Honouring the social contact: Toward ending the "Awful but Lawful" era

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Charles E. "Chuck" MacLean, J.D., PhD[1], walks us through his research about honouring the social contract toward, in his opinion, ending the "awful but lawful" era when it comes to criminal justice in the United States

The United States Constitution, arisen from the Age of Enlightenment, formed the social contract between the American People and their Government, with limited, shared powers exercised by the Government and defined and circumscribed by and with the consent of the People. In a word, the Government must stop authorizing – largely led by U.S. Supreme Court decisions – the wholesale erosion of the constitutional social contract in the quest to serve majority preferences and law enforcement expedience at the expense of individuals' and minorities' rights and privileges.

Simply put, during the "awful but lawful" era, 1969 to the present, unconstitutional government action has been repeatedly celebrated and cemented by successive Supreme Court decisions devoid of true jurisprudence and guided instead, in my opinion, by elitist tropes empowering monied and White interests over all others.

This brief article presents just two paradigm features of the "awful but lawful" era – courts blessing police deceit in interrogations and the ethereal nature of what passes for a right to defense counsel – then proposes, even begs for a return to the pre-era jurisprudence of the U.S. Supreme Court as led by Chief Justice Earl Warren when individual rights, particularly for criminal suspects and defendants, were rigorously memorialized, defended, and expanded.

Coercion by police in securing confessions

The Fifth Amendment, ratified in 1791, precludes compulsion and coercion by police in securing confessions: "No person… shall be compelled in any criminal case to be a witness against himself… (U.S. Const. amend. V)." The U.S. Supreme Court soon clarified based on assessment of federal and state constitutional language on point that the "right to remain silent" extended beyond direct courtroom testimony to include the right to remain silent in questioning even long before trial (*Counselman v. Hitchcock* [U.S. 1892]).

The touchstones then became whether compulsion (or coercion) led one to speak in ways that may involuntarily compromise the speaker's penal interests (*Columbe v. Connecticut* (U.S. 1961) ("If [his confessions] were coerced, Culombe's conviction,

however convincingly supported by other evidence, cannot stand")). That all sounds clear enough: confessions may not be admitted unless they were knowingly, voluntarily, intelligently proffered, and uncoerced.

But by the 1960s, American law enforcement had pushed those boundaries to and beyond the breaking point until, in Miranda v. Arizona (U.S. 1966), the non-unanimous Court majority had seen enough police physical and psychological coercion in interrogations to create a prophylactic rule to ensure that custodial suspects understood their constitutional rights and could not be questioned unless they had voluntarily waived those rights (to silence and defense counsel).

"The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime… We start… with the premise that our holding [in *Miranda v. Arizona*] is not an innovation of our jurisprudence but is an application of principles long recognized." Consider those words: Miranda was more than mere jurisprudence; instead, it stated the natural law and compelled only that which all humans had a natural right to enjoy. That case yielded "Miranda warnings," now a fixture of the U.S. criminal justice landscape. But ever since, court majorities subsequent to Chief Justice Earl Warren's Court have degraded that basic human right toward the vanishing point.

In *Kuhlmann v. Wilson* (U.S. 1986), the Court of Chief Justice Warren Burger held that officers were free to place a jailhouse informant in close proximity to Wilson, a murder suspect, to talk about the murders without informing the suspect of his Miranda rights or disclosing that the informant was working with police.

In *Illinois v. Perkins* (U.S. 1990), while defendant Perkins was in custody on unrelated charges, officers placed an undercover officer posing as a cellmate to question Perkins about a murder; Chief Justice Rehnquist's Supreme Court, betraying no concern whatever for the right to remain silent or affirmatively waive it, held Perkins's non-Mirandized admissions were nonetheless admissible against him at trial.

In *Berghuis v. Thompkins* (U.S. 2010), for the first two hours and 45 minutes of a three-hour custodial police interrogation, the suspect sat absolutely silent while officers peppered him with questions; Chief Justice John Roberts's Supreme Court held 165 minutes of the defendant's absolute silence was not enough to be considered invocation of his right to remain silent. The confession was admitted without regard to the suspect's clear wish to remain silent.

The ethereal right to counsel

To touch on just one other category where the U.S. Supreme Court has favored social contract erosion, the Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall… have the Assistance of Counsel for his defense" (U.S. Const. amend. VI [emphasis added]). And in *Gideon v. Wainwright* (U.S. 1963), Chief Justice Earl Warren's Supreme Court held, clear-eyed, that an indigent's

right to counsel in a criminal case is meaningless without a public-funded attorney. Sounds simple enough, but every U.S. Supreme Court majority has likewise eroded that fundamental constitutional right.

In *Strickland v. Washington* (U.S. 1984), the Burger Court held the constitutional right to counsel does not require a very effective counsel – in that death penalty case, where the counsel offered no mitigation evidence in the sentencing phase of the trial, the Court deemed that will occur within the ambit of reasonable representation by defense counsel. However, one could ask, what purpose is served by the Sixth Amendment right to counsel if the defense counsel fails to offer even the most rudimentary defense?

In *Texas v. Cobb* (U.S. 2001), the Rehnquist Court, apparently finding the right to counsel not that important after all, held that the Sixth Amendment right to counsel is offense-specific not incident-specific and thus does not extend to other offenses that may have arisen from the same criminal behavior.

And in *Marshall v. Rodgers* (U.S. 2013), where the defendant had represented himself at trial and been convicted, and the trial court then refused the defendant's three sequential requests for court-appointed counsel to help him draft a motion for a new trial, the Roberts Court held that refusal to honor that defendant's right to counsel did not violate a clearly established federal requirement (apparently the Sixth Amendment notwithstanding).

The U.S. Supreme Court has favored social contract erosion

This same erosion has played out in dozens of criminal procedure contexts since the Warren Court drew to a close in 1969, including so-called "good faith" exceptions, police mistakes, police excessive force and qualified immunity, use of unconstitutional evidence in a variety of contexts, rights to counsel on appeals, limiting habeas corpus, defendant waivers of rights to discovery and appeal, re-initiating contact with represented defendants, arguments related to invocation of the right to remain silent, DNA seizures from unconvicted arrestees, double jeopardy, and many others. Americans are sleeping on their rights as the U.S. Supreme Court erodes them. And we all – and the Republic – are weaker for it. We must embrace the social contract again and move toward ending the "awful but unlawful" era.

References

- Berghuis v. Thompkins, 560 U.S. 370 (2010).
- Columbe v. Connecticut, 367 U.S. 568 (1961).
- Counselman v. Hitchcock, 142 U.S. 547 (1892).
- Gideon v. Wainwright, 372 U.S. 335 (1963).
- Illinois v. Perkins, 496 U.S. 292 (1990).
- Kuhlmann v. Wilson, 477 U.S. 436 (1986).
- Marshall v. Rodgers, 569 U.S. 58 (2013).
- Miranda v. Arizona, 384 U.S. 436 (1966).
- Strickland v. Washington, 466 U.S. 668 (1984).

- Texas v. Cobb, 532 U.S. 162 (2001).

Additional readings

1. MacLean, C. E., & Densley, J. (2023, forthcoming). Police, prosecutors, judges, and the Constitution; Toward ending the “awful but lawful” era. Springer Publishing.
2. MacLean, C. E., & Lamparello, A. (2022). Justice for all: Repairing American criminal justice. New York NY: Routledge Publishing/Taylor & Francis Group.
3. Morris, C. W. (ed.) (1999). The Social Contract Theorists: Critical Essays on Hobbes, Locke, and Rousseau. Oxford UK: Rowman & Littlefield.

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