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Miranda Rights and Wrongs: Matters of Justice

Richard Rogers & Eric Y. Drogin

Judges are likely to respond with outright skepticism when the validity of a Miranda waiver is questioned because the defendant claimed to be merely "depressed" or "anxious" at the time of arrest. They may be reassured that extensive research on Miranda abilities has largely borne out this perspective.

Symptoms of depression and anxiety, by themselves, do not increase the chances of impaired Miranda comprehension or reasoning. For instance, defendants with even moderate to severe depression have roughly the same odds of impaired functioning as those with negligible depression. Only at the extreme levels of depression does a pattern of deficits emerge for Miranda comprehension but not for Miranda reasoning.¹

Likewise, a similar pattern is observed even for certain psychotic symptoms, such as delusions and paranoid distrust.² On reflection, both legal and mental-health professionals alike can discern a plausible explanation for this occurring. Since most delusions and persecutory thoughts do not involve the police or the criminal-justice system, these symptoms are likely to have only a peripheral influence on Miranda-relevant abilities. Only when psychotic symptoms become truly pervasive (i.e., extremely severe) are they likely to impair Miranda comprehension and reasoning.

This introduction underscores several related points. First, judges would be correct in not equating even serious mental disorders with invalid Miranda waivers. Second, Miranda issues—as we consider the totality of the circumstances—must be viewed as much more complex and nuanced than any simple association of symptoms with functional legal abilities.

Judges, prosecutors, and defense counsel alike may share similar misconceptions regarding the general public's knowledge and understanding of Miranda. For instance, faulty perceptions abound with respect to both the content and the meaning of Miranda warnings. The next two sections address fundamental misunderstandings as they apply to Miranda comprehension and reasoning. We begin with comprehension, focusing first on fundamental myths about Miranda advisements.

THREE FUNDAMENTAL MYTHS ABOUT MIRANDA WARNINGS

Rogers, Shuman, and Drogin³ first articulated major fundamental myths that threaten the integrity of Miranda warnings and subsequent waivers. For instance, judges are sometimes led to assume that there exists only one, simply written Miranda warning that is applied uniformly across the United States. This uniformity myth is shattered by research data that have identified more than 1,000 unique variations, varying in length by more than 500 words, with reading levels that range from grade three to post-college.⁴

In 2011, Rogers⁵ proposed the "general neglect hypothesis" in an effort to explain why Miranda issues were routinely overlooked by the criminal courts—and in particular by the defense bar. Based on very conservative estimates, thousands of arrestees with severely impaired Miranda abilities⁶ are overlooked or disregarded by defense attorneys each year. This section examines three fundamental Miranda myths that are strongly linked to the general neglect hypothesis. For example, legal professionals are likely to overlook Miranda issues if they believe they are irrelevant (i.e., "just a formality" because everyone already knows them).

1. JUST A FORMALITY

One general misassumption is rooted in the notion that nearly all Americans have a working knowledge of the Miranda warnings. If this were true, then the communication of Miranda rights would aptly be captured by the phrase, "just a formality." Although Leo⁷ was critical of police practices in downplaying the importance of Miranda warnings in what he has characterized as a "confidence game," arresting officers may genuinely see these advisements as nothing more than a necessary bureaucratic exercise—mandated by the Supreme Court—for defendants who are already fully apprised of their rights. Simply put, if suspects already know their Miranda rights, then anything more than the most cursory advisement represents not only an unnecessary effort but also a potentially damaging distraction at a critical moment in the investigation.

Judges will recognize instantly why the commonsensical premise for knowing Miranda warnings seems incontestable: Residents of the United States are constantly bombarded with snatches of stereotyped Miranda recitations via countless police dramas and various outlets of the public media. The litany almost inevitably begins with "you have the right to remain silent." Based on this compelling yet false premise, many attor-

Footnotes

2. Id. at 213-14.
4. See generally Rogers & Drogin, supra note 1.
6. An example of severely impaired abilities is the failure to recall even 50% of the Miranda warning immediately following its oral or written administration.
neous from both the prosecution and defense unhesitatingly assume that criminal defendants are fully cognizant of their Miranda rights as expressed in Miranda warnings. This basic myth, “everyone knows their Miranda warnings,” appears to be strikingly pervasive across our communities. However, this view is simply unwarranted. When a cross-section of the community (e.g., juror pools) was surveyed anonymously, roughly one-third (35%) conceded they had little or no Miranda knowledge. Indeed, they were largely accurate in estimating their ignorance of Miranda warnings. While performing moderately well on the first component, right to silence, they faltered on the other three basic components, averaging only 45% correct: risks of talking, right to counsel, and free legal services. The fifth component of most Miranda warnings, addressing the assertion of rights at any time, or continuing rights, is almost universally missed.

Intuitively, it might be argued that investigating officers could easily screen which arrestees were knowledgeable about Miranda—simply by asking them. In this regard, more than 80% of Miranda advisements directly ask arrestees to affirm their understanding of the Miranda warning. Most defendants provide assents, however, through unelaborated responses (e.g., “yes”). Shouldn’t the criminal courts view such terse yet ubiquitous assents with slack-jawed skepticism?

Self-appraisals. High confidence does not necessarily translate into high accuracy. For instance, about 30% of those professing a high level of Miranda knowledge lacked any substantive memory concerning the Miranda component of free legal services. Adversarial context. Many arrestees justifiably view their investigating officers as adversaries, who are responsible for their arrests and current detentions. In this context, it is entirely understandable why some detainees would be reluctant to acknowledge any serious limitations, such as a limited cognitive ability to understand Miranda, which might further weaken—at least in their eyes—their adversarial position.

Irrelevance. Many arrestees may perceive Miranda warnings as inconsequential formalities and pay very little attention to their content. Investigating officers may also communicate this message—either directly or indirectly. As an example of the latter, advisements may be delivered in a “mechanical, bureaucratic manner so as to trivialize their potential significance and minimize their effectiveness.” Alternatively, warnings may be presented with rapid-fire delivery, precluding any meaningful comprehension. Canadian research on audio-recorded warnings administered to actual arrestees has clocked average speeds exceeding 200 words per minute. Besides the virtual incomprehensibility of such breakneck speeds, the warnings were frequently marred by omissions and inaccuracies.

Acquiescence. The response style of “acquiescence” refers to an almost reflexive agreement (i.e., yea-saying) that is especially prominent when certain vulnerable defendants are confronted by authority figures. For persons with intellectual disabilities, yes-no-type questions—pervasive in Miranda waivers—are particularly vulnerable to acquiescence. This pattern of acquiescent responding is captured in the title of a classic study: When in Doubt, Say Yes. However, this problem can easily be averted by asking open-ended questions, such as “What do you remember about your Miranda rights?” As a note of caution, the courts should be skeptical if acquiescence is raised for adult arrestees without major intellectual deficits. While genuine cases of acquiescence can occur, they tend to be relatively infrequent for those with adequate cognitive abilities who lack other relevant conditions, such as a dependent-personality disorder.

2. CONVEYING KNOWLEDGE VIA WARNINGS

The Supreme Court of the United States consistently exhibits an unshakeable belief that Miranda warnings represent a highly effective method of conveying information. In Berghuis v. Thompkins, for example, it was unquestioningly assumed that the defendant was fully aware of his rights once properly advised before questioning. Even after nearly three hours, the Court concluded: “As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate.” In other words, the Court appears to presume that all properly cau-

8. See Rogers et al., supra note 3.
12. The difference lies between “meta-ignorance” (awareness of what is not known) and “meta-knowledge” (awareness of what is known); see Rogers, supra note 5.
13. See Rogers et al., supra note 9.
16. The overall average was 233 words per minute. See Brent Snook, Joseph Eastwood & Sarah MacDonald, A Descriptive Analysis of How Canadian Police Officers Administer the Right-to-Silence and Right-to-Legal Counsel Cautions, 52 CAN. J. CRIMINOLOGY & CRIM. JUST. 545 (2010).
19. See generally ROGERS & DROGIN, supra note 1.
tioned defendants remain fully apprised of their Miranda rights and can even accumulate additional information via the questioning to further inform their decision making.

As noted by Blackwood and her colleagues,21 the Court appears to have fallen victim to the long-disproved supposition that the mind operates like an audio recorder that accurately records and correctly accesses relevant information.22 The “recorder fallacy” of memory has been described as “one of the five great myths of popular psychology.”23 As observed by Rogers and Drogin,24 however, the Court was not provided with “any information to the contrary” (i.e., evidence of impaired Miranda comprehension, either immediately after the warning or following the several-hour delay). Given the presumption of competency, the Court was left with no choice but to assume that the defendant was fully functioning at the time of his incriminating statement.

A mere notification of rights cannot be equated with the education of one’s rights. Simply because something is stated or written does not mean that it was adequately heard or read. Even if it were heard or read, that does not necessarily mean that it was adequately comprehended. Obviously, judges cannot be expected to take into account every instance of willful inattention in determining the validity of Miranda waivers. Nonetheless, Miranda warnings can include easily identifiable elements that essentially preclude the real comprehension of Miranda material. Such a direct statement likely provokes unhealthy skepticism. Consider for the moment reading-comprehension levels. It makes no sense—legal or otherwise—to expect a typical assault victim to read a Miranda advisement written at a college-graduate reading level. Furthermore, research has convincingly demonstrated that lengthy oral warnings cannot be comprehended.25 When given relatively short passages (less than 90 words), well-educated adults are considered to have superior memories if they can immediately recall as much as 72% of the material.26 With typical Miranda warnings—ranging from 125 to 175 words—oral comprehension typically fails to reach 50%, even when administered to college undergraduates.27 At an even more basic level of analysis, research on hundreds of pretrial defendants28 has clearly identified problematic words that foil comprehension. Beyond difficult vocabulary (e.g., “indigent”), other words are legalistic (e.g., “admissible”) or have more commonly used definitions (e.g., “execute” as meaning “to kill”). These issues are addressed more fully in the section “Blueprint for Improving Miranda Warnings.”

3. OVERCOMING MIRANDA MISCONCEPTIONS

A third and final fundamental misconception is that Miranda warnings go beyond conveying knowledge to help in rectifying Miranda misconceptions. As a concrete example, not just judges, prosecutors, and defense counsel, but rather nearly everyone—arrestees, undergraduates, and members of the community—can dutifully recite “you have the right to remain silent.” Nevertheless, a substantial minority continue to embrace the opposite belief. For instance, 20% of prospective jurors,29 26% of undergraduates, and 31% of defendants30 wrongly believe that silence will be used as incriminating evidence. This crucial fallacy can play a determinative role in the waiving of rights.

Rogers and Drogin31 identified approximately 20 misassumptions that could have direct bearing on Miranda-waiver decisions. For example, arrestees in about one-fourth of American jurisdictions are advised that they have the right to silence until they have legal counsel.32 Assuming arrestees believe what they are told, the frame of reference changes from if they should waive to when they should waive their rights and talk. Given that offenders are susceptible to forfeiting long-term considerations for immediate gains33 (e.g., “getting it over”), they may decide to talk now without the benefit of counsel. As a second example, many defendants believe their statements to the police cannot be used as evidence without a signed Miranda waiver. As a consequence of this gross misconception,34 arrestees may not recognize how almost any form of admission can jeopardize their defenses.

Miranda warnings constitute an ineffective method for rectifying fundamental Miranda misconceptions. This finding is hardly surprising, inasmuch as the Supreme Court justices in Miranda and subsequent cases could hardly have envisioned the rampant nature of Miranda misconceptions that would emerge in subsequent decades. Even if they did, the possible solutions might further confound rather than enlighten detainees.

Take, for example, the New Hampshire Supreme Court in State v. Benoit35 that sought to remedy juvenile suspects’ core misconceptions. Its model Miranda warning reassured juveniles

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24. See ROGERS & DROGIN, supra note 1, at 16.
28. Rogers et al., supra note 9.
29. Id.
31. See generally ROGERS & DROGIN, supra note 1.
32. See Rogers et al., supra note 10.
33. This process is referred to as “temporal discounting.”
34. Arrestees do not even need to be asked or provide any verbal indication of their waiver. See Rogers et al., supra note 10.
that invoking their rights carried no penalty: “You will not be punished for deciding to use these rights.”36 In their well-meaning and concerted attempt to correct fundamental Miranda misconceptions, the justices unwittingly created an exhaustive Miranda advisement that is likely to overwhelm even the most educated adult by its extraordinary length: 425 words for the “misdemeanor” version and ballooning to 498 words for the “felony” version. Juvenile suspects are then presented sequentially with two forms of Miranda waivers totaling an additional 175 words for a grand total of 600 or more words. A commonsensical question that begs for a response: “At what point do juveniles simply stop listening or reading?”37

For the purposes of this article, we performed an additional analysis on whether “frequent flyers” in the criminal-justice system at either the “gold” (20-39 arrests) or “platinum” (40+ arrests) levels realized any substantive reductions in their Miranda misconceptions when compared to defendants with fewer than five arrests.38 Contrary to expectations, we found virtually no improvements in average misconceptions: 7.6 for inexperienced defendants versus 7.5 for gold-level and 7.0 for platinum-level defendants. These data expose a fundamental fallacy that repeated exposures to Miranda warnings serve an educative function.39

Rogers and his colleagues40 directly tested whether repeated exposure to Miranda advisements had any curative effect on Miranda misconceptions. To provide greater opportunities for learning, they exposed defendants to five differently worded Miranda warnings, which were interspersed with other tasks to avoid fatigue. To keep these participants actively involved, they were tested on their immediate recall after each warning. Despite this intense exposure, no overall reduction in Miranda misconceptions was observed, irrespective of whether the warnings were provided orally or in writing. As the only bright note, a small number of defendants with substantial difficulties showed modest improvement, but they were clearly outnumbered by those with no improvement or even worse performance.41

MIRANDA-WAIVER DECISIONS

Beyond police coercion impairing their voluntariness,42 Miranda waivers typically rely on knowing and intelligent decisions to relinquish Miranda rights. As two distinct yet related components,43 the “knowing” prong provides the necessary foundation for an “intelligent” waiver. As an analogy from chess, Rogers and Drogin observed that simply knowing how the pieces move is, by itself, insufficient for rational decision making.44

Grisso45 described five important components of rational decision making as it applies to legal competence.46 The five levels are outlined below with illustrative questions that judges will presumably want defense counsel to have asked to investigate the level of rational decision making:

1. **Awareness of the alternatives.** Counsel may wish to inquire: “What did you see as your choices after you were given the Miranda warning?”

2. **Potential consequences of each alternative.** For each choice, counsel may wish to simply inquire: “What did you think would happen?”

3. **Likelihood of these consequences.** As a follow-up to #2, counsel may wish to ask the following for each alternative: “How certain were you that this would happen?”

4. **Weighing the desirability of each consequence.** As a follow-up to #2, counsel may wish to query for each alternative: “How much did you want this to happen?”

5. **Comparative deliberation of alternatives and consequences.** As the final question, counsel may wish to ask: “How did you make the decision?”

Judges are likely to be taken aback by the low level of rational thinking exhibited by many defendants when faced with these potentially life-altering decisions. Considering this notion within a legal framework, the Supreme Court of the United States held in *Iowa v. Tovar*47 that a waiver is intelligent “when the defendant knows what he is doing and his choice is made with eyes open.” A rhetorical but very real question is, “How open?” To be fully open, levels #2, #3, and #4 must be considered. To avoid being fully closed, #2 seems essential. For the remaining levels, the necessary appreciation may have less to do with accuracy than the underlying reasons for this belief. Using #3 as an illustration, a female mentally disordered suspect may correctly believe that her confession may result in an “earthly” conviction but reason delusionally that she is exempt from “earthly” powers.

Miranda reasoning should not be viewed as an all-or-nothing process. Indeed, Blackwood and her colleagues48 found that the large majority of defendants with markedly impaired reasoning

36. *Id.* at 22.
37. *Id.* Both modalities should be used: “The following is to be read and explained by the officer, and the child shall read it before signing.”
38. Averages are derived from the database supporting RICHARD ROGERS, KENNETH W. SEWELL, ERIC Y. DROGIN & CHELSEA E. FIDUCCIA, STANDARDIZED ASSESSMENT OF MIRANDA ABILITIES (SAMA) PROFESSIONAL MANUAL (2012).
41. *Id.* Overall, 33 evidenced at least two fewer misconceptions, whereas 35 showed no improvement at all, or even a worse performance.
43. Interestingly, in *Edwards v. Arizona*, 451 U.S. 477 (1981), the Supreme Court of the United States appeared to de-emphasize the intelligent prong in holding that a basic awareness was sufficient for a valid Miranda waiver.
44. See ROGERS & DROGIN, supra note 1, at 93.
on some aspect of the Miranda waiver could still rationally consider some short- and long-term consequences regarding other aspects. For instance, they found most irrational thinking involved the benefits of exercising rather than waiving Miranda rights. For this article, we performed an additional analysis on our extensive database of more than 600 pretrial defendants. As summarized in Table 1, relatively few defendants evidenced substantially impaired reasoning for waiving or exercising rights. The notable exception (14.4%) involved grossly misperceived risks of requesting counsel. Examples include fundamental fallacies about affordability (e.g., no attorney without the capacity to pay) or allegiance (e.g., court-appointed attorney will divulge your admissions to the judge). Counsel may wish to inquire, for example, “Why didn’t you ask for an attorney immediately after being detained? Why didn’t you ask for an attorney immediately after hearing your Miranda warnings?” Such questions may help to illuminate the defendant’s thinking before the Miranda waiver.

The picture becomes much more complex when irrational and questionable reasoning are considered together. As a benchmark, roughly 20% meet this combined category. When this combined category is examined for defendants who have been found incompetent to stand trial, the number nearly doubles. Depending on other evidence, counsel may wish to routinely consider Miranda issues when competency to stand trial is raised. In general, a major challenge facing defense counsel and their retained experts is that many defendants are confused about their memories around the time of the arrest due to intoxication and severe situational stressors.

Issues of impaired Miranda reasoning are almost invariably raised by defense counsel. Nonetheless, prosecutors as well as judges have a strongly vested interest that only genuine cases go forward. In addition to research on possibly feigned Miranda vocabulary, Rogers and his colleagues are beginning to examine whether defendants are evidence a believable pattern of Miranda misconceptions. These approaches can be used to evaluate whether some defendants are falsely claiming gross misconceptions in an intentional effort to suppress a completely valid Miranda waiver. For example, a “Discrimination Index” was established based on which misconceptions show remarkable deficits or moderate improvements when defendants try to feign impaired Miranda reasoning.

**TABLE 1: DEFENDANTS’ ABILITIES TO REASON ABOUT WAIVING AND EXERCISING THEIR MIRANDA RIGHTS**

<table>
<thead>
<tr>
<th>WEIGHING OPTIONS</th>
<th>SUBSTANTIALLY IMPAIRED REASONING</th>
<th>QUESTIONABLE REASONING</th>
<th>RATIONAL: SHORT-TERM</th>
<th>RATIONAL: LONG-TERM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benefit of waiving</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Silence</td>
<td>2.6</td>
<td>20.2</td>
<td>20.2</td>
<td>51.5</td>
</tr>
<tr>
<td>Counsel</td>
<td>4.7</td>
<td>13.1</td>
<td>13.1</td>
<td>55.8</td>
</tr>
<tr>
<td>Risk of waiving</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Silence</td>
<td>5.1</td>
<td>14.3</td>
<td>14.3</td>
<td>47.1</td>
</tr>
<tr>
<td>Counsel</td>
<td>3.2</td>
<td>20.2</td>
<td>20.2</td>
<td>43.4</td>
</tr>
<tr>
<td>Benefit of exercising</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Silence</td>
<td>2.9</td>
<td>20.2</td>
<td>20.2</td>
<td>46.6</td>
</tr>
<tr>
<td>Counsel</td>
<td>0.8</td>
<td>11.0</td>
<td>11.0</td>
<td>35.4</td>
</tr>
<tr>
<td>Risk of exercising</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Silence</td>
<td>5.5</td>
<td>14.6</td>
<td>14.6</td>
<td>30.0</td>
</tr>
<tr>
<td>Counsel</td>
<td>14.6</td>
<td>10.6</td>
<td>10.6</td>
<td>47.4</td>
</tr>
</tbody>
</table>

* a Considers immediate circumstances only.
* b Considers future consequences.

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49. ROGERS ET AL., supra note 38.
50. Id. The greatest concerns involved the benefits of waiving (45%) or exercising (45%) the right to silence, plus the risk of waiving the right to counsel (48%).
51. Id. Using a detection strategy known as the “performance curve,” the SAMA Miranda Vocabulary Scale expects to find that defendants will have much greater success at easier items than more difficult ones. Feigners often do not pay attention to item difficulty when faking.
ers. In 2008, Rogers\textsuperscript{55} called for the elimination of incomprehensible warnings, particularly those which he categorized as the “worst offenders.” In their recent book, Mirandized Statements,\textsuperscript{56} Rogers and Drogin present tools on selecting simple language for building effective Miranda warnings that can be used with both juvenile and adult arrestees. They recommend grassroot efforts to promote procedural justice involving the key stakeholders, such as law enforcement, prosecutors, defense attorneys—and, of course, judges.

Table 2 outlines the simple steps toward improving Miranda warnings. For vocabulary, five simple steps could effectively

<table>
<thead>
<tr>
<th>STEPS</th>
<th>ISSUES</th>
<th>DETAILS/EXAMPLES</th>
</tr>
</thead>
<tbody>
<tr>
<td>REMOVE DIFFICULT VOCABULARY\textsuperscript{a}</td>
<td>1</td>
<td>Remove legalese</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>Remove formalized words</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>Avoid homonyms (particularly problematic for oral advisements)</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td>Avoid difficult words (10+ grade reading level)</td>
</tr>
<tr>
<td></td>
<td>5</td>
<td>Avoid infrequent words (less than one word per million in writing)</td>
</tr>
</tbody>
</table>

| SHORTEN MIRANDA WARNINGS\textsuperscript{b} | 1 | Component: Silence | Less than 14 words |
| | 2 | Component: Evidence against you | Less than 16 words |
| | 3 | Component: Attorney | Less than 20 words |
| | 4 | Component: Free legal services | Less than 25 words |
| | 5 | Component: Continuing rights | Less than 23 words |
| | 6 | Total warning | Less than 56 words\textsuperscript{c} |

| DECREASE READING-COMPREHENSION DEMANDS\textsuperscript{d} | 1 | Component: Silence | Flesch-Kincaid less than 4.2 grade level |
| | 2 | Component: Evidence against you | Flesch-Kincaid less than 6.9 grade level |
| | 3 | Component: Attorney | Flesch-Kincaid less than 4.5 grade level |
| | 4 | Component: Free legal services | Flesch-Kincaid less than 7.3 grade level |
| | 5 | Component: Continuing rights | Flesch-Kincaid less than 6.4 grade level |
| | 6 | Total warning | Flesch-Kincaid less than 6.4 grade level |

\textsuperscript{a} Some words qualify for multiple categories. For simplicity, they are listed under the first applicable category. Vocabulary issues were distilled from Appendices A and B of ROGERS & DROGIN, supra note 1.

\textsuperscript{b} With warnings from 945 jurisdictions, these lengths represent the first quartile, with more than 200 variations found in general warnings.

\textsuperscript{c} This number is based on the total words and does not equal the sum of each component.

\textsuperscript{d} With warnings from 945 jurisdictions, these reading grade levels represent the first quartile, with more than 200 variations found in general warnings.

55. See Rogers, supra note 11, at 782.

56. See ROGERS & DROGIN, supra note 1.

57. Depending on the jurisdiction, judges may wish to avoid potentially polarizing issues between defense and prosecution.
remove abstruse words that often confuse even the educated public.

Remove legalese: Simple words can easily be substituted for words with specialized legal meanings, such as “admissible,” “appearance,” “inadmissible,” “stipulate,” and “waiver.”

Remove formalized words: Some centuries-old formal words are no longer used in common discourse. Examples include “aforementioned” and “whomsoever.”

Remove homonyms: These words are particularly confusing with oral Miranda warnings. Most defendants have heard “execute” and “terminate,” but many ascribe a very different meaning to them than what is needed to accurately convey the legally relevant information.

Remove difficult words. Some words clearly require close to a high-school education or more before adults can even recognize their correct meanings. Examples particularly relevant to Miranda warnings include “indigent” and “proceedings.”

Remove infrequent words. Some words very rarely appear in print, even if known, they can be barriers to a full understanding of the sentence. Examples are “certify” and “interrogation.”

The second two components can be achieved easily, using Microsoft Word or other major word-processing programs. Word provides readability statistics—including word counts and reading grade levels—almost instantly. The Flesch-Kincaid reading-level estimate that the program generates is widely accepted and used by many governmental agencies, including the Department of Defense.58 As an important caution, its reading levels are set for at least 75% comprehension;59 often several more grades of reading ability are needed to ensure complete comprehension.

The take-home message is very simple. With less than an hour of unhurried work, the language of Miranda warnings could be easily simplified. Equally simple would be the shortening of the Miranda warning and the marked reducing of its reading demands to grade six or even lower. Remember, the reading levels reported in Table 2 were found with several hundred variations (i.e., the lowest quartile). With a more concerted effort, even lower grade levels are easily achievable.

The blueprint for improving Miranda warnings could be extended beyond local jurisdictions and considered at the national level starting with Table 2 and supplemented by the extensive guidelines60 in Rogers and Drogin. Building on the ABA policy, the American Judges Association (AJA) could adopt a more encompassing national policy with the attainable goal of eliminating most incomprehensible warnings, irrespective of age or language.61 This policy would be consistent with Miranda’s language calling for “clear and unequivocal” communication of constitutional rights.62 Moreover, this policy embraces the AJA’s overriding objectives63 of being “dedicated to improving the systems of justice in North America.” Substantiated with an AJA White Paper,64 a movement toward national reform of Miranda warnings could be galvanized.

Richard Rogers, Ph.D., ABPP, is Regents Professor of Psychology at the University of North Texas. For the last decade, he has been a principal investigator on grants from the National Science Foundation, systematically researching Miranda warnings and waivers with more than a dozen refereed articles summarizing key empirical investigations. His 2014 ABA book with Eric Drogin is entitled Mirandized Statements: Successfully Navigating the Legal and Psychological Issues. Citing his research on Miranda, Dr. Rogers was nationally recognized by the American Psychological Association for his distinguished contributions to both professional practice (2008) and public policy (2011). Dr. Rogers also serves as an expert consultant of forensic issues, including Miranda waivers.

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60. See ROGERS & DROGIN, supra note 1, at 21-45 (“An Ounce of Prevention”)
63. This quote is from the current AJA president, Judge Brian MacKenzie, in the “President’s Message” on the home page of the American Judges Association, http://aja.ncsc.dni.us/index.html.
64. An excellent example is PAMELA CASEY, KEVIN BURKE & STEVE LEBEN, MINDING THE COURT: ENHANCING THE DECISION-MAKING PROCESS (2012), http://aja.ncsc.dni.us/pdfs/Minding-the-Court.pdf. As a possible parallel to informed-waiver decisions, it provides examples of how benchcards and other decisional tools can facilitate judicial decision making.