



## IDAHO LAW REVIEW

---

Volume 49, Page 1  
Published 2012

---

### **Overcoming *Miranda*: A Content Analysis of the *Miranda* Portion of Police Interrogations**

Anthony J. Domanico, Michael D. Cicchini & Lawrence T. White

Recommended citation:

Anthony J. Domanico, Michael D. Cicchini & Lawrence T. White, *Overcoming Miranda: A Content Analysis of the Miranda Portion of Police Interrogations*, 49 IDAHO L. REV. 1 (2012)

Other works by Michael D. Cicchini are available at: <https://cicchinilaw.com/articles>

# OVERCOMING *MIRANDA*: A CONTENT ANALYSIS OF THE *MIRANDA* PORTION OF POLICE INTERROGATIONS

ANTHONY J. DOMANICO,\* MICHAEL D. CICCHINI,\*\* AND LAWRENCE T. WHITE\*\*\*

## TABLE OF CONTENTS

I. INTRODUCTION .....	2
II. THE <i>MIRANDA</i> WARNING .....	4
A. The Language.....	4
B. Origin and Purpose .....	5
C. Voluntary, Knowing, and Intelligent Waiver.....	6
III. THE POLICE AND <i>MIRANDA</i> .....	7
IV. EARLIER EMPIRICAL RESEARCH .....	8
V. THE STUDY .....	10
A. Research Questions .....	11
B. Study Design .....	11
C. Findings.....	13
1. How often do suspects in custody waive their <i>Miranda</i> rights? .....	13
2. In custodial interrogations, what reading levels are required to understand the <i>Miranda</i> warning as a whole and its component elements or prongs? .....	14
3. In custodial interrogations, to what extent do police ensure that suspects understand their <i>Miranda</i> rights? .....	15
4. In custodial interrogations, do police minimize the importance of the <i>Miranda</i> warnings and waiver? .....	15
5. In custodial interrogations, to what extent do police use social influence tactics or inducements to procure <i>Miranda</i> waivers? .....	16

---

\* M.B.A., Hamline University (2010); B.A., *cum laude*, Beloit College (2007). Anthony Domanico developed and conducted the study that serves as the basis for this article.

\*\* J.D., *summa cum laude*, Marquette University Law School (1999); C.P.A., University of Illinois Board of Examiners (1997); M.B.A., Marquette University Graduate School (1994); B.S., University of Wisconsin-Parkside (1990). Michael Cicchini is a criminal defense attorney practicing in Kenosha, Wisconsin. He has litigated *Miranda* and confession issues at the pretrial and trial stages of the criminal process and has been named among “The Top 100 Trial Lawyers in Wisconsin” by The National Trial Lawyers.

\*\*\* Ph.D., University of California, Santa Cruz (1984); M.A., with distinction, California State University Fresno (1979); B.A., with honors, Whittier College (1975). Dr. White is a Professor of Psychology and Legal Studies at Beloit College in Wisconsin. He has testified in criminal cases as an expert in the areas of false confessions and eyewitness identifications.

6. In custodial interrogations, do police speak more quickly while reading <i>Miranda</i> warnings?.....	17
D. Study Limitations .....	17
VI. PROPOSED REFORMS .....	18
VII. CONCLUSION .....	22

### ABSTRACT

The authors analyzed the *Miranda* portion of electronically recorded police interrogations in serious felony cases. The objectives were to determine what percentage of suspects waived their rights, whether the suspects understood their rights before waiving them, and whether the police employed any tactics to induce the suspects to waive their rights.

The results of the study revealed that 93% of suspects waived their *Miranda* rights and talked to the police. Further, it is unlikely that those suspects understood their rights; in fact, the police used a version of the *Miranda* warning that required a level of reading proficiency that most suspects do not possess. Moreover, the police did very little to ensure that suspects actually understood their rights before waiving them. Finally, the police spoke significantly faster when reading suspects their *Miranda* rights and, in nearly half of the interrogations, also minimized the importance of the rights. Both of these tactics likely limited the suspects' comprehension of the rights and their importance and likely induced them to waive, rather than invoke, their rights.

These findings are largely consistent with the limited number of other social science studies that have been published and raise serious doubt about whether suspects' waivers are truly voluntary, knowing, and intelligent, as required by *Miranda*. Based on these findings, the authors recommend specific reforms to the *Miranda* warning and to the *Miranda* process.

### I. INTRODUCTION

The *Miranda* warning was originally intended to combat the inherently coercive nature of the in-custody police interrogation. That is, the goal of the *Miranda* warning was to ensure that suspects are fully informed of several important rights—including the right to remain silent and the right to an attorney—before succumbing to police pressures and agreeing to speak.<sup>1</sup>

And further, if suspects decided to waive their rights and talk to the police, *Miranda* sought to ensure that only voluntary, knowing, and intelligent waivers would be deemed legally valid. If the police used trickery or deception to obtain waivers, or if suspects waived without a full understanding of, and appreciation for, their rights, the waiver

---

1. See *infra* Part II.B.

would be deemed legally insufficient, and the subsequent statements would be inadmissible in court.<sup>2</sup>

But in the decades since the Court's *Miranda* decision, the police have developed numerous psychological tactics to obtain *Miranda* waivers—waivers that the courts have later upheld as legally valid.<sup>3</sup> However, the existing social science research casts serious doubt on whether these waivers are truly made in a voluntary, knowing, and intelligent manner.<sup>4</sup>

For example, social science research findings show that: (1) the vast majority of suspects—often in excess of 80%—waive their *Miranda* rights; (2) the typical *Miranda* warning requires a level of reading proficiency that most suspects do not possess; (3) a surprisingly small percentage of suspects—often fewer than half—actually understand their rights before waiving them; and (4) the police sometimes induce *Miranda* waivers by purposely minimizing the importance of the rights.<sup>5</sup>

We set out to test the generalizability of some of these findings and address new questions in the process. In so doing, we analyzed the *Miranda* portion of a sample of electronically recorded interrogations. Due to the differences in *Miranda* warnings across states, counties, and even police departments, our sample was drawn from a single police department to ensure uniformity in the language of the warning from interrogation to interrogation.<sup>6</sup>

Our findings were largely consistent with the existing social science studies and showed that: (1) more than 90% of suspects waived their *Miranda* rights and talked to the police; (2) the *Miranda* warning used by the interrogators required a tenth-grade reading level overall—which is well beyond that possessed by most suspects—and two of the warning's prongs required college- or graduate-level reading ability; (3) based on the language of the warning and other aspects of the police-suspect interactions, it is likely that most of the suspects did not understand their rights before waiving them; and (4) the police used minimization tactics to induce a waiver in nearly 50% of the interrogations.<sup>7</sup>

These findings, in turn, support specific legal reforms. These reforms include requiring the electronic recording of all interrogations, prohibiting the police from using minimization techniques to induce the waiver of rights, and implementing several modifications to the *Miranda* warning and the manner in which the police present the warning to suspects.<sup>8</sup> Only with these changes is it possible to ensure that suspects'

---

2. See *infra* Part II.C.

3. See *infra* Part III.

4. See *infra* Part IV.

5. See *infra* Part IV.

6. See *infra* Part V.B.

7. See *infra* Part V.C.

8. See *infra* Part VI.

waivers are truly voluntary, knowing, and intelligent, as required by *Miranda*.

## II. THE *MIRANDA* WARNING

### A. The Language

The *Miranda* warning is, in one sense, well known, thanks in large part to popular television crime dramas. However, it is virtually impossible to accurately answer the question: “What is the *Miranda* warning?” The answer to this question is so elusive because the Supreme Court does not require any specific language.<sup>9</sup> Rather, the legal test is whether the warning “reasonably convey[s]” the substance of the underlying rights.<sup>10</sup> This wide latitude given to law enforcement has resulted in hundreds of variations of the original warning.<sup>11</sup> And, unfortunately, nearly fifty years after the *Miranda* decision, “large differences exist in the nature of the warnings, their words, their length, their cognitive complexity and indeed their very subject matter.”<sup>12</sup>

This inconsistency renders any type of inter-state, inter-county, or even inter-police department study of *Miranda* very difficult. Therefore, in our study—described below in Part V—we have focused on interrogations conducted by a single law enforcement agency, which routinely used the following set of warnings:

- (1) You have the right to remain silent;
- (2) Anything you say can and will be used against you in a court of law;
- (3) You have the right to consult with a lawyer before questioning and to have a lawyer present with you during questioning;
- (4) If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning, if you so wish;
- and (5) If you decide to answer questions now without a lawyer present, you have the right to stop the questioning and remain silent at any time you wish, and the right to ask for and have a lawyer at any time you wish, including during the questioning.<sup>13</sup>

---

9. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (“Our decision in no way creates a constitutional straightjacket . . .”).

10. David B. Altman, *Fifth Amendment—Coercion and Clarity: The Supreme Court Approves Altered Miranda Warnings*, 80 J. CRIM. L. & CRIMINOLOGY 1086, 1103 (1990) (discussing *Duckworth v. Eagan*, 492 U.S. 195 (1989)).

11. D. Christopher Dearborn, “*You Have the Right to an Attorney, But Not Right Now: Combating Miranda’s Failure by Advancing the Point of Attachment Under Article XII of the Massachusetts Declaration of Rights*,” 44 SUFFOLK U. L. REV. 359, 374 (2011).

12. William F. Jung, *Not Dead Yet: The Enduring Miranda Rule 25 Years after the Supreme Court’s October Term 1984*, 28 ST. LOUIS U. PUB. L. REV. 447, 457 (2009) (emphasis added). See also Illan M. Romano, Note, *Is Miranda on the Verge of Extinction? The Supreme Court Loosens Miranda’s Grip in Favor of Law Enforcement*, 35 NOVA L. REV. 525, 543 (2011) (“Problems arising from *Miranda* stem from the complete lack of uniformity in procedures and enforcement across jurisdictions.”).

13. See *infra* Part V.C.2.

This set of warnings remains fairly true to the language of the original *Miranda* decision<sup>14</sup> and is used as the basis for our study, findings, and proposed reforms.

### B. Origin and Purpose

The requirement of the *Miranda* warning stems, of course, from the Supreme Court's 1966 decision of *Miranda v. Arizona*.<sup>15</sup> The warning was intended to apprise suspects of several of their rights in order to protect them from coerced confessions.<sup>16</sup> The court recognized that coercion by government agents, during the course of secretive, "incommunicado interrogation,"<sup>17</sup> posed at least two distinct problems.

First, the right against self-incrimination and the right to the assistance of counsel are critically important in and of themselves—a fact often unappreciated by aggressive government interrogators. More specifically, "[t]hese precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured 'for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it[.]'"<sup>18</sup>

Second, and as a more practical matter, the Court knew—even in 1966—that coercion can lead to false confessions.<sup>19</sup> This, of course, should trouble everyone, including the police, who at least appreciate that when an innocent suspect is convicted, not only is he or she being unjustly punished, but the true perpetrator of the crime necessarily remains free to commit more crimes in the future.<sup>20</sup>

At the time of the *Miranda* decision, however, law enforcement's use of physical force and threats of violence to coerce confessions was on the decline.<sup>21</sup> But the Court also realized that those tactics were being

---

14. *Miranda*, 384 U.S. at 444 ("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."). *Miranda* also recognizes a suspect's right to stop answering questions at any time, even after he has initially waived his right to remain silent. *See id.* at 444–45.

15. *Id.*

16. *Id.* at 458 ("Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.").

17. *Id.* at 457.

18. *Id.* at 442 (quoting *Choena v. Virginia*, 19 U.S. 264, 387 (1821)).

19. *Id.* at 456, n. 24 ("Interrogation procedures may even give rise to a false confession.").

20. *See generally* Michael D. Cicchini & Joseph Easton, *Reforming the Law on Show-Up Identifications*, 100 J. CRIM. L. & CRIMINOLOGY 381 (2010) (discussing constitutional due process violations and their harm to the innocent and to society generally).

21. Though on the decline, such physical interrogation tactics were not uncommon, nor were they limited to criminal suspects, at the time of the *Miranda* decision. *See Miranda*, 384 U.S. at 446 ("The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently . . . the police brutally beat, kicked and

replaced with a more subtle, but equally effective, form of interrogation. As psychological tactics became more prevalent than physical force, the Court acknowledged “that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.”<sup>22</sup>

Specifically, then, the Court held that *Miranda* warnings were required to balance the scale between the interrogators and the suspect. That is, interrogations are a guilt-presumptive process where the police purposely detain suspects in “isolation and unfamiliar surroundings.”<sup>23</sup> The interrogators are also trained in a variety of tactics—including minimization,<sup>24</sup> trickery,<sup>25</sup> and good-cop-bad-cop routines<sup>26</sup>—in order to induce confessions by playing on suspects’ fears and weaknesses.<sup>27</sup> Further, the interrogators are trained to reject suspects’ denials and claims of innocence and instead to forge ahead with the goal of obtaining a confession at nearly any cost.<sup>28</sup>

The Court held that such an intimidating atmosphere is, in and of itself, coercive.<sup>29</sup> Further, “[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”<sup>30</sup> Thus, the *Miranda* warning was born.

### C. Voluntary, Knowing, and Intelligent Waiver

After advising a suspect of his *Miranda* rights, a police officer may only legally interrogate the suspect if the suspect “voluntarily, knowingly and intelligently” waives his or her *Miranda* rights.<sup>31</sup> The test for

placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party.”).

22. *Id.* at 448.

23. *Id.* at 450 (“The guilt of the subject is to be posited as a fact.”).

24. *Id.* (“The officers are instructed to minimize the moral seriousness of the offense.”).

25. *Id.* at 453 (discussing law enforcement’s use of fabricated evidence to convince the suspect that they know he is guilty and therefore has no choice but to confess).

26. *Id.* at 452 (“One ploy often used has been termed the ‘friendly-unfriendly’ or the ‘Mutt and Jeff’ act[.]”).

27. *Id.* at 455 (“It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings.”).

28. *Id.* at 450 (Suspects’ explanations or outright claims of innocence “are dismissed and discouraged.”).

29. *Id.* at 457 (“It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation.”).

30. *Id.* at 458.

31. *Id.* at 444. Of course, regardless of the law, the police are always better off by interrogating a suspect even if he refuses to waive his *Miranda* rights. The reason is that if the police honor the suspect’s invocation of rights, they will not obtain any statement. However, if they ignore the invocation, continue with their interrogation, and eventually obtain a statement, the worst case is that the statement can still be used at trial as impeachment evidence should the defendant testify. *See, e.g.*, Sandra Guerra Thompson, *Evading Miranda: How Seibert and Patane Failed to “Save” Miranda*, 40 VAL. U.L. REV. 645, 665 (2006) (discussing the “weak exclusionary rule” and how illegally obtained statements can be used

what constitutes a voluntary, knowing, and intelligent waiver has evolved dramatically since the time of the *Miranda* decision.

By way of example only, in *Miranda* the Court was clear that “a valid waiver will *not* be presumed simply from the *silence* of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained . . . . Presuming waiver from a silent record is *impermissible*.”<sup>32</sup>

However, recently in *Berghuis v. Thompkins*, the suspect “refus[ed] to sign even an acknowledgement that he understood his *Miranda* rights”<sup>33</sup> and then “was silent for two hours and forty-five minutes” before finally answering a question.<sup>34</sup> The Court held that the suspect’s answer was admissible against him at trial because he “did *not* say that he wanted to remain silent or that he did *not* want to talk with police.”<sup>35</sup>

Today, therefore, “a suspect who wishes to guard his right to remain silent against such a finding of ‘waiver’ must, counter-intuitively, speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police.”<sup>36</sup>

Despite this unfortunate evolution, however, the test for a legally valid waiver remains, at least in theory, whether the waiver was made voluntarily, “knowingly and intelligently.”<sup>37</sup> That is, the waiver must *not* be the product of “intimidation, coercion, or deception.”<sup>38</sup> Further, “the waiver must have been made with a full awareness of both the nature of the right[s] being abandoned and the consequences of the decision to abandon [them].”<sup>39</sup> Anything less should require a court to find that the suspect’s waiver was invalid and that his subsequent statements are not admissible, at least not in the prosecutor’s case-in-chief.<sup>40</sup>

### III. THE POLICE AND *MIRANDA*

The policy of requiring a legally valid waiver—that is, one that is made “voluntarily, knowingly, and intelligently”—is often at odds with law enforcement’s objective of obtaining a confession in the course of the

---

for impeachment purposes at trial). Further, any physical evidence derived from the illegally obtained statement may also be admissible. *See, e.g.*, Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1548 (2008) (discussing the scaled-back exclusionary rule and how illegally obtained statements can lead to admissible physical evidence); *cf. State v. Knapp*, 700 N.W.2d 899, 914 (Wis. 2005) (providing greater protection under the Wisconsin Constitution and suppressing physical evidence obtained as a result of a *Miranda* violation).

32. *Miranda*, 384 U.S. at 475 (emphasis added).

33. *Berghuis v. Thompkins*, 130 S.Ct. 2250, 2270 (2010).

34. *Id.* at 2258.

35. *Id.* at 2260 (emphasis added).

36. *Id.* at 2266 (Sotomayor, J., dissenting).

37. *Id.* at 2268.

38. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

39. *Id.*

40. *See* Thompson, *supra* note 31, at 665 (discussing the state’s use of illegally obtained statements for impeachment purposes at trial).



guilt-presumptive interrogation process.<sup>41</sup> Therefore, law enforcement officers often fail to take adequate steps to ensure that suspects understand their rights<sup>42</sup> and may also actively employ one of several techniques to induce a waiver.<sup>43</sup>

Two of these waiver-inducing techniques include using social influence tactics and minimization. That is, “[o]fficers may use pre-*Miranda* conversation to build rapport, which is important to obtaining a *Miranda* waiver and—eventually—a statement. Officers may also downplay the significance of the warning or portray it as a bureaucratic step to be satisfied before a conversation may occur.”<sup>44</sup> This “implies that the warnings do not warrant the suspect’s attention.”<sup>45</sup> In one case, for example, a detective said to a sixteen-year-old suspect, “[t]he second part of this is just merely a waiver,” and then proceeded to obtain the waiver and a statement.<sup>46</sup> “Indeed, interrogators often present the *Miranda* warning as a trivial aside—simply another step in the booking process—no more important than taking the suspect’s photo or fingerprints.”<sup>47</sup>

In short, the combination of several factors—including the language of the warning itself, the failure of law enforcement to ensure suspects’ adequate comprehension of their rights, and law enforcement’s active efforts to induce suspects to waive their rights—often results in waivers that are deemed legally valid by the courts, but fail to rise to the level of being voluntary, knowing, and intelligent in any meaningful sense of those words.

#### IV. EARLIER EMPIRICAL RESEARCH

The *Miranda* warning and its delivery by law enforcement have been the subject of relatively few empirical investigations by social scientists. The findings of some of these studies are briefly summarized here.

First, and most significantly, earlier research shows that the great majority of suspects—approximately 80%—waive their right to remain silent and submit to questioning.<sup>48</sup> According to some researchers, the

---

41. See Charles Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1828 (1987) (arguing that the police “have little interest in protecting the suspect’s right to a knowing and intelligent waiver. Their objective is to obtain a confession, and therefore it is unlikely that they will fully inform the suspect of her right[s] . . . or dispel misconceptions about those rights.”).

42. See *infra* Part V.C.3.

43. See *infra* Parts V.C.4–6.

44. Weisselberg, *supra* note 31, at 1562.

45. Adam S. Bazelon, Comment, *Adding (or Reaffirming) a Temporal Element to the Miranda Warning “You Have the Right to an Attorney”*, 90 MARQ. L. REV. 1009, 1034 (2007).

46. Gregory DeClue, *Oral Miranda Warnings: A Checklist and a Model Presentation*, 35 J. OF PSYCHIATRY & L. 421, 431 (2007).

47. Dearborn, *supra* note 11, at 379–80.

48. Three separate studies—one in the United Kingdom and two in the United States—have observed that approximately 80% of suspects waived their *Miranda* rights. Paul Softley, *Police Interrogation: An Observational Study in Four Police Stations*, HOME

police obtain these extraordinarily high waiver rates because they employ techniques specifically designed to overcome the invocation of rights. These include, for example, minimizing the *Miranda* procedure as a mere formality,<sup>49</sup> as well as other techniques described elsewhere in this article.<sup>50</sup>

Second, innocent suspects are more likely than guilty suspects to waive their *Miranda* rights.<sup>51</sup> Innocent suspects often say they have nothing to hide or fear, naively believing their innocence will ultimately set them free; as a result, they often submit to questioning.<sup>52</sup>

Interestingly, one police tactic is to simply present the suspect with a fabricated allegation of which he *is* truly innocent—for example, “you have been accused of forcibly raping the victim”—with the goal of inducing the suspect to waive his *Miranda* rights and deny the allegation.<sup>53</sup> The police can then use the denial—for example, “I didn’t rape anyone; it was consensual”—to prosecute the crime they were *actually* investigating—for example, sexual contact with a minor which requires only consensual sexual contact, and not forcible rape.<sup>54</sup> These tactics are permitted by law as the police are not required to reveal the purpose or scope of their investigation,<sup>55</sup> and further, are permitted to lie to suspects in order to induce both *Miranda* waivers and, more significantly, confessions.<sup>56</sup>

Third, as described in Part II.A. of this article, throughout the United States, there is little or no uniformity in the length or wording of the *Miranda* warning. Most jurisdictions employ their own distinct vari-

---

OFFICE RESEARCH UNIT REPORT 28, 29 (1980); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY, 266, 276 (1996); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 (1996).

49. Richard A. Leo, *Miranda’s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC’Y REV. 259, 272 (1996); Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their Miranda Rights: The Power of Innocence*, 28 LAW & HUM. BEHAV., 211, 212 (2004).

50. See *supra* Part III and *infra* Part V.C.4–6.

51. Kassin & Norwick, *supra* note 49, at 215.

52. *Id.* at 217–18.

53. See Weisselberg, *supra* note 31, at 1560 (describing police training techniques used to get a confession prior to administering the suspect’s *Miranda* rights).

54. See *id.*

55. Ogletree, *supra* note 41, at 1841 (“the police may question a suspect about a more serious crime after she waives her right to silence with regard to a different, lesser offense”); Weisselberg, *supra* note 31, at 1564 (“Police do not have to tell a suspect the subject matter of an investigation.”).

56. *Miranda v. Arizona*, 384 U.S. 436, 453 (1966) (discussing the use of falsified evidence to obtain confessions).

ant.<sup>57</sup> The length of these warnings varies tremendously, ranging from 49 words to 547 words.<sup>58</sup>

Fourth, most suspects do not fully understand their *Miranda* rights,<sup>59</sup> in part because the warnings are sometimes difficult to comprehend,<sup>60</sup> and in part because many suspects are poorly educated and do not read well.<sup>61</sup> Comprehension problems are further exacerbated when a suspect is a juvenile,<sup>62</sup> mentally impaired,<sup>63</sup> or mentally disordered.<sup>64</sup> In one well-known study, only 21% of juveniles and 42% of adults fully understood the *Miranda* warning that was presented to them.<sup>65</sup>

Fifth, the last three elements of the warning—the right to an attorney before and during questioning, the right to a court-appointed attorney for the indigent, and the right to stop answering questions after first waiving the right to remain silent—are more difficult to comprehend than the first two elements—the right to remain silent and the consequences of speaking.<sup>66</sup> Also, *Miranda* warnings written for juveniles are generally more difficult to comprehend than their adult counterparts.<sup>67</sup>

## V. THE STUDY

Our broad objectives in the study were to test the generalizability of findings from previous studies and investigate new questions by systematically observing the actual behavior of police officers and suspects. In so doing, we analyzed the *Miranda* portion of twenty-nine electronically recorded custodial interrogations.

---

57. Richard Rogers et al., *The Comprehensibility and Content of Juvenile Miranda Warnings*, 14 PSYCHOL. PUB. POL'Y & L 63, 67 (2008) (discussing two large-scale studies finding 886 unique variants from 945 different jurisdictions).

58. *Id.*

59. Richard Rogers, *A Little Knowledge is a Dangerous Thing ... Emerging Miranda Research and Professional Roles for Psychologists*, 63 AM. PSYCHOL. 776, 779 (2008).

60. *Id.* at 778–79.

61. KARL O. HAIGLER ET AL., EXECUTIVE SUMMARY OF LITERACY BEHIND PRISON WALLS: PROFILES OF THE PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY xvii (U.S. Printing Office, 1994).

62. Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L 3, 11–12 (1997).

63. Solomon M. Fulero & Caroline Everington, *Assessing Competency to Waive Miranda Rights in Defendants with Mental Retardation*, 19 LAW & HUM. BEHAV. 533, 538–41 (1995).

64. Richard Rogers et al., *Knowing and Intelligent: A Study of Miranda Warnings in Mentally Disordered Defendants*, 31 LAW & HUM. BEHAV. 401, 414 (2007).

65. THOMAS GRISSO, JUVENILES' WAIVER OF RIGHTS: LEGAL AND PSYCHOLOGICAL COMPETENCE 98 tbl. 13 (1981).

66. Jeffrey L. Helms & Candace L. Holloway, *Differences in the Prongs of the Miranda Warnings*, 19 CRIMINAL JUSTICE STUDIES 77, 77 (2006); Rogers et al., *supra* note 57, at 73.

67. Rachel Kahn et al., *Readability of Miranda Warnings and Waivers: Implications for Evaluating Miranda Comprehension*, 30 LAW & PSYCHOL. REV. 119, 119 (2006).

Previous studies typically have been conducted by collecting and analyzing written materials provided by law enforcement officials,<sup>68</sup> testing the ability of volunteer subjects to comprehend their rights,<sup>69</sup> or observing the behaviors of mock suspects who have committed a simulated crime.<sup>70</sup> One previous study, however, has used a methodology similar to ours. In the early 1990s, Richard Leo observed 182 live or videotaped police interrogations at three police departments.<sup>71</sup> Leo's sample was large, and his conclusions have not been seriously questioned. One limitation of the study, however, was that Leo himself was the sole observer.<sup>72</sup> It is not known if a second, independent observer would have replicated Leo's field notes, that is, reported and interpreted police and suspect behaviors in the same way. A second limitation is that Leo was not allowed to observe some of the most serious cases, which (as he acknowledges) compromised the representativeness of his sample.<sup>73</sup>

#### A. Research Questions

When analyzing the *Miranda* portion of twenty-nine electronically recorded custodial interrogations, we set out to answer six specific research questions:

1. How often do suspects in custody waive their *Miranda* rights?
2. In custodial interrogations, what reading levels are required to understand the *Miranda* warning as a whole and its component elements or prongs?
3. In custodial interrogations, to what extent do police ensure that suspects understand their *Miranda* rights?
4. In custodial interrogations, to what extent do police minimize the importance of the *Miranda* warnings and waiver?
5. In custodial interrogations, to what extent do police use social influence tactics or inducements to procure *Miranda* waivers?
6. In custodial interrogations, do police speak more quickly while reading *Miranda* warnings?

#### B. Study Design

The twenty-nine electronically recorded custodial interrogations that we collected and analyzed were drawn from a pool of felony murder or Class A, B, and C felony cases in Milwaukee County, Wisconsin, in

---

68. Rogers et al., *supra* note 57, at 69.

69. Fulero & Everington, *supra* note 63, at 536.

70. Kassir & Norwick, *supra* note 49, at 213–14.

71. Leo, *supra* note 48, at 268.

72. *Id.*

73. *Id.* at 271–72.

2007.<sup>74</sup> In all twenty-nine cases, the suspects were eventually charged with the crimes in question. Our sample includes only those cases in which the defendant and his attorney agreed to our request to study the recorded interrogation. Defendants and attorneys were assured full confidentiality.

All twenty-nine suspects were male and indigent, with a mean age of 19 years (age range = 14 – 27 years). We inferred, by listening to the recordings, that a large majority of the suspects were African American. Thus, our sample of suspects was representative of class A, B, and C felony and felony murder suspects in Milwaukee, as most suspects in that venue and jurisdiction fall between the ages of 17 and 25 and are predominantly African American.<sup>75</sup>

We analyzed the content of each interrogation from the beginning of the recording until the end of the *Miranda* portion. The first author of this article and an undergraduate assistant independently coded each recording. Each coder used a twenty-four-point checklist to extract as much information as possible from each recording. Questions on the checklist included the following: How many detectives were present during the questioning? What statements, if any, did a detective make that implied that *Miranda* is not a serious matter, a mere formality, or something that “just has to be done”? Did the suspect invoke his *Miranda* rights? Did the detective ask the suspect to paraphrase the *Miranda* rights?<sup>76</sup> (These “checklist questions” were designed to help us answer many of the “research questions” enumerated above.)

To calculate the readability of the *Miranda* warning as a whole and of its separate elements (see research question number two), we used the Flesch-Kincaid Grade Level test,<sup>77</sup> which is available in Microsoft Word. The Flesch-Kincaid is a widely used estimate of the grade-equivalent reading level needed to achieve at least 75% comprehension of written material.<sup>78</sup> Its formula combines the average number of syllables per word with sentence length to provide an estimate of the grade level needed to comprehend a written passage. The Flesch-Kincaid is a reliable formula<sup>79</sup> and is the standard measurement tool used in *Miranda* research.<sup>80</sup>

To calculate speaking rates (see research question number six), we used the time tracker on Windows Media Player to count the number of

---

74. All twenty-nine recorded interrogations were made available to us by the Wisconsin State Public Defender in Milwaukee, Wisconsin.

75. Interview with Deja Vishny, Wis. State Pub. Defender (Dec. 13, 2007).

76. The entire checklist is available upon request from the third author of this article.

77. Rudolph Flesch, *Measuring the Level of Abstraction*, 34 J. OF APPLIED PSYCHOL. 384 (1950).

78. William H. DuBay, *The Principles of Readability*, 27 (2004), <http://almacenplantillasweb.es/wp-content/uploads/2009/11/The-Principles-of-Readability.pdf> (last visited Sept. 24, 2012).

79. Michael K. Paasche-Orlow et al., *Readability Standard for Informed-Consent Forms as Compared with Actual Readability*, 348 NEW ENG. J. OF MED. 721, 722 (2003).

80. Rogers et al., *supra* note 57, at 69.

words uttered by a police officer within a specified period of time. Specifically, we calculated speaking rates for three time periods: first, the time period during which the interrogator read the *Miranda* warning; second, the thirty seconds immediately preceding the reading of the *Miranda* warning; and third, the thirty seconds immediately following the reading of the *Miranda* warning. For each time period in each recording, we averaged the times recorded by the two coders to produce a more reliable, accurate measure. (The coders' measurements were always similar to each other but usually not identical.) These mean values were used in subsequent analyses.

The two researchers independently coded the content of the first portion of each interrogation. Each researcher-coder answered twenty-four questions on the checklist. To assess inter-rater reliability, we calculated how often the coders agreed with each other. Levels of agreement were exceptionally high, ranging from 93% to 100%. Coders consistently answered the questions on the checklist in the same way and almost always agreed with each other about what they had heard in the recording. In those rare instances when the coders did not initially agree, they discussed the matter and came to agreement about how to answer the question on the checklist.

### C. Findings

We have organized our findings in terms of the six research questions stated in Part V.A. of this article.

#### 1. How often do suspects in custody waive their *Miranda* rights?

Twenty-seven of the twenty-nine suspects (93%) waived their *Miranda* rights. In every case, the suspect waived his rights orally and did not sign a written waiver.

This finding is consistent with the findings of earlier studies in which approximately 80% of suspects waived their rights.<sup>81</sup> Guilty suspects often waive their rights as part of a self-presentation strategy—for example, “I’ll look suspicious if I choose not to talk”—while innocent suspects often waive their rights because they believe no harm will come to them if they talk—for example, “the truth will set me free.”<sup>82</sup> Yet other suspects waive for different reasons. At least anecdotally, criminal defense lawyers have reported that

many suspects make statements during the process of police interrogation and are surprised to learn thereafter that they had a constitutional right to remain silent or to have an attorney present during questioning. This pattern suggests that *Miranda*

---

81. See Softley, Leo, and Cassell & Hayman, *supra* note 48.

82. Kassir & Norwick, *supra* note 49, at 216.

warnings as currently delivered by the police are not an effective means of informing suspects [of their rights] . . . . [N]otwithstanding the warnings, they believed either that their silence could be used against them as evidence of guilt or, more frequently, that by remaining silent they would forfeit their opportunity to be released on bail.<sup>83</sup>

Indeed, whether the *Miranda* warning is *effective* in communicating the substance of *Miranda's* underlying rights is a critical factor in a suspect's waiver decision. This is also the subject of the next part.

2. In custodial interrogations, what reading levels are required to understand the *Miranda* warning as a whole and its component elements or prongs?

In Milwaukee, Wisconsin, police officers are trained to read a standard set of *Miranda* warnings.<sup>84</sup> As indicated in Part II.A. of this article, this standardization was confirmed by our sample, in which the warnings read to suspects included five separate elements or prongs:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to consult with a lawyer before questioning and to have a lawyer present with you during questioning.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you at public expense before or during any questioning, if you so wish.
5. If you decide to answer questions now without a lawyer present, you have the right to stop the questioning and remain silent at any time you wish, and the right to ask for and have a lawyer at any time you wish, including during the questioning.

The first prong of the *Miranda* warning yields a Flesch-Kincaid readability grade level of 2.3. In other words, most second-graders are able to comprehend at least 75% of the statement's meaning. The second prong yields a grade level of 4.4.

The remaining prongs are more difficult to comprehend. The grade levels for prongs 3, 4, and 5 are 10.0, 13.0, and 18.7, respectively. The Flesch-Kincaid readability grade level of the warning as a whole is 10.0.

The readability pattern we observed is consistent with the findings of earlier studies; the last three elements are more difficult to comprehend than the first two elements.<sup>85</sup> Given its Flesch-Kincaid readability scores, we can say with confidence that the *Miranda* warning used in Milwaukee is difficult to understand fully, especially for those suspects

---

83. Ogletree, *supra* note 41, at 1827–28.

84. Interview with Deja Vishny, Wis. State Pub. Defender (May 31, 2012).

85. Helms & Holloway, *supra* note 66, at 77; Rogers et al., *supra* note 57, at 73.

who are juveniles, semi-literate, poorly educated, mentally disordered, or developmentally disabled.

The fifth prong—regarding the right to stop answering questions after the right to silence is initially waived—is worded in such a way that even college-educated suspects may not fully understand their rights. In fact, the high Flesch-Kincaid score for the fifth prong is substantiated by what actually happens inside police interrogation rooms throughout the country. “That is, eighty percent waive their rights; only twenty percent refuse to speak . . . But the more troubling statistic is this: out of those eighty percent who do agree to talk, *virtually* none subsequently assert their rights during the interrogation.”<sup>86</sup>

3. In custodial interrogations, to what extent do police ensure that suspects understand their *Miranda* rights?

In our sample, the police rarely took steps to ensure that suspects genuinely understood their *Miranda* rights. In twenty-three of twenty-nine interrogations (79%), a police officer simply asked the suspect if he understood his rights after the *entire set* of *Miranda* warnings was read. In four interrogations (14%), the police asked the suspect if he understood his rights after some, but not all, of the individual prongs of the warning had been read. In two interrogations (7%), the police asked the suspect if he understood his rights after each of the five prongs. All twenty-nine suspects said that they understood their rights.

In two interrogations (7%), the police asked the suspect if he had any questions about the warnings. In none of the cases did the police ask the suspect to repeat back the *Miranda* warnings. In two interrogations (7%), the police asked the suspect to paraphrase his *Miranda* rights in his own words. In one of these cases, the detective devoted five minutes to ensuring that the suspect understood his rights. He asked the suspect to explain the meaning of each prong. When the suspect did not fully understand the implications of the warnings, the detective explained the rights to the suspect. This practice was especially important when the detective read the fourth and fifth prongs, neither of which were understood by the suspect initially.

4. In custodial interrogations, do police minimize the importance of the *Miranda* warnings and waiver?

In our sample, police minimized the importance of the *Miranda* procedure in thirteen (45%) of twenty-nine interrogations. The minimization techniques employed ranged from saying the procedure is just

---

86. Marcy Strauss, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent under Miranda*, 17 WM. & MARY BILL RTS. J. 773, 822 (2009) (emphasis in original).



“something we have to do,” to presenting *Miranda* as a mere formality—the appetizer before the main course, so to speak.

In one interrogation, a detective minimized the importance of *Miranda* five separate times. His statements included: “since you’re here and in custody, I’ve gotta read you your rights;” “if we were on the street talking, I wouldn’t have to do this;” and “it’s something we just gotta do because we’re going to talk to you and stuff like that.”

In other interrogations, detectives implied that the *Miranda* rights were a mere formality that had to be completed before proceeding. For example, one detective said, “Because you’re in custody, I’m going to read you your rights real quick; it’s part of the formality.”

5. In custodial interrogations, to what extent do police use social influence tactics or inducements to procure *Miranda* waivers?

Social psychologists have known for decades that two persons acting in concert are more persuasive than one person acting alone.<sup>87</sup> Examples of this influence tactic abound in everyday life. For example, Mormon missionaries travel in pairs, and mothers often tell their disobedient children to “wait until your father gets home.”

In our sample, two detectives were present in ten (34%) of twenty-nine interrogations; a single detective was present in nineteen (66%) of the interrogations. These percentages conform very closely with the numbers obtained by Richard Leo in his landmark study of 182 police interrogations.<sup>88</sup>

In our sample, detectives typically spoke to the suspect for only a minute or two before Mirandizing the suspect. If rapport building occurred, it occurred after the suspect waived his *Miranda* rights, and was therefore directed at eliciting a subsequent confession, rather than an initial *Miranda* waiver. Unfortunately, we have no information about what kind of conversation may have transpired before the recording equipment was activated and thus do not know if rapport building was employed at an earlier, unrecorded stage of the process.

In three cases (10% of the total), the police told the suspect he would only be able to tell his side of the story if he waived his *Miranda* rights. In one case (3.5%), the police told the suspect, prior to *Miranda*, that the evidence against him was strong. In no case did the police, prior to *Miranda*, tell the suspect he could only be helped if he talked to the police about what happened.

In short, we found little evidence that the police used special social influence tactics to induce suspects to waive their *Miranda* rights. Given that 93% of the suspects in these cases waived their rights, there may have been little or no need for additional inducements.

---

87. Rod Bond, *Group Size and Conformity*, 8 GROUP PROCESSES & INTERGROUP RELATIONS 331, 334 (2005).

88. Richard A. Leo observed that one detective questioned the suspect in 69% of cases, and two detectives questioned the suspect in 31% of cases. Leo, *supra* note 48, at 273.

6. In custodial interrogations, do police speak more quickly while reading *Miranda* warnings?

The mean (average) speaking rate of police during the thirty seconds before *Miranda* was 3.26 words per second (SD = .68).<sup>89</sup> While reading the *Miranda* rights, the mean speaking rate was 4.47 words per second (SD = .56). The mean speaking rate during the thirty seconds after *Miranda* was 3.50 words per second (SD = .59).

A repeated-measures analysis of variance revealed that, on average, detectives spoke significantly faster—31% faster—during the *Miranda* procedure than they did in the thirty seconds before or after *Miranda*,  $F = 41.43$ ,  $p < .001$ ,  $r = .77$ . The statistic  $r$  measures the size of an effect; an  $r$  of .77 indicates a very large effect.<sup>90</sup> In plain English, speaking 31% faster is a meaningful difference in this context.

In our sample, detectives read the *Miranda* warning at an average rate of 268 words per minute (wpm). This finding is worrisome because speech comprehension declines slightly up to a speaking rate of 275 wpm (and even more rapidly beyond that point).<sup>91</sup> In other words, as speakers speak faster and faster, listeners comprehend less and less. Comprehension degrades in part because, when someone speaks more rapidly, there are changes in vocal inflection and intensity, as well as changes in the relative duration of consonants, vowels, and pauses.<sup>92</sup>

Interestingly, faster readers are better able to comprehend accelerated speech, while slower readers are less able to comprehend accelerated speech.<sup>93</sup> Given that most criminal suspects are relatively poor readers,<sup>94</sup> the impact of accelerated speech on comprehension during the *Miranda* warning is likely heightened.

#### D. Study Limitations

Our sample of recorded interrogations was relatively small ( $N = 29$ ), limited to felony cases in which charges were filed, and limited to a single venue within a jurisdiction (Milwaukee, Wisconsin). Our major findings—nearly all suspects waived their rights and submitted to ques-

---

89. SD refers to the standard deviation, a measure of variability. If speaking rates are normally distributed in a bell-shaped curve, we can expect roughly two-thirds of speaking rates to fall within  $\pm .68$  words of the mean rate of 3.26 words per second.

90. JACOB COHEN, *STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES* 80 (1977).

91. Emerson Foulke & Thomas G. Sticht, *Review of Research on the Intelligibility and Comprehension of Accelerated Speech*, 72 *PSYCHOLOGICAL BULLETIN* 50, 56 (1969).

92. *Id.* at 50.

93. *See id.* at 59.

94. *See generally* Karl O. Haigler et al., *Executive Summary of Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey*, U.S. DEPARTMENT OF EDUCATION (1992) (study discussing the literacy of adult inmates in U.S. prisons).

tioning, the wording of the *Miranda* warning required a tenth-grade reading proficiency for adequate comprehension, detectives frequently minimized the importance of the warning, and detectives spoke more rapidly while reading the warning—may or may not be replicated in other jurisdictions or venues, or in non-felony cases.

Nearly all of the suspects (93%) in our study waived their *Miranda* rights and submitted to questioning. Although this percentage is somewhat higher than the rates observed in previous studies, the difference may simply reflect sampling error. Each individual study's estimate is an imprecise indicator of the true value in the larger population. Studies with larger sample sizes generally produce more reliable estimates. Given that our sample ( $N = 29$ ) was substantially smaller than Leo's sample ( $N = 182$ ), we believe his estimate of the waiver rate (84%) is the more trustworthy figure.

Conversely, however, our sample was restricted in the sense that it only included cases in which charges were filed. As a result, innocent suspects were likely underrepresented in our sample of interrogations. Given that innocent suspects waive their rights more often than guilty suspects do,<sup>95</sup> our observed waiver rate of 93% may actually represent a slight underestimate of the true overall rate for Milwaukee, Wisconsin, notwithstanding our relatively small sample size.

Our sample was also restricted in a second sense: All suspects in our sample were indigent and represented by the State Public Defender's Office. Indigent defendants may waive *Miranda* more often—or less often—than defendants who can afford to retain a private attorney.

The strength of our methodology—an analysis of actual police interrogations as opposed to a simulation study—is also a limiting factor in that large sample sizes are difficult to obtain. Ideally, researchers will examine custodial interrogations in other jurisdictions. However, obtaining recorded interrogations can be difficult because permission may not be granted, and not all police departments record interrogations.<sup>96</sup>

## VI. PROPOSED REFORMS

Our findings, combined with those of other social scientists, support specific reforms that would advance the Court's stated policy of protecting individual rights by ensuring that waivers are truly made "voluntarily, knowingly, and intelligently."<sup>97</sup>

---

95. Kassir & Norwick, *supra* note 49, at 216.

96. Many states now require police to audio or video record interrogations. However, failure to record the interrogation may not result in suppression of the statement; rather, the state may still be entitled to present the interrogator's version of the defendant's statement at trial, and the defendant *may* be entitled to a jury instruction informing the jury that the police should have recorded the statement, and that "the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation[.]" See, e.g., WIS. STAT. ANN. § 972.115 (2006). As a practical matter, of course, this is a nearly useless remedy.

97. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

First, the police should be required to electronically record all custodial interrogations.<sup>98</sup> A permanent and accurate record of the *Miranda* portion of police interrogations is virtually a prerequisite to determining whether a suspect has made a voluntary, knowing, and intelligent waiver of his rights. Without such a recording, courts will have “difficulty in depicting what transpires at such interrogations”<sup>99</sup> and will instead rely exclusively on after-the-fact police testimony about the event.<sup>100</sup> This means, of course, that virtually every *Miranda* waiver will be held to be legally valid, regardless of what actually took place in the secretive “incommunicado interrogation.”<sup>101</sup>

Second, the police should be prohibited from minimizing the importance of the *Miranda* warning.<sup>102</sup> Minimization tactics were employed in nearly half of the interrogations in our sample and were likely a substantial reason the police were able to obtain waivers in more than 90% of all interrogations in the sample. Minimization techniques are, by their very nature, clearly at direct odds with a suspect having “full awareness of both the nature of the right[s] being abandoned and the consequences of the decision to abandon [them].”<sup>103</sup>

Preventing minimization techniques could be accomplished in at least two ways: first, trial courts could be required to rule that minimization techniques render a waiver involuntary, much the way that threats or promises render a waiver (or even the subsequent statement itself) involuntary; and second, the *Miranda* warning could include specific language that emphasizes the importance of the underlying rights.<sup>104</sup>

Third, the presentation of the *Miranda* warnings should be modified to make them understandable to all or most suspects.<sup>105</sup> The *Miranda* warnings that were used as the basis for this study required, overall, a tenth-grade reading level, while most criminal suspects fall well below

---

98. Jung, *supra* note 12, at 457 (arguing that “a recordation requirement” would “pose only a mild inconvenience and would vastly increase the confidence of the interrogation result”).

99. *Miranda*, 384 U.S. at 445.

100. Romano, *supra* note 12, at 542 (arguing that, without an electronic recording, “*Miranda* rights are violated constantly during interrogation, and the defense can seldom win the argument [at the subsequent suppression hearing] when going against a police officer’s word”).

101. *Miranda*, 384 U.S. at 457.

102. Weisselberg, *supra* note 31, at 1562 (“Officers may also downplay the significance of the warning or portray it as a bureaucratic step to be satisfied before a conversation may occur.”).

103. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

104. Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MIN. L. REV. 781, 813 (2006) (arguing for the adoption of a *Miranda* warning that begins with the statement: “You have a number of important constitutional rights that protect you when law enforcement officers ask you questions.”).

105. See, e.g., DeClue, *supra* note 46, at 439.

that.<sup>106</sup> Further, and even more alarming, the last two warnings used in our study—the right to a free attorney and the right to stop answering questions after the suspect initially waives the right to remain silent—required reading levels of 13.0 and 18.7, respectively, thus rendering them incomprehensible to most criminal suspects and even to many college students.<sup>107</sup>

In addition to (or in lieu of) modifying the language of the warning itself, three modifications to the presentation of the warning—instructing the suspect as to the nature of the upcoming information, listing and presenting each right separately, and explaining each right in a slightly different manner—have been shown to improve comprehension dramatically.<sup>108</sup> These modifications improve the “listenability” of the warning because: (a) suspects know what to listen for and can focus their attention on the task at hand; (b) the information is separated into discrete packets, which introduces a helpful pause between each of the *Miranda* rights and eases the burden on working (short-term) memory; and (c) built-in redundancies allow suspects to capture any information they may have missed the first time.<sup>109</sup> In one study, adding all three modifications to a standard warning nearly doubled the average comprehension score.<sup>110</sup>

Fourth, the police should be required to present the warning both orally and in written form.<sup>111</sup> This practice would enhance understanding for many suspects because statements that are difficult to comprehend are more easily understood when presented in written form as opposed to orally.<sup>112</sup> Indeed, one experiment found that pretrial defendants were much less likely to understand their *Miranda* rights when the rights were read orally instead of presented in written form.<sup>113</sup> The extra time devoted to administration of *Miranda* would also allow suspects to consider more carefully their rights and whether they wish to waive those rights.

Fifth, the police should be required to actively assess the degree to which suspects understand their rights. This can be easily accomplished

---

106. Dearborn, *supra* note 11, at 374–75 (discussing another set of warnings that also required “a tenth-grade reading level,” while “seventy percent of inmates read at a sixth-grade level or below”).

107. *Id.* at 375 (discussing one study where “sixty-four percent of college students displayed two or more fundamental errors in their understanding of the warnings.”).

108. Joseph Eastwood & Brent Snook, *The Effect of Listenability Factors on the Comprehension of Police Cautions*, 36 LAW AND HUMAN BEHAVIOR 177, 181 (2012).

109. *Id.* at 179, 181.

110. *Id.* at 182.

111. Strauss, *supra* note 86, at 823 (arguing for a “set script”); Godsey, *supra* note 103, at 807 (arguing for the requirement of a written form at periodic intervals throughout the interrogation to remind the suspect of his rights).

112. Shelly Chaiken & Alice H. Eagly, *Communication Modality as a Determinant of Message Persuasiveness and Message Comprehensibility*, 34 J. OF PERSONALITY AND SOCIAL PSYCHOL. 605, 609 (1976).

113. Rogers et al., *supra* note 57, at 780 (discussing the rate of comprehension failures, which were more than double for oral presentations (16.6%) as opposed to written presentations (6.5%)).

by asking suspects to restate *Miranda* rights in their own words, as two of the interrogators did in our sample.<sup>114</sup> Police should also be required to clarify any misconceptions or misunderstandings that the suspect may have.<sup>115</sup>

If police departments adopt a paraphrasing protocol, suspects should be asked to paraphrase each element separately. Any attempt to paraphrase the content of the *Miranda* warnings in their entirety would overwhelm the cognitive resources of most suspects.<sup>116</sup> A model warning that incorporates a paraphrasing protocol—and that can be understood by individuals who read at a second-grade level—is readily available.<sup>117</sup> When police test a suspect’s understanding of his or her rights, attorneys and judges can be more confident that a knowing and intelligent *Miranda* waiver was obtained by the police.

Sixth and finally, the police should be required to obtain written acknowledgement that the suspect understands each right.<sup>118</sup> Such acknowledgement must occur immediately after each right is presented. This practice would prevent police from presenting the rights in a rapid and uninterrupted torrent, with no pauses between separate elements.

Some might argue that these safeguards are unnecessary when a suspect has a lengthy arrest record; indeed, even the U.S. Supreme Court has embraced the notion that repeated *Miranda* advisements lead to better comprehension and recall.<sup>119</sup> Empirical research, however, fails to support this contention. “Frequent flyers” who have been arrested more than twenty times do not differ appreciably from less experienced defendants in their ability to comprehend and recall *Miranda* warnings.<sup>120</sup>

---

114. Brenda L. Rosales, Note, *The Impact of Berghuis v. Thompkins on the Eroding Miranda Warnings in Limited English Proficient Individuals: You Must Now Speak Up to Remain Silent*, 9 HASTINGS RACE & POVERTY L.J. 109, 128 (2012) (arguing that police officers should be required “to ask the suspect to paraphrase” the rights to ensure understanding) (citing Michele Lavigne & Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters*, 15 U.C. DAVIS J. JUV. L & POL’Y 37, 90 (2011)).

115. Strauss, *supra* note 86, at 823 (“the courts should adopt a stringent ‘stop-and-clarify’ method”); Thompson, *supra* note 31, at 664 (arguing that the police should be required to ask “clarifying questions”); Joshua I. Hammack, Note, *Turning Miranda Right Side Up: Post-Waiver Invocations and the Need to Update the Miranda Warnings*, 87 NOTRE DAME L. REV. 421, 446 (2011) (arguing that the police should be required to ask “clarifying questions”).

116. Richard Rogers et al., *In Plain English: Avoiding Recognized Problems with Miranda Comprehension*, 17 PSYCHOL. PUBLIC POL. & LAW 264, 282 (2011).

117. DeClue, *supra* note 46, at 427, 439–41.

118. Godsey, *supra* note 104, at 807 (arguing for the requirement of a written form to protect suspects’ rights).

119. See *Fare v. Michael C.*, 442 U.S. 707 (1979); *Yarborough v. Alvarado*, 541 U.S. 652 (2004).

120. Rogers et al., *In Plain English*, *supra* note 116, at 281.

## VII. CONCLUSION

The vast majority of criminal suspects waive their *Miranda* rights and consent to interrogation. However, social science research suggests that the majority of these waivers are *not* made knowingly, voluntarily, and intelligently, as required by *Miranda*.<sup>121</sup> This is largely due to two factors: first, most versions of the *Miranda* warning require a reading proficiency beyond that of the typical criminal suspect; and second, rather than taking steps to ensure that suspects understand their *Miranda* rights, the police typically employ several tactics, including minimizing the importance of the rights, in order to induce suspects to waive their rights and make statements.<sup>122</sup>

The study that lies at the heart of this Article largely confirms these earlier findings. More specifically, in our sample: (1) more than 90% of suspects waived their *Miranda* rights; (2) the *Miranda* warning required, overall, a tenth-grade reading level, with some of its individual prongs requiring college- or graduate-level reading abilities; (3) the police did little, if anything, to ensure that suspects understood their rights; (4) the police minimized the importance of the rights in nearly 50% of the interrogations in order to induce suspects to waive; and (5) the police spoke much more quickly during the *Miranda* portion of the interrogation, which likely reduced suspects' already limited understanding of the rights.<sup>123</sup>

These findings support several proposed reforms to the *Miranda* process, including: (1) requiring the electronic recording of all interrogations; (2) prohibiting the police from minimizing the importance of the rights in order to obtain a waiver; (3) modifying the warnings and their method of delivery by the police; (4) requiring the police to present the warning both orally and in writing; (5) requiring the police to actively assess the degree to which suspects actually understand their rights; and (6) requiring the police to obtain a written acknowledgement of understanding after each of the individual rights.<sup>124</sup> These reforms will be a significant step forward in ensuring that suspects' waivers are made knowingly, voluntarily, and intelligently, as required by *Miranda*.

---

121. *See supra* Part IV.

122. *See id.*

123. *See supra* Part V.C.

124. *See supra* Part VI.