Id.* at 455.
37. *Id.* at 467.
38. *Id.* at 458.
39. *Id.* at 499 (Clark, J., concurring) (citations omitted).
40. *Id.* at 518–19 (Harlan, J., dissenting).
41. 417 U.S. 433 (1974).

be excluded from evidence even though *Miranda*'s dictates were not observed.[42] The Court regarded the *Miranda* warnings as prophylactic and held that a mere failure to comply with *Miranda*'s warning requirement did not necessarily result in a "breach [of] the right against compulsory self-incrimination."[43] As the Court later said in *Oregon v. Elstad*, the failure to warn was not an "actual infringement of the suspect's constitutional rights."[44]

Even though *Tucker* has not gained ascendance in post-*Miranda* jurisprudence, the decision does reveal some of the inherent problems in *Miranda*. As noted, *Miranda* tended to assume that the custodial interrogation environment is inherently coercive. But, if the Court's assumption is correct, it is difficult to understand how *Miranda*'s requirement of prophylactic warnings provides adequate protection for suspects being interrogated. After the *Miranda* warning is administered, the suspect remains in what the Court assumes to be an "inherently coercive" context, and the mere administration of the warnings might not be sufficient to overcome the coercion. In *Miranda* itself, the Court recognized this fact when it stated that the "circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators."[45] The *Miranda* Court attempted to respond to this concern by providing suspects with the right to counsel, as well as by requiring the police to inform suspects of their rights.[46] But as Justice White argued in dissent in *Miranda*:

> If the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?[47]

There is much force to Justice White's argument. When the decision about whether to waive is made, the circumstances are stacked in favor of the police. The police can isolate a suspect in an interrogation room before attempting to seek a waiver. Although the *Miranda* warning provides suspects with some information, many suspects will understand little else about criminal law or the rules of evidence. For example, suspects

42. *Id.* at 445–46.
43. *Id.* at 445.
44. 470 U.S. 298, 308 (1985).
45. *Miranda*, 384 U.S. at 469.
46. *Id.*
47. *Id.* at 536 (White, J., dissenting).

may believe that they can talk themselves out of the situation by offering an alibi or other excuse and may not understand that they are making incriminating admissions or otherwise prejudicing their future defense. By the time suspects realize that they should have kept quiet, it may be too late. Moreover, if suspects fail to assert their rights, the police are free to utilize many of the interrogation techniques outlined in *Miranda*.

Another potential problem with the *Miranda* decision is that once the warnings are administered, the Court is much more likely to find that any ensuing confession is voluntary and admissible.[48] For example, in *Connecticut v. Barrett*, after being given a *Miranda* warning, the defendant signed a form stating that he would not give a written statement unless his attorney was present, but that he had "no problem" talking about the crime.[49] Several times thereafter, defendant made it clear that he would not give a written statement, but that he was willing to give an oral statement. The Court rejected the argument that defendant's knowledge regarding the consequences of an oral statement was sufficiently incomplete as to nullify his consent: "*Miranda* gives the defendant a right to choose between speech and silence, and Barrett chose to speak."[50] The Court also rejected the argument that Barrett's distinction between oral and written statements indicated "an understanding of the consequences so incomplete that we should deem his limited invocation of the right to counsel effective for all purposes."[51] Justice Stevens, joined by Justice Marshall, dissented, arguing that Barrett had effectively requested counsel.[52]

Also illustrative of the insulating effect of a *Miranda* warning on the validity of a confession is the holding in *Moran v. Burbine*.[53] In that case, the defendant was in custody when his sister obtained a lawyer to represent him. The lawyer telephoned the police station, but was told that the police "were through with [the interrogation] for the night."[54] About an hour later, the police resumed their questioning of Burbine, who waived his privilege against self-incrimination.[55] The Court concluded that the waiver was valid: "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on

48. *See, e.g.*, Colorado v. Spring, 479 U.S. 564, 577 (1987); Connecticut v. Barrett, 479 U.S. 523, 530 (1987); Davis v. United States, 512 U.S. 452, 461–62 (1994); Patterson v. Illinois, 487 U.S. 285, 296–97 (1988). *But see* Missouri v. Seibert, 542 U.S. 600, 616–17 (2004).
49. *Barrett*, 479 U.S. at 525.
50. *Id.* at 529.
51. *Id.* at 530.
52. *Id.* at 536–37 (Stevens, J., dissenting).
53. 475 U.S. 412, 424 (1986).
54. *Id*. at 417.
55. *Id*.

the capacity to comprehend and knowingly relinquish a constitutional right."[56]

Part of the justification for the decisions in both *Barrett* and *Moran* is that there was no evidence that either defendant was coerced into incriminating himself, in violation of the Fifth Amendment privilege against self-incrimination, or that either confession was necessarily so unreliable that its admission violated due process. That said, the known circumstances regarding each case are sufficiently disturbing, and the available facts sufficiently limited, so that one might legitimately question whether the confessions were really voluntary and informed.

IV. WERE THERE ALTERNATIVES?

As a prophylactic decision, *Miranda*—and its requirement of a warning—seems sensible enough, and it is not clear that other alternatives would have been as effective. One thing that the Court could have done in *Miranda* was to require the presence of counsel for every custodial interrogation. While this step might have been extremely effective in ensuring that confessions are not coerced, there are perhaps good reasons why *Miranda* did not opt to require counsel. For one thing, the cost of such a requirement would be substantial. The states already incur significant costs related to *Gideon v. Wainwright*,[57] and the requirement that states provide indigents with appointed counsel before subjecting them to the penalty of imprisonment.[58] If states were required to provide suspects with counsel for all custodial interrogations, these costs would escalate dramatically. It is unlikely that the Court would impose such a requirement on the states.

Dissenting in *Miranda*, Justice White, joined by Justices Harlan and Stewart, suggested a number of alternative steps the Court could have taken in lieu of imposing a warning requirement. Specifically, he suggested that:

> Even if one were to postulate that the Court's concern is [that some] confessions induced by police interrogation are coerced . . . and present judicial procedures are believed to be inadequate to identify the confessions that are coerced and those that are not, it would still not be essential to impose the rule that the Court has now fashioned. Transcripts or observers could be required, specific time limits, tailored to fit the cause, could be imposed, or other devices could be

56. *Id.* at 422.
57. 372 U.S. 335 (1963).
58. *See* WEAVER ET AL., *supra* note 8, at 51 n.1.

> utilized to reduce the chances that otherwise indiscernible coercion will produce an inadmissible confession.[59]

It is not clear that any of these steps would have been a panacea either. While it would be nice to have a transcript of custodial interrogations, a skillful interrogator can ask questions that will sound perfectly reasonable in transcript form even though the interrogator's tone and inflection are more coercive. Having an observer present in the room would provide additional insight into police tactics and the potential for abuse, but it might be costly to mandate that observers be constantly present. Moreover, while specific time limits might be fine, a coercive interrogation might still produce a coerced confession within the allowable time limits.

Another thing that could be done, but by contrast would be relatively easy and inexpensive, is to require that interrogations be recorded. This option is attractive because it provides video evidence of what happened and allows a reviewing court to assess whether a confession really was coerced. While this option was viable when *Miranda* was decided, it has become much more viable in the following decades as the cost of recording technology has decreased and the quality of such technology has increased. In many contexts, it should not be difficult to record custodial interrogations, and to allow the courts to see whether the police have used coercive techniques to gain a confession. However, a recording requirement is likely to work better in large jurisdictions that can afford to install video equipment in a special interrogation room. Moreover, many interrogations (or, at least, quasi-interrogations) take place outside the context of police stations—for example, at the place of arrest or on the way to the police station—so that a recording room might not be practical. Nevertheless, the court might gain some tangible benefit from requiring the police to record confessions whenever possible.

A videotaping requirement is potentially beneficial because it does not alter or affect the dynamics of the interrogation process. One of the concerns about *Miranda* was that suspects who were given warnings, or provided with counsel, might choose to remain silent and refuse to cooperate with the police. Justice Clark's *Miranda* concurrence emphasized that the interrogation of witnesses is "an essential tool in effective law enforcement."[60] In his *Miranda* dissent, Justice Harlan expresses concern about the fact that the warnings might deter suspects from talking to police.[61] Obviously, a videotaping requirement does not necessarily interfere

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59. Miranda v. Arizona, 384 U.S. 436, 535 (1966) (White, J., dissenting).

60. *Id.* at 502 (Clark, J., concurring) (citing Haynes v. Washington, 373 U.S. 503, 514 (1963)).

61. *Id*. at 505 (Harlan, J., dissenting).

with the interrogation process. Indeed, if the police are concerned about the effect of videotaping on the process, they can conceal videotaping machines in unobtrusive places. Justice Harlan described the decision as "poor constitutional law" and suggested that it "entails harmful consequences for the country at large"[62] because "the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all."[63] By contrast, videotaping is passive and would not discourage confessions.

V. CONCLUSION

At forty years, *Miranda* presents a mixed bag. *Miranda* had a positive effect on the confessions process because it encouraged and required the police to provide suspects with information regarding their Fifth Amendment rights. Moreover, because the *Miranda* decision has been embraced by the media and shown in thousands of television shows and movies, it has had a very broad and profound educational effect. On the other hand, although *Miranda* attempted to articulate a bright-line rule designed to avoid the confusing problems created by preexisting confessions law, it is not clear that *Miranda* succeeded. The Court did create a bright-line rule—for example, before engaging in custodial interrogation, a suspect must be given a *Miranda* warning and must voluntarily waive his rights—but it is not clear that this rule has accomplished its objective of protecting defendants against inherently coercive interrogation environments. Moreover, one can argue that *Miranda* has an undesirable effect because it encourages courts to affirm convictions if the *Miranda* warning has been given.

The net effect is that *Miranda* has not turned out to be a panacea. It has not redefined confessions jurisprudence, nor obviated the need to rely on prior confessions jurisprudence. In subsequent cases, the Court has been forced to continue to apply due process principles, but with the same reservations and the same difficulties as before.[64] In addition, the Court has continued to apply the Sixth Amendment right to counsel to interrogations in *Massiah* contexts (post-indictment interrogations).[65]

62. *Id.* at 504.
63. *Id.* at 505.
64. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 287 (1991); Colorado v. Connelly, 479 U.S. 157, 163–64 (1986); Mincey v. Arizona, 437 U.S. 385, 398 (1978).
65. *See, e.g.*, Kuhlman v. Wilson, 477 U.S. 436, 459 (1986); Michigan v. Jackson, 475 U.S. 625, 632 (1986); Brewer v. Williams, 430 U.S. 387, 400–01 (1977).

However, the Court seems to have abandoned *Escobedo* in the sense that the Court has not applied the Sixth Amendment right to counsel to suspects who have not been indicted and who are simply the "focus" of a criminal investigation.[66] So, while there is value in the *Miranda* decision, especially because of its educational effect, it may be time for further refinements—for example, requiring videotaping of custodial interrogations.

66. *See supra* notes 26–28 and accompanying text.