

January 2012

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Recommended Citation

G. Kristian Miccio, *Miranda, Morality, and Court-Created Caveats: A Reply to Malvina Halberstam*, 2 U. Denv. Crim. L. Rev. 13 (2012)

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Keywords

Criminal law, Public safety

MIRANDA, MORALITY, AND COURT-CREATED CAVEATS: A REPLY TO MALVINA HALBERSTAM

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There are times when I consider the Fifth Amendment right against self-incrimination to be a nuisance. There are other times when I view it as an impediment to accountability and justice. But these are not my concerns at the moment; rather, what Malvina Halberstam's article, *Requiring Miranda Warnings for the Christmas Day Bomber and Other Terrorists*, has raised is a rather interesting discussion on whether *Miranda*¹ is either viable or desirable when discussing notions of national security. Indeed, Halberstam correctly notes that the *New York v. Quarles* decision, which crafted a public safety exception to *Miranda*,² lays the groundwork for the slow chipping away of protections afforded by the Fifth Amendment. What Professor Halberstam does not address are the moral consequences that the chipping-away process produces as well as the Court's crabbed view of *Miranda* violations within the context of police negligence or wilful refusal to follow *Miranda* admonitions. And yet, it is the moral questions raised by *Quarles* and its progeny that are worthy of discourse and debate; thus these questions will be the focus of my reply to Professor Halberstam's article.

Let's be honest, shall we? *Miranda* was fashioned to protect the Fifth Amendment right against self-incrimination, nothing more, nothing less. And, the *Miranda* warnings fashioned by the Court were a necessary maneuver because a police-dominated environment, coupled with police initiated and controlled interrogation, is inherently coercive.³ We can all agree, regardless of our political, philosophical, or legal point of view, that while a police controlled environment and interrogation is coercive it triggers neither a Fourteenth Amendment Due Process concern or violation. But such a setting is nonetheless both formidable and intimidating, and thus worthy of constitutional protection under the Fifth Amendment.

Neither *Quarles*, *United States v. Patane*,⁴ *Dickerson v. United States*,⁵ nor Professor Halberstam's thesis disturbs this basic and fundamental notion concerning the coercive effect of custodial interrogation. Moreover, they neither contradict nor contest the view that such interrogation has a corrosive effect on the right against self-incrimination—a view not only consistent with *Miranda*'s *raison d'être*, but consonant with the moral values that establish the

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¹ The *Miranda* doctrine requires that "[p]rior to any questioning, the [suspect in custody] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

² 467 U.S. 649, 655-56 (1984).

³ See *Miranda*, 384 U.S. at 467, 458 (concluding that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," and that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice").

⁴ 542 U.S. 630 (2004) (plurality opinion).

⁵ 530 U.S. 428 (2000).

right. The real bone of contention, or contested premise, is the Court's and Halberstam's location of the violation, and the ever expanding exceptions that place *Miranda* outside the ambit of either a principled deviation or digression.

I. THE MORAL FOUNDATION FOR MIRANDA

Why should we have a right against self-incrimination? Is it embedded in our Constitution because a cadre of British ex-pats were dissatisfied with how they were treated by the Crown?⁶ Could it be a holdover from either the romantics or the natural law aficionados? Or does this right reflect actions and social practices that are not only morally justifiable but morally grounded? In a word, yes.⁷ The right to silence has moorings in a moral framework that ratifies the dignity of the *autonomous* individual and the inviolable nature of one's thoughts and words.⁸ And, while the founding fathers may not have wrapped themselves in Kantian or Rawlsian conceptions of individual rights and state responsibility to protect such rights, they certainly held firm to the idea that the individual had a right to choose when and if to disclose information to another person, and most certainly to the State qua State.⁹

The notion of the autonomous individual was a rather novel concept in the Eighteenth Century,¹⁰ but it pervades our constitutional scholarship and is supported by the moral idea that the individual and her papers, ideas, and thoughts are beyond the control of the State. Indeed, in the absence of probable cause, the State is barred from compromising the privacy of the individual in her home, papers, effects, and body.¹¹ The idea that the State can extract information from an individual through the use of police-controlled interrogation within a police-dominated environment wreaks havoc on our conceptions of the autonomy and dignity of the individual.

Unlike the Fourth Amendment, which conditions violations upon the reasonableness of State conduct, the Fifth Amendment right against self-incrimination has no such condition.¹² The language is unambiguous: "nor shall be compelled in any criminal case to be a witness against himself."¹³ And, while there has been some debate about the interpretation of the word "shall" by such noted jurists as Justice Antonin Scalia,¹⁴ for those of us who adhere to not only common sense but to the common understanding of such words as "shall" and "may," there really is no *principled* dispute related to these words.

I want it understood from the start that I am not addressing, debating, or critiquing issues about a *moral* duty owed by individuals to the State, to other members of society, or to oneself

⁶ See generally LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION (1968) (discussing the English history of the right against self-incrimination). It was not until 1848 that a statute protecting a defendant's right to silence became law in England. *Id.* at 375. Indeed, criminal defendants did not have full legal representation rights until 1836. *Id.* at 322.

⁷ Cf. *Boyd v. United States*, 116 U.S. 616, 630-32 (1886) (discussing conceivable justifications for the right against self-incrimination).

⁸ See R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 42-43 (1981). Although Professor Greenawalt's article is devoted to silence as a private right, his analysis is applicable within the criminal law context primarily due to the fact that the autonomous nature of the individual does not change. See *id.* at 49.

⁹ See LEVY, *supra* note 6, at 430-31.

¹⁰ See *id.* at 423.

¹¹ U.S. CONST. amend. IV. Of course there is the *Terry* exception to both the probable cause and warrant requirements. *Terry v. Ohio*, 392 U.S. 1, 20, 24 (1968). But that exception does have limits and, if adhered to, creates a limited interference with Fourth Amendment protections. See *id.* at 33.

¹² U.S. CONST. amend. V.

¹³ *Id.*

¹⁴ *Mitchell v. United States*, 526 U.S. 314, 331 (1999) (Scalia, J., dissenting).

regarding truth or its close approximation. Rather, I am focusing on the moral imperative that forms the basis for the right to silence and the moral impoverishment that accompanies Court-constructed caveats. Indeed, the Fifth Amendment right against self-incrimination is at once a limitation on State power to compel statements and a shield to protect defendant's decision to remain mute. The enunciation of *Miranda* standards and admonitions creates a presumption that unwarned statements are compelled.¹⁵ *Miranda* was unequivocal in finding that a police-dominated environment and interrogation was State created compulsion regardless of whether police conduct was negligent or willful.¹⁶ There were no caveats: not a public safety exemption, private safety exemption, nor national security exclusion.¹⁷ I am sure that the Warren Court was aware of various conditions that could give rise to such exceptions, not the least of which were threats to national security and domestic tranquility precipitated by the violence of the Cold War, the Vietnam War, and Southern white supremacy movements.

Yet, the Warren Court did not yield nor compromise. And, while silence may not be golden, it is within the province of the criminal defendant to maintain her silence even in the most heinous of circumstances. Indeed, it is when we are confronted with the unthinkable or the most heinous behavior that the *moral* mettle of our beliefs is tested—and in the case of *Miranda*, we have failed miserably.

The *Quarles* decision is a stellar example of the moral paucity that frames *Miranda* jurisprudence. There was no quarrel or even discussion concerning the efficacy of police conduct in that case. The identification of a rapist by the survivor, coupled with the credible claim that the perpetrator was armed, gave the police the requisite probable cause to arrest.¹⁸ The fact that the rapist was located in a public space made an arrest *sans* warrant within the ambit of Fourth Amendment jurisprudence.¹⁹ And the question – “Where is the gun?” – was not only appropriate to, but necessitated by the circumstances presented to the officers at the time.²⁰

This much is unobjectionable. The problem lies not with the inquiry by police but with the use of the defendant's response at trial. The language and message of *Miranda* are clear: unwarned statements are presumptively unconstitutional and cannot be introduced in the People's case in chief.²¹ As the Cowardly Lion put it, “No way . . . no how.”²² The *Quarles* Court, however, in an attempt to weasel out of addressing a simple legal question that admittedly implicates a profoundly complex *moral* issue, creates a “public safety exception.”²³ And there you have it. If there is an immediate threat to public safety, the Fifth Amendment right to silence is obviated. How incredibly simple; how incredibly offensive to our notions of justice and fundamental fairness.

What then is the morally consistent and constitutionally coherent position that the Court should have adopted? It is this: Where public safety is threatened, police ought to ask whatever questions are necessary to abate the threat. If time is of the essence, the six seconds it takes to administer *Miranda* should be abandoned. Though the warnings may be jettisoned, however, the constitutional moorings may not be compromised. Consequently, while police questioning may be warranted, *introduction* of those statements at trial is neither defensible nor justified.

¹⁵ *New York v. Quarles*, 467 U.S. 649, 683 (1984).

¹⁶ See *Miranda v. Arizona*, 384 U.S. 436, 460-61 (1966); *Rhode Island v. Innis*, 446 U.S. 291, 301 (holding officer's subjective intent to incriminate is not determinative of whether “interrogation” occurred).

¹⁷ See *Miranda*, 384 U.S. at 460-61.

¹⁸ See *Quarles*, 467 U.S. at 652.

¹⁹ See *id.* at 652, 653 n.3.

²⁰ See *id.* at 653.

²¹ *Miranda*, 384 U.S. at 444-45.

²² *THE WIZARD OF OZ* (Metro-Goldwyn-Mayer 1939).

²³ See *Quarles*, 467 U.S. at 655-56.

Introduction of the statements is indefensible because the language of the Fifth Amendment and *Miranda* is unequivocal: no criminal defendant shall be compelled to speak, and compulsion is inherent in police interrogation within a police-dominated environment.²⁴ Under *Miranda*, such compulsion is not obviated by any circumstances; police-controlled interrogation constitutes a Fifth Amendment precondition for warnings by the State, period.²⁵ And introduction of a *Quarles*-like statement at trial is unjustified because the conditions that gave rise to the unwarned questions have abated. And failure to warn cannot be cured; *Miranda* did not create a "boo-boo" or "oops" doctrine.

Yet, there is a more compelling reason *not* to create such exceptions. The Constitution, and more specifically the Bill of Rights, constructs the terrain that supports notions of individual liberty. Moreover, individual liberty is grounded in moral principles of dignity; the integrity of the self, the right to be silent and to be free from compelled speech, are central to notions of the autonomous self. While a strict Kantian approach to mediating the tension between the "I" and the "We" is untenable, the scheme crafted by the *Miranda* Court incorporates a standard that diminishes neither the rights of the individual nor those of society. Indeed, there is nothing to prevent police from asking questions *sans Miranda* even absent a *Quarles*-like situation; at trial, however, the state must rely exclusively on evidence other than the unwarned statements.²⁶

With the advent of the War on Terror, we have seen a rather frantic chipping away of basic liberties embedded in the Bill of Rights. Now, in addition to having the privacy of luggage violated, airplane travellers are forced to submit either to the dreaded body scanner or to an invasive pat down. We have jettisoned any pretext of adherence to Fourth Amendment protections against unreasonable searches and seizures under the auspices of the age old canard of "national security." But think for a minute. Any self-respecting terrorist is going to secret explosive materials in places where either the body scanner or the hyper-sexualized pat down cannot reach. Indeed, the body scanner or pat down cannot reveal objects lodged in body cavities.²⁷ Any prosecutor worth her salt knows that body cavities are the site of choice for those wishing to transport contraband through airports and across borders.²⁸ Nonetheless, we walk in line, handing over our luggage and our bodies for inspection because we are told that not to acquiesce is an unpatriotic slap in the face to our notions of national security.

The chipping-away process affects the *entire* panoply of rights that secure notions of freedom and individual liberty. And, while there is no question that our world has become less safe, one factor that contributes to an unsafe environment is the whittling away of basic liberties. The power of the state to invade not only our thoughts but our bodies has increased; indeed, the decline in individual liberty is tied to the notion that once the phrase "national security" is uttered, the Bill of Rights becomes illusory. And yet, it is at this moment, when national security is compromised, that our adherence to constitutional principles and the moral framework that shapes them is put to the test. This is true with any relationship, whether between individuals or between the individual and the polity. Should the courts enforce *Miranda* or Fourth Amendment protections only when the political or cultural environment is copacetic? Should not such protections be *strengthened* when that environment is under attack, as proof of our adherence to basic notions of ordered liberty and individual freedom? Abrogating or weakening the Fifth Amendment is as detrimental to the moral and cultural life of our society as the bombing of the

²⁴ U.S. CONST. amend. V; *Miranda*, 384 U.S. at 460-61.

²⁵ *Miranda*, 384 U.S. at 460-61.

²⁶ See *id.* at 444-45.

²⁷ Colleen Deal, Comment, *Faith or Flight?: A Religious Dilemma*, 76 J. Air L. Com. 525, 554 (2011) (citing Zack Kaldveer, *Airport Body Scanner Update DHS Answers EPIC, Nader/Paul, and Alternatives*, PRIVACY REVOLT! BLOG (Jan. 7, 2011), <http://consumercal.blogspot.com/2011/01/airport-body-scanner-update-dhs-answers.html>).

²⁸ Steven Vina, Comment, *Virtual Strip Searches at Airports: Are Border Searches Seeing Through the Fourth Amendment?*, 8 TEX. WESLEYAN L. REV. 417, 428 (2002).

World Trade Center or other criminal activity. Undoubtedly, the framers of our Constitution and the Bill of Rights were aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure."²⁹ *Quarles* and its expansion reflect the very concerns expressed by the architects of our enabling documents; such prescience is at once uncanny and disturbing.

II. LOCATING THE RIGHT

Professor Halberstam's article raises another rather intriguing question: when is the right to silence violated? According to the professor and the Court, the location of the violation is when the State attempts to admit unwarned statements at trial.³⁰ Indeed, Halberstam cites *United States v. Patane* to support the claim that the violation occurs "at trial."³¹ Is she correct? More importantly, is *Patane* correct?

Halberstam states,

Although it is frequently stated that law enforcement officials are required to give *Miranda* warnings before questioning a suspect in custody, it is not a violation of *Miranda* for police to question a suspect without first giving him the warnings It is only a violation to use the incriminating statements in evidence against him at trial.³²

I understand that Professor Halberstam relies on *Patane* as foundational to her assertion. But there is a problem with her analysis, and with her claim that *Miranda* is violated *solely* upon the introduction of unwarned statements at trial. First, such a claim defies the plain language of *Miranda*. The *Miranda* Court was unequivocal in its command; words like "shall" and "must" were used throughout the opinion and tied specifically to what the police must do to collect statements that are the product of "free will."³³ There is no debate, no equivocation, and no speculation whatsoever. If the State wishes to extract evidence from the defendant's own words, those words must follow adequate *Miranda* warnings.

Second, the assertion that the Fifth Amendment privilege is confined to criminal court proceedings is counter to the language and rationale of *Miranda*. The Court stated, "Today, then, there can be no doubt that the Fifth Amendment privilege is available *outside of criminal court proceedings* and serves to protect persons *in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves."³⁴ The Court could not have been any clearer. But to assuage any remaining doubts, the Court reinforced when *Miranda* applies and when it is violated by the state:

The privilege against self-incrimination . . . is the essential mainstay of our adversary system and guarantees to the individual the right to remain silent unless he chooses to speak in the unfettered exercise of his own will, during a period of custodial interrogation, as well as in the courts or during the course of other official investigations.³⁵

²⁹ *Boyd v. United States*, 116 U.S. 616, 635 (1886).

³⁰ Malvina Halberstam, *Requiring Miranda Warnings for the Christmas Day Bomber and Other Terrorists*, 2 U. DENV. CRIM. L. REV. 1, 3-4 (2012).

³¹ *Id.* at 3.

³² *Id.* at 3-4.

³³ *E.g.*, *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) ("[T]he accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."); *id.* at 474 ("If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.").

³⁴ *Id.* at 467 (emphasis added).

³⁵ *Id.* at 460, 467.

Third, a *Miranda* violation is a two-step process. Part one is collection of statements that are unwarned, the consequence of inadequate warnings or defective waiver; part two is the introduction of the statements at trial.³⁶ The taint is the collection of unwarned statements and their introduction at trial.³⁷ Failure to warn is a condition precedent and introduction of such statements is a condition subsequent. Absent introduction of unwarned statements at trial, the failure to warn does not create a Fifth Amendment violation. Consequently, Halberstam's claim distorts *Miranda* and the logical connection between compelled statements and the Fifth Amendment right to silence. Moreover, her assertion grossly overstates the flawed findings of *Patane*. *Patane*, rather circuitously, comes out in the same place as my two-step analysis of the "taint."³⁸ Additionally, *Patane* was concerned with the exclusion of evidence outside the scope of the statement *qua* statement.³⁹ The Court has consistently refused to extend the exclusionary rule to evidence contained within the statement absent a Fourteenth Amendment due process violation.⁴⁰ It is conceivable that *Patane*'s rather specious reasoning rests not only on past, equally specious plurality decisions, but on a refusal to extend the exclusionary rule beyond what was outlined in *Dickerson*.⁴¹

III. CONCLUSION

Where do we go from here? I would like to think that as scholars we would make principled decisions when addressing constitutional protections, fundamental rights, and state interests regarding national security and criminality. The principled approach is to recognize the tension that exists between individual rights and state interests to thwart terrorism and crime, and to give law enforcement the necessary tools to ferret out such conduct, but not at the expense of vitiating Fifth Amendment protection. The State has every right to circumvent *Miranda* in order to identify potential threats to our national security. It does not have the right to do so at the expense of the right against self-incrimination. Let the defendant speak in the absence of *Miranda* warnings, but let us stand upon principle and refuse to defend introduction of such statements at trial. Perhaps, if we affirm such rights, the courts shall follow.

³⁶ See *id.* at 478-79.

³⁷ *Id.*; see also *Chavez v. Martinez*, 538 U.S. 760, 766 (2003) (holding that coercive interrogation did not violate respondent's constitutional rights where he was not charged with any crime and his statements were not used against him in a criminal proceeding); *United States v. Patane*, 542 U.S. 630, 641 (2004) (plurality opinion) (noting that negligent or intentional failure by police to provide *Miranda* warnings, without more, does not constitute a constitutional violation).

³⁸ *Patane* is truly tortured in its explanation and rational. Initially, the Court states that a failure to give *Miranda* statements, *by itself*, does not constitute a Fifth Amendment violation. 542 U.S. at 641. It then goes on to state that mere negligence or wilful conduct to withhold *Miranda* warnings does not create a violation unless those statements are introduced at trial. *Id.* The Court fails to recognize the dependent relationship that exists between pre-trial police conduct and prosecutorial conduct regarding introduction of unwarned statements.

³⁹ See *id.* at 643.

⁴⁰ See *id.* at 642; *Nix v. Williams*, 467 U.S. 431, 441-43 (1984).

⁴¹ See *Dickerson v. United States*, 530 U.S. 428 (2000) (holding that, since *Miranda* requirements are constitutionally based, they cannot be legislatively superseded by Congress).