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Miranda's Demise

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Miranda's Demise? by Professor Clymer

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Miranda v. Arizona[1] has been a prominent fixture of the American criminal justice system, as well as police television shows and movies, for more than a third of a century. And when, amid considerable fanfare, the Supreme Court in June 2000 announced its decision in *Dickerson v. United States,*[2] it appeared that *Miranda* would retain that status for the foreseeable future. In *Dickerson*, a surprisingly large 7–2 majority settled a long-standing debate about the constitutional legitimacy of *Miranda*, holding that the *Miranda* rules are firmly grounded in the Fifth Amendment's self-incrimination clause.

But now, a mere three years later, *Miranda*'s fortunes have shifted dramatically. In May of this year, a divided Supreme Court cast doubt on whether *Miranda* imposes an obligation on police when they question arrested suspects. And, in the coming Term, the Court will decide two cases that further will determine whether *Miranda* will continue to play a significant role in regulating police interrogation practices. There is a good chance that by this time next year, with tacit approval from the Court, many police departments will spend more time and energy devising methods of circumventing the *Miranda* rules than following them. In order to understand why *Miranda*'s future looks so precarious, it is helpful to begin by briefly reviewing its past.[3]

Miranda to *Dickerson*: A Very Brief History

The 1966 *Miranda* decision was a *tour de force* in constitutional interpretation. After having experimented with both the Due Process Clause and the Sixth Amendment right to counsel as means of controlling pernicious police interrogation practices, the Court, in *Miranda*, turned to the Fifth Amendment self-incrimination clause. The Court determined that custodial police interrogation, by its nature, forces arrested suspects to answer questions. It concluded that suspects' answers to such questioning are inherently "compelled" and thus inadmissible in criminal prosecutions by virtue of the Fifth Amendment privilege against compelled self-incrimination. But, the *Miranda* Court struck a compromise of sorts, giving police an opportunity to "dispel" the compulsion and thus obtain admissible responses to their questions. To do so, police had to give the now-famous warnings and obtain from suspects affirmative waivers of their "rights" to remain silent and consult with counsel. If suspects asserted rather than waived their rights, police were supposed to honor those invocations by terminating interrogation.

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The Justices of the U.S. Supreme Court

In the decades following *Miranda*, the Court refined the new doctrine. Many decisions addressed predictable issues: what constitutes "custody" and "interrogation" for purposes of triggering the warnings and waiver requirements;[4] what sorts of responses are sufficient to qualify as waivers of rights;[5] and whether police are foreclosed from making additional efforts to secure waivers once suspects invoke their right to counsel or to remain silent.[6] But, two more fundamental interpretative issues soon arose, ones that would play a critical role in determining the meaning and operation of *Miranda*. One issue involved the constitutional legitimacy of *Miranda*; the other affected police compliance with the *Miranda* rules.

The first issue surfaced in a series of cases beginning in 1974 with *Michigan v. Tucker*,[7] in which the Court began to describe *Miranda* as if it were something less than a constitutional requirement. In those cases, the Court explained that *Miranda* "sweeps more broadly" than the Constitution and requires suppression even when police do not use constitutionally-prohibited compulsion during questioning. The Court seemed to have concluded that the secrecy of the police interrogation process and the inevitable swearing contests at suppression hearings between police officers and suspects about what had occurred during questioning made it prohibitively difficult for courts to determine whether police actually had coerced a suspect into answering questions. As a result, *Miranda*'s bright line rule—suppression of statements absent affirmative proof of police compliance with the warning and waiver requirements—was a necessary prophylaxis.

Whatever the merits of that reasoning, the Court's description of *Miranda* as extending beyond the boundaries of the Constitution presented a problem. If the *Miranda* doctrine sweeps more broadly than the Constitution, then some violations of *Miranda* are not violations of the Constitution. But, if a *Miranda* violation is not a constitutional violation, by what authority can the Supreme Court require the suppression in state court proceedings of a suspect's statements taken in violation of only the prophylactic *Miranda* rules? And, even if the Court's supervisory power permits it to require such a rule in federal courts, why can't Congress overrule it, as it attempted to do when it enacted 18 U.S.C. § 3501, a statute permitting the introduction of voluntary confessions in federal courts even absent compliance with the *Miranda* rules? These questions about the constitutional legitimacy of *Miranda* triggered a decades-long debate, one that was not resolved until the *Dickerson* decision.

The second issue, police compliance, arose in a series of Supreme Court decisions that addressed the consequences of violations of the *Miranda* rules —situations in which police question an arrested suspect without first properly advising him of his rights ("failure-to-warn violations") or continue to question an arrested suspect after his assertion of his right to silence or counsel ("failure-to-honor violations"). Although *Miranda* had held that the prosecution is forbidden from introducing statements resulting from such violations in its case-in-chief, the Court left open the question whether prosecutors can use such statements to impeach defendants who give inconsistent trial testimony. Likewise, *Miranda* did not determine whether prosecutors can admit evidentiary fruits of statements that police obtain by violating the *Miranda* rules, such as physical evidence or testimony from witnesses identified in suspects' statements.

In two post-*Miranda* cases, the Court determined categorically that prosecutors are free to impeach testifying defendants with inconsistent statements made following either failure-to-warn

or failure-to-honor *Miranda* violations.[8] Although, to date, the Court has been less categorical on the fruits issue, it held in one case that the prosecution could call a witness whom police had identified only because of a statement that a suspect gave without having received proper *Miranda* warnings.[9] Similarly, in another case, the Court held that when police first obtained a statement by questioning an arrested suspect without *Miranda* warnings, a later statement that the suspect made following *Miranda* warnings was not tainted by the first statement.[10]

These impeachment and fruits decisions do more than determine what sort of evidence the prosecution can admit at trial. They create affirmative incentives for police to violate the *Miranda* rules. If an earlier un-warned statement does not taint a suspect's later, post-*Miranda* statement, police have reason to question a suspect without advising him of his rights to silence and counsel. Such questioning may increase the chances of obtaining a statement which, although inadmissible in the prosecution's case-in-chief, can serve as a "beachhead." By later warning the suspect of his rights, police can "cure" the earlier violation and likely persuade the suspect, who already has "let the cat out of the bag," to repeat the statement. Under the Court's approach, the second statement is freely admissible.

In addition, police have little reason to stop questioning when a suspect invokes his right to silence or counsel. Honoring the assertion of rights forecloses the chance of obtaining any statement; dishonoring the assertion can lead to acquisition of a statement that, although inadmissible in the prosecution's case-in-chief, can be used to impeach the suspect at trial (and perhaps deter the defendant from testifying at all) or aid in discovery of other evidence. Indeed, in recent years, a number of police officers and departments have chosen to deliberately violate the *Miranda* rules because of these evidentiary incentives. Supporters of *Miranda* have criticized both the Court for creating the incentives and the police for acting on them.[11]

There seemed to be a connection between these two issues—the scope of the *Miranda* exclusionary rule and *Miranda*'s constitutional legitimacy. When the government compels a statement from a person outside the context of custodial interrogation, thereby triggering the protections of the self-incrimination clause, the prosecution is forbidden from making any use of the statement in a criminal prosecution of the person who made the statement. For example, in the context of grand jury investigations, witnesses sometime refuse to answer questions by asserting their Fifth Amendment privilege. The prosecution can overcome that assertion, and compel answers, by obtaining a grant of immunity. But, although an immunized witness has to answer questions or face contempt of court sanctions, the prosecution cannot use a statement compelled by an immunity grant in any way if it later prosecutes the witness. Thus, the prosecution cannot introduce the immunized statement in its case-in-chief against the witness-turned-defendant, and, in contrast to the rules that apply in the *Miranda* context, cannot use it to impeach inconsistent trial testimony or introduce any evidentiary fruits of the statement. There was reason to believe that the more limited exclusionary sanction in the *Miranda* context was an outgrowth of the Court's characterization of *Miranda* as only a prophylactic rule. The Court seemed to have concluded that violations of the merely prophylactic *Miranda* rules required a less drastic response than the Fifth Amendment privilege itself required in other contexts. Thus, when the Supreme Court granted review in *Dickerson*—to consider whether Congress

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had the authority to overrule *Miranda*—it appeared that the Court was poised to confront both the legitimacy issue and questions regarding the scope of the *Miranda* exclusionary rule.

Dickerson v. United States: Affirmation or Only a Brief Reprieve?

In 1968, two years after the Court decided *Miranda*, Congress attempted to overturn it. It did so by enacting 18 U.S.C. § 3501, a statute requiring federal courts to admit defendants' post-arrest statements as long as they were voluntarily made. Under Section 3501, a failure to advise an arrested suspect of his rights was a factor to be considered in assessing voluntariness but, in contrast to the *Miranda* doctrine, did not require suppression. Although Section 3501 has been available since 1968, the Department of Justice rarely argued in court that it trumped *Miranda*. In *Dickerson*, the Fourth Circuit Court of Appeals *sua sponte* relied on Section 3501 to reverse a district court's order suppressing a confession that an FBI agent obtained without *Miranda* warnings. The appellate court ruled that the confession, because it was voluntary, was admissible despite the failure to follow *Miranda*. When the Supreme Court chose to review the Fourth Circuit's decision, it was obvious that it would resolve the long-standing debate about *Miranda*'s legitimacy.

At first blush, the result in *Dickerson* appeared to be a stunning victory for *Miranda*'s defenders. In an opinion written by Chief Justice Rehnquist, who long ago had touched off the legitimacy debate in his opinion in *Michigan v. Tucker*, seven members of the Court rejected the notion that Congress could overrule *Miranda*. Rather, the Court held that *Miranda* was a constitutionally-based rule, resting firmly on the Fifth Amendment privilege. The Court had resolved the debate in *Miranda*'s favor, making clear that it *Miranda*'s constitutional pedigree was pure.

But, upon closer inspection, the *Dickerson* opinion cast a shadow on *Miranda*'s future. First, no member of the Court expressed any real enthusiasm for *Miranda*. Rather than extolling the virtues of the *Miranda* doctrine or its importance in regulating police interrogation practices, the Court's opinion simply noted that it had in the past described and treated *Miranda* as if it were a constitutionally-based decision and that the Court was reluctant, for purposes of *stare decisis*, to change course, "[w]hether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance."[12] Remarkably, the Court seemed unwilling to endorse even the most basic tenets of *Miranda*, ascribing them instead to the *Miranda* Court. For example, the *Dickerson* Court stated that the "*Miranda* Court" had concluded that the warning and waiver requirements were necessary to overcome the pressures of custodial interrogation, but never expressed agreement with either this or any other premise of the *Miranda* decision. Similarly, *Dickerson* was noticeably devoid of any concurring opinion extolling the importance of *Miranda* as a means of regulating police interrogation.

Second, contrary to the views of many commentators that the legitimacy question was linked to the scope of the *Miranda* exclusionary rule, the *Dickerson* Court appeared to see no inconsistency between a constitutionally-based *Miranda* doctrine and a watered-down exclusionary sanction. Although the *Dickerson* Court did not address the scope of the exclusionary sanction directly, it described with approval some of its decisions permitting impeachment with statements taken in violation of *Miranda* and the admission of fruits of such statements. Thus, while the Court made clear that *Miranda* has a constitutional foundation, it appeared to leave intact the incentives for police to violate the *Miranda* rules.

Third, and perhaps most significantly, the Court used language suggesting that even if *Miranda* has a constitutional foundation, the foundation is not as solid as *Miranda*'s supporters would like. In several places, the *Dickerson* Court described *Miranda* as a rule of admissibility, not a rule governing police conduct. Coupled with the

Court's lack of enthusiasm for *Miranda* and its willingness to create incentives for police to violate the *Miranda* rules, those passages set the stage for what may be *Miranda*'s demise.

Miranda's Foundation: What Does the Privilege Require?

Miranda's constitutional foundation, the Fifth Amendment privilege, provides that "no person… shall be compelled in any criminal case to be a witness against himself." The text of the privilege thus suggests that what it prohibits is not "compulsion" *per se* but rather the admission "in any criminal case" of a compelled statement "against" the person who gave it. In other words, a violation only occurs if and when a compelled statement is admitted into evidence, not when it is compelled. This understanding of the privilege is significant for at least two reasons.

First, if admission in a criminal case is necessary for a violation to exist, then police use of compulsion alone to obtain a statement does not violate the privilege. To be sure, extreme forms of compulsion would still violate another constitutional right. The Court has made clear that the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit police conduct that "shocks the conscience," including use of physical force, threats of force, and extreme forms of psychological coercion during interrogation. But, transgressions of the *Miranda* rules alone do not violate due process. Thus, police would not be liable for civil rights violations for merely failing to follow the *Miranda* rules.

Second, and more significantly, if compulsion alone does not violate the privilege, then police commit no constitutional wrong by disregarding the *Miranda* requirements. In other words, police have no constitutional obligation to follow *Miranda*. Instead, like a prosecutor deciding whether to use the compulsion of an immunity order, their decision is properly based on an assessment of the costs and benefits of compliance and non-compliance with the warning and waiver requirements.

Last term, in *Chavez v. Martinez*,[13] the Court adopted the view that the privilege is a rule that governs only admissibility, not one that operates as a direct restraint on police conduct. *Chavez* involved a police investigation gone tragically awry. Martinez, a farm worker, was riding a bicycle in Oxnard, California as two officers were investigating possible drug sales. The officers stopped Martinez. Although a number of facts are in dispute, no one doubts that Martinez struggled with one of the officers and that the other officer, believing that Martinez had taken her partner's service revolver, shot Martinez, leaving him blind and partially paralyzed. Chavez, a police supervisor who was not involved in the stop or shooting, attempted to interview Martinez in the hospital emergency room despite both Martinez's anguished pleas that he be left alone and hospital workers' requests that Chavez leave. Martinez did provide some answers in response to Chavez's persistent questioning. Martinez, who was never prosecuted for a crime, sued the police department, alleging that police had violated a number of his constitutional rights. Among other things, Martinez claimed that Chavez's persistent questioning violated both his due process rights and his "right to remain silent" under the Fifth Amendment privilege.

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Although a majority of the Supreme Court was willing to permit Martinez to pursue his due process claim, it rejected his view of the privilege. The Court held that, as a general matter, admission of a compelled statement in a criminal case is necessary for a finding that the Fifth Amendment privilege has been violated. Martinez was never prosecuted

for a crime and thus his statements to Chavez were never admitted in a criminal case against him. As a result, under the Court's interpretation of the privilege, he suffered no violation of his Fifth Amendment privilege.

Chavez has profound implications for the *Miranda* doctrine. If *Miranda*'s constitutional foundation—the Fifth Amendment privilege—cannot be violated without use of a compelled statement in a criminal case, it would seem that the same holds true for *Miranda*. If so, police commit no constitutional violation if they disregard the *Miranda* rules. Thus, by its decision in *Chavez* and the cases in which it has permitted impeachment use of statements taken in violation of the *Miranda* rules and at least some evidentiary fruits of such statements, the Court seems both to permit police to disregard *Miranda* and to provide incentives for them to do so.

The Future of *Miranda*: Next Term and Beyond

When the Court decides the two *Miranda* cases on its docket for next Term, it will make clear just how much or how little *Miranda* will continue to matter. One case, *United States v. Patane*,[14] raises the fruits question: whether a firearm, which police found only as a result of a statement taken in violation of the *Miranda* rules, should be admissible. If the Court follows what appears to be the trend emerging from its earlier decisions, as well as language in a handful of both majority and concurring opinions, it likely will hold that even when *Miranda* requires suppression of a post-arrest statement, all evidentiary fruits are admissible.

The other case, *Missouri v. Seibert*,[15] raises the question whether more stringent suppression rules should apply when police deliberately violate the *Miranda* rules in order to take advantage of the evidentiary benefits that the Court has created. In *Seibert*, the police, hoping to obtain a fully admissible *Mirandized* confession, deliberately refrained from giving warnings when they started interrogating a murder suspect. Once the suspect gave a statement, the police then warned her of her rights and had her repeat the statement. Although, as explained above, the Supreme Court had previously permitted the introduction of a second, post-*Miranda* statement taken under similar circumstances, the lower court in *Seibert* held that the second statement should be suppressed if the initial violation is deliberate. The chances are good that the Court will reject that conclusion. First, if, as *Chavez* suggests, police have no constitutional duty to comply with the *Miranda* rules, then there seems to be no reason why a decision to deliberately violate the rules at the outset of the interrogation should matter. Second, in an analogous Fourth Amendment context, the Court has held that a police officer's subjective motivation has no bearing on the legality of an arrest.[16] Rather, as long as objective circumstances establish probable cause to support an arrest, the officer's subjective motivation for making the arrest is irrelevant. A similar approach in the *Miranda* context would foreclose inquiry into whether a police officer's violation of *Miranda* is deliberate. Third, as explained above, this Court seems unwilling to champion extensions of *Miranda*.

The Court seems both to permit police to disregard *Miranda* and to provide incentives for them to do so.

If the Court decides *Patane* and *Seibert* as predicted, *Miranda* will, by the end of next year's Term, be reduced to a set of rules that police can ignore deliberately when it is advantageous for them to do so. Although *Miranda* still will require

suppression in the prosecution's case-in-chief of any statement taken after a failure-to-warn or a failure-to-honor violation, police almost certainly will commit both sorts of violations with some regularity. They often will question suspects without warnings in hopes of minimizing the likelihood of an invocation of rights, and warn only after the suspects have given statements that they are likely to repeat even after receiving warnings. When faced with assertions of the rights to silence or counsel, assertions that normally would foreclose acquisition of any statement if the assertions were honored, police instead will continue to question in hopes of obtaining statements useful to impeach or as a source of leads to other evidence.

If all of this happens, it would be perverse and unfortunate. It would undercut the reason for having the *Miranda* rules—to combat the compulsion inherent in police interrogation. Although the constitutional provision upon which *Miranda* rests—the privilege—may be a rule of admissibility, the *Miranda* Court resorted to it in hopes of controlling what police did in the interrogation room. The *Miranda* Court was willing to impose the cost of suppression of probative evidence in order to minimize the risk that police would use the pressures of custodial interrogation to compel suspects to confess against their wills. But, if, as seems likely, the Court signals to police that they have no constitutional duty to follow the *Miranda* rules and that they can gain evidentiary benefits by violating those rules, *Miranda* will not serve its purpose. Police will refrain from giving the pressure-reducing warnings, at least at the outset of interrogation, and continue to exert pressure even after suspects ask to remain silent or to speak with counsel. As a result, the pressure that the *Miranda* Court sought to alleviate will play a role in suspects' decisions to answer questions.

The Court could save *Miranda* from this fate by rethinking the decisions in which it created the incentives for police to violate *Miranda*. In *Patane*, the Court could reverse course and determine that fruits of statements taken in violation of the *Miranda* rules are not admissible. Similarly, the Court could rethink its decisions permitting impeachment use of such statements. If the costs of violating the *Miranda* rules outweigh the benefits, police will comply with the rules, even absent a constitutional obligation to do so. But, given the Court's apparent lack of enthusiasm for *Miranda*, it is unlikely that it will adopt this approach or another that would revitalize *Miranda*. Instead, *Miranda* soon may matter more on television shows than it does in real-life police stations and courtrooms.

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1. 384 U.S. 436 (1966).

2. 530 U.S. 428 (2000).

3. For a fuller treatment of many of the issues discussed here, see Steven D. Clymer, "Are Police Free to Disregard *Miranda*?" 112 *Yale L. J.* 447 (2002).

4. *See, e.g., Oregon v. Mathiason,* 429 U.S. 492 (1977) (defining "custodial"); *Rhode Island v. Innes,* 446 U.S. 291 (1980) (defining "interrogation").

5. *See, e.g., Moran v. Burbine,* 475 U.S. 412 (1986).

6. *See, e.g., Michigan v. Mosely,* 423 U.S. 96 (1975) (assertion of right to silence); *Edwards v. Arizona,* 451 U.S. 477 (1981) (assertion of right to counsel).

7. 417 U.S. 433 (1974). The other cases are *Oregon v. Elstad,* 470 U.S. 298 (1985) and *New York v. Quarles,* 467 U.S. 649 (1984).

8. *See Harris v. New York,* 401 U.S. 222 (1971) (impeachment with statement taken without *Miranda* warnings); *Oregon v. Haas,* 420 U.S. 714 (1975) (impeachment with statement taken following assertion of *Miranda* rights).

9. *See Michigan v. Tucker,* 417 U.S. 433 (1974).

10. *See Oregon v. Elstad,* 470 U.S. 298 (1985).

11. *See, e.g.,* Charles D. Weisselberg, "Saving *Miranda,*" 84 *Cornell Law Review* 109 (1998).

12. 530 U.S. at 443.

13. 123 S.Ct. 1994 (2003).

14. The lower court's decision is *United States v. Patane,* 304 F.3d 1013 (10th Cir. 2002).

15. The lower court's decision is *State v. Seibert,* 93 S.W.2d 700 (Mo. 2002).

16. *See Whren v. United States,* 517 U.S. 806, 813 (1996).