



## CHAPTER SEVEN

# *Criminal Justice*

Stories of abuse and mistreatment in the criminal justice system have long held the nation's fascination. The most egregious examples include the 1931 Scottsboro trials; the 1961 conviction of Clarence Earl Gideon, who was later retried and acquitted after winning the right to counsel; and more recently the round-up in Tulia, Texas, of forty-six men and women, most of whom were African American, in a purported drug sting orchestrated by a rogue undercover officer in 1999. Such high-profile cases serve as occasional reminders that the accused in our system stand innocent before the law until proven guilty and that such proof must conform to specific constitutional limits on government power as well as the broad guarantee of due process of law.

Historically, although such incidents may not have been the norm across the country, they occurred more frequently than many people wished to accept. For much of the twentieth century, coerced confessions, police brutality, and other abuses were not necessarily common, but they were not rare either. In many Southern states, the criminal justice system reflected the divisive and denigrating ideology of Jim Crow. And throughout the country, the most basic protections afforded by the system were often illusory in practice for poor or minority individuals accused of crime.

In the 1960s, the Supreme Court began to revolutionize the constitutional rights of individuals within the criminal justice system. The Court held that defendants are entitled to have an attorney present during custodial interrogations and lineups.<sup>1</sup> It required the state to provide an indigent criminal defendant with a lawyer if he or she could not afford one.<sup>2</sup> It extended the warrant requirements of the Fourth Amendment to cover electronic surveillance,<sup>3</sup> administrative inspections,<sup>4</sup> and the search of a home following an

arrest.<sup>5</sup> Moreover, as discussed in more detail below, the Court in *Miranda v. Arizona* replaced case-by-case inquiry into the voluntariness of confessions with a prophylactic requirement that custodial interrogations be preceded with a warning notifying the defendant of the right to remain silent and to have a lawyer present during questioning.<sup>6</sup> And in *Mapp v. Ohio*, the Court extended the exclusionary rule to the states, barring prosecutors from using evidence obtained through any search that violates the Fourth Amendment.<sup>7</sup> Many of these decisions drew criticism for supposedly having no basis in the Constitution and for tilting the criminal justice system too heavily in favor of the accused. The criticism reached a crescendo when Richard Nixon made it a centerpiece of his 1968 presidential campaign, pledging to appoint judges who believed in “strict construction” and “law and order” (which Nixon understood to be the same things). President Nixon’s successful campaign marked the beginning of the end of the Warren Court, as he and his Republican successors appointed several Justices who were more conservative on criminal justice issues than the Warren Court had been.

Tellingly, however, the landmark criminal procedure decisions of the Warren Court, while not extended in later doctrine and in some cases weakened by exceptions, remain largely intact today. Their endurance as settled law indicates that their constitutional grounding is more sound and their holdings more widely accepted than the attacks on them would suggest. Over the years, *Miranda* has been subjected to especially vigorous criticism, as conservatives have argued that the warnings are not constitutionally compelled and that voluntariness is the only true constitutional requirement for use of a confession in court. According to this view, the *Miranda* rule could be supplanted by a federal or state statute. But when the Supreme Court finally heard a case testing the constitutionality of a statute purporting to supersede *Miranda* in federal prosecutions, Chief Justice Rehnquist, an early critic of *Miranda*, wrote a 7–2 opinion holding that “*Miranda* announced a constitutional rule that Congress may not supersede legislatively.”<sup>8</sup> The Court declined to overrule *Miranda* on the ground that “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”<sup>9</sup>

The legitimacy of *Miranda* does not rest simply on long usage and familiarity. The decision itself is faithful to the Constitution in the way it interprets the document’s text and principles to sustain their vitality as our society and

institutions change over time. In particular, *Miranda* adapts the Fifth Amendment privilege against self-incrimination to important transformations of the criminal justice system that have occurred since the Founding era.

On an initial reading, the privilege against self-incrimination—“nor shall [any person] be compelled in any criminal case to be a witness against himself”<sup>10</sup>—appears limited to the principle that no one may be compelled to testify against himself in a criminal proceeding in which he is a defendant.<sup>11</sup> On this view, *Miranda*’s extension of the privilege to custodial interrogation by the police seems unauthorized by the text. But in order to properly construe the text, it is essential to understand the historical context in which the Fifth Amendment was ratified. As Yale Kamisar has explained, a criminal defendant was not permitted to testify at trial at all, either for or against himself, at the time of the Fifth Amendment’s adoption.<sup>12</sup> Thus, the original importance of the privilege was not to protect against self-incrimination in a criminal trial. It was instead “to bar pretrial examination by magistrates, the only form of pretrial interrogation known at the time.”<sup>13</sup>

Given this history, how does the privilege apply to pretrial questioning by the police? The problem is one that the Framers never contemplated for the simple reason that at the time “there was no generalized bureaucracy of investigation of the sort we know today as the police. . . . ‘[T]here were simply no “police interrogators” to whom the privilege could be applied.’”<sup>14</sup> What the Court eventually called “the advent of modern custodial police interrogation”<sup>15</sup> did not occur until the late nineteenth century. Yet the application of the privilege to police interrogation flows logically from the constitutional principle because “if the police are permitted to interrogate an accused under the pressure of compulsory detention to secure a confession . . . they are doing the very same acts which historically the judiciary was doing in the seventeenth century but which the privilege against self-incrimination abolished.”<sup>16</sup> In other words, “[t]he function which the police have assumed in interrogating an accused is exactly that of the early committing magistrates, and the opportunities for imposition and abuse are fraught with much greater danger.”<sup>17</sup> Chief Justice Warren described those dangers at length in *Miranda* en route to observing that the privilege, as it developed historically, “has always been ‘as broad as the mischief against which it seeks to guard.’”<sup>18</sup> The Court’s conclusion that “all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody

questioning”<sup>19</sup> is thus a sensible adaptation of the Fifth Amendment to new and unforeseen circumstances. “This is, indeed, a broad construction of the constitutional language”—and one that was not part of the original understanding—“but it is a construction which has seemed to be required if the basic objective of that language is to be realized.”<sup>20</sup>

The specific warnings prescribed by *Miranda* have been more controversial. They are, critics say, a prime example of judicial legislation. Yet the warnings are fully consistent with a judicial role attentive to the practical efficacy of the Constitution’s protections and to the lessons of experience in crafting workable rules. The Court in *Miranda* “came to [the issue of compulsion in custodial interrogation] after decades of experience with case-by-case assessment of all the circumstances” to determine the voluntariness of confessions.<sup>21</sup> As Stephen Schulhofer has explained, the totality-of-the-circumstances test

had left lower courts without usable standards and thus had created disproportionate demands for case-by-case review in the federal courts. The problems of judicial review also meant that intense interrogation pressures were inadequately controlled in practice. The case-by-case approach even failed to prevent, and in subtle ways actually encouraged, outright physical brutality. . . . Finally, case-by-case review left police themselves without adequate guidance.<sup>22</sup>

Similarly, the Court in *Dickerson* noted *Miranda*’s concern that “reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession”<sup>23</sup> and also observed that “experience suggests that the totality-of-the-circumstances test . . . is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner.”<sup>24</sup> Against this backdrop, the *Miranda* warnings reflect the Court’s attempt to develop a practical rule for the accused, the police, and the courts to ensure the efficacy of the Fifth Amendment privilege. Notably, although *Dickerson* held that “*Miranda* announced a constitutional rule,”<sup>25</sup> the Court there, as in *Miranda* itself, declined to hold that “the *Miranda* warnings are required by the Constitution, in the sense that nothing else will suffice to satisfy constitutional requirements.”<sup>26</sup> The Court thus continues to leave open the possibility that a legislative solution, informed by experience with evolving interrogation practices, could be at least as effective as *Miranda* warnings in protecting Fifth Amendment rights.<sup>27</sup>

In the Fourth Amendment area as well, key Warren Court decisions reflect a judicial approach that faithfully interprets the Constitution by giving practical effect to its text and principles in the face of societal change. In Chapter 2, we saw this methodology at work in *Katz v. United States*,<sup>28</sup> where the Court construed the right against unreasonable searches and seizures to cover not only physical trespass but also electronic surveillance. Although the protections of the Fourth Amendment were originally tied to common-law protections of physical spaces and tangible objects, new communication technologies and the expectations of privacy we have when using them have outstripped the original understanding of the amendment's reach. *Katz* illustrates how an approach to interpretation that relies too heavily on original understandings of the reach of a constitutional principle would defy our own understanding of the Constitution as a document meant to retain not lose its significance over time. In reading the terms "search" and "seizure" to cover non-physical intrusions such as wiretapping, the Court famously declared that "the Fourth Amendment protects people, not places,"<sup>29</sup> and effectively heeded Justice Brandeis's admonition that the Constitution "must have a . . . capacity of adaptation to a changing world" if "[r]ights declared in words [are not to] be lost in reality."<sup>30</sup>

The application of the exclusionary rule to the states also illustrates the adaptation of constitutional principle to societal change. Although the text of the Fourth Amendment does not prescribe a remedy for violations, the principal remedy available during the Founding era was the common law of trespass, which threatened strict liability for law enforcement officials who conducted warrantless searches but granted immunity to officials acting pursuant to a warrant. By imposing probable cause and specificity requirements on when a warrant may issue, the Fourth Amendment eliminated general warrants and, in so doing, narrowed the grounds on which an official could claim immunity in a trespass action. Personal liability thus gave law enforcement authorities a strong incentive to comply with the Fourth Amendment in its original historical setting.<sup>31</sup>

By the time the Supreme Court decided *Mapp v. Ohio*,<sup>32</sup> years of experience had shown that civil remedies and other alternatives were inadequate to deter Fourth Amendment violations. The Court in *Mapp* noted that "while in 1949 . . . almost two-thirds of the States were opposed to the use of the exclusionary rule, now . . . more than half of those since passing upon it, by

their own legislative or judicial decision, have wholly or partly adopted or adhered to [it].”<sup>33</sup> Citing California as a prominent example, the Court observed that “[t]he experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States.”<sup>34</sup> Immunity doctrines, the difficulty of proving official misconduct before a jury, and other obstacles meant that civil remedies did “little, if anything, to reduce the likelihood of the vast majority of fourth amendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice.”<sup>35</sup> Other remedies, such as criminal prosecution or injunctive relief against continuing violations, “are rarely brought and rarely succeed.”<sup>36</sup> As Justice Ginsburg recently explained, “a forceful exclusionary rule” continues to be “the only effectively available way” to deter and remedy Fourth Amendment violations, especially in an age of increasing bureaucratization and technological sophistication of law enforcement.<sup>37</sup>

Thus the exclusionary rule, though not a perfect remedy, reflects a judicial adaptation of the Fourth Amendment’s principles to contemporary realities. Far from unprincipled judicial legislation, the rule is designed to “merely place[] the government in the same position as if it had not conducted the illegal search and seizure in the first place.”<sup>38</sup> Although the Framers did not contemplate the modern inefficacy of civil remedies for wrongful searches and seizures, the amendment was plainly intended to set effective limits on law enforcement and not to be “reduced to a ‘form of words.’”<sup>39</sup> In light of its historical backdrop, the exclusionary rule makes sense as “a translation [of constitutional principle] aimed to preserve old protections in a new legal context.”<sup>40</sup>

In recent years, the Supreme Court’s treatment of the exclusionary rule has been rather inhospitable, with narrow majorities agreeing to limit its reach.<sup>41</sup> The Court should not continue this trend unless it finds a more effective way to prevent or remedy unlawful searches and seizures. If the Court finds such a solution, then the evolution of doctrine, far from subverting the Constitution or the judicial role, would serve to keep faith with the Constitution’s text and principles over time.