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At 51, *Miranda* starting to show its age; a tune-up may be in order

Last month marked the 51st anniversary of *Miranda v. Arizona*. It is now 14 years shy of Medicare eligibility. What is remarkable is that the warnings themselves have never changed. Yet, like Dorian Gray, the picture hidden in the attic reveals the true ravages of age.

Miranda actually is in need of some serious cosmetic surgery. Fortunately, professor Tonja Jacobi of Northwestern Pritzker School of Law has provided it in her aptly named article, "Miranda 2.0, first published in the UC Davis Law Review in November.

The article is available for free at ssrn.com/abstract=2656405.

Everyone thinks they know the *Miranda* warnings from TV and movies. And, for once, everyone is right. This is how the *Miranda* court described the warnings in 1966: "[A suspect in custody] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

All of this should come as no surprise to even the most casual viewer of "Law and Order."

But a half-century of U.S. Supreme Court gloss has shown there are gaps in the standard warnings. For example, it is clear that the right to counsel includes not only the right to consult with an attorney, but the right to actually have the attorney with you during any interrogation.

Yet when the Supreme Court was asked to include this important point in the standard *Miranda* warnings, the court refused. *Florida v. Powell*, 130 S.Ct. 1195 (2010). In fact, in 51 years the court has refused to amend the basic *Miranda* warnings in any way.

Jacobi's revisions of the warnings address what she perceives as the most serious problem in the area of police interrogations: false confessions. She contends that "the central problem with *Miranda* is that it was not crafted specifically to prevent false confessions, but rather to regulate interrogations more generally."

She cites one study which found that 81 percent of innocent persons waived *Miranda* while only 36 percent of guilty persons did. Ironically, by trusting the criminal justice system innocent suspects increase their exposure to police interrogation and the concomitant risk of false confessions.

Jacobi focuses on an underappreciated factor in false confessions: the length of interrogation. One study of false confessions showed that 34 percent were obtained in interrogations lasting six to 12 hours, while 39 percent were the result of 12 to 24 hours of interrogation.

Jacobi recommends that the Supreme Court should not only create a bright-line limit on the length of interrogation sessions, but that this information should be communicated to suspects as part of the *Miranda* warnings. This would help eliminate the classic "We've got all the time in the world" police stratagem.

Another aspect she emphasizes has particular resonance here in Illinois. In a section of her article titled "Making Miranda variable," she criticizes the decision to make the warnings "one-size-fits-all."

Studies have shown that juveniles and people who are mentally challenged are far more likely to comply with requests for interrogation in order to accommodate the police officers they view as authority figures. Just as troubling, evidence indicates these suspects simply do not understand the *Miranda* warnings as written.

She cites a number of police departments around the country that have responded to this by amending and clarifying the standard *Miranda* warnings.

> ... *"the central problem with* Miranda *is that it was not crafted specifically to prevent false confessions, but rather to regulate interrogations more generally."*

Fortunately, on Jan. 1, Illinois joined the movement. Illinois adopted what amounts to a "juvenile *Miranda* warning" to be read to any suspect who was under 18 at the time of the commission of the offense. (705 ILCS 405/5-401.5 (a-5); 725 ILCS 5/103-2.1 (a-5))

This specially created warning states: "You have the right to remain silent. That means you do not have to say anything. Anything you do say can be used against you in court. You have the right to get help from a lawyer. If you cannot pay for a lawyer, the court will get you one for free. You can ask for a lawyer at any time. You have the right to stop this interview at any time."

Equally important, the law also demands two follow-up questions. First, the officer must ask "Do you want to have a lawyer?" The officer is not allowed to proceed until the juvenile answers the question. Next, the officer must ask "Do you want to talk to me?"

Once again, the officer is forbidden to continue until the juvenile responds.

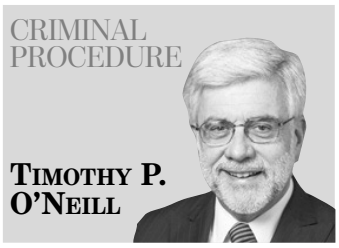
In addition to the modified warnings, this same group of under 18 juveniles must have their interrogations videotaped if the confessions are to be used in a felony trial as well as certain misdemeanor trials. (705 ILCS 405/5-401.5(b); 725 ILCS 5/103.2.1 (a-10)

Finally, Illinois law now provides that a juvenile under 15 at the time of the commission of either a homicide or serious sexual assault must be represented by counsel during the entire custodial interrogation. 705 ILCS 405/5-170(a). In other words, *Miranda* warnings are not necessary in these cases because no waiver of counsel is even allowed.

It is a good time to reconsider the entire *Miranda* issue. At the time the decision came down in 1966, there were those who believed it would simply end police interrogations forever.

Instead, statistics show that around 80 percent of suspects waive their *Miranda* rights and agree to be interrogated. This may not be bad per se. But what is troubling is to learn from the Innocence Project that 28 percent of wrongful convictions involved either false confessions or self-incriminating statements.

Jacobi offers some excellent suggestions for improvements. Fortunately, Illinois at this point is a bit ahead of the curve.



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