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Unhandcuffing the Police?

By ABRAHAM S. GOLDSTEIN

New Supreme Court Ruling Is a Step Back to Invisibility

NEW HAVEN—For generations, we have tolerated a situation in which police have often searched or interrogated or eavesdropped illegally. As it became plain that police and legislators were unwilling to deal realistically with the problem, judges reluctantly concluded that they would have to fill the vacuum. Their solution was the exclusionary rule, an awkward device which is built on a principle of deterrence. It assumes that police misconduct will be reduced if evidence obtained illegally is excluded from use at trial. The fact that, in Justice Cardozo's words, a criminal may "go free because the constable has blundered" is regarded as a price worth paying in order to serve the larger social interest.

Miranda v. *Arizona* was a high point in the development of exclusionary rules. It set out in detail the advice police must give suspects in custody—about their rights to remain silent and to have counsel if they are interrogated, making known to the indigent and the ignorant what is more commonly known to the affluent and the informed.

In *Harris* v. *New York*, the Supreme Court has sounded a retreat from *Miranda*. The opinion, written by Chief Justice Burger in a minor key, appearing to decide only the case before the court, seems obvious enough: a defendant who takes the witness stand can be contradicted by what he said earlier at the police station. Its special significance, however, lies in the fact that the earlier statement may be used even if it was obtained illegally. The incentive to violate *Miranda* is clear: if an incriminating statement is obtained, whether legally or illegally, it may keep the defendant from testifying at trial.

The importance of *Harris* should not be measured by its low profile. it recalls a time, not so long ago, when courts acquiesced much too casually in police disregard of constitutional rights. And it does so in the wake of a confusing debate about "law and order," and an overheated rhetoric about courts "handcuffing the police" and somehow being responsible for the crime problem.

It is plain that *Miranda* and related cases are a fragile base for keeping police conduct within bounds. For all their prominence, they have had too little impact on the day-to-day administration of criminal justice because they exclude only in contested cases. And such cases are very rare. Most are decided by pleas of guilty, which have declined in volume hardly at all—because people "cooperate" with the police or plead guilty for reasons of sentencing advantage or psychological need, rather than because they are not advised of their rights. An even larger number of cases are dismissed by police or prosecutors before trial, many of them involving unlawful arrests made in an excess of zeal, or to harass, or to obtain information without any thought of going to trial at all.

Even with *Miranda*, therefore, there is no assurance that police misconduct will surface so that judges can do something about it. Indeed, charges may be dropped or "plea bargains" made in order to avoid such review. Police and prosecutor and defendant and judge may all find it in their short-run interest to overlook what the police have done, work out a deal and dispose of the case. But it is not in society's interest that "the system" should be arranged to conceal police excess.

The principal valid criticism of *Miranda*, and of the exclusionary rule, is that there must be a better way to control police than to let criminals go free. Yet even for such critics, *Miranda* seemed to offer a solution. In a significant passage, the Court suggested that the rules might be changed if new methods were devised to safeguard the rights of suspects, presumably in the form of legislative expansion of liability in damages, or more effective observation or review of police conduct.

Despite its limitations, *Miranda* draws the invisible world of the police station into public view, putting against the policeman's inevitable temptation to excess an opposing pressure to resist the temptation. It relies, ultimately, upon a faith that the police will respect the law if it is made plain that the larger society demands it. And such demands are increasingly being made, as not only the poor and the uninformed find themselves in police custody but also the children of the middle and upper classes, caught up in drug use or war-protest activities.

Now, when a sure and steady pressure from the Supreme Court is needed if we are ever to have executive and legislative protection of the rights of suspects, police departments have been put on notice that they need not accommodate to *Miranda* because more permissive rules may be in the offing. *Harris* points us back to a time when the courts were only marginally interested in police misconduct, and others interested in it hardly at all.

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