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The Destruction of Miranda

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We all know about the Fifth Amendment and the protection against self-incrimination. If a person does not wish to speak to a government official, they can “plead the fifth” and then remain silent. There are countless examples of people who unwittingly give cops and prosecutors the rope they eventually use to hang them at trial. It is almost always best to say nothing to government agents. Anything you say or do really WILL be used against you by cops. They are not “cool” or “just making conversation.” They are cleverly manipulating you into digging your own grave. Shut up and say nothing except “I invoke my Fifth and Sixth Amendment rights to remain silent and be provided with a lawyer.” This is literally the advice that cops, lawyers, and judges give to their own children about interacting with police.

The US Constitution says that **“No person shall . . . be compelled in any criminal case to be a witness against himself. . . .”**

In a rare example of a government body expanding liberty and limiting governmental power, the Supreme Court gave the Fifth Amendment a real-world application that would protect many people from coerced confessions by cops. But that doesn’t do exactly what many people think it does. In [*Miranda v. Arizona* \(1966\)](#), the Supreme Court held that the 5th Amendment means that “any statements that a defendant in custody makes during an interrogation are admissible as evidence at a criminal trial only if law enforcement told the defendant of the right

to remain silent and the right to speak with an attorney before the interrogation started, and the rights were either exercised or waived in a knowing, voluntary, and intelligent manner.”

Ernesto Miranda was arrested in Phoenix due to circumstantial evidence that he had been involved in a kidnapping and rape. After a long interrogation (that many would consider coercive) by cops while in custody, Miranda confessed to the charges and signed a statement that said the confession was made voluntarily. Miranda never was told of his right to remain silent, of his right to have a lawyer, or of the fact that any of his statements during the interrogation could be used to convict him. At trial, his lawyer objected to the introduction of the written copy of his confession into evidence, arguing that his ignorance of his rights and the implicit coercion of being locked up and interrogated by armed cops made the confession involuntary.

The trial judge overruled the objection and Miranda was convicted of the kidnapping and rape at least in part because of the written confession, and he was sentenced to 20-30 years in prison. An appeal based on the confession's allegedly involuntary nature was rejected by the Arizona Supreme Court. The Supreme Court heard the appeal and ruled in favor of Miranda.

This created the famous “*Miranda* warning” that all cops now issue whenever arresting someone. They do this because they want to be able to use any statement made by the suspect once the case goes to trial. They give the warning that “you have the right to remain silent . . . anything you say can be used against you in a court of law. . . .” and then the cops proceed to use every method possible to get the suspect to say things that would make them look guilty in a trial. Police departments have since made the “*Miranda* warning” a standard procedure whenever cops have someone in custody.

But ever since *Miranda*, the SCOTUS has been weakening its protections of people interrogated by cops, and widening the gap between what people believe and what the law

actually does. The SCOTUS in some cases did “expand” the protections offered by *Miranda*, but this article will focus on the court cases that weakened them (because I’m a pessimist voluntarist and I’m too lazy to read and summarize even *more* cases).

It’s important to understand that the intent of the 5th Amendment and of the SCOTUS is primarily to protect suspects from being coerced by armed cops to incriminate themselves while in handcuffs. No more and no less. I previously misunderstood the scope of the self incrimination clause and *Miranda*, mistakenly believing that it protected citizens from far more police/prosecutorial conduct than it does.

In [*Beckwith v. United States \(1976\)*](#), the SCOTUS held that statements made by a taxpayer to IRS agents during the course of an interview in a criminal tax investigation were admissible (could be used in court) against them in an ensuing criminal tax fraud prosecution, even though they were not given *Miranda* warnings.

In [*Rhode Island v. Innis \(1980\)*](#), the SCOTUS held that cops can arrest someone and then use trickery to elicit incriminating statements and confessions from the suspect in detention as long as they gave a *Miranda* warning prior to the manipulative solicitation and did not overtly coerce the suspect into speaking. In this case, the suspect was arrested, handcuffed, and sitting in a police car. He was Mirandized and elected to remain silent. The cops in the car then manipulated him by supposedly chatting among themselves about how sad it would be if local school children who had disabilities were to find the shotgun and hurt themselves with it, at which point Innis told the police to turn the car around so he could show them where the shotgun was located, in a sincere effort to protect the local children. His knowledge of the shotgun’s location was used at trial to convict Innis and the SCOTUS held that the motion to suppress that

piece of evidence should fail because he was given the *Miranda* warning and the cops didn't use force to get him to confess; just manipulation.

The SCOTUS then dealt a massive blow to *Miranda* protections in [*New York v. Quarles* \(1984\)](#) by creating a huge exception for "public safety."

The doctrinal underpinnings of *Miranda* do not require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety. The case involved a man named Benjamin Quarles, who was stopped at gunpoint by a cop and then handcuffed and frisked. The cop was acting on a report by a woman that a man matching Quarles' description had just raped her and then ran into the supermarket. There is no question that he was being detained in police custody at this moment. Without issuing the *Miranda* warning, the cop asked Quarles where the gun was. The handcuffed suspect nodded toward some empty cartons and responded that "the gun is over there." The prosecutor obviously wanted to use that statement at trial, and the defendant moved to suppress it based on it being the product of a *Miranda* violation. Writing for the 6-3 majority, Justice Rehnquist said that:

This case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*. Although [Quarles] was in police custody when he made his statements . . . there is a "public safety" exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted.

Thus, the highest court decided that the *Miranda* rule and the Fifth Amendment could be thrown in the trash as long as the police officer believes that there is a potential threat to "public safety," an element that nearly every officer could claim exists in nearly every case. Everything cops do is for the purpose of public safety, after all!

In the same session, the SCOTUS expanded the *Miranda* exceptions for cops by shrinking the definition of “detention.” Even if you can’t leave and understand that you aren’t free to go and may be physically restrained, you’re not technically being “detained,” and so cops could legally coerce you into making incriminating statements and then use those statements as evidence against you at trial. An Ohio state cop pulled over a man for allegedly weaving. The cop made it clear that the driver was not free to leave the scene. Although he was being detained and was not Mirandized, the cop interrogated him. The driver made statements admitting to drinking beer and smoking cannabis. The SCOTUS unanimously ruled in [*Berkemer v. McCarty* \(1984\)](#) that statements made during a roadside detention before a *Miranda* warning are admissible and could be used to prosecute the defendant, saying that:

The roadside questioning of a motorist detained pursuant to a routine traffic stop does not constitute "custodial interrogation" for the purposes of the *Miranda* rule. Although an ordinary traffic stop curtails the "freedom of action" of the detained motorist and imposes some pressures on the detainee to answer questions, such pressures do not sufficiently impair the detainee's exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights. A traffic stop is usually brief, and the motorist expects that, while he may be given a citation, in the end, he most likely will be allowed to continue on his way. Moreover, the typical traffic stop is conducted in public, and the atmosphere surrounding it is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda* and subsequent cases in which *Miranda* has been applied.

Mauro was similar to *Innis*, though less manipulative and far more tragic. Here, Arizona cops apparently tricked a man into saying things on tape that prosecutors would later use against

him in a unique way. After going to a [local discount store](#) and telling employees he had just killed his son, William Mauro was arrested and brought to the police station for interrogation. He invoked his rights to remain silent and to have a lawyer provided to him. They allowed Mauro's wife to speak to him in an office at the station in the presence of an officer. The trial court said that "the officer who was present produced a tape recorder and told the couple that their conversation would be recorded, and put that tape recorder down on the desk in plain sight and taped their conversation, so they had knowledge that that was going on." During their conversation, Mauro advised his wife not to talk to the police without a lawyer present. At the homicide trial, Mauro's lawyer used an insanity defense. The prosecution rebutted this claim by using the recorded conversation to demonstrate that Mauro was of sound mind and intelligent enough to advise his wife against speaking to cops unless her lawyer was present. Although the suspect undisputedly invoked his right to not speak to any cops about anything whatsoever so that nothing he said could be used against him, cops got him to make a statement that undercut his defense, recorded it, and used it to crush his primary defense. The judge allowed the evidence into the trial, ignored the insanity defense, and Mauro was convicted and sentenced to death. The Arizona Supreme Court reversed the conviction, holding that the police had impermissibly interrogated Mauro within the meaning of *Miranda*.

The 5-4 SCOTUS ruled in [Arizona v. Mauro \(1987\)](#) that since he was not technically being interrogated by cops at the time he made the statement, it could be used against him at trial: "The police's actions following respondent's refusal to be questioned without a lawyer did not constitute interrogation or its functional equivalent."

The minority made some good points, including that the cops intended to subvert *Miranda*:

. . . the police employed a powerful psychological ploy; they failed to give respondent any advance warning that Mrs. Mauro was coming to talk to him, that a police officer would accompany her, or that their conversation would be recorded. As the transcript of the conversation reveals, respondent would not have freely chosen to speak with her. These facts compel the conclusion that the police took advantage of Mrs. Mauro's request to visit her husband, setting up a confrontation between them at a time when he manifestly desired to remain silent. Because they allowed respondent's conversation with his wife to commence at a time when they knew it was reasonably likely to produce an incriminating statement, the police interrogated him.

Footnotes by dissenters:

1. The Arizona Supreme Court, after studying the trial record in light of our precedents, concluded that respondent's Fifth Amendment rights had been violated. Its decision rests on a **careful evaluation** of the **behavior** of the **local police**. Justices of that court regularly review cases in which **Arizona police officers** have testified. The Arizona Supreme Court's assessment of the actual intent of the Arizona police officers who testified in this case is therefore a **good deal more reliable** than this Court's (the SCOTUS is in DC and is not very familiar with the customs of Arizona cops). Indeed, whenever this Court reviews a state appellate court's examination of a trial record, there is a **special risk of error** resulting from **lack of familiarity with local conditions** and from the limited time the Members of this Court can devote to study of the trial record.

2. The regrettable irony in this case is that respondent endured the functional equivalent of interrogation while in the very process of advising his wife to exercise her own Fifth Amendment right to remain silent.

Because *Miranda*'s function is solely to protect suspects from overt coercion into self-incrimination by cops while knowingly being detained, statements made to undercover cops while detained in jail could be used at trial to prosecute the suspect. That's what the SCOTUS said in [*Illinois v. Perkins* \(1990\)](#). Perkins was in jail for an unrelated charge when the cops placed an undercover agent and a criminal informant into his cellblock. The pair manipulated Perkins by chatting with him about whether he's ever killed anyone, and he fell for the bait. As Justice Marshall writes in his dissent:

The officer's narration of the "conversation" at Perkins' trial, however, reveals that it clearly was an interrogation.

"[Agent:] You ever do anyone?"

"[Perkins:] Yeah, once in East St. Louis, in a rich white neighborhood."

"Informant: I didn't know they had any rich white neighborhoods in East St. Louis."

"Perkins: It wasn't in East St. Louis, it was by a race track in Fairview Heights. . . ."

"[Agent:] You did a guy in Fairview Heights?"

"Perkins: Yeah, in a rich white section where most of the houses look the same."

"[Informant]: If all the houses look the same, how did you know you had the right house?"

"Perkins: Me and two guys cased the house for about a week. I knew exactly which house, the second house on the left from the corner."

"[Agent]: How long ago did this happen?"

"Perkins: Approximately about two years ago. I got paid \$5,000 for that job."

"[Agent]: How did it go down?"

"Perkins: I walked up to . . . this guy's house with a sawed-off under my trench coat."

"[Agent]: What type gun"

"Perkins: A .12 gauge Remington Automatic Model 1100 sawed-off."

The police officer continued the inquiry, asking a series of questions designed to elicit specific information about the victim, the crime scene, the weapon, Perkins' motive, and his actions during and after the shooting.

The 8-1 majority held that "an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response."

So, even when a suspect is locked behind bars and even when a cop and an informant are eliciting incriminating statements from him, a *Miranda* warning is not necessary because the suspect wasn't really being actively coerced by a cop in uniform who was overtly interrogating him about a specific crime. Adding to *Innis* and *Mauro*, this ruling confirmed that cops were allowed to use deceptive interrogation tactics to elicit incriminating statements without *Miranda* getting in the way.

In this next case, Mr. Muniz was arrested for allegedly driving while under the influence. He was taken into custody and booked by police. Without any *Miranda* warnings, he was interrogated and investigated, including with numerous tests while on video. In his responses, he stumbled over his words twice and could not provide the date of his sixth birthday. He also made several incriminating statements while undergoing the physical sobriety tests. He was then asked to take the breathalyzer test and given a *Miranda* warning for the first time. Both the video and

audio portions of the tape were admitted at trial, and he was convicted. His motion for a new trial based on wrongly admitted evidence was denied. The Pennsylvania Superior Court reversed that decision and ruled that he was entitled to a new trial, because Muniz's answers to questions and his other verbalizations were testimonial and, thus, the audio portion of the tape should have been suppressed in its entirety. The SCOTUS in [*Pennsylvania v. Muniz*](#) (1990) held that only Muniz's response to the sixth birthday question constitutes a testimonial response to custodial interrogation for *Miranda* purposes. The Court quoted a [prior case](#) to demonstrate the distinction between verbal testimony versus physical evidence, remarking that the 5th Amendment protects the "accused from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, but not from being compelled by the State to produce real or physical evidence." Therefore, the parts of the recording that demonstrated his slurred speech could be admitted as incriminating evidence and were not protected by *Miranda* because slurring is not a communicative function like speaking. To be testimonial, the communication must explicitly or implicitly relate a factual assertion or disclose information.

Oliverio Martinez was in the emergency room being treated for serious gunshot wounds to the face. Blinded by his injuries, the man screamed in agony as doctors did their best to patch the bullet holes and keep him alive. A police supervisor named Ben Chavez furiously interrogated the critical patient. He would end up permanently blind and paralyzed from the waist down. The depraved cop clearly manipulated the suspect by convincing him that the medical staff would not treat his wounds unless he complied with the interrogation. As a result of this vicious technique, the cop successfully induced Martinez to admit that he used heroin and had taken an officer's gun during the incident. At no point was Martinez given *Miranda*

warnings. After he recovered, Martinez sued Chavez under 42 U. S. C. § 1983 for using torture to violate his Fifth Amendment right to remain silent. The District Court wrote that Martinez:

. . . had been shot in the face, both eyes were injured; he was screaming in pain, and coming in and out of consciousness while being repeatedly questioned about details of the encounter with the police. His blinding facial wounds made it impossible for him visually to distinguish the interrogating officer from the attending medical personnel. The officer made no effort to dispel the perception that medical treatment was being withheld until Martinez answered the questions put to him. There was no attempt through *Miranda* warnings or other assurances to advise the suspect that his cooperation should be voluntary. Martinez begged the officer to desist and provide treatment for his wounds, but the questioning persisted despite these pleas and despite Martinez's unequivocal refusal to answer questions.

The District Court and the Ninth Circuit ruled that qualified immunity did not insulate Chavez from being sued and that the lawsuit could proceed. In [*Chavez v. Martinez* \(2003\)](#), the SCOTUS reversed and ruled that Martinez could not sue Chavez for using torture to compel admissions of guilt because the government did not technically prosecute those crimes. The Fifth Amendment and *Miranda* are not offended unless and until the prosecution for the crime actually occurs, and a citizen cannot sue a cop for violating this right before the prosecution occurs. If the cops and prosecutors had brought criminal charges against Martinez, the trial judge may have supported those incriminating statements that he made while being tortured. Clarence Thomas simply remarked that "Chavez did not deprive Martinez of a constitutional right."

The SCOTUS granted Chavez immunity due to the cop not knowing he was violating a "clearly established constitutional right." During oral arguments, Justice Breyer wondered ". . .

why in heaven's name, when the person is undergoing serious pain, or he thinks he's dying, where the doctors are saying, get out of here . . . and he continues to press and then says, well, you're going to get your treatment after . . . after you answer my question.”

The cop's lawyer conceded that Officer Chavez coerced the plaintiff, but consistently argued that there needn't be any punishment or cause for a lawsuit arising from a cop's coercion of statements because the inadmissibility of such statements in court is sufficient punishment to generally deter cops from torturing confessions out of innocent people. The lawyer primarily argued that the cop did not know he was violating Martinez's constitutional rights, which is a preposterous contention.

In the next case, the SCOTUS wrote that the federal appeals court was wrong “in ruling that the taking of unwarned statements violates a suspect's constitutional rights.” Curious how the justices came to that conclusion? Me too! It all began when Samuel Francis Patane was arrested for allegedly harassing his ex-girlfriend, Linda O'Donnell. He was released on bond, subject to a temporary restraining order that prohibited him from contacting O'Donnell. A few days later, Patane allegedly violated that restraining order by attempting to telephone O'Donnell. Officer Tracy Fox of the Colorado Springs Police Department began to investigate that allegation. On the same day, a county probation officer informed an ATF agent that Patane owned a gun despite being a felon, which is a massive crime. The ATF relayed this information to Detective Josh Benner of the local police, who then proceeded to Patane's home with Fox. After reaching the residence and asking about Patane's attempts to contact O'Donnell, Officer Fox arrested him for violating the restraining order despite lacking probable cause, according to the trial court. Detective Benner attempted to advise Patane of his *Miranda* rights but got no further than the right to remain silent. At that point, Patane interrupted, asserting that he knew his

rights, and neither officer attempted to complete the warning. Detective Benner persistently questioned Patane about the presence of a handgun, and Patane eventually confessed that he had a pistol in his bedroom. He was indicted by a federal grand jury for possession of a firearm by a convicted felon, in violation of 18 U. S. C. §922(g)(1). The District Court granted Patane's motion to suppress the firearm as evidence, reasoning that the cops lacked probable cause to arrest him for violating the restraining order. It therefore declined to rule on Patane's other argument; that the gun should be suppressed as the fruit of an un-Mirandized statement. The Court of Appeals for the Tenth Circuit reversed the District Court's ruling with respect to probable cause but affirmed the suppression order on the *Miranda* violation. In the complicatedly divided opinion, the effective plurality of the SCOTUS in [United States v. Patane \(2004\)](#) held 5-4 that the Fifth Amendment's protection against self-incrimination by coercion only applies to communicative statements and offers no protection from un-Mirandized physical evidence being admitted at trial.

In [Berghuis v. Thompkins \(2010\)](#), the SCOTUS clarified that a suspect must "unambiguously" invoke his right to remain silent and/or to have counsel present during questioning. A suspect's silence and refusal to answer questions does not invoke those rights and therefore does not compel officers to cease an interrogation. Cops can interrogate a person for as long as they want (literally; some cops will hold people in a room for 16 hours interrogating them 'til they crack) and don't need to stop until the person properly invokes their *Miranda* rights. After wisely remaining silent during the 3-hour interrogation, Thompkins fell for a trap and answered "yes" when asked if he prayed to God to forgive him for the shooting. At trial for murder and other charges, Thompkins moved to suppress that statement, arguing that he implicitly invoked his right to remain silent by being silent for nearly three hours of

interrogation; the cops should have understood that he was invoking his right and stopped questioning him without an attorney. The trial court rejected that motion and allowed the statement to be admitted. The jury convicted Thompsons, and he was sentenced to life in prison without parole. The 5-4 SCOTUS affirmed, holding that “Thompkins’ silence during the interrogation did not invoke his right to remain silent.”

A few years later, Mr. Fields, a Michigan state prisoner, was escorted from his prison cell by a corrections officer to a conference room where he was questioned by two sheriff’s deputies about criminal activity he had allegedly engaged in before coming to prison. At no time was Fields given *Miranda* warnings or advised that he did not have to speak with the deputies. The inmate was questioned for between five and seven hours in that room. Several times during the interrogation, Fields told the cops that he no longer wanted to talk to them, but he did not ask to go back to his cell. He made incriminating statements during the interrogation. The trial court denied Fields’ motion to suppress his confession, and he was convicted. The federal District Court and the Sixth Circuit held that the interview was a custodial interrogation within the meaning of *Miranda*, reasoning that [Mathis v. United States \(1968\)](#) “clearly established” that isolation from the general prison population, combined with questioning about conduct occurring outside the prison, makes any such interrogation custodial *per se*. The SCOTUS in [Howes v. Fields \(2012\)](#) unanimously reversed, and the conservative justices admonished the Sixth Circuit for grossly misinterpreting *Mathis*:

The Sixth Circuit misread *Mathis*, which simply held, as relevant here, that a prisoner who otherwise meets the requirements for *Miranda* custody is not taken outside the scope of *Miranda* because he was incarcerated for an unconnected offense. It did not hold that imprisonment alone constitutes *Miranda* custody. . . . The other two elements in the Sixth Circuit’s rule are likewise

insufficient. Taking a prisoner aside for questioning may necessitate some additional limitations on the prisoner's freedom of movement, but it does not necessarily convert a noncustodial situation into *Miranda* custody. Isolation may contribute to a coercive atmosphere when a nonprisoner is questioned, but questioning a prisoner in private does not generally remove him from a supportive atmosphere and may be in his best interest.

In the latest case, Los Angeles County Deputy Vega elicited a confession from Tekoh without first issuing a *Miranda* warning. His written statement was admitted against him at trial, but the jury still unanimously found him not guilty. Tekoh then sued the cop in federal court for violating his 5th Amendment right. The Ninth Circuit held that the use of an un-Mirandized statement against a defendant in a criminal proceeding violated the Fifth Amendment and could support a section 1983 claim; the lawsuit should not be dismissed at the start. Doubling down on the *Chavez* doctrine created two decades earlier, the 6-3 SCOTUS in [Vega v. Tekoh \(2022\)](#) made it very clear that a cop violating *Miranda* is a far cry from a cop violating the Fifth Amendment; *Miranda* is but a distant step-child of the Fifth Amendment and lacks the protective cloak and the teeth of its parent. Writing for the six conservative justices, Alito said that “if a *Miranda* violation were tantamount to a violation of the Fifth Amendment, our answer would of course be different.”

In summary, it may be wise to refrain from ever saying anything to any government official other than “I invoke my Fifth and Sixth Amendment rights.” Say that and then shut up. Your lawyer will thank you for making such a wise decision.