Understanding Prophylactic Supreme Court Decisions

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John F. Stinneford, The Illusory Eighth Amendment, 63 **Am. U.L. Rev.** 437 (2013).

It is a rare achievement to write about a case in the constitutional law canon and tell us something we did not know. This is the achievement of John Stinneford's recent article, *The Illusory Eighth Amendment*. Despite its title, the most interesting part of Stinneford's article is actually an analysis and critique of the Supreme Court's famous decision in *Miranda v. Arizona*.

For those who neither study criminal procedure nor watch police procedurals, Miranda held that in the absence of a provable superior alternative:

> Prior to any questioning, the person 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.

Standard accounts treat *Miranda* as a "prophylactic" decision. According to this view, the Constitution directly prohibits the use of compelled confessions. But the Supreme Court concluded that the direct prohibition was too narrow, either because it was too difficult to enforce or because the error costs were asymmetric. The Court responded to the problem by intentionally creating a "prophylactic" rule that swept broader than the Constitution itself. This ensured that the underlying right was adequately protected.

Stinneford argues that *Miranda* did not actually create a prophylactic rule. If *Miranda* were a prophylactic rule, the Court would have (1) described what the regular rule is, and then (2) created an additional rule to provide the prophylactic protection. But on Stinneford's reading, the *Miranda* Court actually flirted with at least three different theories of what constituted impermissible compulsion, and its rule *underprotected* two of them. In other words, *Miranda* may not have been intended prophylactically at all.

As Stinneford puts it, "The truth of the matter is that the Supreme Court in Miranda did not particularly care what the term 'compelled' means." ("Compelled" is the word used by the Fifth Amendment.) Here is his key point:

> In *Miranda*, the Court flirted with the idea that certain kinds of pressure tactics and trickery might constitute compulsion, but never quite reached this conclusion. The Court also flirted with the idea that custodial interrogation itself might constitute compulsion because of the pressures associated with custodial interrogation, but never quite reached this conclusion. Because the Court never held that these practices constituted compulsion (and indeed, never determined what "compelled" means), many of the practices disliked by the *Miranda* Court are still used today. As long as the police give the requisite warnings and obtain the requisite waiver, they can still keep the defendant alone in a room and question him for hours, using psychological pressure and trickery to induce a confession.

Since *Miranda*, the Supreme Court has decided many cases that seem to narrow its scope, as discussed in Barry Friedman's *The Wages of Stealth Overruling*. Stinneford's analysis affects how we assess these more recent cases. On the standard account of *Miranda* as purely prophylactic, the erosion of *Miranda* may not be a big constitutional problem. If the core constitutional right remains protected, the newer cases just reduce *Miranda* from a big prophylactic rule to a slightly smaller prophylactic rule. But if Stinneford's account is right, eroding *Miranda* may actually underprotect the core right even more. For example, in the recent decision of *Berghuis v. Thompkins*, the Court concluded that *Miranda* permitted the use of a defendant's confession made after he sat in custody through hours of unsuccessful questioning. If pressure tactics and custodial interrogation *are* compulsion, this is erosion of the core right, not just erosion of prophylaxis.

The Supreme Court's later decision in *Dickerson v. United States* also suggests that *Miranda* is ultimately not a prophylactic rule in this sense. There the Court held that Congress lacked the power to overrule *Miranda*, because of that case's constitutional status. Notably, the decision used the word "prophylactic" only once, quoting a prior case (which it distinguished).

The analysis also has broader implications for Supreme Court doctrine and prophylactic rules more generally. Stinneford's article generalizes to the Eighth Amendment context. We might generalize further. Stinneford argues that the Court ought to first be clear about the scope of the core requirement before it creates a doctrinal rule designed to protect the core. Other scholars have suggested that when relying on precedent, the Court ought to first figure out what the Constitution actually requires, and then analyze whether precedent requires something different. In each case, the two-step process helps us figure out what work the Court's doctrine is actually doing, which also affects how to think about future cases narrowing or broadening the doctrine.

On the other hand, the Court's lack of clarity may be strategic. If courts clearly stated that the Constitution requires X, but they were going above and beyond to require Y, would its decisions have the same legitimacy? How much of the Court's constitutional authority stems from the fact that it purports to be interpreting the Constitution, rather than erecting an explicitly separate legal rule on top of the Constitutional meaning? I'm sure many law professors have no problem with layered doctrine or prophylactic rules, but how would other political actors and common citizens react if the Court's lawmaking role were exposed?

I suspect that it turns out to be important to distinguish extra-constitutional prophylaxis of this sort from constitutional decision rules. When constitutional violations are genuine but hard to spot, or the relevant standard is difficult to articulate or apply, courts might devise an implementing rule that is clearer than the underlying standard. This kind of doctrine is tethered to direct constitutional meaning and relatively uncontroversial. On the other hand, if the Court admits that it is going above and beyond the constitutional requirements, it is acting at the outer reaches of its authority.

The lesson of *Miranda* and *Dickerson* may be that the authority of judicial doctrine depends on which kind of rule it is: constitutional doctrine has much greater authority than extra-constitutional prophylaxis.

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