The Three Threats to Miranda

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By

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Miranda v. Arizona (1966) was the centerpiece of the Warren Court’s “revolution” in American criminal procedure. Moreover, as Professor Stephen Schulhofer of the University of Chicago Law School has recently noted, a number of the Miranda safeguards “have now become entrenched in the interrogation procedures of many countries around the world.” (See generally Craig Bradley, “The Emerging International Consensus as to Criminal Procedure Rules,” 14 Michigan Journal of International Law 171 [1993].)

But Miranda is in serious trouble at home. A provision of the federal criminal code enacted in 1968, 18 U.S.C. § 3501, purports to “repeal” Miranda and reinstate the pre-Miranda standard for the admissibility of confessions — the due process “totality of circumstances” “voluntariness” test. Section 3501 has been avoided by every administration since its enactment more than 30 years ago. But this has not discouraged conservative legal foundations from urging the federal courts to inject § 3501 into their cases.

In 1999, these legal groups gained a stunning victory when a 2-1 majority of a panel of the U.S. Court of Appeals for the Fourth Circuit ruled — against the express wishes of the Department of Justice — that the pre-Miranda voluntariness test set forth in § 3501, rather than the famous Miranda case, governs the admissibility of confessions in the federal courts. According to the Fourth Circuit panel, the Miranda rules are not constitutionally required; they are only “prophylactic” rules designed to implement or reinforce the underlying constitutional right. Therefore, § 3501 is a valid exercise of congressional authority to override judicially created rules [that are] not part of the U.S. Constitution.

I strongly disagree. I share the view of a number of criminal procedure and constitutional law professors that the Miranda rules were an understandable (and long overdue) response to the inadequacies of the mushy, subjective, and unruly voluntariness test (under which every factor was relevant, but virtually nothing was decisive). I agree, too, that prophylactic rules are a necessary and proper feature of constitutional law — a means of interpreting constitutional provisions in light of institutional realities — a means of providing constitutional rights much-needed “breathing space.” But if the present Court were to address this issue in the near future, I am afraid that at least four justices might uphold the statute purporting to abolish Miranda (the Chief Justice and Justices O’Connor, Scalia, and Thomas).

Professor Kamisar, widely known for his pioneering teaching materials on criminal procedure and his many articles defending and explaining the Warren Court’s “revolution” in American criminal procedure, is a specialist in constitutional law. He has studied the impact and aftermath of the U.S. Supreme Court decision that produced what we now call the Miranda Rule since the decision was handed down in Miranda v. Arizona in 1966. Here, he identifies three distinct threats to the protections the ruling provided for suspects and defendants.
Section 3501 is not the only danger facing Miranda. A decade and a half ago, in Oregon v. Elstad (1985), a case that upheld the admissibility of a second confession made at the time the police complied with Miranda, although earlier that day the police had obtained a statement from the same defendant — in violation of Miranda — the Supreme Court indicated that the “fruit of the poisonous tree” doctrine did not apply to Miranda at all. If so, all the “fruits” of (or evidence derived from) a Miranda violation would be admissible — not just a second confession or a witness for the prosecution whose identity the government learned from the inadmissible confession, but physical evidence, e.g., the drugs, the proceeds from a bank robbery, or the murder weapon.

The Court has never explicitly decided whether physical or nontestimonial evidence derived from a Miranda violation is admissible. However, I have to say there is a good chance it will do so. In the meantime, the state courts and the lower federal courts have almost uniformly ruled that the prosecution may use the nontestimonial fruits of a Miranda violation.

Some 30 years ago, Judge Henry Friendly noted that “what data there are suggest that the obtaining of leads with which to obtain real or demonstrative evidence or prosecution witnesses is more important than getting statements for use in court.” (Emphasis added.) Therefore, a ruling that all types of evidence derived from a Miranda violation are admissible would strike the landmark case a grievous blow. How could we possibly expect the police to comply with Miranda if the courts barred only the use of incriminating statements obtained in violation of that doctrine, but none of the leads or clues or evidence these statements brought to life?

Miranda faces still another danger — there is good reason to think that in a substantial number of police stations throughout the land police interrogators are violating Miranda in a fundamental way. They are getting suspects to waive their rights — by persuading them it’s in their “best interest” to tell the police “their side of the story” so the police can help them — before they advise them of their rights.

These interrogation techniques were first described at length in David Simon’s book, Homicide: A Year on the Killing Streets. The author, a Baltimore Sun reporter, was granted unlimited access to the city’s homicide unit for a full year. Recent articles indicate that the interrogation tactics employed by the Baltimore police are being utilized by detectives in a number of other police departments as well.

If the admissibility of a statement obtained as a result of these methods were challenged by a defense lawyer, a prosecutor would be in a strong position, for she would be armed with a signed waiver of rights form (and a signed explanation of rights form as well). But she would be in a strong position only if — as would hardly be surprising — the detective involved in the case conveniently failed to remember how the suspect was induced to sign the waiver of rights form. However, if all the details were known — if the entire transaction had been tape recorded — no court would be able to admit the statement unless it was prepared to overrule Miranda itself.

(Unfortunately neither the Warren Court nor any other Supreme Court has ever required law enforcement officers to tape record, when feasible, how the warnings of rights are delivered, how the waiver takes place, and what the police do thereafter. And the overwhelming majority of state courts have held that the testimony of a police officer that he gave complete Miranda warnings and obtained a voluntary and intelligent waiver of rights need not be corroborated.) Miranda emphasizes that “any evidence” that a custodial suspect was “threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.” But in a substantial number of station houses, the police are threatening the suspect: they are telling him that unless he talks to them about the homicide, they will write it up as first degree murder and turn him over to a merciless assistant prosecutor. The police are also tricking the suspect: they are leading him to believe that it is in his best interest to tell them his side of the story. Indeed, the police are pretending that talking to the police instead of asking for a lawyer is the suspect’s only chance to get the homicide charge reduced (or perhaps even dismissed).

The police are not supposed to subject a custodial suspect to questioning unless and until they obtain a waiver of his rights. Unfortunately, what they are really doing in too many places is subjecting individuals to “interrogation” before they waive their rights — indeed, before they even advise them of their rights.

Once the police have taken a suspect into custody, there is no such thing (at least there is no lawful basis for any such thing) as a “pre-interview” or “pre-waiver” interrogation. The waiver of rights transaction is supposed to take place as soon as the curtain goes up — not be postponed until the second act.

Reports about how modern police interrogators have “adapted” to Miranda underscore the need to record on video- or audiotape the entire proceeding in the police station — any preliminary conversation, the reading of rights, the waiver transactions, and any subsequent interrogation. There is nothing new or startling about tape recording police questioning. Virtually all of the nation’s criminal procedure professors — critics and defenders of Miranda alike — favor the idea. Moreover, there is widespread satisfaction with a mandatory recording requirement in Great Britain. Why then is tape recording, where feasible, not the general practice in American police stations today?

The only startling thing about this issue is that, after all these years, American law enforcement officials are still able to prevent objective recordation of all the facts of police “interviews” or “conversations” with a suspect and, of course, how the warnings are delivered and how the waiver of rights is obtained. But if you were a member of the Baltimore homicide unit (or a member of other police departments employing the same interrogation methods), would you favor tape recording (and making available for public inspection) what really happens in the interrogation room?