Judicial Proceedings Committee
Senate Bill 22
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Testimony of Joshua E. Hoffman

Like so many other rights long established, the Miranda warnings, which currently exist solely because of the Supreme Court, are certainly in jeopardy. For this conservative majority, it's difficult to understand how *Miranda v. Arizona* could survive. This reasons for this Committee to act to push back and preserve long established rights, meanwhile, could not be more clear.

Today's originalist majority wing of the Supreme Court, if we take them at their word, protects no rights that they don't find significant support for from the mid-nineteenth century. That is before modern policing, urban policing, even existed. If there is one thing ten years of practicing law before our courts, state and federal, has taught me, it is that courts are results oriented at times. And if they are result oriented sometimes, they may be so any time.

And rest assured, Miranda rights are not in the United States Constitution or the Maryland Declaration of Rights. They have merely been created by the Supreme Court as a necessary measure to give meaning to the constitutional right against self-incrimination. Maryland courts have followed that law but have never expanded it.

One scholar has written "You cannot justify the Gideon line of cases[1] in any remotely originalist way, and one of the important areas-- not the entire area, but one of the important areas--of the Fifth Amendment is Miranda. It's the same thing. I mean, it's about as far from originalism as one can possibly get."[2]

In *Dobbs*, this Supreme Court majority along partisan lines overruled all constitutional protection for abortion. It has been pointed out that their rationales would do the same for privacy rights like contraception, homosexuality, etc. In dissent, Justice Breyer, joined by Kagan and Sotomayor wrote "The Constitution

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[1] Gideon v. Wainwright, 372 U.S. 335 (1963) establishing that an "indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial." It is the considering police interrogation a phase of criminal proceedings which, in part, underpins not only Miranda but all protections against self-incrimination applied against police and not just courts.

[2] Originalism and Criminal Law and Procedure 2005 National Lawyer's Convention November 10, 2005, 11 Chap. L. Rev. 277, 288 (2008)

will, today's majority holds, provide no shield, despite its guarantees of liberty and equality for all. And no one should be confident that this majority is done with its work."

For Miranda itself, this has already begun. This past June, in *Vega v. Tekoh*, a 6-3 decision also along partisan lines, the US Supreme Court reversed the 9th Circuit and held that a violation of Miranda cannot be cause for a civil rights law suit. They wrote that "a violation of Miranda does not necessarily constitute a violation of the Constitution." Dissenting, Justice Kagan wrote "Today, the Court strips individuals of the ability to seek a remedy for violations of the right recognized in Miranda."

And, of course, *Miranda v. Arizona* was mentioned in the now infamous footnote 48 from the concurring opinion in *Dobbs*, identified by many as a to-do list of cases for this Supreme Court majority to overturn.

As always, when declining to protect a right, the federal courts are quick to point out that state courts are free to decide otherwise within their jurisdictions, passing the buck, in other words. State courts often say much the same thing about their own legislatures. The common refrain is that they, as courts, are in no position to decide policy. And they say it regardless of whether they are making policy.

Perhaps they are right and the problem is that we spent so many decades relying on this super powered court to protect fundamental freedoms. Perhaps it has been the job of state legislatures all along. After all, there would never have been a risk of *Roe* being overturned if Congress had acted, unless Congress were to overturn it. The difference is Congress would be, in theory, responsible to their constituents, whereas the courts are responsible to no one.

In 1977 Justice Brennan wrote "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law--for without it, the full realization of our liberties cannot be guaranteed."

That language seems quaint, from an older age. Unless they're Second Amendment Rights or the rights for unlimited election spending, this Court seems unlikely to protect them. His suggestion is so much more true for legislatures.

Recent history proves as much. Protections for Marylanders from law enforcement have come from nowhere but the General Assembly of late. Anton's Law, interrogations of children, use of force, body cameras, are all measures that came from the representatives of the people.

The courts meanwhile, including our own, have continued to gut the Fourth Amendment. Likely, no one on this Committee needs to be taught about Qualified Immunity, which, in the judiciary, has been a steady march of preventing rights violations from reaching juries, provided law enforcement can claim some plausible explanation for why a hypothetical, reasonable police officer *might* have thought their conduct was legal, regardless of how illegal it actually was.

The protections against self incrimination found in our Declaration of Rights and the Federal Constitution refer to criminal proceedings. With modern policing, the criminal proceeding begins at the very moment one is brought into contact with police. For that reason, SB 22 proposes expanding Miranda style warnings to detention scenarios. When a person is being interviewed, making statements, on or off body camera, the groundwork for any criminal trial is already being put in place.

Yet, there are so many possible scenarios. Investigative questioning during a DUI stop and during a free-to-leave interview for a sex offense bear only some similarities. And courts, as they so often point out, are in no position to establish a work group to study the various scenarios.

What of those who speak English as a second language? Or those with learning disabilities or the plain uneducated? What of citizens terrified of being hand cuffed versus hardened criminals?

While requiring these warnings for interrogations following arrest is beyond question, perhaps it is too early to expand Miranda style warnings to each and every police detention. This Committee ought to consider a work group to do what the courts cannot: to study the various situations law enforcement and our citizens find themselves in and adjust the law accordingly.

No doubt it will be suggested to leave the matter to the courts unless and until we are forced to act. The recent midterm elections showed, among other things, the preference of the public that we do *not* rely on the courts for protecting our basic rights.

A scenario where *Miranda* is overruled or substantially modified would create a period of tremendous uncertainty for those, like me, working on the front lines in our criminal tribunals. It is inconceivable to invite such chaos when this body may, while causing no changes anywhere, simply codify Miranda style warnings in statute. The question is not “why?” it is "why not?”

Joshua E. Hoffman