Cornell Journal of Law and Public Policy

Volume 12
Issue 3 *Summer 2003*

Article 5

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INTRODUCTION

This symposium on the intersection of law and politics affords me the opportunity to comment on the role of politics in the law of criminal procedure, especially in context to *Miranda v. Arizona*[1] and its progeny. At one level, politics appear to have nothing to do with criminal procedure. Most important aspects of criminal procedure are a product of explicit constitutional provisions. As a result, regardless of one's policy preferences with regard to criminal matters, a distinct, if not ponderous and dated, system of adversarial adjudication remains the constitutionally mandated method of dispute resolution. At a less abstracted level, politics in one sense becomes important. For example, a judge's comparative preference for civil liberties over crime control might lead to certain predictable decisions in interpreting and applying constitutional standards. This sense of "politics," one that generates legal preferences and informs decision-making, appears to be an eradicable prelude to the creation of legal rules. This sort of politics leads to law, and thus comprises merely one item in the long list of considerations, such as religious view, class partiality, philosophical principle, or consequentialist preference, which might equally motivate a decision-maker to prefer a particular legal rule over another.

I wish to consider "politics" in a different sense, according to the Aristotelian concept of politics, which defines politics as an essential means of social well-being.[2] For Aristotle, human beings are political by nature, using "the power of speech . . . to set forth the expedient and inexpedient, and therefore likewise the just and the unjust."[3] Aristotle termed the person best able to exercise this political function the "states-

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1 384 U.S. 436 (1966).

2 ARISTOTLE, *Politica, in* THE WORKS OF ARISTOTLE 1252a, Book I (W.D. Ross ed. & Benjamin Jowett trans., Oxford at the Clarendon Press 1921).

3 *Id.* at 1253a.

man."[4] Aristotle's teacher Plato expanded on this idea in his second book, *The Statesman*,[5] of his trilogy on jurisprudence.[6] In this long dialogue, the "Visitor" leads "Young Socrates" to understand that the job of the statesman is unique and calls for people who are exceptionally skilled in the arts of prudence and judgment. The statesman expediently influences and directs disparate human beings to form a cohesive, productive community, a "single product with a single function and form."[7] This classical idea of politics differs from the contemporary conception. In the classical sense, one's politics are not a defined, stable set of policy preferences, such as "liberal" or "conservative." Instead, politics is an art, a continual act of judgment and discretion that actively brings coherence to otherwise isolated human beings. Plato suggests the closest analogy to the statesman is the weaver.[8]

What is different about politics in the classical sense as it relates to law is that, unlike ordinary politics in the contemporary sense, it does not necessarily generate preferences for particular legal rules. Indeed, a preference for the obvious flexibility and discretion needed for "statesmanship" militates against the creation of unbending legal rules. Statesmanship as an end in itself appears more consistent with a concentrated form of political authority, such as the benevolent oligarchy proposed in *The Republic*, and less consistent with a democratic, rights-based system of government and law. For politics in the classical sense to be practiced, persons must be imbued with substantial authority to rule. The rule of law, in which the law controls the actions even of those who rule, seems philosophically antithetical to acts of political discretion on the scale and of the kind envisioned by Plato.

This article will argue that in *Miranda* and its progeny, particularly in the recent decision in *Dickerson v. United States*,[9] the Supreme Court has practiced a significant amount of classically defined politics. The Court's decisions can be explained best as an expression of a particular political vision. This vision is not a political preference in the contemporary sense, but rather presents an act of classical statesmanship that attempts to weave together a complex and lengthy body of jurisprudence with an intractable factual setting. Despite its classical antecedents, the Court's practice of classical politics is problematic. The law of criminal

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4 ARISTOTLE, *supra* note 2, at Book VII.

5 PLATO, STATESMAN (Julia Annas ed. & Robin Waterfield trans., Cambridge University Press 1995).

6 PLATO, REPUBLIC (G.M.A. Grube trans. & revised by C.D.C. Reeve, Hackett Publishing Co. 1992); PLATO, THE LAWS (T.J. Saunders trans., Penguin Books 1970); PLATO, *supra* note 5.

7 PLATO, *supra* note 5, at 81.

8 *Id.*

9 530 U.S. 428 (2000).

procedure, perhaps more than any other area of constitutional law, is ill suited to the Court's political approach.

I. *MIRANDA* RECONSIDERED

Miranda constitutes the Court's most political decision in the criminal procedure jurisprudence. At its most elemental level, the decision merely institutes informed consent,[10] and a comparatively brief opinion written directly to that point might have avoided much of the public and professional controversy that the opinion generated. The Court did not adopt such a straightforward approach, and the form and substance of the lengthy opinion reveals much about the Court's intentions.

The factual setting for *Miranda* involved a serious and pervasive problem in the criminal justice system: the use of coercive measures in interrogating suspects. The due process clause of the Fourteenth Amendment requires that confessions be voluntary if they are to be admitted into evidence.[11] This "involuntariness" test worked in an era where confessions were sometimes obtained through improper physical force.[12] As more subtle psychological ploys became the norm for inducing confessions, the involuntariness test required the trial court to determine the accused's capacity to maintain free will in the face of coercion.[13] Assessing a person's capacity to maintain free will involved a myriad of elements of indeterminate importance.[14] By the time of *Miranda*, the Court was ready to admit that the interrogation room was "inherently compulsive."[15] The involuntariness test, however, appeared inadequate to determine in which particular cases that inherent compulsion, coupled with any additional elements of compulsion introduced by the interroga-

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[10] *Cf.* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (holding that consent in the Fourth Amendment context can be obtained without the prior provision of information by the police to the suspect).

[11] Brown v. Mississippi, 297 U.S. 278 (1936).

[12] *See id.* (severe whippings used to obtain confessions); *see also* Payne v. Arkansas, 356 U.S. 560 (1958) (accused given no food for twenty-four hours); *see also* Ashcraft v. Tennessee, 322 U.S. 143 (1944) (accused not permitted to sleep for thirty-six hours).

[13] In Watts v. Indiana, 338 U.S. 49, 53 (1949), the Court stated:

> [I]f [the confession] is the product of sustained pressure by the police it does not issue from a free choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary.

[14] *See* Payne v. Arkansas, 356 U.S. 560 (1958) (accused had fifth grade education; police told defendant of potential for mob violence if he did not confess); *see also* Fikes v. Alabama, 352 U.S. 191 (1957) (accused was in the third grade for eight years or he was "of low mentality, if not mentally ill"); *see also* Culombe v. Connecticut, 367 U.S. 568, 620 (1961) (accused illiterate and mentally defective); *see also* Blackburn v. Alabama, 361 U.S. 199, 207 (1960) (suspect likely insane when confessed). *See generally*, Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979).

[15] Miranda v. Arizona, 384 U.S. 436 (1966).

tor, sufficed to overwhelm the mental capacity of the accused to speak willingly. The psychological composition of various defendants probably varied greatly, and that variation did not necessarily correlate to observable facts, such as age or education. Moreover, certain people might be especially vulnerable or invulnerable to particular interrogator ploys. As a result, it was difficult for a court to ever conclude with requisite assurance that a particular confession was involuntary. The court's task was made more difficult because the involuntariness test, so heavily dependent on the facts of particular police behavior toward a particular defendant, was inherently resistant to the usual accumulation of case precedents to create an understandable and principled body of law. Inevitably, trial courts would get many of these cases wrong.[16]

The form of the opinion *in Miranda* suggests the Court's impatience with the customary restrictions on judicial decision-making and its unhappiness with the involuntariness test. Instead of articulating in a series of decisions the parameters of the warnings, their timing, and other requirements as the facts of individual appeals warranted, the Court opted to resolve all issues in a single decision. The result was an opinion that, in form and content, resembles a statute. The topic sentences of the *Miranda*'s paragraphs provide the rule of law; the remainder of the paragraph supplies examples and exceptions, much like commentary to a statutory provision. Thus the form of the opinion itself suggests that the Court was acting outside of its usual jurisprudential limitations.

The content of the opinion suggests why the majority chose to write in the form of a statute. *Miranda*, consistent with the due process jurisprudence that preceded it,[17] and consistent with the extant Sixth Amendment cases,[18] envisioned a central role in the interrogation room for the defendant's attorney.[19] The Court apparently assumed its decision would

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16 *See* Stephen S. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Costs*, 90 NW. U. L. REV. 500, 555 (1996) ("Instances of overbearing coercion are bound to occur under such a system, not because some officers will deliberately fault [sic] the law but because even the best of professionals will inevitably misjudge the elusive psychological line.").

17 *See* Spano v. New York, 360 U.S. 315 (1959) (establishing that a suspect's request to see attorney was refused); *see also* Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966).

18 *See* Massiah v. United States, 377 U.S. 201 (1964) (holding that police cannot deliberately elicit incriminating statements from accused post-indictment); *see also* Escobedo v. Illinois, 378 U.S. 478 (1964) (holding that police cannot deny accused right to meet with attorney).

19 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. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warn-

lead to defense counsel routinely participating in interrogations.[20] The Court did not seem to anticipate that the practical effect of the suspect's invocation of the right to have counsel present during questioning would be to end the interrogation.

What these defense attorneys were supposed to do at the interrogation went unstated; the verbose *Miranda* opinion is very brief on this point.[21] Objections by counsel to police questions would seem inapposite, given that police interrogators are not obliged to conform to evidentiary courtroom standards. Presumably the lawyer might look for coercive police activity. The problem with this task is that the lawyer lacks any special training in coercion detection, especially of the subtle psychological kind coming into vogue. Further, if the defense attorney were to perceive police coercion, the remedy might be for the lawyer to testify to that fact at the subsequent prosecution, thereby ethically disqualifying the lawyer from continuing in the representation.[22] Certainly the Supreme Court was aware of the limitations of defense counsel in the interrogation room.[23] Its decision to nonetheless place a lawyer there implies the Court had some function in mind for the lawyer other than objecting to questions or testifying to coercion.

The Court's silence on how exactly the presence of the defense counsel would help ameliorate the effects of police coercion demands imagination to understand the Court's plan. The opinion seemed to anticipate the following: that the act of consultation with a lawyer, by itself, would help discourage and remedy police coercion of the suspect. In other words, the Court seemed to anticipate that the very act of consultation, involving moments spent in contemplative, unhurried verbal exchange with the lawyer, would afford the suspect distance from the police interrogative techniques and allow for a truly voluntary confession.[24] One piece of evidence for this contention may be adduced from the nature of the *Miranda* warnings themselves. Although designed to be

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> ing . . . cannot itself suffice to that end. . . . Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

Miranda, 384 U.S. at 469–70.

20 *Id.* at 474. The majority assumed that defense counsel would be required to appear so often at interrogations, at the behest of their clients, that the opinion invents and refutes a charge that the decision would create a permanent office of "station house lawyer." *Id.*

21 The Court's description of the role of the attorney in the interrogation room is brief. "[T]he individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Id.* at 474.

22 *See* MODEL RULES OF PROF'L CONDUCT R. 3.7 (2002).

23 The Court used the identical remedy in an attempt to reduce police suggestiveness at lineups. United States v. Wade, 388 U.S. 218 (1967) (requiring lawyers at police lineups).

24 "Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim

provided to the suspect by police in what may frequently be trying circumstances, involving physical arrest, handcuffs, and forcible transportation to a police station, the warnings presume the suspect can briefly consider his situation and make an intelligent decision about exercising or waiving his rights to silence and to an attorney. The warnings are designed to break the coercive pattern of arrest and allow for a moment of unclouded reason. Consultation with the defense lawyer stationed in the interrogation room would function in the same way, allowing for moments of pause and reflection which, if nothing else, would interrupt the stream of police interrogative action.

Essentially what the *Miranda* court pictured, although the Court denied it,[25] was the quasi-office of station house lawyer. Today, of course, that idea of interrogations proceeding and confessions being elicited in the presence of defense lawyers sounds quaint, since all parties to the interrogation drama understand that, as a practical matter, the interrogation phase of the investigation is over once the suspect invokes his right to counsel.[26] Lawyers need not actually be in permanent residence at the station house because police do not attempt to interrogate suspects in a lawyer's presence. But the court seemed to anticipate that they would, as evidenced by the "station house" comment.[27] The fact that the *Miranda* holding has evolved into a vehicle by which interrogations are terminated, not continued, should not obscure understanding the decision as the Court wrote it. The Court considered itself to be creating something close to a new office. This decision was a political one in the classical sense, an act that tried to put someone in place who would use discretion and prudence, or, in the case of a defense attorney, advice and negotiation, to deal with the complex and fact-driven problem of compulsive police interrogation. The lawyer-officer function would be to dissipate that compulsiveness while allowing for the continuation of the interrogation itself. *Miranda* is a political decision in an additional dimension, and here the opinion offers more direct evidence. As has often been

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is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." Miranda, 384 U.S. at 469.

25 The Court explicitly denied that the holding would mandate a lawyer to be permanently employed at the police station. "This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners." *Id.* at 474.

26 Edwards v. Arizona, 451 U.S. 477 (1981) (invocating the right to counsel requires termination of questioning).

27 Miranda, 384 U.S. at 474. The Court also anticipated that prosecutors, who claimed defendants chose to proceed without counsel, would face a "heavy burden" to show waiver, thus again implying that the Court anticipated many, if not most interrogations, would proceed with counsel present. *Id.* at 475.

noted, the opinion never makes clear the source of the Court's authority to impose *Miranda*'s strictures on the States.[28]

At certain junctures, the Court appears to regard its decision as constitutional;[29] at other points, the Court seems to say that the decision seeks only to create "adequate safeguards"[30] to protect the underlying constitutional right.[31] The issue of the basis for *Miranda*'s authority is obviously significant: if the federal constitution does not require the holding in *Miranda* then the Court is formally powerless to impose it on the states.[32] Yet the Court is obviously conscious that it is imposing law on the states outside of its formal power to do so; the Court's open invitation to Congress and state legislatures to devise better solutions to the problem of police coerciveness "in the exercise of their creative rule-making capacities"[33] suggests that the Court is aware that its decision is tantamount to an act of legislative discretion.

Miranda is a highly politicized decision because the opinion is written like a statute, because it abjures case-by-case decision-making, because it appears to create a quasi-permanent office of station lawyer, and because its tacit claim of authority can only be compared to the power of the federal legislature to override state law. Its political nature is "political" in the classical sense more than it is a contemporary expression of a particular partisan viewpoint; it is more an act of political discretion than an act of political preference. As the Court anticipated events, the station house lawyer's job was not to curtail the procurement of necessary confession evidence, but to dissipate coercion by improving the institution. The net effect of the lawyer's function would therefore not necessarily favor the defendant. The prosecution would obtain its information, and moreover would not have to be concerned about exclusion of the confession for involuntariness. The Court attempted to deal with a difficult

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28 *Cf.* Duckworth v. Egan, 492 U.S. 195, 203 (1989) (O'Connor, J., concurring); *cf.* Oregon v. Elstad, 470 U.S. 298 (1985); *cf.* New York v. Quarles, 467 U.S. 649 (1984); *cf.* Michigan v. Tucker, 417 U.S. 433 (1974).

29 "[W]e deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution. . . ." Miranda, 384 U.S. at 439; "The constitutional issue we decide in each of these cases. . . ." *Id.* at 445.

30 *Id.* at 447.

31 It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution . . . . Our decision in no way creates a constitutional straitjacket . . . .

Id. at 467.

32 See Mu'Min v. Virginia, 500 U.S. 415, 422 (1991) (noting that with respect to cases tried in state court, the Supreme Court's "authority is limited to enforcing the commands of the United States Constitution").

33 Miranda, 384 U.S. at 467.

problem by inserting a lawyer into the setting without telling the lawyer what he was supposed to do. The lawyer was to reduce police coerciveness and improve the quality of confession evidence, not through the rule of law, but presumably through acts of discretion and discussion.

II. *MIRANDA*'S POLITICAL PROGENY

Politics also has much to do with the post-*Miranda* decisions from the Supreme Court. The *Miranda* court considered the system of warnings, rights and waiver it instituted to create a remedy: the exclusion of confessions obtained in violation of *Miranda*'s prophylactic safeguard protecting the underlying privilege against involuntary self-incrimination.[34] Like other remedies, the *Miranda* system deters the police from avoiding the warnings by denying the prosecution the benefits of confessions obtained in violation of *Miranda*.[35] Because *Miranda* takes away the benefits of un-Mirandized confessions, it is a remedy that relies on disgorgement. The police must first obtain a confession for *Miranda*'s deterring exclusion to operate. Even where a *Miranda* violation has been found, the magnitude of that disgorgement, measured in evidentiary loss to the prosecution, must be assessed for its likely impact on future police conduct.[36]

These assessments of comparative costs and their future behavioral consequences devolve to empirical questions. *Miranda* was intended to improve the quality of interrogations through the presence of a lawyer. Its system of warnings and waiver, instead of resulting in interrogations in the presence of defense counsel, instead has given rise to binary legal issues about sufficiency of the warnings or the content of the waiver. *Miranda*'s remedy, however, exclusion of evidence, has not led to a binary legal question involving the characterization of facts or the definition of categories. Instead, the question the remedy raises is a prudential one: is a particular exclusion of wrongfully obtained evidence necessary to shape subsequent police conduct?[37] Will police officers in the future, when considering the costs and benefits to any particular course of action, consider the exclusion of the evidence in a case identical to that

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[34] *See id.*

[35] Michigan v. Tucker, 417 U.S. 433 (1974) (weighing the costs of evidence loss against the benefit of deterring future Miranda violations).

[36] *Id.* at 446–47.

[37] The Court has repeatedly posed itself this question and has often answered in the negative. *See id.* at 450-52 (admitting fruits of confession; noting that minimal additional deterrence would come from excluding fruits and that exclusion from case-in-chief suffices for deterrence); Oregon v. Elstad, 470 U.S. 298 (1985) (admitting a subsequent confession); New York v. Quarles, 467 U.S. 649 (1984) (admitting a statement obtained in exigency); Harris v. New York, 401 U.S. 222 (1971) (allowing the use of a wrongfully obtained confession for impeachment purposes because sufficient deterrence existed by refusal to allow confession in case-in-chief).

presented and consequently alter their behavior? The answer to such a question is a matter of degree and judgment. It is a political decision in the classical sense.

Miranda's most recent progeny also is a product of political judgment. The appeal in *Dickerson v. United States*[38] raised the issue of the legal authority for *Miranda*'s holding in light of a federal statute that contradicted it.[39] The Court had available to it one of two legal answers to the appeal, to conclude either that *Miranda* was in fact prescribed by the constitution's privilege against self-incrimination, or that it was not, and therefore the *Miranda* decision could be overridden by the federal statute.[40] Neither legal result seemed practically appealing. A decision that *Miranda* is constitutionally prescribed would mean that all uses of wrongfully obtained confessions, even outside of the case-in-chief, would be prohibited.[41] This result would require the Court to overrule a significant number of prior decisions, which were explicitly based on the legal premise that *Miranda* is but a safeguard to the underlying constitutional right.[42] A contrary decision that *Miranda* was not constitutionally prescribed would eviscerate the heart of the decision, effectively returning the federal courts to the involuntariness test while leaving states free to ignore *Miranda*'s dictates.

The *Dickerson* court resolved this thorny legal issue by selecting neither of the available legal resolutions. Refusing to adopt either "legal" holding, the Court ruled that *Miranda* was "a constitutional decision of this Court,"[43] albeit reflecting a "constitutional principle" that is not "immutable."[44] The mutability of the principle lay in the Court's dicta upholding all of the *Miranda* progeny.[45] In legal terms, this is a strange decision, and may prove untenable.[46] It has long been the case that evidence obtained in violation of the Fifth Amendment cannot be used for any purpose.[47] If *Miranda* warnings are required by the Fifth Amendment, then presumably a violation of *Miranda* violates the Fifth, thus

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38 530 U.S. 428 (2000).

39 *See* 18 U.S.C. § 3501 (2000) (providing, in essence, that the admissibility of confessions should turn on their voluntariness, not on whether or not Miranda was satisfied).

40 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (holding that an Act of Congress will not be enforced by the courts if what it prescribes violates the federal constitution).

41 *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978) (ruling that the due process clause prohibits use of constitutionally defective confession for any purpose, even impeachment).

42 *See* Davis v. United States, 512 U.S. 452 (1994); Duckworth v. Egan, 492 U.S. 195 (1989); Oregon v. Elstad, 470 U.S. 298 (1985); New York v. Quarles, 467 U.S. 649 (1984); Michigan v. Tucker, 417 U.S. 433 (1974).

43 Dickerson v. United States, 530 U.S. 428, 428 (2000).

44 *Id.* at 429.

45 *See id.* at 443.

46 *See* United States v. Patane, 304 F.3d 1013, 1018–19 (10th Cir. 2002) ("[T]he premise upon which *Tucker* and *Elstad* relied was fundamentally altered in *Dickerson*.").

47 Mincey v. Arizona, 437 U.S. 385 (1978).

rendering much of *Miranda*'s progeny unstable, at the least.[48] As a result, either the Court's decision tacitly reverses prior decisions by holding that evidence obtained in violation of the Fifth Amendment may nonetheless be used for some purposes by the prosecution, or the decision in *Dickerson* essentially creates a new category of Fifth Amendment doctrine in which the *Miranda* cases are the sole residents, and that this new category permits derivative uses not permissible elsewhere.

The Court offered another ground for its decision in *Dickerson*: stare decisis.[49] This doctrine is explicitly political, in the classical sense, creating a preference against non-incremental change.[50] Stare decisis is employed with great selectivity; it did not preclude the *Miranda* decision but did prevent *Miranda*'s overruling. Under this doctrine, the Court considers people's investment in and expectations around prior announced law. In *Dickerson*, the Court determined that the *Miranda* warnings were now "embedded in routine police practice"[51] and "part of our national culture."[52] The Court, in sustaining *Miranda*, employs discretion, prudence, and some empirical conclusions, all characteristics of the classical political decision.

III. JUDGES AS STATESMEN

Miranda stands out among the Supreme Court's criminal procedure decisions as unusually political. The Court's political plan to dissipate the coerciveness of police interrogation through the informal office of station house lawyer did not come to fruition. Instead, *Miranda* came to stand for a system of warnings and waivers, and when that system's requirements were violated, the Court imposed the remedy of exclusion only where, again in an exercise of political judgment, exclusion would serve the needs of deterrence. The Court's continued reluctance in *Dickerson* to ground the *Miranda* decision explicitly in the text of the Fifth Amendment demonstrates that the Court continues its political enterprise with respect to interrogation problems to this day. Starting with *Miranda*, the Court has preferred to treat a complex problem with the flexi-

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48 *See* Dickerson, 530 U.S. at 450–55 (Scalia, J., dissenting).

49 *Id.* at 443.

50 *See* William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1392 (1988); *see also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1018 (1989) ("Public values have a gravitational force that varies according to their source (the Constitution, statutes, the common law) and the degree of our historical and contemporary commitment to these values."). *Cf.* Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 362-63 (2000) ("The policy of *stare decisis* is at its most powerful in statutory interpretation (which Congress is always free to supersede with new legislation). . . .").

51 Dickerson, 530 U.S. at 443.

52 *Id.*

bility of regulation and oversight instead of imposing the more prescriptive and dogmatic rules of law.

The Court's "political" approach in *Miranda* is problematic along many dimensions, two of which have particular importance to police interrogations.[53] The first problem inheres in the undeclared empiricism that underlies much of *Miranda* law. Courts, especially on the appellate level, obviously are not as well-equipped as legislatures to engage in factual investigations. What if the Court has been wrong about many of the factual premises that underlie *Miranda* case law? It appears the Court may well have made factual errors. Unlike the naive *Miranda* vision, defense counsels have not routinely appeared at police stations to advise their clients through interrogations. Instead, the invocation of the right to counsel effectively concludes police questioning.[54] As a result of the Court's mistaken prediction of attorney behavior, the *Miranda* rule creates the incentive for police to redirect any coercive measures at the key waiver question.[55]

The Court may also have made empirical mistakes in some of its post-*Miranda* cases. The decisions to permit derivative uses of *Miranda*-violating evidence may, incrementally, have created tangible incentives for officers to avoid *Miranda* warnings for fear of invocation by the accused. Alternatively, the Court's several expansions of *Miranda* rights[56] may have effectively denied the accused a practical chance to waive his rights even when he wishes to do so. The Court's decision to curtail the accused's ability to waive his rights after invocation of the right to an attorney,[57] for example, appears to be a product of the view that the accused who waives after invocation is not acting out of rational free will but because of police coercion.[58] Again, this empirical proposition may well be wrong: remorseful people might often desire to confess without concern about minimizing adverse consequences.

The decision in *Dickerson* to reaffirm the entire *Miranda* system, to the extent the decision is based on stare decisis,[59] also rests on a poten-

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53 *See* Dickerson, 530 U.S. at 444–50 (Scalia, J., dissenting) (outlining significant constitutional problems with majority's approach).

54 *See* Edwards v. Arizona, 451 U.S. 477 (1981).

55 *See* Laurence A. Benner, *Requiem for* Miranda*: The Rehnquist Court's Voluntariness Doctrine in Historical Perspective*, 67 WASH. U. L.Q. 59, 161 (1989) ("*Miranda* . . . transformed the debate about self-incrimination into a debate about waiver.").

56 *See* Edwards, 451 U.S. 477 (questioning must cease once suspect invokes right to counsel); *see also* Minnick v. Mississippi, 498 U.S. 146 (1990) (prohibiting the resumption of questioning of a suspect who has invoked right to counsel until counsel is consulted).

57 Minnick, 498 U.S. at 153.

58 *Id.* ("A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and that may increase as custody is prolonged.").

59 Dickerson v. United States, 530 U.S. 428, 444 (2000).

tially false factual premise. *Dickerson* presumes that "our national culture" has so adjusted to and embraced the *Miranda* system that a radical change would be a bad idea.[60] It is not clear that the national culture has so adjusted to *Miranda*, or that the general public is even aware of how *Miranda* actually operates. The warnings repeated on law-and-order television shows do not educate viewers about the *Miranda* system. The system works as follows: *Miranda* occasionally excludes from evidence confessions that are reliable, relevant, and voluntary because the *Miranda* warnings, presumably already known by the suspect by heart, were not provided in full or in a timely fashion. One possible result of exclusion is that the admitted criminal may get off comparatively lightly, if not go free. Exclusion is ordered so that police in the future will pay better heed to *Miranda*'s requirements, and by doing so, will act to mitigate or avoid coercive interrogation tactics. One question the public might want to ask is whether or not these requirements actually succeed in dissipating coercive police tactics. The public might also wonder if sometimes the warnings induce guilty criminals to decline to confess.[61] The system also functions to effectively shield coercive police conduct that occurs after a *Miranda* waiver has been obtained from judicial oversight. Judges who have found a valid *Miranda* waiver might be disinclined to examine the case further for evidence of more ambiguous due process problems. *Miranda* certainly has been unsuccessful in the way it was intended. It has not served to introduce defense lawyers into the interrogation process. If, as an empirical matter, *Miranda*, now a system of warnings and waiver, has not succeeded in reducing coercion, then *Miranda* exclusion exists simply to protect and encourage *Miranda* warnings. The system exists for itself, apart from the problem of coercion. The public might not support the haphazard exclusion of reliable evidence unless it is sure of the exclusion's purpose.[62]

The second problem with the Court's "political" *Miranda* decisions is the implicit yet profound rejection of the legal process these decisions suggest. Any particular interpretation of the constitution or a statute is

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60 *See id.* at 443.

61 A debate on the impact of Miranda on confessions continues. *See* Karen L. Guy and Robert G. Huckabee, *Going Free on a Technicality: Another Look at the Effect of the* Miranda *Decision on the Criminal Justice Process*, 4 CRIM. J. RES. BULL. 1 (1988) (Miranda issue raised in 9% of appeals, but only 5.6% of those claims were successful, resulting in a reversal rate of .51% of all criminal appeals). *But see* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 479 (1995) (Miranda causes substantial harms to groups including the innocent and victims).

62 The more public debate on the exclusionary rule suggests that the national culture has not clearly embraced the utilitarian ethic behind the exclusion of evidence in one case to promote lawful compliance in future cases. *See generally*, Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 BYU L. REV. 1443 (2000).

contestable, regardless of whether the interpretation is grounded in historical usage, original meaning, textual interpretation, or political preference. Even the underlying interpretive theory is debatable. When a court acts politically in the sense seen in *Miranda*, however, legal disagreement is precluded. The Court in *Dickerson*, for example, did not adopt a particular interpretive theory of the Fifth Amendment and then explain how that theory resulted in the case holding. Instead, the majority in *Dickerson* refused even to say precisely if *Miranda* is prescribed by the Fifth Amendment or not, thus rendering inapposite any criticisms of the opinion derived from the history, text or meaning of the self-incrimination clause. Not only is the decision insulated from criticism on customary constitutional grounds, the *Dickerson* Court placed its holding beyond legislative amendment as well.[63] The result is that no quintessentially legal avenues of disagreement are left available to critics; resort to textual language or analogical reasoning seems useless, as does enactment of positive law. Critics may respond to the Court's empirical claims or propose more effective or more practical solutions to the problem of police coercion, but criticisms of this sort fall outside the lawyer's expertise. Judges who act as statesmen are able to manufacture immunity from criticism on legal grounds.

The consequences of this practical immunity are serious along at least two dimensions particularly relevant to criminal procedure. First, the law of criminal procedure depends on critical commentary to a degree beyond other constitutional law subjects. The Court has used the Fourth, Fifth and Sixth Amendments of the Constitution as vehicles to fashion a large body of law regulating the interactions of government officers with private citizens. As evidenced by the significant number of decisions handed down by the Supreme Court in this area each year, these interactions are dynamically evolving and appear in endless variety. The law that regulates them evolves concomitantly, and this legal evolution is a product of the appeals, arguments, comments and criticisms brought to the Court's attention by those nearer to the scene. A law of criminal procedure, as seen in *Miranda* and its offspring, that is based on certain presumed factual realities and an uncertain gloss on constitutional text lies beyond the usual critical tools of lawyers, and thus will likely not evolve as needed in this dynamic field.

Second, implied in the Court's establishment of case law that is effectively immune from legal criticism is the apparent understanding by the majority of justices that this particular problem of criminal procedure is best solved by management, not law. The history of the *Miranda* cases has been about management. The Court's initial effort to insert a

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63 *See generally* Dickerson, 530 U.S. at 444.

lawyer into the interrogation process, the Court's effort to adjust *Miranda*'s exclusionary rule according to the perceived demands of deterrence, and the Court's decision in *Dickerson* to describe *Miranda*'s constitutional footing in such a way as to uphold *Miranda*'s progeny all suggest that the Court's preferred approach to the intensely factual problem of coercive interrogations is best solved by regulation and management, and if defense attorneys will not do the job, then the judiciary will. This preference for the discretion and flexibility of management over the narrow categories of law might lead to improved public policy, but it will not lead to improved judging, at least not in the area of criminal procedure. Many people, especially officers, lawyers and judges, are required to put the Supreme Court's criminal procedure decisions into immediate effect. Unlike most areas of constitutional law, the law of the Fourth and Fifth Amendments is fully and immediately operational in a very dynamic setting and on a wide basis. Officers and others need accessible and understandable answers to legal questions to avoid legal entanglements. A body of case law about which no one knows the answers to key questions until the Supreme Court provides them could create corrosive problems for the efficient operation of the criminal justice system.

CONCLUSION

Along with politics, Plato spent much of his time writing about legal philosophy. In his famous and dazzling tour de force, the Republic, Plato envisions ideal lawmakers to be carefully educated guardians who would exercise their beneficent wisdom on behalf of all citizens.[64] In the Republic's lesser known sequel, the Statesman, Plato retreats from the absolute dependency on the guardian class and instead describes the advantages of a more democratic form of government, ruled by statesmen who gain competence in the art of lawmaking through experience.[65] One senses, in reading the Statesman, Plato's growing sense of the impracticality and danger of his earlier, grand ideas. The last book of his jurisprudential trilogy is *The Laws*.[66] *The Laws* is an unfinished work. In *The Laws*, as the name implies, Plato largely abandons the philosophical ideal of the wise ruling class. The book consists mostly of a compilation of proposals for laws, very specific and detailed drafts covering matters as sublime as the division of authority of public officers and as prosaic as throwing drinking parties as a device to educate the young. One wonders why Plato wrote *The Laws*. Plato possessed one of the greatest minds in history, and there is much evidence that he knew it. Why did he choose to spend his precious final weeks, lying on his deathbed, feverishly de-

64 *See* PLATO, REPUBLIC, *supra* note 6.

65 *See* PLATO, STATESMAN, *supra* note 5.

66 *See* PLATO, THE LAWS, *supra* note 6.

voting the last impulses of that great mind to the pedestrian task of drafting legislation? I will suggest that Plato realized that ruling guardians are too rare, and that the best way to the best political life comes through laws, rules that are written with particularity to provide for the best solutions to political problems. The Court's apparent turn away from law, and toward politics, suggests that the Court believes it has a governing competence that it in fact may lack.