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Miranda Rights and Wrongs: Matters of Justice

Richard Rogers
University of North Texas

Eric Y. Drogin
Harvard Medical School

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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 Drogin[3] 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, Rogers[5] 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* abilities[6] 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 Leo[7] 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

1. *See* RICHARD ROGERS & ERIC Y. DROGIN, MIRANDIZED STATEMENTS: SUCCESSFULLY NAVIGATING THE LEGAL AND PSYCHOLOGICAL ISSUES 215 (2014).
2. *Id*. at 213-14.
3. Richard Rogers, Daniel W. Shuman & Eric Y. Drogin, *Miranda Rights . . . and Wrongs: Myths, Methods, and Model Solutions*, 23 CRIM. JUST. 4 (2008).
4. *See generally* ROGERS & DROGIN, *supra* note 1.
5. Richard Rogers, *Getting It Wrong About Miranda Rights: False Beliefs, Impaired Reasoning, and Professional Neglect*, 66 AM. PSYCHOL. 728 (2011).
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.
7. Richard A. Leo, Miranda's *Revenge: Police Interrogation as a Confidence Game,* 30 LAW & SOC'Y REV. 259 (1996).

neys 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,"[8] 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,[9] 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,[10] 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[11] 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.[12] 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*.[13]

Adversarial context. Many arrestees justifiably view their investigating officers as adversaries, who are responsible for their arrests and current detentions.[14] 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."[15] 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.[16] 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*.[17] However, this problem can easily be averted by asking open-ended questions,[18] 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.[19] 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*,[20] 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.
9. Richard Rogers, Chelsea E. Fiduccia, Eric Y. Drogin, Jennifer A. Steadham, John W. Clark III & Robert J. Cramer, *General Knowledge and Misknowledge of* Miranda *Rights: Are Effective* Miranda *Advisements Still Necessary?* 19 PSYCHOL. PUB. POL'Y & L. 432 (2013).
10. Data from 945 American jurisdictions found that 81.8% included *continuing rights* as the fifth component. Richard Rogers, Lisa L. Hazelwood, Kenneth W. Sewell, Kimberly S. Harrison & Daniel W. Shuman, *The Language of Miranda Warnings in American Jurisdictions: A Replication and Further Analysis*, 32 LAW & HUM. BEHAV. 124 (2008).
11. Based on a national survey, 84.6% of *Miranda* warnings ask for a self-appraisal of arrestees' understanding. *See* Richard Rogers, *A Little Knowledge Is a Dangerous Thing . . . Emerging Miranda Research and Professional Roles*, 63 AM. PSYCHOL. 776 (2008).
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.
14. Because of temporal discounting, many offenders are more concerned about their immediate circumstances than the long-term consequences; *see* Hayley L. Blackwood, Richard Rogers, Jennifer A. Steadham & Chelsea E. Fiduccia, *Investigating Miranda Waiver Decisions: An Examination of the Rational Consequences*, INT'L J. L. & PSYCHIATRY (in press).
15. Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-First Century*, 99 MICH. L. REV. 1000, 1003 (2001).
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).
17. Carol K. Sigelman, Edward C. Budd, Cynthia L. Spanhel & Carol J. Schoenrock, *When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons*, 19 MENTAL RETARDATION 53 (1981).
18. Nigel Beail, *Interrogative Suggestibility, Memory and Intellectual Disability*, 15 J. APPLIED RES. INTELLECTUAL DISABILITIES 129 (2002).
19. *See generally* ROGERS & DROGIN, *supra* note 1.
20. Berghuis v. Thompkins, 130 S. Ct. 2250 (2010).

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 healthy skepticism. Consider for the moment reading-comprehension levels. It makes no sense—legal or otherwise—to expect a typical arrestee with a sixth- or seventh-grade reading level to comprehend 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 defendants[28] 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 defendants[30] 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 Drogin[31] 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, then 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 gains[33] (*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 misbelief,[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. Benoit*[35] that sought to remedy juvenile suspects' core misconceptions. Its model *Miranda* warning reassured juveniles

21. Blackwood et al., *supra* note 14.
22. Ulric Neisser, *On the Trail of the Tape-Recorder Fallacy*, 11 SOC. ACTION & L. 35 (1985).
23. Stephen O. Lilienfeld, Steven J. Lynn & Barry L. Beyerstein, *The Five Great Myths of Popular Psychology: Implications for Psychotherapy*, *in* RATIONAL AND IRRATIONAL BELIEFS: RESEARCH, THEORY, AND CLINICAL PRACTICE 313 (Daniel David, Stephen J. Lynn & Albert Ellis eds., 2010).
24. *See* ROGERS & DROGIN, *supra* note 1, at 16.
25. Blackwood et al., *supra* note 14.
26. For further commentary, see Richard Rogers, Hayley L. Blackwood, Chelsea E. Fiduccia, Jennifer A. Steadham, Eric Y. Drogin & Jill E. Rogstad, *Juvenile Miranda Warnings: Perfunctory Rituals or Procedural Safeguards?* 39 CRIM. JUST. & BEHAV. 229 (2012).
27. *See* Nathan D. Gillard, Richard Rogers, Katherine R. Kelsey & Emily V. Robinson, *An Investigation of Implied Miranda Waivers and* Powell *Wording in a Mock-Crime Study*, LAW & HUM. BEHAV. (in press).
28. Rogers et al., *supra* note 9.
29. *Id.*
30. Richard Rogers, Jill E. Rogstad, Nathan D. Gillard, Eric Y. Drogin, Hayley L. Blackwood & Daniel W. Shuman, *"Everyone Knows Their Miranda Rights": Implicit Assumptions and Countervailing Evidence*, 16 PSYCHOL. PUB. POL'Y & L. 300 (2010).
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.
35. State v. Benoit, 126 N.H. 6, 14 (1985).

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 colleagues[40] 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]

Grisso[45] 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 colleagues[48] 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).
39. *See* State v. Lanning, 5 Wash. App. 426, 487 P.2d 785 (1971), and Fare v. Michael C., 442 U.S. 707 (1979).
40. Richard Rogers, Chelsea E. Fiduccia, Emily V. Robinson, Jennifer A. Steadham & Eric Y. Drogin, *Investigating the Effects of Repeated Miranda Warnings: Do They Perform a Curative Function on Common Miranda Misconceptions?* 31 BEHAV. SCI. & L. 397 (2013).
41. *Id.* Overall, 35 evidenced at least two fewer misconceptions, whereas 55 showed no improvement at all, or even a worse performance.
42. Colorado v. Connelly, 479 U.S. 157 (1986).
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.
45. Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3 (1997).
46. Grisso and his colleagues also proposed a more elaborate model with eight components. *See* Thomas Grisso, Paul S. Appelbaum, Edward P. Mulvey & Kenneth Fletcher, *The MacArthur Treatment Competence Study II: Measures of Abilities Related to Competence to Consent to Treatment*, 19 LAW & HUM. BEHAV. 127 (1995).
47. Iowa v. Tovar, 124 S. Ct. 1379, 1387 (2004).
48. Blackwood et al., *supra* note 14.

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.[49] 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.[50] 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,[51] Rogers and his colleagues are beginning to examine whether defendants are evidencing a believable pattern of *Miranda* misconceptions.[52] 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.

A BLUEPRINT FOR IMPROVING *MIRANDA* WARNINGS

Citing earlier *Miranda* research,[53] the American Bar Association issued a policy statement to legislative bodies and governmental agencies, asking for their constructive efforts toward "the development of simplified *Miranda* warning language for use with juvenile arrestees."[54] In our estimation, the need for comprehensible warnings should have no age barri-

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

	Percentages for Different Levels of Reasoning			
WEIGHING OPTIONS	SUBSTANTIALLY IMPAIRED REASONING	QUESTIONABLE REASONING	RATIONAL: SHORT-TERM[a]	RATIONAL: LONG-TERM[b]
Benefit of waiving				
Silence	2.6	20.2	20.2	51.5
Counsel	4.7	13.1	13.1	55.8
Risk of waiving				
Silence	5.1	14.3	14.3	47.1
Counsel	3.2	20.2	20.2	43.4
Benefit of exercising				
Silence	2.9	20.2	20.2	46.6
Counsel	0.8	11.0	11.0	35.4
Risk of exercising				
Silence	5.5	14.6	14.6	30.0
Counsel	14.6	10.6	10.6	47.4

[a] Considers immediate circumstances only.
[b] Considers future consequences.

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.
52. Richard Rogers, Emily V. Robinson & Sarah A. Henry, *Feigning Deficits in Legal Abilities: Development of Detection Strategies for the SAMA and ILK*, paper presented at the annual conference of the American-Psychology Law Society, San Diego (March 2015).
53. JOSEPH C. HYNES, REPORT ON 102B: JUVENILE MIRANDA RIGHTS (2010), www.abanet.org/crimjust/policy/midyear2010/102b.pdf.
54. AMERICAN BAR ASSOCIATION, RESOLUTION 102B: JUVENILE MIRANDA RIGHTS (2010), www.abanet.org/crimjust/policy/midyear2010/102b.pdf.

ers. In 2008, Rogers[55] called for the elimination of incomprehensible warnings, particularly those which he categorized as the "worst offenders." In their recent book, *Mirandized Statements*,[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.

Judges play a highly influential role in the American criminal-justice system. While they may not wish to become deeply involved in the development of model *Miranda* warnings,[57] they can still help to shape and improve current practices. Toward this end, we offer a simplified blueprint that should enable judges and their staff to facilitate simple yet effective changes in the existing *Miranda* advisements.

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

TABLE 2: BLUEPRINT FOR IMPROVING *MIRANDA* WARNINGS

STEPS	ISSUES	DETAILS/EXAMPLES
REMOVE DIFFICULT VOCABULARY[a]		
1	Remove legalese	Examples: admissible, alleged, appearance, deposes, detain, duress, entitled, executed, inadmissible, incriminate, knowingly, privilege, retain, revocation, statutory, stipulate, waive, waiver
2	Remove formalized words	Examples: aforementioned, hereinafter, hereby, pursuant, whatsoever, whomsoever
3	Avoid homonyms (particularly problematic for oral advisements)	Examples: admission, aggravated, charge, commitment, counsel, execute, immunity, petition, terminate, waive
4	Avoid difficult words (10+ grade reading level)	Examples: appointed, certify, coerce, coercion, compelled, compulsion, counsel, discretionary, indigent, incompetent, intimidation, invoke, leniency, pending, perjury, proceedings, render, renounce, signify
5	Avoid infrequent words (less than one word per million in writing)	Examples: certify, cross-examine, detain, discontinue, inducement, initialed, interrogation
SHORTEN *MIRANDA* WARNINGS[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[c]
DECREASE READING-COMPREHENSION DEMANDS[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

a. Some words qualify for multiple categories. For simplicity, they are listed under the first applicable category. Vocabulary issues were distilled from Appendixes A and B of ROGERS & DROGIN, *supra* note 1.
b. With warnings from 945 jurisdictions, these lengths represent the first quartile, with more than 200 variations found in general warnings.
c. This number is based on the total words and does not equal the sum of each component.
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.

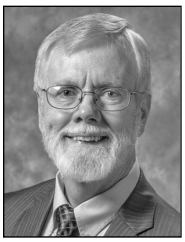
Remove difficult words. Some words clearly require close to a high-school education or more before adults can even recognize their correct meanings. Examples particularly relevant to *Miranda* warnings include "indigent" and "proceedings."

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 guidelines[60] 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 objective[63] 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.*

Eric Y. Drogin, J.D., Ph.D., ABPP, is an attorney and board-certified forensic psychologist serving on faculty of the Harvard Medical School Department of Psychiatry (as a member of the Beth Israel Deaconess Medical Center's Forensic Psychiatry Service and in the Program in Psychiatry & the Law). He currently chairs the American Bar Association's Behavioral & Neuroscience Law Committee. Dr. Drogin's other professional roles have included President of the American Board of Forensic Psychology, President of the New Hampshire Psychological Association, Chair of the American Psychological Association's Committee on Legal Issues, Chair of the American Psychological Association's Committee on Professional Practice & Standards, and Commissioner of the American Bar Association's Commission on Mental & Physical Disability Law.

58. John A. Schinka & Randy Borum, *Readability of Adult Psychopathology Inventories*, 5 PSYCHOL. ASSESSMENT 384 (1993).
59. WILLIAM H. DUBAY, THE PRINCIPLES OF READABILITY (2004).
60. *See* ROGERS & DROGIN, *supra* note 1, at 21-45 ("An Ounce of Prevention").
61. Spanish *Miranda* warnings sometimes include mistranslations and awkward usages. *See* Richard Rogers, Amor A. Correa, Lisa L. Hazelwood, Daniel W. Shuman, Raquel C. Hoersting & Hayley L. Blackwood, *Spanish Translations of Miranda Warnings and Totality of the Circumstances*, 33 LAW & HUM. BEHAV. 61 (2009).
62. Miranda v. Arizona, 384 U.S. 436, 467-68 (1966).
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.