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SYMPOSIUM INTRODUCTION

Miranda at 40: Applications in a Post-Enron, Post-9/11 World

*Donald J. Kochan**

The examination of *Miranda v. Arizona*¹ at the 2007 Chapman Law Review Symposium, held in Orange, California on January 26, 2007, was a resounding success and this print issue provides an interesting array of some of the wisdom expressed at the event. The full Symposium can be viewed on the Chapman University School of Law website.² The Keynote Address at the Symposium was an interesting and informative address by the Honorable Edwin Meese III, former Attorney General of the United States.

This introduction provides a brief synopsis of the Symposium that led to this publication. It then moves into summaries of each of the articles herein included. The fortieth anniversary of *Miranda* provides an excellent avenue for a contemporary examination of its influence, past and present, along with the current state of criminal law and procedure.

In 1966, the U.S. Supreme Court was confronted with the question of whether individuals in custodial relationships with police needed to be informed of certain constitutional rights. In the opening paragraph of the opinion of *Miranda v. Arizona*, the Supreme Court set out its importance:

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe

* Associate Professor of Law, Chapman University School of Law; and Faculty Advisor to the Chapman Law Review. Recognition should be made to Professor Katherine Darmer for the inspiration for the topic of this Symposium issue and her leadership in obtaining scholars to participate and publish, and to Dean John Eastman and Professors Melissa Berry, Matthew Parlow, and Larry Rosenthal for their significant efforts in drawing participants for the symposium and related articles. I also thank *all* of the participants, including my colleagues Henry Butler and Marissa Cianciarillo for moderating panels.

¹ 384 U.S. 436 (1966).

² http://www.chapman.edu/LawReview/symposium2007_webcast.asp. See also <http://www.chapman.edu/LawReview/symposium2007.asp>.

consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which accrue that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.³

The Court ultimately set forth rules regarding custodial interrogation that are the subject of continuing debate today.⁴

As with so many constitutional decisions, *Miranda* does not set a standard that is subject to absolute certainty in its application. Thus, a Symposium on the experiences and precedents that have evolved in the past 40 years helps to explore the evolution of the criminal law and procedural dictates set forth in *Miranda*. Complications with custodial interrogation—and the impulses and incentives involved by both the interrogator and the interrogated—have long been an exploration in law, literature, and other forums.⁵

There is an initial necessity to recognize the monumental impact that *Miranda* has had on the evolution of criminal and, concomitantly, constitutional law. Some have concluded that “*Miranda* remains the most famous criminal law case the U.S. Supreme Court has ever decided, and the *Miranda* warnings may be the most famous words the Court has ever written.”⁶

Unlike many legal doctrines, *Miranda*—due to media dra-

³ 384 U.S. 436, 439 (1966).

⁴ *Id.*

⁵ See, e.g., FYODOR DOSTOEVSKY, CRIME AND PUNISHMENT 113-15 (Random House, ed. 1956).

⁶ Laurie Magid, *The Miranda Debate: Questions Past, Present, and Future*, 36 HOUS. L. REV. 1251, 1314 (1999). See also Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 840 (1996) (describing *Miranda* as “most famous criminal law decision”); Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda’s Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1057 (1998) (“*Miranda* . . . became [the Supreme Court’s] most famous criminal law decision.”); Eric English, *You have the right to remain silent. Now please repeat your confession: Missouri v. Seibert and the court’s attempt to put an end to the question-first technique*, 33 PEPP. L. REV. 423, 429 (2006) (“*Miranda* is recognized as the Warren Court’s landmark criminal law decision and remains good law today.”). Furthermore, it has been stated that “The *Miranda* warnings may be the most famous words ever written by the United States Supreme Court.” Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 671 (1996). See also Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1418 (1985) (*Miranda* has “celebrity status” and “part of our common awareness”).

mas—is a “household word”⁷ and part of the “national culture.”⁸ Among other characterizations, the *Miranda* decision has been described as “monumental,”⁹ “iconic,”¹⁰ and “epochal.”¹¹ After 40 years of development, this Symposium issue involves a balanced discourse of articles that celebrate, laud, denigrate, deconstruct, or simply examine the role of *Miranda* today.

In this issue, the Chapman Law Review provides several articles that emerged from the Symposium. These authors hardly remain silent on these areas of the state of *Miranda* today in criminal law.

A dinner address kicked off the event, and four panels followed the next day. Thanks go to all the participants, including: The Honorable Edwin Meese III, Maurice Suh, Keith Bishop, Henry N. Butler, Sherri L. Burr, Marisa S. Cianciarulo, Russell Covey, M. Katherine Baird Darmer, Roman E. Darmer, Steven B. Duke, Jim Fleissner, Mark A. Godsey, Steve Goorvitch, Thomas E. Holliday, Sam Kamin, Linda Keller, Donald J. Kochan, Joan L. Larson, Jeremy M. Miller, Stephen F. Rohde, Lawrence Rosenthal, Ronald J. Rychlak, Paul Shechtman, Ronald Steiner, and J. Kelly Strader.

The substance of several of the presentations is memorialized in articles for print in this Symposium issue. The following is a summary of the Symposium panels the articles that are presented in this issue.

First, the Keynote remarks of the Honorable Edwin Meese III, on “A Republic, If You Can Keep It,” are transcribed in this issue. General Meese’s address title reflects the line spoken by Benjamin Franklin at the conclusion of the constitutional con-

⁷ Leo, *supra* note 6 at 671 (“With the widespread dissemination of *Miranda* warnings in innumerable television shows as well as in the movies and contemporary fiction, the reading of the *Miranda* rights has become a familiar sight and sound to most Americans; *Miranda* has become a household word.”).

⁸ *Dickerson v. U.S.*, 530 U.S. 428, 430 (2000) (“*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”).

⁹ Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465, 499-500 (2005) (“The *Miranda* decision represented a monumental departure from the past, in several important respects.”).

¹⁰ Barbara Bergman, Arthur G. Lefrancois, & Marianne Wesson, *New Developments in Fourth, Fifth and Sixth Amendment Law Panel*, 31 N.M. L. REV. 175, 198 (2001) (Concluding that “the monumental importance . . . of *Miranda* is absolutely in its iconic, symbolic value. It’s an artifact of our national culture.”).

¹¹ Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1315-1316 (1998) (“*Miranda* was an ‘epochal case’ . . . As the Chief Justice has explained for the Court, ‘[t]he current practice of incommunicado interrogation is at odds with one of our Nation’s most cherished principles—that the individual may not be compelled to incriminate himself.’”).

vention. The theme of the talk was whether the Constitution is a foundation or a trampoline, and whether the Supreme Court is taking over war-making powers. Critical to his analysis was a discussion on the rights of individuals implicated in the war on terror.

The panels at this Symposium surrounded this address and included topics on *Miranda*'s history and current applicability. While the anniversary makes the Symposium timely, the existence of continued debate demonstrates that *Miranda* is also still an interesting subject of concern and contemplation in criminal law and procedure.

The first panel addressed "*Miranda* and the War on Terror." There has been considerable recent debate about interrogation tactics employed in the War on Terror, both at home and abroad. It explored the extent to which *Miranda* and other civil liberties should be extended in warfare, given the uncertainty regarding the meaning of "war" and the extraterritoriality of our constitutional principles.

The second panel focused on "*Miranda* and the Media." This panel discussed whether the modern understanding, courtesy of mass media, factors into current application of *Miranda*. The panelists explored whether media scrutiny impacts high profile investigations and whether the popular culture exposure to *Miranda* has altered the legal and practical applications of the doctrine.

The third panel contemplated "*Miranda* and Modern Practice." *Miranda* is designed to prevent coerced confessions. The panelists discussed whether, after 40 years, *Miranda* actually achieves this purpose or whether law enforcement has been able to adapt their practices to overcome. The panelists discussed whether *Miranda* can be used to discriminate between guilt and innocence. The ultimate question considered was whether *Miranda* in fact helps prevent convictions of innocent persons due to coercive police practices.

The final panel examined "*Miranda* and Corporate Crime." There is a need to evaluate the role of *Miranda*'s role following Sarbanes-Oxley, enacted in the wake of tremendous corporate scandals such as Enron. The panel discussed whether this legislation imposes obligations on corporate insiders to cooperate with government investigators in a way that violates *Miranda*'s protection against self-incrimination. Importantly, it dealt with the issue of the new McNulty Memorandum,¹² which has replaced

¹² See Keith Paul Bishop, *The McNulty Memo—Continuing the Disappointment*, 10

the widely criticized Thompson Memorandum,¹³ on how to achieve the right balance in guiding prosecutors to ferret out corporate crime while respecting legal rights.

* * *

The following articles are published in this issue, arising from the engaging discussions at the Symposium event. There is a wide variety of content, commentary, and legal analysis enclosed.

The Keynote Address was from The Honorable Edwin Meese III, as described above.¹⁴ You will find that transcript leads this Issue.

In *Against Orthodoxy: Miranda is Not Prophylactic and the Constitution is Not Perfect*,¹⁵ Professor Lawrence Rosenthal of Chapman University School of Law attacks what he characterizes as the two points of consensus that have developed about *Miranda*—that it is properly understood as a prophylactic rule that is broader than the Fifth Amendment's prohibition on compelled self-incrimination, and that *Miranda* has failed to combat violations of the Fifth Amendment in an effective manner. On the first point, Rosenthal defends *Miranda's* conception of custodial interrogation as inherently coercive, and defends *Miranda's* warnings as rooted in the traditional rules governing waiver of constitutional rights. On the second point, Rosenthal argues that *Miranda's* critics have yet to make the case that the Constitution demands greater regulation of police interrogation practices than the decision offers.

Paul Shechtman, a partner with Stillman, Friedman & Shechtman, P.C., presents a piece, *An Essay on Miranda's Birthday*,¹⁶ that provides an excellent and concise summary of the evolution in *Miranda's* influence. He concludes with a description of alternative verifications of the truthfulness in interrogations, including videotaping, reliance on experts, and interrogation length restrictions.

In *Miranda Warnings, Torture, the Right to Counsel and the War on Terror*,¹⁷ Professor Katherine Darmer, of Chapman University School of Law, argues for a broad exception to *Miranda* in the terrorism cases, anchoring the proposal in the notion that *Miranda* is in fact a prophylactic rule that can be modified with-

CHAP. L. REV. 729 (2007).

¹³ *Id.* at 735.

¹⁴ 10 CHAP. L. REV. 539 (2007).

¹⁵ 10 CHAP. L. REV. 579 (2007).

¹⁶ 10 CHAP. L. REV. 655 (2007).

¹⁷ 10 CHAP. L. REV. 631 (2007).

out running afoul of the Constitution and analyzing fellow symposium participant Larry Rosenthal's view to the contrary. She argues further, however, that *Miranda* has done an inadequate job of protecting "real compulsion" as constitutionally forbidden by the Fifth Amendment and criticizes the Supreme Court's exclusive reliance on the Due Process Clause for regulating coerced confessions. She argues that fundamental rights such as those protected by the Fifth and Sixth Amendments are not being adequately recognized with regard to Guantanamo detainees and otherwise.

Professor Linda Keller of the University of Michigan Law School is publishing in this issue an article entitled *Alterations to Miranda: Preventing Coerced Confessions via the Convention Against Torture*.¹⁸ Keller discusses the example of the use of truth serum to demonstrate that there are international law alternatives to *Miranda* for preventing coerced confessions. Keller starts by describing *Miranda*'s limits in reducing coerced confessions and then describes the Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment (hereinafter "CAT") as providing a potential limit on particular methods. She posits, however, that both CAT and other possible sources of limitations contain ambiguities and loopholes that would likely not definitively exclude the use of truth serum. Keller argues further that the use of truth serum should be classified as mental torture and should be prohibited.

The article, *The Right to Remain Silent in Light of the War on Terror*, is by Associate Dean and Professor Ronald Rychlak of the University of Mississippi.¹⁹ He argues that there are certainly merits to *Miranda*, but in situations of a war on terror they may not be manifest or particularly current. He contends that changed circumstances require changed analysis. Rychlak contends that the foundational principles of *Miranda* be preserved, but that in a war on terror the practical applications may need to be different than in its historical application and judicial enforcement.

Keith Bishop has authored *The McNulty Memorandum – Continuing the Disappointment*.²⁰ Bishop is an adjunct professor of law at Chapman University School of Law and a shareholder in the law Firm of Buchalter Nemer. Bishop explains the difficult problems with attorney-client privileges and relations and the Department of Justice's approach to the same. He explains

¹⁸ 10 CHAP. L. REV. 745 (2007).

¹⁹ 10 CHAP. L. REV. 663 (2007).

²⁰ 10 CHAP. L. REV. 729 (2007).

the debate over a potential chilling effect related to corporate counsel, and analyzes the relationship to corporate criminal prosecutions. Importantly, his piece analyzes the incentives and disincentives for internal transparency within corporate entities between officials and counsel as a result of guiding standards.

Professor Steven Duke of Yale Law School has published herein *Does Miranda Protect the Innocent or the Guilty*.²¹ Duke concludes that *Miranda* has not, empirically, been particularly effective at helping juries reach the truth of the matter. Thus, rather than “tweaking” *Miranda*, he offers a number of alternatives to increase the reliability of custodial interrogations.

Professor Mark Godsey of the University of Cincinnati School of Law is publishing *Reliability Lost, False Confessions Discovered*.²² Godsey discusses the issues of modern forensic techniques and revelations, DNA, and the related reliability factor for past confessions and interrogations. In his analysis, he argues that perhaps *Miranda* is not our only check on the search for truth. At the very least, he argues that there exists a false confession problem that the law must handle and address.

Professor Jeremy Miller of Chapman University School of Law presents his article, *Law and Disorder: The High Court’s Hasty Decision in Miranda Leaves a Tangled Mess*,²³ which argues that the *Miranda* decision was decided wrongly. Miller posits that although there is and was a need to protect the accused from erroneous confessions, attaching a right to counsel to the self-incrimination clause was unabashed fiat. He argues that the Sixth Amendment critical stage analysis would and could make the law more principled

Professor Sam Kamin of the University of Denver School of Law has published herein an article entitled *How the War on Terror May Affect Domestic Interrogations: The 24 Effect*.²⁴ In this piece, he describes media and popular culture’s reflections on methods of interrogation in light of the war on terror. Kamin also concludes that in a new era, where perceptions of terrorism abound, we need to reflect more closely on what constitute acceptable methods of interrogation.

Professor Russell Covey’s article, *Miranda and the Media: Tracing the Cultural Evolution of a Constitutional Revolution*,²⁵ analyzes the iconography of *Miranda* in popular culture. Covey

²¹ 10 CHAP. L. REV. 551 (2007).

²² 10 CHAP. L. REV. 623 (2007).

²³ 10 CHAP. L. REV. 713 (2007).

²⁴ 10 CHAP. L. REV. 693 (2007).

²⁵ 10 CHAP. L. REV. 761 (2007).

is at Whittier Law School. He explains that there are aspects of our familiarity with *Miranda* that befit but sometimes serves to the detriment of the purposes of justice.

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And for a break from *Miranda*, this issue also includes a Note by Chapman University law student Ian McClure entitled *Be Careful What You Wish For: Copyright's Campaign for Property Rights and an Eminent Solution to Intellectual Monopoly*.²⁶ It discusses the dichotomy between theories of property rights and the nature of intellectual property vis-à-vis real property and personal property and explores the appropriateness of any distinction with regard to regulation and eminent domain.

* * *

The articles presented herein provide a valuable contribution to the analyses and scholarship on *Miranda*'s evolution and its effects today. A court decision touted as "one of the most well-known and influential legal decisions of the twentieth century,"²⁷ deserves this attention and examination on its fortieth anniversary. Obviously, this is an impressive group of contributors to this symposium issue and an important contribution of scholarship in this field.

In summary, this issue is rich with diverse analyses and perspectives on critical legal and policy questions. As previously stated, criminal law, criminal procedure, and constitutional law were all *revolutionized* by *Miranda* forty years ago, yet its *evolution* must continue to be discussed and examined.

²⁶ 10 CHAP. L. REV.789 (2007).

²⁷ Leo, *supra* note 6, at 671.