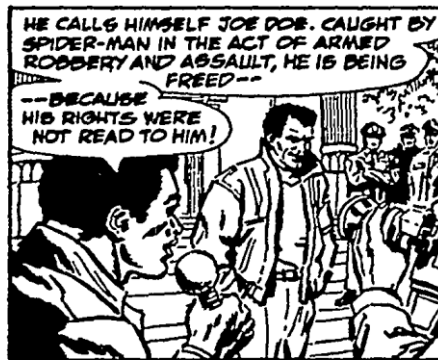


A MODEST PROPOSAL FOR THE ABOLITION OF CUSTODIAL CONFESSIONS

Introduction

In a recent comic, Spider-Man crashed through a store window, rescued a robbery hostage from a vicious gunman in full view of police officers and television cameras, and then turned the web-tied perpetrator over to the authorities. But it was all for naught:

Amazing Spider-Man



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The misadventure culminates in a philosophical dialogue between Peter Parker, the web-slinger's alter ego, and Robbie Robertson, his editor at The Daily Bugle:



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Although no mention is made of a confession, the allusion to police failure to read Joe Doe his rights plainly refers to the warnings required by *Miranda v. Arizona*. Never mind the specifics of the cartoon are wrong – Doe never would be released, conviction of a crime witnessed by scores of persons doesn't turn on admissibility of a culprit's confession. In a broader sense, the author is right on the button; he's conveyed the popular perception of our criminal justice system accurately. Robbie Robertson's civil libertarian plea is tentative and conclusory, while the fiery and idealistic young Parker gives a recitation of the prevailing law and order perspective, which appears to be the dominant social view.

In the wake of calls for greater law enforcement to combat increasing crime, the drumbeat against *Miranda*, echoed by the Supreme Court of the United States (SCOTUS), tends to obscure the circumstances leading to the *Miranda* ruling – widespread and unmonitored coercive police practices. Miranda's solution was a warning/waiver requirement administered by the very individuals whose tactics gave rise to the problem of coerced confessions. Little wonder some view *Miranda* as offering the appearance but not the reality of an effective mechanism against police overreach – *Miranda's* problem is not that it impedes the police, but does not impede them enough: *Miranda* is unable to protect suspects from improper police practices and the overwhelming pressures of custody. More rigorous safeguards, such as requiring counsel at interrogations, are essential to deter official misconduct and facilitate the knowledgeable exercise of free will.

The Meaning of *Miranda*

The majority and dissenting opinions in Miranda are not only based on widely disparate views of what actually happens during custodial interrogation, but also broadly differ on values which reflect the ages-old tension between individual rights and public safety. The secrecy cloaking police interrogations permitted the Justices to draw contrary conclusions regarding its nature. **The majority's** extensive recitation of common police practices used to elicit confessions revealed a reality consisting of hidden trials taking place inside stationhouses, skillful, intimidating police tactics inevitably overcoming the will of an individual being held alone and incommunicado. **The dissenters**, on the other hand, if not subscribing to a genteel view of life at police headquarters, at least considered the majority depiction as extremely skewed. Far from inappropriate, the mild encouragement being given to confess was a reasonable if not laudable means to protect society.

These divergent views may help to explain in part why **the dissenters** believed the real effect of the decision was to outlaw all custodial interrogation, and why **the majority**, on the other hand, was willing to settle for the limited device of police warnings. According to **the dissenters**, if **the majority's** depiction of a chamber of horrors were accurate, the bland set of admonitions that the *Miranda* warnings laid out was worthless; police would lie about having given them or would give the warnings in rote fashion and then proceed to extract a waiver and a confession. A nationwide epidemic of ruthless police interrogation hardly could be eradicated by distributing small printed cards to the alleged culprits and instructing the contents be read to apprehensive suspects. If, however, **the dissenters'** view were the correct one, the result of conscientious police adherence to **the majority's** newly laid rules would result in the end to all effective interrogation.

The majority must have believed the warnings would effect a sweeping change and stop most interrogation – namely that advising suspects of their rights would create a markedly different stationhouse atmosphere, one in which suspects felt free to exercise their rights by requesting counsel, thereby significantly reducing the number of confessions. That **the majority** felt typical suspects would invoke the right to counsel rather than waive that right is evident – lawyers were seen as “the adequate protective device” to prevent police misconduct by stopping interrogations altogether or being present as they happened. They also downplayed the importance of confessions in securing convictions, allowing them to see no impediment to crime control (supporting this by providing evidence from the FBI and foreign countries limiting the use of confessions).

The dissenters' fears of *Miranda* discouraging confessions essentially corroborated **the majority** viewpoint about suspects invoking their rights resulting in fewer confessions. But they did not agree that *Miranda* would not impact crime control, predicting it would have a "corrosive effect" on law enforcement. **The dissent** saw nothing wrong with police interrogations and felt voluntary confessions those corroborated by other evidence, were highly reliable and provided certainty of guilt.

So it's fair to say that although the majority and dissent disagreed sharply concerning the value of confessions and their utility in the criminal justice process, both sides felt that a sweeping change was in the offing – if not a world devoid of confessions, at least one in which they were far less central in the enforcement of criminal law. What actually occurred was not change, however, but merely the illusion of change.

What Ever Happened to *Miranda*?

SCOTUS has undercut the *Miranda* decision in a variety of ways...

*In one line of cases, the Court has focused on defining custody as the prerequisite for application of *Miranda*. In interpreting "custody", post-*Miranda* decisions generally insist on comparing the whereabouts of the particular interrogation with the coercive police station settings described by the *Miranda* ruling, rather than realistically focusing on how reasonable suspects perceive their situations regardless of location.*

In other contexts, the Court has further constricted *Miranda* by virtually distorting the plain meaning of the *Miranda* opinion. *Cases permitting use of statements elicited in violation of *Miranda* for impeachment purposes if a defendant testifies at trial* illustrate how the Court ignored *Miranda's* intent when it stated, absent proper warnings, "no evidence obtained as a result of interrogation can be used against" a defendant. While impeachment focuses on showing a defendant committed perjury or contradicted prior statements to police, this line of cases has been extended almost beyond its logical limits. SCOTUS has permitted use of statements taken from a suspect after he invoked his *Miranda* rights. While the Court didn't allow prosecutors to impeach a defendant with his post-warning silence, they have allowed use of an *unwarned* suspect's silence for impeachment, since police hadn't induced his refusal to speak by complying with *Miranda*. Apparently lost in the shuffle was the meaning of the fifth amendment right to remain silent.

*Closely allied to the impeachment issue is the question whether any evidence obtained as a result of a confession secured contrary to *Miranda* may be used.* The Court has permitted the testimony of a witness identified by a defendant given incomplete warnings. Rulings have also allowed the use of a consecutive statement secured after an initial confession made in the absence of *Miranda* warnings even though the police did not tell the accused, when giving him warnings prior to securing the second confession, that they could not use his original statement. These cases effectively deny *Miranda's* basic premise that custodial confessions obtained without warnings are coerced.

In the warning context, the Court, in one of its most effective invitations to the police to take advantage of untutored suspects, upheld a warning advising the suspect a lawyer would be appointed "if and when you go to court." *The Court held the warnings were not themselves rights guaranteed by the Constitution so they need not be given in the precise form specified in *Miranda*.* The Court concluded the warnings given the suspect sufficiently conveyed the *Miranda* protections. The dissent argued suspects given the warnings are "often frightened suspects unlettered in the law, not lawyers or judges or others schooled in interpreting...the pretzel-like warnings here— intertwining, contradictory, and ambiguous as they are."

The "if and when" caveat undermines the prior warning given a suspect that an attorney can be present during interrogation and makes it appear either that interrogation will be delayed or that the defendant will be entitled to an attorney only at trial. A defendant's misunderstanding of his right to counsel acts as an

incentive to discuss the matter with police immediately, despite the absence of counsel, to extricate himself from the confines of the stationhouse. Thus the warnings designed to advise defendants of their rights may instead be used to mislead them and to induce ignorant waivers.

The Court has also curtailed the right to counsel by concluding Miranda's warnings apply either to "express questioning or its functional equivalent", so any police conduct that's likely to elicit responses from a defendant. Yet in the very same case providing this seemingly broad definition, they applied it narrowly to admit a confession made in response to a conversation between police officers intimating that a missing gun might be found by handicapped children. Such a decision does little more than encourage loud and provocative police dialogues in the presence of the accused—the better to entice a "voluntary" statement.

No matter how limited these decisions interpreting *Miranda* have been, it always seemed clear that if the conditions requiring application of *Miranda* were met, the warnings were mandatory; failure to administer them rendered a statement inadmissible. Then, almost twenty years later in *New York v. Quarles*, the Court created a "public safety" exception. The majority assumed providing warnings would deter suspects from speaking and the ensuing cost of fewer convictions permissible to protect our fifth amendment rights. Although the *Miranda* Court itself conceded some confessions, while voluntary under traditional due process standards, would be inadmissible if secured without the now prescribed warnings, the challenged admission in *Quarles* was not of that kind. The defendant was captured in the middle of the night in a deserted supermarket, handcuffed, and surrounded by four armed police officers. Aside from negligible danger to public safety, what's most striking is the defendant's confession bore all the signs of coercion and, therefore, may well have been inadmissible even under pre-*Miranda* standards.

The Institutional Damage

Retention of a devitalized *Miranda* has many undesirable effects. *The Supreme Court's post-Miranda decisions have made it difficult for police and lower courts to determine the circumstances under which confessions may be obtained and admitted into evidence.* The result is not merely confusion, but a tacit encouragement of police overreaching and judicial circumvention. Moreover, *Miranda's* seeming vitality effectively permits the Court to avoid devising meaningful remedies to deal with coercive police interrogation.

Even *Miranda's* dissenters ultimately acknowledged it had one virtue – *the ruling created a bright line that made it relatively easy to separate admissible from inadmissible confessions, giving fairly explicit guidance to the police and lower courts.* Law enforcement officers knew unless they gave the warnings and secured a valid waiver, a suspect's statement could not be used to establish guilt. Even lower courts hostile to *Miranda* had little choice but to abide by its clear-cut directives. *Twenty years later, however, certainty and predictability are going, if not gone.* Other than in cases of outright coercion, officers no longer can know what limits there are in securing confessions. At best, they realize there's now room for interpretation; at worst, that a skillful prosecutor can argue away successfully any deficiencies in how police elicited a suspect's statement. Similarly, lower courts are asked to divine on a case-by-case basis whether *Miranda* governs a particular matter or it instead falls within any of numerous exceptions and qualifications grafted on over the years.

Indeed, it's no longer true police need even administer the Miranda warnings initially to assure admissibility of subsequent statements. The Court has held the mere failure to give *Miranda* warnings was not by itself a violation of the fifth amendment, therefore a defendant's second statement made after *Miranda* warnings were given was admissible. Based on such a ruling, after securing a confession without giving the required warnings, the police need only follow up with the warnings without advising a suspect of the first confession's inadmissibility. This should invariably prompt another statement from unwary defendants who make the plausible assumption they've already incriminated themselves. Had the Court explicitly advised police this

decision provided a means to avoid *Miranda*, the object lesson hardly would have been any clearer. Law enforcement officials also understand winks. The danger of winks, however, is they may be interpreted more broadly than the Justices intended and prompt more overt police misconduct. At a minimum, such decisions convey a message police should not take *Miranda* too seriously as SCOTUS will stretch to uphold admissibility of confessions. From there, it's a short distance to concluding it's the interrogator's job to get confessions one way or the other, and that of the lawyers and courts to work out the niceties of any resulting technicalities.

SCOTUS has also ruled police failure to inform a suspect his attorney was at the station asking to see him did not make a confession inadmissible. That SCOTUS refused to invalidate police deception of a defendant and his attorney constitutes clear evidence police understand this message and that the Court itself is apparently intent on reinforcing it. It suggests as long as the warnings are uttered almost any accompanying subterfuge will be tolerated. If this deceit by police was insufficiently egregious to violate due process, police necessarily must ask themselves what techniques short of rubber hoses courts will find constitutionally impermissible. Once such questions have been invited, it's almost a foregone conclusion answers will be sought.

The wedge created by *Quarles* will have similar effect. Unlike the preceding cases, however, this ruling eliminates the need to even give a *Miranda* warning. To the extent warnings act to inhibit confessions or that police perceive them as such, this loophole may prove irresistible. The circumstances of *Quarles* suggest danger to public safety will be easily established in a host of situations. At least where weapons are or may be involved, the ruling invites law enforcement officials to commence interrogation immediately after apprehending a suspect and to do so without administering warnings. Furthermore, the elasticity of the public safety concept allows it to be enlarged to include not only interrogation of a suspect concerning the location of a weapon but questioning with respect to the whereabouts of victims or armed coconspirators.

Even if police officials do not understand all ramifications and nuances of the post-*Miranda* determinations, what they do realize is that the Court does not like *Miranda* and that in most cases it upholds police conduct and permits the use of confessions. The Court's message is not subliminal. It has been given clearly and repeatedly: *Miranda* hinders effective law enforcement and will be disregarded whenever possible. The loss of *Miranda*'s bright line also will have an adverse effect on lower court adjudication. Judges antagonistic to *Miranda* have been given numerous mechanisms for evading its reach. Even those who conscientiously attempt to apply SCOTUS's decisions in this area must face a welter of rulings whose overall effect is to make it unclear under what circumstances a confession is admissible.

The Modest Proposal

The Miranda decision itself recognized warnings could be dispensed with if other equally effective remedies were used. But SCOTUS has not advanced any other such rules and the few proposals made in this area are either unduly vague or are easily subject to circumvention. Some of the more radical recommendations advanced over the years are meritorious. For example, *having an attorney present at all custodial interrogations* certainly helps assure any resulting confession is a product of the defendant's free will. But the question of ineffective assistance of counsel can't be easily dismissed. While it may be true "any lawyer worth his salt will tell the suspect to make no statement to police under any circumstances," the problem is some lawyers aren't worth their salt. Indeed, given the stress and time pressures of stationhouse questioning, mistakes in judgment, such as erroneous advice to give an exonerating statement, are more likely to occur.

Similarly, proposals *requiring police to bring suspects before a judge to advise them of their constitutional rights* help encourage voluntariness but don't guarantee it. Coercive tactics still can take place prior to a suspect being presented in court. And this temporary respite from exclusive police custody ends when a suspect leaves the courtroom, not addressing the issue of coercive police tactics during the interrogation.

Whether suspects render confessions in the stationhouse, the court-room or any other custodial context, the circumstances surrounding their elicitation are so intimidating the exercise of free will is at best problematic. The voluntariness of admissions in such cases always will be debatable. The proposals above don't directly address the real issue – whether *any* confession given by a suspect while in custody can be considered voluntary. Our answer is maybe. The confession may or may not be voluntary, depending on various factors including the quality and quantity of police pressure, but any confession is inevitably compelled – something not allowed by the fifth amendment. There may be no blatant pressure, but government-created situations (such as being in custody) prevent defendants from fully exercising free will in determining whether to assist the state in securing their own convictions. This view of compulsion is that police, in arresting the suspect and placing him in custody, have created an atmosphere that is inherently coercive. In that sense there is a causal connection between official action and the ensuing confession.

It is our view suspects in custody cannot make truly non-compelled confessions and, therefore, any statements made by them should be inadmissible in evidence. We do recognize everyone ultimately has free choice – of sorts. As the saying goes, even the condemned person awaiting execution can opt either to curse the hangman or pray to God. Admittedly, in the everyday world, there are also constraints simply common to the human condition, such as unconscious desires, time pressures, economic demands, cost-benefit analyses, and the like. But the circumstances of being in custody are unique: the suspect is stripped of power, control, and dignity, and is subject to the whims of jailers.

Although *Miranda* focused on the inherent coerciveness of custodial *interrogation*, it is custody in and of itself that's coercive. Interrogations heighten the tension, but even without them, custody tends to deprive persons of free choice. Given the nature of custody, advising suspects of their rights is unlikely to dissipate custody's oppressive effects; it's unrealistic to view giving up one's right in such situations as non-compelled. Moreover, police apparently have become adept at creating circumstances short of interrogation that nonetheless effectively compel a suspect to make supposedly spontaneous statements. There may of course be certain persons of steel will who can insulate themselves from the effects of custody and are able to reach a sound decision to confess. But such individuals are rare and it's extremely difficult to determine just who they are.

Just as *Miranda* established its warning rules even though the effect would be to exclude some confessions that would have once been deemed voluntary, *this proposal would prohibit admission of all custodial statements even though a few may have been the products of free will.*

Drawing the line at custody does deny protection for those confessions by previously unsuspected persons who voluntarily appear at the police station, with or without an attorney. But the more typical case consists of police arresting a suspect or a suspect surrendering in response to a warrant or other coercive mechanism. The latter group hasn't had the opportunity while free of government coercion to make an unfettered decision to give themselves over to the police – true, ignorance, fear and economic constraints may act as deterrents to seeking counsel prior to a voluntary appearance, and thus the choice may not be completely free. But those in custody are absent that ability to make even that choice.

We do not advocate the more radical position all statements made by suspects to officials during interrogation be inadmissible in evidence. As the Miranda majority acknowledged, custody is an appropriate dividing line. At the same time, there is much merit in this more protective view, because the line between custodial and noncustodial interrogation may prove inadequate to deal with police questioning in noncustodial contexts, such as allegedly nonthreatening but nonetheless inherently intimidating interrogation in the suspect's home.

Our proposition is not such a sharp departure from the original understanding of *Miranda*. The proposal would not preclude admissibility of voluntary statements made in noncustodial situations, although we would

define custody broadly. This compromise, however, at least would prevent the most abusive forms of police misconduct, for it is custody that permits police to play havoc with the defendant's free will, and it is custody that invites the sort of official trickery, such as not letting a suspect speak with his attorney when the attorney is trying to see him, effectively condoned by SCOTUS. At the same time, the proposal respects the individual's decision to make incriminating statements in the noncustodial context. Furthermore, *by generally precluding reliance on confessions, it would provide an incentive for improved police investigation.* The proposal surely would discourage placement of suspects in custody absent sufficient evidence of guilt. It also would provide a brighter line to guide police, prosecutors, and judges with respect to the admissibility of confessions.

Finally, in comparison to the proposals requiring appearance before a magistrate or the presence of counsel during interrogation, this recommendation gives greater expression to a core value of the fifth amendment, namely, the protection of human dignity. To allow the state to prove a person's guilt based on a confession made in a government-created situation that by its very nature psychologically induces people to disclose incriminating information and denigrates the concept of man as entitled to the exercise of free will.

Conclusion

While we do not denigrate government's need to deal effectively with criminal conduct, there is scant evidence *Miranda* is either an impediment to effective law enforcement or, more specifically, a significant obstacle to conviction. Even so, *Miranda* apparently has become a scapegoat for all the intractable criminal law problems facing this country. Crime abounds, and we do not know what to do about it. Why people commit crimes, how to stop them, how to sentence them, and how to control the scourge of drugs are all unanswered questions. In the absence of meaningful solutions, critics seem to say, let us be rid of legal technicalities such as exclusionary rules that ostensibly allow criminals to evade justice. Let *Miranda*, not crack, serve as public enemy number one. Better still, tie them together casually. There is more crack because of *Miranda*; therefore, *Miranda* must go. But if, after *Miranda* is gone, the same problems still persist, what constitutional guarantee will have to be sacrificed next?

If nothing else, we hope that this proposal can help to move the debate to a slightly more reasonable position on the ideological spectrum. After all, evolving standards reflect this country's maturation as a civilized society. Surely the movement from the early decisions prohibiting physical brutality in the extraction of confessions to *Miranda*'s rules bespeaks that truth. History dictates that we should examine how to strengthen fifth amendment protection rather than eviscerate it.

And that, Peter Parker, is supporting the law, not the lawless.