

THE ROUTLEDGE  
INTERNATIONAL  
HANDBOOK OF LEGAL AND  
INVESTIGATIVE PSYCHOLOGY

*Edited by Ray Bull and Iris Blandón-Gitlin*

 Routledge  
Taylor & Francis Group  
LONDON AND NEW YORK

# 1

## THE RIGHT TO REMAIN SILENT: REALITIES AND ILLUSIONS

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Most Western democracies recognize the right to remain silent and embody that right through warning-and-waiver requirements adapted from the US Supreme Court opinion in *Miranda v. Arizona* (1966) (Weisselberg, 2017). In that opinion, the Court ruled that police must inform suspects who are in custody of their constitutional rights to remain silent and have a lawyer present. Aimed at protecting citizens from the “inherently compelling pressures” of an American-style police interrogation, the Court offered a remedy: Any statement taken from a suspect in custody without a knowing, intelligent, and voluntary waiver of these rights would be considered unlawful and hence inadmissible at trial. One year later, *In re Gault* (1967) extended these rights and procedures to youth appearing in juvenile court.

For three reasons, the Supreme Court’s opinion in *Miranda* has stood as a shining symbol in criminal justice. First, by cloaking *Miranda* in the Fifth Amendment privilege against self-incrimination, the Court declared that the constitutional rights of the accused pertain not only in the courtroom but in the police station as well. Second, by expressing concern about the trickery and deceit that underlies modern-day police tactics, the Court acknowledged the potentially coercive nature of a psychological approach to interrogation (“To be sure, this is not physical intimidation, but it is equally destructive of human dignity”). Third, the Court articulated a chain of mechanisms to ensure compliance and enforcement—namely, (1) *custody* triggers the requirement that police recite a *warning* that informs the suspect facing interrogation of his or her rights; (2) police must then obtain from the suspect a knowing, intelligent, and voluntary *waiver* before commencing an interrogation; (3) if a suspect invokes these rights, interrogation must stop; and (4) any statements otherwise taken shall be excluded from evidence.

At the time, the Court’s ruling in *Miranda* set off a firestorm of criticism from law enforcement officials, prosecutors, and “law-and-order” politicians who argued that criminal offenders would routinely invoke their rights, refuse to answer questions, seek counsel, and escape prosecution. Several years ago, Cassell (1996)—an outspoken critic who argued in *Dickerson v. United States* (2000) that *Miranda* should be overturned—cited data from pre-post and international comparisons to claim that *Miranda* had lowered clearance rates because of confessions that are “lost” whenever offenders invoke their rights or suppressed because of warning-and-waiver violations. However, others were quick to note that Cassell’s sampling and analysis of these naturalistic data were seriously flawed (e.g., see Donohue, 1998; Schulhofer, 1996) and that the costs to law enforcement, if they do exist, are outweighed by social benefits such as curbing

police misconduct and increasing the public's awareness of its constitutional rights (e.g., Leo, 1996a; Thomas, 1996).

It is now clear that the dreaded effects feared by critics never materialized. Opposition among law enforcement groups and prosecutors quickly subsided; police continued to solve cases by confession; judges continued to allow these confessions into court. In his opinion that affirmed *Miranda* in *Dickerson v. United States* (2000), Chief Justice Rehnquist noted that the warnings themselves have become part of our national culture. Indeed, one might argue that this experiment has proved so successful, at least on the surface, that 108 countries—in the Americas and the Caribbean, East Asia and the Pacific, Europe and Central Asia, the Middle East and North Africa, South Asia, and Sub-Saharan Africa—have gone on to implement similar protections that require police to warn suspects of the rights to silence and to counsel (Global Legal Research Center, 2016).

Although *Miranda* is here to stay, research has cast serious doubt as to the protection, if any, that it affords (Smalarz, Scherr, & Kassin, 2016). Among legal scholars, White (2001) complained of “*Miranda*’s waning protection” in light of follow-up court rulings that proved narrowing and erosive. Weisselberg (2008), “on record as an estranged former supporter” (2017, p. 1236), wrote of “Mourning *Miranda*”—which he declared dead, noting that it now functions as a safe harbor for police. Kamisar (2012) lamented the politicization of *Miranda* and concluded that it had been “downsized and weakened in various ways” (p. 1021).

Weisselberg (2017) notes that *Miranda* has fared poorly on two levels: “on the books” and “on the ground” (pp. 1248–1249). On the books, the US Supreme Court has steadily retreated from its original mission to protect citizens facing police interrogation from infringements of their constitutional rights by weakening the safeguards put in place. In a series of decisions, for example, the courts have ruled that police may skirt *Miranda* by creating situations that are not technically “custodial;” that police are not required to obtain a waiver before commencing an interrogation, advise suspects that a lawyer is seeking them out, or advise suspects of their rights at all if public safety is at risk. In addition, the courts have lowered the bar as to what constitutes an adequate warning—and what constitutes a waiver. And even if police do violate a suspect’s narrowed rights, thereby excluding the confession from evidence, the state may still use the statement taken to impeach the defendant’s credibility at trial or obtain admissible physical evidence (see Friedman, 2010; Kamisar, 2012; Weisselberg, 2008).

### **Empirical assessment: How protective is *Miranda*?**

Despite all the attention that *Miranda* warning and waiver requirements have received, one empirical fact looms above all others: Very few suspects invoke their rights. This tendency was apparent at the outset (Wald et al., 1967). Later direct and indirect observational studies more specifically indicated that roughly four out of five suspects waive their rights and submit to questioning (Cassell & Hayman, 1995; Leo, 1996b). In more recent observational studies in the US, the waiver rates have exceeded 90% (Feld, 2013; Domanico, Cicchini, & White, 2012; Kassin et al., 2018).

In contrast to analyses of how the law pertaining to *Miranda* has changed since 1966, our objective is to examine this phenomenon and 50-plus years of psychological research that has addressed the basic question of how protective *Miranda* is. First, we examine studies that assess the language of *Miranda* warnings and the extent to which people can comprehend the warnings and know how to implement them. Second, we address questions concerning usage and the extent to which the decision to invoke or waive one’s rights is made voluntarily or subject to the same pressures that bear on suspects throughout the process of interrogation. Third, we address

what we call the “innocence problem,” whereby suspects who are innocent, believing that the truth will prevail, are particularly unlikely to invoke their rights. Fourth, we examine the psychological state of “custody”—how it is defined by the courts and how it is perceived both by suspects and observers. Fifth, we examine the potential cost to suspects who invoke their rights to silence and/or an attorney in terms of the adverse inferences others may draw. Our review of this research will lead us to suggest reforms to *Miranda* and reinforce a proposal, frequently made, that all interviews and interrogations be video recorded in their entirety. Although we frame arguments in terms of *Miranda*, we focus on pervasive issues that may undermine protections across legal systems (e.g., impaired comprehension; Cleary & Vidal, 2016; Vanderhallen et al., 2016; Whittemore & Ogloff, 1994) while simultaneously highlighting important differences (e.g., in the trigger point of administering interrogation rights and the use of manipulative tactics abroad versus in the US; see Slobogin, 2001).

### ***Limits of comprehension***

Early on, psychologists were concerned that some people—perhaps because they are young, cognitively limited, or facing the stress and uncertainty of interrogation—would not comprehend the *Miranda* warnings they were given. To evaluate this proposition, Grisso (1981, 1998) devised standardized objective instruments to assess *Miranda* comprehension (for reviews, see Goldstein & Goldstein, 2010; Goldstein, Zelle, & Grisso, 2012).

It is clear that the language of these warnings itself was concerning. Although the Supreme Court clearly defined the rights of which suspects must be informed, it prescribed no specific wordage, enabling police departments to devise their own. Similar discretion is found in jurisdictions across European countries (e.g., Belgium, Italy, Poland, and the Netherlands; Panzavolta et al., 2015). In a study that examined 560 *Miranda* warning forms used by police across the US, a host of variations in content and format were thus identified; metric analysis of the language revealed reading-level requirements ranging from third-grade level to the complexity of postgraduate textbooks (Rogers et al., 2007; also see Rogers et al., 2008; Kahn, Zapf, & Cooper, 2006). Such discrepancies also extend to methods of administering interrogation rights. Presentation differences are especially apparent in the ways that juveniles are informed across Europe, where methods range from a letter of rights (Belgium, Poland) to simple oral administrations (Netherlands) to both written and oral offerings (UK; Panzavolta et al., 2015). Not surprisingly, using oral administrations can introduce a host of problems. In one study, researchers noted that detectives spoke significantly faster while administering *Miranda* than before or afterward, thereby degrading comprehension even further (Domanico, Cicchini, & White, 2012).

Studies have shown that under benign testing conditions, most adults exhibit reasonably good understanding—but far from perfect. Even in favorable conditions, educated adults in the US (e.g., Grisso, 1998) and in Europe (e.g., Clare, Gudjonsson, & Harari, 1998) struggle to fully comprehend their rights; when actual detainees in the US and UK are sampled, comprehension levels fall dramatically (e.g., Cooke & Philip, 1998; Fenner, Gudjonsson, & Clare, 2002). Thus, despite exposure to TV and other popular media depictions that increase people’s confidence, people still harbor misconceptions about the meaning and function of the rights to silence and counsel (Rogers et al., 2010, 2013). Moreover, the high-pressure circumstances under which real suspects are informed are less than ideal (Rogers et al., 2011; Scherr & Madon, 2012). Thus, comprehension deficiencies can stem from a range of factors, both personal and situational (see Smalarz, Scherr, & Kassin, 2016).

Adolescence is the most well-documented personal risk factor. Over the years, researchers have found that juveniles—particularly those younger than 16—have difficulty understanding

their rights and how to implement them (e.g., Goldstein et al., 2003; Grisso, 1981; Redlich, Silverman, & Steiner, 2003; Woolard et al., 2008; Viljoen, Zapf, & Roesch, 2007). In one study, for example, only a third of younger juveniles were able to paraphrase their rights (Abramovitch, Peterson-Badali, & Rohan, 1995). While these limitations may be moderated by IQ and academic achievement (Zelle, Romaine, & Goldstein, 2015), the result is robust both in the US and abroad (Panzavolta et al., 2015; Vanderhallen et al., 2016)—and prior experience with the legal system does not ameliorate the problem (Zelle, Romaine, & Goldstein, 2015).

Although researchers administer objective tests to determine comprehension, real-life observations of juvenile interrogations suggest that police often intuit a suspect's understanding through simple affirmations, nonverbal gestures, and clarification-seeking questions, or lack thereof (e.g., Feld, 2006, 2013). This may be particularly true in some European jurisdictions where standardized assessments do not exist (e.g., Italy; Vanderhallen et al., 2016). Using these kinds of subjective metrics all but guarantees that police and prosecutors will overestimate juvenile comprehension. In one observational study, 71% of youthful suspects displayed at least one behavioral affirmation of understanding and asked no questions—suggesting comprehension at a rate far higher than is indicated by testing (Clearly & Vidal, 2016).

Even judges may make these kinds of intuitive judgments. Consider the case of Brendan Dassey, convicted “co-star” of the 2015 Netflix documentary, *Making a Murderer*. Dassey was 16 and had a borderline IQ when he was induced to confess to involvement in a murder. He described himself in the film as stupid. Confiding in his mother, he said, “They got into my head.” Yet in a 4–3 ruling, the Seventh Circuit appeals court, declined to overturn Dassey's controversial conviction, arguing that he waived his *Miranda* rights, which constituted prima facie proof that his confession was voluntary. The majority observed that Dassey listened to *Miranda* and “nodded in agreement.” The research suggests that while Dassey may have nodded, this gesture may well have betrayed the acquiescence to authority of a low IQ teen—not comprehension of his constitutional rights.

Finally, it is important to note that many juveniles who seem to have an adequate factual understanding of *Miranda* warnings do not grasp the relevance or applicability of these warnings to the situation they are in (e.g., Viljoen, Zapf, & Roesch, 2007). For example, one may factually grasp that “I can have an attorney before and during questioning” yet not know what an attorney is or what role that individual could play. Others may understand the attorney's role but fail to realize that it would apply to their situation. In short, “factual understanding” sets a low bar for satisfying the *Miranda* court's demand that suspects waive their rights knowingly and intelligently.

Comprehension difficulties extend to other at-risk individuals too—namely, people with intellectual impairments (Clare & Gudjonsson, 1995; Everington & Fulero, 1999; Fulero & Everington, 1995; O'Connell, Garmoe, & Goldstein, 2005) and serious mental health issues (Cooper & Zapf, 2008). The combination of these risk factors, even among adults, can become a serious handicap. In a sample of adults diagnosed with both an intellectual impairment and psychological disorder, participants comprehended only 25% of the warning (Rogers et al., 2007).

Situational influences can also undermine a suspect's comprehension of *Miranda*. It is not surprising that being put in custody and standing accused of a crime—which is the condition that precipitates the need for a warning in the US—can be highly stressful. Indeed, both naturalistic observations (e.g., Gudjonsson, 2003) and laboratory experiments (Guyl et al., 2013) have demonstrated the stress that is aroused in individuals accused of wrongdoing. This effect has been observed in physiological recordings (Normile & Scherr, 2018; Madon et al., 2017) and in self-reports (Scherr & Madon, 2012; Scherr & Franks, 2015). Consistent with basic research indicating that high levels of stress can impair learning and memory, laboratory experiments

have shown that an accusation of wrongdoing can impair *Miranda* comprehension (Rogers et al., 2011). In one study, for example, college students were randomly assigned to be accused or not accused of cheating. Those who were accused reported more stress and scored substantially lower on a test of comprehension—comparable to levels displayed by patients diagnosed as psychotic (Scherr & Madon, 2012).

### *Voluntariness of usage*

Comprehension is one precondition necessary for suspects to invoke or waive their constitutional rights knowingly and intelligently. In addition, however, the Supreme Court required that suspects make this decision voluntarily and of their own free will—not prompted by threats, trickery, and cajoling (*Miranda v. Arizona*, 1966).

Despite the Court's explicit language on this matter, it is clear that US police deploy various social influence strategies aimed at eliciting the waiver (such tactics are rarely, if ever, used in the UK; Slobogin, 2001). In an article titled "*Miranda's Revenge: Police Interrogation as a Confidence Game*," Leo (1996a) observed in both live and videotaped interrogations that police would often exploit the scarcity principle by presenting *Miranda* to suspects as a one-time-only opportunity to tell their side of the story. They would establish a rapport, present themselves as an ally, and ingratiate themselves through the offer of water, coffee, cigarettes, or a bathroom break, thereby activating the norm of reciprocity; they would then characterize the process as a mere formality and construct implicit waivers that create social pressure to submit to questioning (e.g., "We just need to get this out of the way, it is not a big deal—you probably know these better than I do"). Wanting to fulfill their part of the bargain, four out of five suspects agree to waive their rights and commence interrogation (Leo, 1996b).

Controlled laboratory experiments involving college students suggest that the tactics of the confidence game may well increase the waiver rate. In one study, Scherr and Madon (2013) accused innocent participants of misconduct for cheating on an experimental task and told them they would have to discuss the incident with the principal investigator, a professor. Participants were informed that they had the right to have a student advocate present during that meeting but offered the option to waive that right. The experimenter led some participants to believe the waiver had important implications for their future outcomes; for others, the waiver was presented as trivial. Mirroring the typical crime suspect, most participants waived their right to a student advocate. Importantly, they were significantly more likely to do so when the waiver was presented as trivial than important—86% to 62%. Using a similar paradigm, additional research demonstrated that other manipulative tactics—such as characterizing the waiver decision as normative—had the same effect (Scherr & Franks, 2015).

Several years ago, Weisselberg (2008) quoted an instructor who trained police in laws pertaining to interrogation. He said:

An implied waiver happens if an officer admonishes the suspect, the suspect understands so he knows he has the right not to say anything, and then he answers questions. If he just goes ahead and answers questions the officer asks him, he's given up that right implicitly, so there's a valid implied waiver.

(p. 1585)

This practice aimed at circumventing *Miranda* is the acceptance of implicit waivers—proceeding as if suspects have waived their rights *unless* they articulate an invocation with some degree of verbal precision. In *Berghuis v. Thompkins* (2010), for example, the Supreme Court ruled that the

right to silence must be invoked explicitly and that valid *Miranda* waivers could be implied by a suspect's actions as well as words. What is the effect of raising the bar for what constitutes an invocation of rights? Once again, controlled laboratory research indicates that implicit waivers diminish the likelihood that a suspect will invoke silence in response to interrogation questions (Gillard et al., 2014; also see Scherr et al., 2016).

To sum up: Commonly trained police tactics aimed at eliciting *Miranda* waivers, legal acceptance of these tactics within the courts, and psychological research confirming that this prelude to interrogation ensures high waiver rates, help to explain the basis for evolved law enforcement support for *Miranda*: Police have developed near sure-fire ways to secure waivers from suspects whose subsequent confessions are therefore deemed voluntary and admissible at trial.

### ***The innocence problem***

Drawing on anecdotal evidence, Kassin (2005) proposed the compelling and nonintuitive hypothesis that innocence puts innocent suspects at risk in an interrogation setting. Specifically, he theorized that innocent suspects would fail to appreciate the significance of their *Miranda* rights precisely because they harbor a phenomenology of innocence, a naïve faith in the power of their own innocence to prevail. This mental state may be rooted in a generalized “belief in a just world” (Lerner, 1980) or in an “illusion of transparency” by which people overestimate the extent to which their true status can be seen by others (Gilovich, Savitsky, & Medvec, 1998). Either way, he suggested that *Miranda* warnings may not adequately protect people accused of crimes they did not commit.

In a first test of the hypothesis that innocence puts innocents at risk, Kassin and Norwick (2004) conducted an experiment in which participants were guilty or innocent of committing a mock theft, after which they were apprehended and confronted by a neutral, sympathetic, or hostile investigator seeking a *Miranda* waiver to commence interrogation. Overall, those who were innocent were substantially more likely to sign a waiver than those who were guilty (81% to 36%). This decision-making tendency was so strong that two-thirds of innocents signed the waiver even when confronted by a hostile investigator. When asked to explain this decision, most innocent suspects said they signed the waiver precisely because they were innocent (e.g., “I did nothing wrong;” “I had nothing to hide”).

Other research has strongly supported this “innocence effect” on *Miranda* waivers in the face of accusation. In one study, the basic finding was replicated within a sample of Canadian participants (Moore & Gagnier, 2008). In a second study, the waiver rate was particularly pronounced among innocents who believed that the world was fair and just (Scherr et al., 2016). In a third study, innocent participants were more likely to waive their rights—relative to those who were guilty—when they understood the waiver decision to be made than when they found it more confusing (Scherr et al., 2018).

It is important to note that the naïve phenomenology of innocence can infect a suspect's behavior across a range of interrogation outcomes—not just waiver decisions. Research shows that innocent people are open and forthcoming in their narratives when interviewed by police (Hartwig et al., 2005; Hartwig, Granhag, & Stromwall, 2007); they offer up alibis freely, without regard for the fact that minor inaccuracies would be viewed with suspicion (Olson & Charman, 2012), and they exhibit less physiological arousal and self-reported stress in response to an accusation and the processes of interrogation (Guyl et al., 2013; Madon et al., 2017; Normile & Scherr, 2018; Scherr & Franks, 2015). In one series of studies, Perillo and Kassin (2012) examined bluffing—a common US interrogation tactic in which police claim to have collected evidence to be tested (e.g., DNA). In these instances, many innocent participants agreed to sign



a false confession to crashing a computer, or to cheating, when told that their sessions had been recorded by a surveillance camera which would later be available for review. To those who are innocent, the bluffed camera offered an assurance of future exoneration, which paradoxically made it easier to confess.

### ***“Custody” as a trigger point***

The US Supreme Court ruled that police must Mirandize suspects who are “in custody.” But what conditions constitute a state of custody? In the UK, this issue lacks relevance because interrogators are required to caution suspects of their rights as soon as there is reason to assume they are involved in criminal activity (Slobogin, 2001). Over the years, US courts have struggled to define what it means to be in custody. In *Miranda*, the Court defined a custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way” (p. 445). Elsewhere in that opinion, the Court cited several concrete indicia such as police use of intimidation, expressions of hostility, trickery, restriction of personal liberty, and an unfamiliar environment.

Custodial interrogation involves a combination of two legal states: interrogation and custody. “Interrogation” refers to any questioning initiated by police of a suspect that has a reasonable likelihood of eliciting an incriminating statement (*Rhode Island v. Innis*, 1980). “Custody” is a more ambiguous state that has been variously defined. Objectively speaking, it is clear that formal arrest triggers custody and hence the need for a warning (*Orozco v. Texas*, 1969). However, police often question individuals who are not under arrest. In these more ambiguous cases, the situation may be considered custodial if police restrict an individual’s freedom of action in a significant way (*California v. Beheler*, 1983).

In *Stansbury v. California* (1994), the US Supreme Court considered a case in which a police officer had failed to Mirandize a suspect because he did not perceive that the suspect was in custody. In a 9–0 ruling, the Court held that “an officer’s subjective and undisclosed view concerning whether the person being interrogated is a suspect is irrelevant to the assessment [of] whether the person is in custody” (p. 318). Rather, the Court stated, any inquiry into whether a suspect was in custody involves a consideration of (1) the totality of *objective circumstances* of the suspect’s situation, and hence (2) a determination of whether a *reasonable person* in that situation would have perceived a significant restriction on his or her freedom of action.

Although no comprehensive list of objective criteria exists, the courts have variously cited as relevant whether police explicitly advised the suspect that he or she was free to leave, whether the suspect’s freedom of movement was restrained (e.g., located in a police station; handcuffed; held in a room with the door locked; stripped of shoes, clothing, cell phone, or car keys), and whether coercive interrogation tactics were used (e.g., isolating the suspect from friends and family members; using physical force or discomfort; making accusations; using threats, promises, trickery, and deceit to elicit a confession). Using these types of factors as a guide, police officers can then make real-time determinations as to how a reasonable average person would perceive the situation.

### **Perceptions of custody: Relevant psychology**

In light of the pivotal nature of the construct, is it psychologically sound to expect that observers can accurately judge how the average reasonable person will perceive whether or not a situation is custodial? Classic studies of actor–observer differences in attribution suggest a negative answer to this question. Beginning with Heider (1958), attribution theorists have found that actors



and observers tend to diverge in their social perceptions, with observers focusing on actors and actors focusing on the predicaments in which they find themselves. This divergence in perceptions is called the actor-observer effect (Jones & Nisbett, 1972; Watson, 1982).

Harvey, Harris, and Barnes (1975) examined this actor-observer effect with specific regard to perceptions of freedom, the antithesis of custody. Their study used a Milgram-like teacher-learner paradigm to test people's attributions for the teacher's administration of painful shocks. In each session, two participants were randomly assigned to serve as the teacher or an observer, while a confederate, ostensibly in an adjacent room, played the learner. Afterward, the teacher and observer answered questions about the experience. Results showed that when the learner exhibited severe vs. only moderate distress, observers attributed more freedom and responsibility to the teachers; yet the teachers attributed less freedom and responsibility to themselves.

More recently, Alceste, Luke, and Kassin (2018) conducted a two-phased laboratory experiment to test the Supreme Court's assumption that observers can discern the subjective perceptions of a reasonable person in the context of a police-suspect interaction. In Phase 1, college student participants were present in a waiting room when a confederate returned from the inner chamber of the lab to "discover" that her wallet was missing. In an apparent response to this staged theft, the confederate filed a report with campus security, which brought a guard into the lab to investigate and question the innocent participant. By random assignment, the objective conditions were varied to model a classic interview vs. interrogation. Some participants were interviewed as witnesses might be (the experimenter remained in the room, the door was left open, and questioning was brief and non-accusatory). Others were interrogated as suspects (the security guard asked the experimenter to leave, the door was shut, and questioning was longer and accusatory). These sessions, all of which were video recorded through a concealed camera, manipulated the kinds of objective factors that would constitute noncustodial and custodial situations, respectively. Afterward, participants filled out a questionnaire in which they indicated their perceptions of the situation—most importantly, whether they felt free to leave. In Phase 2 of the experiment, participant observers watched a single interview or interrogation, after which they judged whether the suspect felt free to leave.

Across questioning conditions, results showed that a majority of Phase 1 actors said they did not feel free to leave. The "noncustodial" interview condition proved particularly interesting. Confirming the manipulation, participants said they felt more like witnesses than suspects and believed that the security guard perceived them to be innocent—in sharp contrast to perceptions of those in the interrogation condition. Yet while Phase 2 observers differentiated between the two conditions, seeing suspects as freer to leave the interview than the interrogation, the suspects themselves did not feel free to leave either situation—not even the benign interview. Mirroring the divergence of perceptions reported by Harvey, Harris, & Barnes (1975), perceptions of custody were subject to the actor-observer effect. This divergence calls into question the assumption that a reasonable person standard can be used to determine custody.

Consistently, the courts have noted that explicitly advising suspects that they are free to leave is one clear and objective factor indicating non-custody—and hence no need for *Miranda* warnings (e.g., *California v. Beheler*, 1983; *Howes v. Fields*, 2012; *Oregon v. Mathiason*, 1977). But does this advisement have the presumed effect? To test this hypothesis, Alceste, Luke, and Kassin (2018) conducted a follow-up experiment using the interview condition of the same paradigm. In this study, the security guard at the outset advised some suspects, randomly assigned, but not others: "*Just so you know, you're free to leave. I'm not holding you here. If you don't want to talk to me or need to leave for any reason, you're free to do that.*" Interestingly, results showed that while participants in the advisement condition knew that they were free to leave, objectively speaking, they did not *feel* freer to leave compared to the no-advisement control group. In short, this research challenges

the reasonable person standard and suggests instead that judges may be over-attributing freedom in their rulings on custody.

Both studies did reveal a consistent result that may offer a means of bringing into synchrony the perceptions of observers with the suspects themselves. In both studies, observers overstated the suspects' subjective sense of freedom in the interview condition. However, this difference was eliminated when observers were asked to take the perspective of the suspect and indicate how free they would feel if they were in the same predicament. In response to this perspective-taking question, the actor-observer effect was eliminated; observers did not imagine themselves as feeling free to leave the interviews or interrogations. This result suggests a possible remedy—one previously suggested by the US Supreme Court:

I have no doubt that the state trier of fact is best situated to put himself in the suspect's shoes, and consequently is in a better position to determine what it would have been like for a reasonable man to be in the suspect's shoes.

(*Thompson v. Keohane*, 1995, p. 119)

### **Circumventing custody: The Perkins ruse**

After *Miranda* raised the stakes as to what constitutes a custodial interrogation, a good deal of debate has centered on how to define custody. Since 1966, the Supreme Court has progressively narrowed its definition and thereby reduced the number of factual situations in which a defendant would be entitled to protection. As noted earlier, for example, and in contrast to the findings reported by Alceste, Luke, and Kassin (2018), questioning is consistently deemed noncustodial when police tell suspects that they are free to leave (*California v. Beheler*, 1983; *Howes v. Fields*, 2012; *Oregon v. Mathiason*, 1977).

In the controversial case of *Illinois v. Perkins* (1990), the US Supreme Court broke open a particularly gaping loophole to the requirement that in-custody suspects must be Mirandized. Lloyd Perkins, in jail for aggravated battery, was joined in his cell by an undercover police officer posing as another prisoner. Without Mirandizing Perkins, this officer questioned him about a murder; Perkins confessed. It is hard to imagine a more “custodial” situation than being locked in jail, so the trial judge suppressed the confession and an appellate court affirmed. But then the Supreme Court reversed these prior rulings. The Court held that *Miranda* warnings are required to offset the inherent coerciveness of a police-dominated interrogation. Although the undercover agent sought to elicit a confession, although Perkins was incarcerated, and although no warnings were administered, the confession was voluntary and hence admissible because Perkins was not aware that he was speaking with a police officer.

### ***Perceived consequences of invoking rights***

As we've seen, there are a multitude of explanations for the lopsided rate at which people waive their self-protective rights. One unexplored possibility concerns the potential cost to suspects who invoke silence and/or request an attorney in terms of the adverse inferences others may draw. Grisso (1998) found that many people harbor the fear that silence and the request for an attorney can be used against them, or even that they could be punished or prosecuted for it. Indeed, *Miranda* warnings seldom contain language to offset such misconceptions. An analysis of 385 warnings from across the US revealed that only 7% informed suspects that invoking their rights would result in the immediate cessation of questioning; none assured suspects that it could not be used as evidence of guilt (Rogers et al., 2008).

In *Griffin v. California* (1965), the US Supreme Court ruled that a defendant had an absolute Fifth Amendment right not to take the witness stand at trial and no adverse inference of guilt could be drawn from the exercise of that right. Prosecutors are therefore not permitted to comment on a defendant's failure to take the witness stand—and judges may admonish the jury not to draw an adverse inference (*Lakeside v. Oregon*, 1978). But what if a defendant had invoked the right to silence or to an attorney at the police station, during an interrogation? Citing *Griffin* from the preceding year, the *Miranda* Court stated:

In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

(p. 1625)

As with other aspects of *Miranda*, the US courts have eroded the protection against adverse inference through various exceptions (e.g., distinguishing between a suspect's silence before arrest, after arrest but before warnings, and after both arrest and warnings). Although the *Miranda* Court clearly stated that suspects in custody could exercise their right to silence “in any manner,” that is no longer true. Two cases in particular illustrate the point.

In *Berghuis v. Thompkins* (2010), the defendant refused to sign a written form of his rights. Police questioned him anyway for almost three hours during which he sat mostly silent, eventually saying yes to three questions: “Do you believe in God?”, “Do you pray to God?”, and “Do you pray to God to forgive you for shooting that boy down?” His responses were taken to be implied waivers. In *Salinas v. Texas* (2013), Genovevo Salinas, a suspect in a murder investigation, agreed to submit his shotgun for ballistics testing and accompany police to the station to answer questions. Police did not arrest or Mirandize Salinas. When they asked him about the gun, he did not respond. According to the officers, he looked down, shuffled his feet, bit his lip, and tightened up. Years later, Salinas was arrested for murder; he pled not guilty. At trial, the prosecutor cited his silence as evidence of guilt. Salinas appealed, arguing that this comment on his silence—which preceded both arrest and *Miranda* warnings—violated his Fifth Amendment rights. By a 5–4 margin, however, the Supreme Court affirmed his conviction, and asserted that suspects must speak up and expressly invoke their right to silence in order to challenge later any adverse inference at trial. Clearly, at times, suspects who remain silent in the US may have their silence used against them in court. The same is true in at least some other countries—such as the UK (Slobogin, 2001). There is, however, one critical difference: *Adult* suspects in the UK are informed that their silence can be used against them; neither adult suspects in the US nor juvenile suspects in Europe are similarly warned (Panzavolta et al., 2015).

*Salinas*—and interrogation rights guidelines in many European countries—raise a host of psychologically interesting empirical questions. But let's start with the most basic: Do people naturally draw adverse inferences from a defendant's exercise of rights? In a book titled *Common Sense and the Fifth Amendment*, Hook (1957) argued that the invocation of the Fifth Amendment by a criminal defendant establishes a presumption of guilt. Mock jury research on the effects of a defendant, or key defendant witness, failing to testify suggests that Hook was right. In one study, researchers found that a defendant who invoked the Fifth Amendment—either from the witness stand in response to specific questions or by wholesale declining to take the stand—was more likely to be judged guilty and deserving of conviction than one who testified and answered all questions (Shaffer & Case, 1982). In a second study, mock jurors read a trial transcript in which the defendant's close friend or a lesser acquaintance did not testify, and in which the prosecutor

did or did not suggest making an adverse inference. In this instance, where the missing witness was a friend, and therefore expected to testify, participants inferred guilt only when prompted by the prosecutor's adverse inference argument (Webster, King, & Kassin, 1991).

In light of these studies, one would expect that suspects who invoke their rights during an interrogation would appear guilty to observers. Similarly, one might expect that the presence and intervention of an attorney would have the same effect. Consistent with theorizing on the phenomenology of innocence, research shows that innocent participants are less likely than offenders to invoke their rights (Kassin & Norwick, 2004; Moore & Gagnier, 2008; Scherr & Franks, 2015). One might expect that an inverse phenomenology of guilt would also be known to the average person as a matter of common sense, thereby forming a basis for a prejudicial inference. A collateral empirical question concerns whether any such effects would be mitigated by admonishment.

To examine what inferences people draw from silence and the presence of an attorney, Sukumar and Kassin (2017) conducted two experiments in which online participants read a version of a transcript in which police interrogated a male burglary suspect (adapted from an actual case involving the burglary of three laptops and a camera from a city residence). All scripts opened with a detective Mirandizing the suspect and then asking some benign background questions. At one point, he outright asked the suspect if he stole the missing items. The suspect denied doing so, at which point the detective initiated use of various interrogation tactics (i.e., confrontation, presentations of alleged evidence, guilt-presumptive minimization themes). In response to the interrogation, the suspect agreed to speak and continued to deny wrongdoing, or he exercised his right to silence, responding with "no comment" to all remaining questions. In some transcripts, the suspect was alone. In others, he was accompanied by an attorney who either intervened periodically or sat passive and silent.

In the first experiment, results showed that participants were more likely to see the suspect as guilty of the crime when he invoked his right to silence than when he continued to deny the allegations—this difference was significant, by a margin of 77% to 45%. Interestingly, judgments of the suspect were not impacted by the presence or intervention of defense counsel. In the second experiment, participants were more likely again to judge the suspect guilty when he invoked silence—this time by a margin of 59% to 20%. Some participants also received an instruction reminding them that suspects have a constitutional right to silence and cautioning them against drawing an adverse inference. In this latter condition, the increase in guilt judgments persisted—at 53%. This finding is consistent with mock jury research showing that people do not disregard inadmissible evidence that they deem relevant despite admonishments to do so (Kassin & Sommers, 1997; Kassin & Studebaker, 1998; Steblay et al., 2006).

### What next? Proposed reforms

After more than a half-century, it is clear that *Miranda v. Arizona* (1966) has failed to fulfill its promise. Two simultaneous sets of developments, in juxtaposition with one another, define the magnitude of this failure. On the one hand, US courts have systematically demolished the Court's holding, leading Kamisar (2012) to lament "The rise, decline, and fall of *Miranda*," and leading Weisselberg (2008) to "pronounce the body" and mourn its death—a death caused by what Friedman (2010) called "stealth overruling."

Virtually every aspect of *Miranda* has been rendered impotent. The courts have set a lower and lower bar, if any, as to what constitutes a sufficient warning—in wordage, presentation, and context; they have set an unimaginably high bar as to what constitutes an invocation of one's rights to which police must adhere; they have set no limits on the tactics police may use

to contextualize *Miranda* in ways that ensure waivers and to circumvent the requirements if invoked; they have offered no concrete, empirically defensible definition of what it means to be “in custody,” permitting police, for example, to invite suspects to the station and advise them they are not under arrest, or to deploy the *Perkins* ruse by which undercover officers can interrogate unwitting suspects locked in a jail cell without apprising them of their rights; they have created exceptions as to the conditions that should trigger the warning and waiver requirements, carving out, for example, a public safety exception. The list of corrosive rulings is extensive, yielding “death by a thousand cuts.”

Concurrently, recent years have brought to light the problem of police-induced false confessions. Often lost to the historical record, *the Miranda court explicitly acknowledged not only the inherently compelling nature of modern-day police interrogations but the risk that the tactics used can lead innocent people to confess.* The Court specifically cited the case of George Whitmore, in New York City, as a “conspicuous” new example. In 1964, Whitmore had “confessed to two brutal murders and a rape which he had not committed” (p. 455; for more on this story and its legacy, see Shapiro, 1969; Vitello, 2012).

As the US judiciary proceeded to erode *Miranda*, a revolution at the interface of science and law had begun to expose the tragic outcomes of psychologically coercive interrogation practices. In 1992, at Cardozo School of Law, Barry Scheck and Peter Neufeld founded the Innocence Project. Their mission was to use newly available DNA testing to evaluate post-conviction claims of innocence. At present, more than 350 people in the US have been exonerated by DNA. In 28% of these cases, false confession by the defendant or someone else was a contributing factor ([www.innocenceproject.org/](http://www.innocenceproject.org/)). Twenty years later, at the University of Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law, Samuel Gross and Rob Warden launched the National Registry of Exonerations. Whereas the Innocence Project addresses only claims resolvable by DNA, the National Registry archives a broader sample of exonerations resolved in other ways as well. The Registry now contains well over 2,000 wrongfully convicted individuals in its database, approximately 13% of whom had confessed ([www.law.umich.edu/special/exoneration/Pages/about.aspx](http://www.law.umich.edu/special/exoneration/Pages/about.aspx)).

Also concurrent with the judiciary’s downgrading of *Miranda*, developments had unfolded that suggested the need for more protection of suspects, not less. In addition to early *Miranda*-inspired studies of comprehension assessment (Grisso, 1981), social psychology research had demonstrated in the laboratory the coercive power of police interrogation practices (e.g., Kassin, 1997, 2005). In addition, changes had emerged in Great Britain, starting in the 1980s, after some shocking false confessions were uncovered, sparking calls for reform. These latter cases gave rise to observational studies, a focus on how to protect vulnerable individuals, and the development of alternative, less coercive approaches to interrogation. Today, “investigative interviewing” is used, an approach aimed more at information gathering than confession taking (Bull, 2014; Gudjonsson, 2003; Shepherd & Griffiths, 2013; Williamson, 2006). In short, a scientific study of false confessions had fully developed (for a review, see Kassin et al., 2010; for an assessment of consensus within the field, see Kassin et al., 2018).

Well-intentioned and forward-looking as it was, *Miranda* has failed to protect citizens targeted for interrogation. Indeed, it is hard to fathom how out of step the post-*Miranda* courts have been. So what else can be done to provide a meaningful safeguard? The most obvious approach would be to repair the damage inflicted on foundational objectives—to ensure that warnings are administered, not circumvented, in a timely manner; that the warnings be delivered in language and style that is simple, accessible, and non-manipulative; that vulnerable individuals be protected; and that the invocation of rights is by default accepted unless explicitly waived according to *Miranda*’s knowing, intelligent, and voluntary criteria. Weisselberg (2017) suggests

that Europe may lead the way in making various innovations (e.g., in the UK, the triggering point for caution is not custody but merely having “grounds to suspect” someone of criminal activity; see Slobogin, 2001). He also notes, however, that American courts have moved in the opposite direction and that the US judiciary often reacts with hostility toward “foreign authority.” For all these reasons, coupled with the fact that many innocent suspects will invariably waive their rights out of a naïve belief that their innocence will prevail, we are not sanguine in projecting that *Miranda* will ever achieve its intended purposes.

To reinforce the protections lost in *Miranda*, one need only revisit the parts of the Court’s opinion that were highly critical of the “police-dominated” process that characterizes the psychological approach to incommunicado interrogation, namely the Reid technique, which produces “inherently compelling” pressures, and which can put innocent people at risk to confess. The Court accurately depicted what is still today the basic tenets of this approach—e.g., “The guilt of the subject is to be posited as a fact,” “the officers are instructed to minimize the moral seriousness of the offense” (p. 1615). From this depiction, the Court concluded that “the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals” (p. 1618). Hence, “we concern ourselves primarily with the interrogation atmosphere and the evils it can bring” (p. 1618).

The processes of interrogation helped to inspire the need for warning and waiver prescriptions. Limiting the interrogator’s tactics, therefore—such as banning police lies about evidence, which is prohibited in the UK and many other European countries but still permissible in the US—provides an alternative way to protect the rights of suspects brought into custody, presumed guilty, and accused. It is beyond the scope of this chapter to review empirical research that has identified the types of individuals, circumstances, trickery, and deception that increase the coercive nature of police-suspect encounters and the risk of false confessions (for recent reviews, see Gudjonsson, 2018; Kassin et al., 2010; Kassin et al., 2018). Similarly, it is beyond the scope of this paper to offer alternative paradigms of interrogation—i.e., forms of investigative interviewing—aimed at eliciting information without incurring these risks (e.g., see Bull, 2014; Shepherd & Griffiths, 2013; Vrij et al., 2017).

Following the leading recommendation of the White Paper of the American Psychology-Law Society (Kassin et al., 2010), we believe that the most essential avenue for reform is to require the video recording of all suspect interrogations in their entirety. In England, under the Police and Criminal Evidence Act of 1984, the mandatory requirement for recording police interviews was introduced to safeguard the legal rights of suspects and the integrity of the process. In the US, a video recording requirement is now in effect in roughly half of all states, the District of Columbia, and in federal agencies. This means of protection has an inherent advantage over *Miranda* because it does not require the suspect to activate it. There are multiple other benefits as well. One field study demonstrated that police officers who were informed vs. not informed that a mock interrogation they were set to conduct was to be recorded used fewer coercive tactics (Kassin et al., 2014). In a second study, officers investigated a mock crime scene, interrogated two innocent suspects, and filed an incident report. When compared to covert recordings of these sessions, results showed that police understated in the reports their use of various tactics. Video recording can thus be used to ensure a more accurate and objective record of all that transpired—including, ironically, the often-disputed process by which suspects are warned and waive their *Miranda* rights (Kassin et al., 2017).

One concern often expressed in the US is that the physical or imagined presence of a camera will distract or inhibit suspects. To test this hypothesis, a recent fully randomized field experiment was conducted in partnership with a northeast US police department. One hundred twenty-two real crime suspects were randomly informed or not informed that their interrogations



would be video recorded. Subsequent coding indicated that those who were informed spoke as often and as much, were as likely to waive their rights at the outset and later, and were as likely to make admissions and confessions. In addition, the two groups were perceived no differently by the detectives (Kassin et al., 2019).

The recording of all interrogations at a police station has long been required in the UK. Such transparency protects both police and the accused. However, an important caveat accompanies this reform policy within the US. In statutes that require video recording, the typical trigger point—as in *Miranda*—is custody. Only custodial interrogations must be recorded. As noted earlier, however, 50-plus years of post-*Miranda* experience has indicated the subjective nature of making custody vs. freedom judgments and the ways in which this ambiguous construct has served as a loophole for law enforcement. In order to avoid these issues, we believe that video recording requirements should commence as soon as police begin to suspect that a person of interest is involved in criminal activity (i.e., starting during the interview; before the administration of interrogation rights). In studies recently conducted in Sweden, researchers asked police officers to formulate questioning strategies for suspects presented in vignettes. Consistently, they formulated more guilt-presumptive questions for suspects who had been apprehended than for those who had not (Lidén, Gräns, & Juslin, 2018). This finding suggests that police may naturally form guilty expectations before a suspect is custodialized. An earlier trigger point for recording is therefore necessary to deter the practice of interrogating suspects off camera before they are deemed to be in custody.

### Take home points

1. Following the US Supreme Court's ruling in *Miranda v. Arizona* (1966), most Western democracies require that police inform suspects in custody of their rights to silence and/or an attorney.
2. Over the years, psychological research has cast doubt as to whether these rights—which suspects routinely waive—are sufficiently protective in an interrogation setting.
3. Reforms are proposed in light of research on *Miranda* comprehension, voluntariness, the phenomenology of innocence, and what constitutes “custody”—the condition that often triggers the warning and waiver requirement.

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