Miranda rights

Curtailing coercion in police interrogation: the failed promise of *Miranda v. Arizona*

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Miranda v. Arizona is without a doubt the most famous American criminal law opinion of all time—it is hard to imagine any American who does not recognize its famous warning:

> You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right to the presence of an attorney during any questioning. If you cannot afford an attorney, one will be appointed for you.

In fact, thanks to the worldwide reach of American television and movies, the Miranda warnings are familiar even to citizens of countries in which they have no legal effect. Considered as a vehicle to promote widespread public awareness of law, Miranda is perhaps the most successful educational project of all time. But despite that superficial success, it has failed to achieve its original aim of protecting suspects in police custody from coercive interrogation. As a result, scholars and commentators have called Miranda a "spectacular failure" (Thomas 2004: 1091), a "mistake" (Stuntz 2001: 975), a "farce" (Garcia 1998: 497), an "empty ritual" (Uviller 1996: 124), and a "hoax" (Slobogin 2003: 309). Most scholars agree that Miranda has had little impact on the outcome of police interrogation. Just as before Miranda, the vast majority of arrested persons still make incriminating statements to police under interrogation (Schulhofer 1996: 516–38; Thomas 1996: 957; Donahoe 1998; Leo 2001: 1006–9; cf. Cassell and Hayman 1996; Cassell 1996a). Best estimates put the number of arrestees who answer police questions after receiving Miranda warnings at approximately 80% (Leo 2001: 1009). More to the point, the Miranda-endorsed interrogation regime still permits the police to conduct lengthy incommunicado interrogations in which they are free to lie to the suspect, fabricate "evidence" of his guilt, and alternately browbeat him with exaggerated threats of punishment and cajole him with implied promises of leniency, as long as the Miranda warnings precede the ordeal (White 2001).

Whether or not the Miranda safeguards are effective in constraining coercive practices in police interrogation is a question with serious implications. DNA technology has now

conclusively proven that significant numbers of people are convicted for crimes they didn't commit. Although it is impossible to obtain completely reliable statistics on how many innocent people are convicted, best estimates (Thomas 2004: 546; Gilvelber 1997: 1336–46) suggest that at least 6,000 and possibly as many as 40,000 persons are erroneously convicted of serious crimes every year in the United States. Of those that have been ultimately exonerated due to DNA testing, one in four had confessed under police grilling despite being given the Miranda warnings (Drizin and Leo 2004: 905). Psychologists studying the phenomenon of false confessions have identified a number of ways in which police interrogation can sometimes lead innocent people to confess to crimes (Wrightsman and Kassin 1993: 123–39). Once a confession is obtained, conviction is almost inevitable. Even when a coerced confession bears significant indicia of unreliability, a confession is nevertheless powerfully persuasive evidence to juries (Kassin and Sukel 1997). What this means is that, despite the panoply of constitutional constraints on police questioning imposed by Miranda and its legal progeny, problems in police interrogation are still a major contributor to miscarriages of justice in which the innocent are erroneously convicted of crimes.

So, what went wrong? Much of the blame for the failure of Miranda can be laid at the feet of the Supreme Court itself through subsequent cases when it interpreted and fleshed out the mandate of Miranda—cases resting on flawed assumptions about the nature of language and human communication. To understand the failure of Miranda as a public policy initiative, one must first understand why the Supreme Court felt the need to curtail unfettered police interrogation and what they hoped to achieve by implementing the Miranda framework.

Coercion and confessions

The understanding that abusive police interrogation of suspects could result in false confessions is certainly not a new one. In the early twentieth century, the Supreme Court was faced with a series of high-profile cases in which patently abusive, even brutal, police interrogations had led to the conviction of probably entirely innocent defendants based on little more than their extorted confessions (see e.g. *Brown v. Mississippi* 1936). The Court held that the Fourteenth Amendment's due process clause prohibited the introduction into court of any supposed confession that was obtained through coercive police behavior in the course of interrogation. Only voluntary confessions were to be admissible, because confessions that were procured through violence or threats pose an unacceptable risk that they might have been forced from an innocent person. As this voluntariness requirement developed, the Court expanded its reach beyond cases involving physical abuse to include confessions derived from other offensive police practices that might overbear the free will of the suspect. Whenever the conduct of the police interrogation was deemed to be manifestly unfair and overreaching, the resulting confession was held to be inadmissible, even in cases in which there was no serious doubt that it was in fact truthful (see e.g. *Rogers v. Richmond* 1961).

One difficulty with this voluntariness test for the admissibility of confessions was that it required a contextually sensitive assessment of all of the characteristics of the suspect and of the conditions of the interrogation in order to determine whether the suspect's free will had been overborne. Doing this on a case-by-case basis hamstrung police agencies in

developing practical regulations and policies to govern interrogations and likewise put immense strain on the courts as a source of judicial oversight. Applying the voluntariness test on a consistent basis proved virtually impossible.

Miranda v. Arizona—an attempt to prevent police over-reaching and to promote reliability of confessions

The Miranda opinion represented an admission by the Court that the due process voluntariness standard was inadequate to prevent abuses in police interrogations that could lead to untrustworthy confessions. In an exhaustive sixty-page opinion, the Miranda Court recounted the long history of abusive interrogation, beginning with the days in which physical abuse and threats of abuse were the order of the day and ending with contemporary law enforcement practices that, while less brutal than earlier interrogations, were in the Court's view equally problematic. Interrogation of suspects behind closed doors, with no witnesses except the interrogators and the suspect, invited coercive tactics that were designed to pressure, trick, intimidate, coax, and cajole arrestees into incriminating themselves. Detailing the many tricks and psychological ploys recommended in police interrogation manuals, the Miranda Court was deeply skeptical that those in police custody could meaningfully resist the psychological pressure inherent in incommunicado interrogation.

The disapproval expressed in Miranda of the current state of police interrogation came close to suggesting that it should not be permitted at all. The Court, for all its jaundiced view of custodial interrogation, did not take that step, however. Instead, it sought, in its words, "to dispel the compulsion inherent in custodial surroundings" (*Miranda v. Arizona* 1966: 458) by giving the suspect information about the legal rights he could interpose to protect himself from police over-reaching. Above all, the arrestee would now need to be explicitly told that he had the right to refuse to answer police questions, and that, if he did choose to do so, he should be conscious that any answers he gave could later be used as evidence against him. Even that advice was in the Court's judgment inadequate as a counterweight to the power of the police who had total domination over the arrestee. After all, the same coercive environment that might compel a person to respond to police questions might also make it difficult for him to make a reasoned decision about whether or not to cooperate, even if he knew that he had a right to remain silent. For that reason, the Court interpolated the requirement that the arrestee be additionally told that he would be permitted to consult with an attorney, if he wished, before deciding whether to answer police questions.

The Miranda majority apparently was convinced that the ability to consult with defense counsel would change the one-sided dynamics of police interrogation from a setting in which the overwhelming power of the state could overbear the will of the arrested person to one in which there was a more level playing field between the suspect and his accusers. Suspects armed with information about their legal rights could then choose whether it was in their best interests to answer police questions. If they were unsure of what their best choice might be, the Miranda warnings informed them that they had the right to consult with an independent agent, an attorney, who was committed to protecting their interests. Understanding their rights and options, arrestees could make rational and informed decisions about how best to respond to police

interrogation. At least, that was the world optimistically anticipated by the Supreme Court in its Miranda decision. Reality was, however, to fall far short of this.

Miranda as implemented: no remedy for police coercion after all

The language of warning

The Miranda opinion is predicated on the assumption that, as long as an arrested person understood that he had the right not to respond to police interrogation and that he had the right to have a lawyer assist him in dealing with the situation, the coercion inherent in being in police custody would be dispelled. This could only be true, however, if the language of the Miranda warning were sufficiently clear and comprehensible that the suspect who is given that information actually understood the nature of his rights and the choices that he could make. There is good evidence, however, to suggest that many who are given Miranda warnings do not have that requisite level of understanding.

The language of the warning itself is in places insufficiently clear to adequately inform suspects of their rights. The ordering of the rights within the standard Miranda warning is illogical and confusing, beginning with information about the right not to answer questions, skipping ahead to the implication of deciding to answer questions, and only then going on to inform the suspect about the availability of legal counsel. Syntactically, the warning is couched in a highly embedded structure. For example, note the embedded series of clauses in the warning on the right to have a lawyer:

You have the right
(to have a lawyer present)
(during questioning)
(to advise you)
(prior to questioning)

It is well known that the more highly embedded the language, the more difficult a text is to understand (Shuy 1998b: 56–58).

Sometimes variations on the canonical Miranda warning are given, and in many cases these variations are even less understandable. In a landmark study (Rogers *et al.* 2007), a team of researchers collected 560 variations on Miranda warnings used in state and federal jurisdictions throughout the United States and analyzed them for comprehensibility, using the Flesch Reading Ease test, the Flesch-Kincaid test, and the SMOG readability scale. What they found was that some rights—for example, the right to remain silent—tended to be articulated in language classified as "fairly easy reading material," or language that would be understood adequately by 80% of the general population. Other parts of the warning, however, particularly the warnings involving waiver of rights, were phrased in such complex and convoluted ways that they were classed as "post-graduate reading level." For example, the right of a suspect to have counsel present during questioning and to have counsel appointed in the case of an indigent was presented in such a fashion that only 11% of the general public would likely understand it (Rogers *et al.* 2007: 186).

Consider one version of the warning on the right to counsel that the Rogers team assessed for comprehensibility: "You have the right to consult with, and have present,

prior to, and during interrogation, an attorney either retained or appointed" (Rogers *et al.* 2007: 184). Note first that the verbs articulating the nature of the rights in this warning are conjoined, so that the hearer must process each of these rights separately. Further, note that the conjoined verbs "consult with" and "have present" are presented without an immediate direct object, which is not a typical feature of spoken English. In spoken English, hearers expect the direct object to closely follow the verb, whereas in formal written English, the reader can be expected to parse the sentence even when its elements occur in atypical positions. Intervening in this warning between those twinned verbs and the direct object is another doubled element—this time a doubled prepositional phrase, "prior to and during." Even when the direct object "attorney" finally makes an appearance in the warning, it is immediately followed by the doubled adjectives "retained or appointed." English syntax almost always inserts adjectives before modified nouns, but in this case adjectives constructed from verbs are placed in the highly unusual slot after the modified noun "attorney." In addition, the verbal adjectives "retained or appointed" are used in specialized senses rather than in their ordinary meanings. "Retained" generally means "kept" or "held in," not in the meaning used here "hired with one's own funds." Similarly, "appointed" usually means "officially chosen" and not "provided with public funds." Only someone already conversant with the practices of obtaining lawyers would likely understand the specialized meaning of these two verbal adjectives. As a spoken utterance, this sentence violates most of the norms of spoken English and would be challenging to parse even in formal written English and it would be a difficult utterance to understand fully even in the best of circumstances. Needless to say, the context of a high-pressure, anxiety-ridden interrogation room only adds to the difficulty of making sense of such verbiage.

In addition to poorly framed, vague, and circuitous expressions, the Miranda warnings analyzed by the researchers were typically too dense in information for adequate comprehension and recall. Based on their analysis, the researchers concluded that, as used in many jurisdictions, much of the Miranda warning would not be properly understood by a considerable percentage of the general public and would be inadequately understood by an even larger percentage of arrestees, given their statistically lower educational attainment.

As this research shows, it is questionable whether the language of the Miranda warnings suffices to make clear to the average person what their constitutional rights are and what options are open to them in the course of police interrogation. When, however, the suspect is not the average person, the situation is evenly bleaker. Many of those arrested and subjected to custodial interrogation—for example, juveniles, the mentally retarded, and the mentally ill—could well be less capable than the average person of understanding their rights (Solan and Tiersma 2005: 77–82). Empirical research has borne this out. A study looking at the comprehension of the Miranda warnings by mentally retarded individuals concluded that they fail to understand the rights as articulated and that they therefore are not capable of making voluntary and intelligent decisions to exercise or to waive them (Cloud *et al.*: 2002). In fact, that same study demonstrated that even non-retarded individuals with merely slightly lower than average IQs—in the 70s and 80s—have dramatically lower rates of comprehension than do persons of average intelligence (Cloud *et al.* 2002: 571–72). Similar research shows that juveniles, too, have more limited comprehension of the rights than do adults, with markedly lower degrees of understanding by those under the age of fifteen (Grisso 1980). Not surprisingly, perhaps, analysis of cases in which innocent persons were known to have confessed under police interrogation includes

disproportionate numbers of those especially vulnerable groups—the young and the cognitively impaired (Drizin and Leo 2004: 963–69, 971–73).

The language of waiver

Assuming that a suspect actually does understand the rights given in the Miranda warning, there is still the question of under what circumstances his responses to subsequent interrogation should be considered legally admissible. The Miranda Court recognized that an arrestee might legitimately want to cooperate with the police and voluntarily respond to questioning, but it maintained a healthy skepticism about the likelihood of any purported waiver of rights, putting what it called "a heavy burden" on the prosecution to demonstrate the validity of any such waiver (*Miranda v. Arizona*, 1966: 475) and cautioning 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" (*Miranda v. Arizona*, 1966: 475).

Soon enough, however, the Supreme Court retreated from this position. Despite the Miranda Court's presumption against the voluntariness of waiver of rights by arrestees in police custody due to the oppressive atmosphere of incommunicado interrogation, in subsequent cases the Supreme Court has been far more willing to find that suspects have waived their Miranda rights. Even when the police reports of the words by an arrestee purporting to show waiver instead display frank incomprehension of the rights outlined in Miranda, courts have nevertheless counted them as valid waivers. For example, in *North Carolina v. Butler* (1979), the arrestee being questioned while in police custody agreed to answer questions orally but would not put anything in writing or sign the waiver form. The obvious implication of that statement is that the suspect must have erroneously believed that written statements and signed waiver forms would be harmful to him in ways that merely answering oral questions would not be. In short, the only reasonable construction of the suspect's behavior is that he failed to understand that oral statements were every bit as binding on him as written statements and would be fully admissible in court. Yet the Supreme Court allowed the admission of his statements, finding that he had made a knowing and intelligent waiver of Miranda rights on these facts. Wisely, the Court did not even try to attempt to articulate a credible reason why someone would agree to incriminate himself by answering police questions orally but not in writing, despite knowing all along that the oral statements were binding and admissible. Perhaps any such attempt would have strained credulity to the breaking point and beyond (Kamisar 2007: 180–81). Instead of requiring affirmative waiver by the defendant in that case, the Supreme Court noted that his silence in the face of the warnings, coupled with his incriminating responses to police questioning, qualified as "a course of conduct indicating waiver" (*North Carolina v. Butler*, 1979: 373).

After *Butler*, it was no longer necessary for the prosecution to prove that a suspect had articulated either an understanding of his rights or of his desire to waive them and answer questions. Assuming that Miranda rights were read and that the suspect eventually responded to police questions, what the Miranda Court had once called the "heavy burden" on the prosecution to show a knowing, voluntary, and intelligent waiver of rights was satisfied. Having signaled to lower courts that the "heavy burden" on the State to prove waiver was in fact almost no burden at all, the Supreme Court in effect sanctioned lower court inquiry into waiver that was perfunctory at best. Once judges find that the defendant has waived his Miranda rights, moreover, the resulting confession is

nearly always then admitted into evidence with no further meaningful examination as to whether it was the product of police over-reaching or coercion (White 2001: 1219–20; Klein 2001: 1070).

Because the making of incriminating statements has come to be treated as itself proof of waiver of Miranda rights, the law fails to protect the most vulnerable arrestees from police coercion and manipulation. A representative example of this occurred in *Miller v. State* (2002). In that case, a defendant, whom the trial judge found to be mentally retarded, was taken into custody and questioned by the police about a homicide. During that interrogation, the police lied to him about his having been seen just outside the victim's office before his death. The police also fabricated a computer printout and fingerprint card purporting to be those of the defendant, and told him falsely that his fingerprints had been found at the death scene. They went on to show him a copy of a report that falsely stated that the victim had died of natural causes, and to suggest to him that the death could have been accidental. Despite the blatant use of lies by the police to a suspect who was arguably particularly vulnerable to such tactics because of his low cognitive capacity, the Indiana Supreme Court had no trouble concluding that his confession was admissible, finding that "beyond a reasonable doubt the defendant had voluntarily waived his rights, and that his incriminatory statements ... were voluntarily given" (*Miller v. State*, 2000: 768).

In another case involving an especially vulnerable arrestee, a Vietnamese-speaking suspect with limited English competence was read an error-filled Vietnamese language version of the Miranda warnings. When the police lied to him, telling him that he had been seen at the crime scene, he made incriminating statements. Despite the defective warnings and the fact that he never affirmatively waived his rights in any way, he, too, was held to have validly waived his rights simply by responding to police questioning (*Thai v. Mapes*, 2005). In yet another such case, the reviewing court found a knowing and intelligent valid waiver of Miranda rights, by arguing that the suspect's ability to write his name and answer questions was sufficient proof that he had adequate intelligence to understand the Miranda warnings, and by citing his record of prior convictions as proof that he must have had "at least a rudimentary understanding of his rights" (*U.S. v. Cuevas-Robledos*, 2006). This opinion directly contradicts the Miranda Court's express insistence that evidence of past encounters with the police were inadequate to show appropriate knowledge of one's rights, since what if anything a suspect learned about the constitutional rights in any earlier experience could "never be more than speculation" (*Miranda v. Arizona*, 1966: 471–72).

Not only may the police lie to suspects about the evidence in the case, they may also actively mislead the suspect about the nature of his rights (White 2006). Take, for example, the case of *Soffar v. Cockrell* (2002). In that case, the arrestee asked the interrogating detective how he could get a lawyer. The detective responded by asking Soffar if he could afford to hire a lawyer, knowing that he could not and also knowing full well that the Miranda rules mandate telling arrestees that, if they cannot afford to retain counsel, a lawyer will be appointed for them. The detective's implied assertion that only those with money had the right to counsel was unsuccessful in persuading Soffar to talk, however, because Soffar then asked the detective how he could get a court appointed lawyer and how long it would take to procure one. The detective knew that the law required that suspects must be charged and provided with counsel within 72 hours of arrest, but that is not what he told Soffar. Instead, he lied to him and told him that he didn't know how long it might take, but that he "guessed it could take as little as one

day or as long as a month" (*Soffar v. Cockrell*, 2002: 591). Given this discouraging—and untrue—news about the unavailability of legal counsel, Soffar then replied, "So you're telling me I'm on my own." The detective's response, according to his own testimony at two hearings on the issue, was either "Yes, you are," or silence. Either way, the detective succeeded in discouraging Soffar from exercising his right to have a lawyer's assistance by intentionally giving him misleading and false information about his rights. Nevertheless, the 5th Circuit Court of Appeal, in an *en banc* opinion, held that Soffar's waiver of his rights was a knowing, voluntary, and intelligent one, and Soffar's death sentence was affirmed.

Even explicit statements by an arrestee that he is refusing to waive his rights are often of no avail. In one such case, the suspect refused to sign a Miranda waiver form and, in addition, twice explicitly told his interrogators that he was not waiving any rights. When, despite his insistence, the police continued to question him and he made incriminatory responses to police questioning, the reviewing court ignored his explicit assertions that he did not intend to waive his rights and held that the fact that he eventually answered police allegations was enough to prove a valid waiver of his rights (*U.S. v. Acosta*, 2006).

As courts began to treat any response by suspects as evidence of waiver of his rights, police naturally sought to provoke suspect responses. Professor Richard Leo, who has observed hundreds of police interrogations in the course of his research, has detailed various tactics and stratagems adopted by the police in order to get suspects to respond to questioning (Leo and White 1999: 433–35). He notes, for example, that they intentionally undercut Miranda in many ways. Officers minimize the suspect's attention to the significance of the warnings by reciting them in perfunctory, unanimated tones, speaking quickly without making eye contact, and referring to the warnings, often jokingly, as a mere formality to be quickly dispensed with in order to get to more important matters (Leo and White 1999: 433–35). In one such interrogation, the detective began his recitation of the Miranda warnings by saying, "Okay ... let me go ahead and do this here real quick, like I said, so don't let this ruffle your feathers or anything like that, it's just a formality we have to go through, okay" (Leo and White 1999: 434). In another case, the officer joked, "You've probably seen it on TV a thousand times. I know I've said it about ten thousand times." In a similar vein, a detective in another case preceded the warnings with the following:

> In order for me to talk to you specifically about the injury with [victim], I need to advise you of your rights. It's a formality. I'm sure you've watched television with the cop shows, right, and you hear them say their rights and so you can probably recite this better than I can but it's something I need to do and we can get this out of the way before we talk about what's happened.
>
> (Leo and White 1999: 435)

Discourse analyses of the required British cautioning of interrogated suspects show that, like their American counterparts giving Miranda warnings, British police administer cautions in a ritualistic, "hyperfluent" manner, minimizing both their significance and their comprehensibility (Rock 2007: 156–57).

Once the Miranda warning is given, the police often emphasize to the suspect how much they want to hear his side of the story, encouraging him to respond by a variety of framings, such as exaggerating the cruelty or magnitude of the crime as they now understand it without the benefit of the defendant's version, or suggesting that

cooperating with the police will result in leniency or even dropping any charges (Leo and White 1999: 437–48). In one interrogation of a juvenile suspect recorded by Leo, the officer framed the Miranda warnings as giving the child the opportunity to confirm that he was not guilty of the crime, saying "Uh, we're gonna give you the opportunity to clear this whole matter up, and that's gonna entail you answering some question to us. Okay? You feel comfortable with that?" (Leo and White 1999: 445). Having framed the interrogation as a positive benefit to the suspect, the perfunctory recitation of the Miranda rights is hardly calculated to effectively warn the suspect about the very real potential of interrogation to provide incriminating rather than exculpatory evidence.

As long as the suspect eventually responds to interrogation, most courts will find an implied waiver of the Miranda rights despite deficiencies in the manner of the warnings and despite lack of any affirmative statement by the accused explicitly waiving his rights. Far from being what the Miranda Court called a "heavy burden" on the prosecution, waiver has become the default presumption whenever the suspect ultimately succumbs to police questioning. Whatever responses a suspect makes to police interrogation are held to constitute conclusive proof that he understood and chose to waive his rights, unless he explicitly takes specific steps to invoke his rights.

The language of invocation

One weakness in the specificity of the Miranda warnings is that they do not provide any guidance to suspects on how to claim their rights if they choose that option rather than waiving them. Given that, it would seem appropriate that courts would liberally construe attempts by suspects to invoke their rights as effective. Instead, the Supreme Court has held that, unless attempted invocations of Miranda rights are made using clear, unequivocal, and unambiguous language, they are legally void (*Davis v. United States*, 1994). Without such a clear and unambiguous invocation, the police can continue their interrogation without restrictions and need not even attempt to clarify whether or not the suspect is trying to assert his rights.

Examination of post-*Davis* case law shows the ways in which courts have bent over backwards construing arrestees' attempts to exercise their Miranda rights as fatally unclear or equivocal, thus denying them the protection of Miranda. Suspects must navigate a veritable linguistic minefield of disqualifying language in trying to exercise their Miranda rights. Some arrestees made the mistake of asking for their right to a lawyer using an interrogative syntactic form instead of an imperative:

- "Could I call my lawyer?" (*Dormire v. Wilkinson*, 2001).
- "May I call a lawyer? Can I call a lawyer?" (*State v. Payne*, 2001).
- "Do you mind if I have my lawyer with me?" (*U.S. v. Whitefeather*, 2006).
- "Can I speak to an attorney before I answer the question to find out what he would have to tell me?" (*Taylor v. Carey*, 2007).

These requests were all rejected as invocations because they were interpreted as merely theoretical questions about the availability of counsel rather than as actual requests for counsel. Reviewing courts here seemed to be under the mistaken impression that interrogative forms can never be meant as imperatives, despite the frequency in ordinary human interaction in which speakers do just that (Solan and Tiersma 2005: 54–62).

Other suspects were unsuccessful in their attempts to assert their rights because they used softened or indirect imperatives or they phrased their assertion of their rights with polite hedges:

- "I think I would like to talk to a lawyer." (*Clark v. Murphy*, 2003).
- "I think I will talk to a lawyer." (*State v. Farrah*, 2006).
- "It seems like what I need is a lawyer ... I do want a lawyer." (*Oliver v. Runnels*, 2006).
- "Actually, you know what, I'm gonna call my lawyer. I don't feel comfortable." (*People v. McMahon*, 2005).

Preceding a demand for a lawyer with an initial subjunctive clause doomed the invocation of a suspect who said, "If I'm going to jail on anything, I want to have my attorney present before I start speaking to you about whatever it is you guys are talking about" (*Kibler v. Kirkland*, 2006). Despite that fact that the suspect in this case was indeed going to jail, the mere existence of the initial qualifying clause disqualified this invocation.

Sometimes arrestees need the cooperation of the police in order to get an attorney to be present during questioning. Asking for police assistance in obtaining counsel, however, could render their attempted invocation invalid. For example, the suspect who responded to the Miranda warnings by asking that the police retrieve his lawyer's business card was held not to have invoked his right to counsel (*US v. Tran*, 2006). Similarly unsuccessful was the hospitalized arrestee who asked police, "Could I get a phone in here so I can talk to a lawyer?" (*Jackson v. Commonwealth*, 2006).

Attempts to invoke the constitutional right to remain silent are likewise disqualified if they are deemed to be insufficiently direct and precise. The following responses to the Miranda warnings were all held too ambiguous or equivocal to count as successful invocations of the right to silence:

- "I don't want to talk about it." (*Owen v. State*, 2003).
- "I don't have anything to say." (*State v. Hickles*, 1996).
- "I don't wanna talk no more." (*U.S. v. Stephenson*, 2005).
- "I just don't think I should say anything." (*Burket v. Angelone*, 2000).
- Officer: "Do you want to make a statement to us?" Arrestee: "Nope." (*James v. Marshall*, 2003).

Simply remaining silent during interrogation has also been held to be insufficient as an attempt to claim the Miranda right to remain silent. Apparently, a suspect has to speak up in order to exercise his constitutional right not to speak (*State v. Ross*, 1996).

Even when the suspect tries to claim both the right to remain silent and the right to counsel, lack of sufficient precision often dooms the attempted invocation of Miranda rights:

- "I don't even want to talk unless I have me a lawyer and go through this shit." (*Harper v. State*, 2001).
- "I don't feel like I can talk with you without an attorney sitting right here to give me some legal advice." (*Baker v. State*, 2005).
- "I'll be honest with you. I'm scared to say anything without talking to a lawyer." (*Midkiff v. Commonwealth*, 1995).

- Suspect responded to police questioning with, "Fuck you, talk to my lawyer." (*People v. Varnum*, 2004).
- Arrestee responded to police officer saying, "Having these rights in mind, do you wish to talk to us?" with "Can I put 'no' 'til I get my lawyer?" (*State v. Jackson*, 2001).

These cases are among the most compelling for finding an invocation, in that they exemplify the very concern that led the Supreme Court in Miranda to interpose a right to counsel in the police interrogation context. As the Court saw it, a legally naïve arrestee might well not be in a position to determine how to respond to police questioning, or indeed whether to respond at all, without the assistance of legal counsel to advise him about how best to protect his interests. Those suspects whose attempts at invocation expressly articulate their need for legal advice before answering police questions thus ought to be cases deserving the most generous construal of the adequacy of rights invocations.

A telling indication of the bankruptcy of the Miranda framework as currently implemented is the finding by criminal justice scholars that, once a purported Miranda waiver has been given and questioning begins, almost no suspects ever attempt to end the interrogation by invoking their rights (Stuntz 2001: 998). Yet it must be more the rule than the exception that an interrogation increases both in intensity and focus over time, with more pointed questions, more specific accusations, and a greater adversarial tone as it unfolds. One would expect, then, that suspects who originally waived their Miranda rights under the mistaken impression that they could explain away the case against them would recognize as the heat was turned up that continued participation in the interrogation was no longer in their best interests. The fact that suspects seldom if ever attempt to terminate oppressive interrogations regardless of how onerous they become is strong evidence that they do not think that they have the power to do so.

Questioning "outside" Miranda

Almost immediately after announcing the Miranda framework for police interrogation, the Supreme Court began backpedaling from its underlying logic in a series of cases that permitted the admission of evidence obtained through police interrogation that violated the constraints of Miranda (see e.g. *New York v. Harris* 1971; *Michigan v. Tucker* 1974; *Oregon v. Elstad*, 1985). In permitting expansive use by prosecutors of evidence obtained in violation of Miranda, the Court—wittingly or not—provided a positive incentive for police to ignore the Miranda rule. The primary mechanism for enforcing constitutional constraints on police investigatory practices is, after all, the knowledge by police and prosecutors that illegally procured evidence cannot be admitted in court. Knowledge that intentional violations of the constitution in the course of police investigation will result in no usable evidence thus acts as a positive deterrent to police over-reaching.

It was not long before the police came to appreciate that there were substantial benefits in violating Miranda's strictures. In a process that came to be known as "questioning outside *Miranda*," some agencies actually instructed their officers on the advantages of intentionally violating Miranda, and instructed officers on how to take advantage of circumstances that would allow the evidence into court notwithstanding a purposeful violation of Miranda. For example, some police agencies recommended to officers that they consider violating the constitutional Miranda requirements in order to get a confession, and then, after getting incriminating statements, quickly Mirandizing

the suspect and having him repeat the just-procured confession. Even if the suspect refused to repeat the confession, officers were reminded that the illegally obtained confession could still be validly used as impeachment if the defendant testified in his own defense at trial (Leo and White 1999; Weisselberg 2001). In this way, Supreme Court cases permitting the use at trial of evidence acquired through violation of the Miranda framework actually appear in some instances to promote intentional police violations of the law (Leo and White 1999: 448–50).

The Supreme Court reconsiders the Miranda framework

Although the Supreme Court has, in the years since the Miranda opinion, significantly weakened its reach through its subsequent rulings, it has not abandoned it altogether. In 2000, the Court was asked to reconsider the constitutional status of Miranda and overrule it, and to the surprise of many court-watchers, it instead re-affirmed the constitutional validity of the case (*Dickerson v. United States,* 2000). What remains of the Miranda framework, however, is in a real sense an empty shell. Its doctrinal framework has remained in place; however, as a practical matter, Miranda rights are dangerously easy to waive and nearly impossible to invoke successfully. Worse yet, courts have been disinclined to look carefully at whether a confession meets the minimal standards of voluntariness and reliability as long as an initial Miranda waiver can be inferred (White 2001: 1219–20). Far from being a bulwark against coercion in police interrogation, the Miranda requirements, once satisfied, have instead shielded interrogation from the kind of searching judicial inquiry that could expose instances of police over-reaching and undue pressure. To quote Yale Kamisar, widely recognized as the leading legal scholar on Miranda, the Supreme Court is "unwilling to overrule *Miranda* ... and also unwilling to take *Miranda* seriously. That is the sad reality" (Kamisar 2007: 230).

The role for linguists in preventing miscarriages of justice

While it is apparent that the Supreme Court has no plans to scrap the Miranda framework in the near future, whatever its deficiencies, within that framework many issues occurring in individual cases present factual questions involving language usage and the appropriate interpretation to be accorded to that language. From a practical perspective, linguists could be extremely helpful in analyzing the discursive structure and linguistic content of interrogations. As Roger Shuy, one of the most experienced American forensic linguists, put it,

> (L)inguists know what to listen for in a conversation. They listen for topic initiations, topic recycling, response strategies, interruption patterns, intonation markers, pause lengths, speech event structure, speech acts, inferencing, ambiguity resolution, transcript accuracy, and many other things. Scientific training enables linguists to categorize structures that are alike and to compare or contrast structures that are not.
>
> (Shuy 1993a: xvii–xviii)

Linguistic evidence could be brought to bear on the question of whether a particular defendant likely had an adequate understanding of his rights from the warnings given to

him. Such testimony would be especially pertinent when special reasons exist to be skeptical of whether the defendant had full understanding of the Miranda warnings—for example, when the defendant had diminished cognitive capacity, or was not a proficient English speaker, or was deaf, or was a juvenile, and so forth (see Solan and Tiersma 2005: 77–87). Whether a suspect's language showed that he knowingly and intelligently waived his rights; whether a waiver appeared to be coerced; whether a confession is credible evidence of guilt or instead only acquiescence to overbearing authority; whether the police deceptively promised leniency in return for an admission of involvement; whether a purported confession was of questionable reliability, because all of the pertinent information about the crime was fed to the suspect by the police—all these are issues lending themselves to discursive analysis by linguists, and in a number of instances, linguists have done useful analyses on just such cases (see Shuy 1998b: 17–33, 33–40, 122–39, 174–85). Many different sub-fields of linguistic expertise could be brought to bear on these questions, ranging from interactional discourse analysis (Watson 1990) to Gricean pragmatic analysis (Lakoff 1996) to phonetic analysis of intonation patterns (Shuy 1998b: 70–71) to analysis of topic and response sequences (Shuy 1998b: 33–40).

One factor frequently limiting the ability of linguists to assist in assessing the reliability of confessions in these cases can be the lack of an objective record of the course of the interrogation. The text of the written and signed confession admitted into evidence is the end product of a lengthy process of questions and answers in which multiple, competing, and conflicting narratives of the crime are created. During the interrogation process, details of the facts and attributions of motive and criminal responsibility sometimes originate with the interrogators and other times with the suspect, but by the time the confession is reduced to writing, it can be impossible to determine exactly who was responsible for word choice and narrative sequencing (Heydon 2005). Where there is neither a tape recording nor a transcript of the questioning, the linguist may be forced to reconstruct the interrogation from the memories and notes of the police and of the suspect. This admittedly partial and inaccurate record may stymie the linguist in drawing any valid conclusions (see Shuy 1998b: 58–68, 140–52, 154–73). In addition, written records lack features such as the intonation and phonetic reduction in articulation of the original oral statements, features which provide important clues to the proper interpretation of the meaning of the utterances (Shuy 1998b: 68–72.). Pauses, hesitancy, emotional emphasis, and the like are all key indexes of meaning that are eliminated in the reduction of a purported confession to a written narrative.

If the primary policy concern in regulating police interrogation is in preventing abusive and oppressive interrogations that could result in unreliable confessions, the best remedy to both prevent and detect such practices would be to insist that all custodial police questioning be videotaped. Across the political spectrum, nearly all legal commentators on police practices—both those opposed to Miranda and those who approve of it—agree that videotaping these sessions is highly desirable (Cassell 2001: 486–92; Kamisar 2007: 188–91; Slobogin 2003). In fact, when the Police and Criminal Evidence Act of 1986 made taping of all significant police interrogations mandatory in Great Britain, police administrators themselves found that audio taping their interrogations has been beneficial in promoting effective police investigation (Rock 2007).

Currently American police understand that, when courts come to determine what happened during an interrogation, it is their word against that of the suspect, and in such "swearing contests," the suspect will always be disbelieved (Kamisar 2007: 191). Knowing that the sessions were being taped would likely discourage the police from

adopting abusive and unfair tactics in their questioning in the first place. In any event, taping would provide an objective record of what transpired that could later be closely examined to determine exactly what was said, when, and by whom. For example, since the Supreme Court has held that the precise language used by a suspect in attempting to invoke his rights is dispositive in whether he has efficaciously done so, there have been frequent contests over exactly what language was used by the invoking suspect (Shuy 1998b: 58–68). A taped record would eliminate such disputes. The experience of forensic linguists such as Roger Shuy in reconstructing and analyzing police interrogations clearly shows that if taping were required more generally in the United States, linguists could be of inestimable use in preventing miscarriages of justice resulting from unreliable confessions.

Further reading

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Rock, Frances (2007) *Communicating Rights: The Language of Arrest and Detention*, Basingstoke: Palgrave Macmillan [a good comparative discourse analysis of the police caution in the UK].

Shuy, Roger W. (1998) *The Language of Confession, Interrogation, and Deception*, Thousand Oaks, CA: Sage [Roger's greatest "hits" regarding police interrogation].

Solan, Lawrence M. and Tiersma, Peter M. (2005) *Speaking of Crime: The Language of Criminal Justice*, Chicago: University of Chicago Press [they include a significant chapter on Miranda].

Weisselberg, Charles D. (2008) "Mourning Miranda," *California Law Review*, 96: 1519–1600 [a more legally focused examination of why Miranda has failed].

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