DO YOU UNDERSTAND YOUR RIGHTS AS I HAVE READ THEM TO YOU?
UNDERSTANDING THE WARNINGS FIFTY YEARS POST MIRANDA

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I. INTRODUCTION

Since the landmark Miranda decision, the Miranda warnings have permeated American culture by way of crime novels, television shows, and movies.\(^1\) Indeed, the Supreme Court has acknowledged that, “Miranda has become embedded in routine police practice to the point where the warnings have become part of our national culture.”\(^2\) With this permeation in American culture, one would think that most suspects would understand the Miranda warnings.\(^3\) Social science studies conducted over the years after Miranda, however, indicate that the opposite may be true.\(^4\)

Although the Supreme Court decided Miranda in 1966, it was not until the 1980’s that suspects’ comprehension of Miranda began to attract significant attention of researchers.\(^5\) The initial inquiries into Miranda comprehension looked at the vocabulary of the warnings.\(^6\) Since that time, numerous psychological, linguistic, and criminology scholars have conducted empirical research regarding a suspect’s ability to understand, and therefore knowingly and intelligently waive, his or her Miranda rights.\(^7\) This article will explore several studies that expose potential barriers to a suspect’s understanding of the Miranda warnings as well as proposed Miranda reforms meant to increase a suspect’s understanding.

4. See id. This research is ongoing. See generally Richard Rogers et al., IN PLAIN ENGLISH: Avoiding Recognized Problems with Miranda Comprehension, 17 Psychol. Pub. Pol’y & L. 264, 265 (2011) (providing a concise summary of some research into Miranda language and content).
Before embarking on an analysis of various social science studies regarding *Miranda*, it is necessary first to briefly summarize the origin and purpose of the historic *Miranda* decision, including what it means to waive one’s rights. Part II then reviews studies regarding a suspect’s ability to understand the *Miranda* Warnings, specifically the effect of language disorders, mental disorders, stress, suggestibility, and delivery techniques on comprehension of the *Miranda* Warnings. Part III discusses the most popular of the myriad of proposed *Miranda* reforms. Part IV sets out which of the proposed reforms is best and why.

“No person … shall be compelled in any criminal case to be a witness against himself.”8

II. THE *MIRANDA* WARNINGS

*Miranda*’s constitutional basis is, of course, found within the 5th amendment of the Constitution, which in pertinent part prohibits compelled incriminatory statements in criminal cases.9 By the time *Miranda* was decided, torture or the “third degree” to elicit a confession was no longer common.10 Although the Supreme Court was still concerned about physical coercion at the time of *Miranda*, it focused on the suspects’ psychological integrity and the nature of custodial interrogations.11

A. Origin and Purpose

In *Miranda v. Arizona*, the Supreme Court held that custodial interrogations involve “inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”12 Such “compelling pressures” have the potential to undermine one’s Fifth Amendment privilege against self-incrimination.13 To combat the inherently coercive nature of custodial interrogations and to allow suspects the opportunity to exercise his or her Fifth Amendment privilege, the Supreme Court mandated what it called “procedural safeguards,” or warnings that must precede a custodial interrogation or any resulting statements are inadmissible.14 Those safeguards have come to be known as the “*Miranda* warnings” or “*Miranda* rights.”

8. U.S. Const. amend. V.
9. Id.; *Dickerson*, 530 U.S. at 437-444 (holding *Miranda* as a constitutional rule).
11. See id. at 7.
13. Id. at 467-468.
14. Id. at 467-479.
The *Miranda* warnings were meant to advise the suspect of his or her fifth amendment rights, or specifically that the suspect “has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to an attorney, and that is he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation.”\(^{15}\)

The Supreme Court later held that no specific formulation of the *Miranda* warnings is required so long as the police conveyed the essence of the *Miranda’s* warnings.\(^{16}\) The burden is on the government, however, to prove by the preponderance of the evidence that the police gave the suspect the *Miranda* warnings and that he or she validly waved them.\(^{17}\) If the government does not meet this burden, then the government cannot admit the testimonial evidence obtained during an interrogation at trial.\(^{18}\)

**B. Waiver**

Police may gather admissible evidence by questioning a suspect provided that the suspect is advised of her *Miranda* rights and she knowingly, intelligently, and voluntarily waived them.\(^{19}\) That is, for a waiver to be valid, first “the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it”\(^{20}\)

Courts look at the ‘totality of the circumstances surrounding the interrogation’ to determine whether a waiver is valid.\(^{21}\) In doing so, it considers facts such as the suspect’s age, intelligence, mental condition, education, and experience.\(^{22}\)

**III. RESEARCH INTO UNDERSTANDING THE WARNINGS**

Social science research discussed in this article grew out of questions regarding whether certain suspects are capable of understanding their *Miranda* rights enough to knowingly and intelligently waive them. Initially the research appeared to focus on subsets of individuals, such as juvenile suspects and those

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15. *Id.* at 479.
18. *Id.* at 479 (“But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.”).
19. *Id*.
21. *Id*
with conditions that may potentially limit understanding the *Miranda* warnings, but has recently grown to include broad studies of all suspects as a whole.\textsuperscript{23}

\subsection*{A. The Language of Miranda}

Although no specific formulation of the *Miranda* Warnings is required, the Supreme Court did state that those held for interrogation must be “clearly informed” of their rights.\textsuperscript{24} However, what is “clear” to a high school graduate may not be so to someone with, for example, a seventh grade education. The measure of clarity for understanding *Miranda* is, as noted previously, whether the suspect was fully aware “of both the nature of the right being abandoned and the consequences of the decision to abandon it.”\textsuperscript{25}

\subsubsection*{1. Vocabulary}

Research into the vocabulary of the *Miranda* warnings stems from the notion that knowledge of the individual words in *Miranda* is critical to understanding the *Miranda* warnings in total.\textsuperscript{26} In other words, a suspect’s ability to understand key *Miranda* terms is related to, and may be indictor of, the suspect’s ability to comprehend the *Miranda* Warnings.\textsuperscript{27}

Initial *Miranda* vocabulary research focused on a single formulation of the *Miranda* warnings and the comprehension of six key *Miranda* words by juveniles.\textsuperscript{28} This research found that the warning “was problematic for many offenders because of uncommon words… or polysemous terms with specialized legal meanings.”\textsuperscript{29}

Because there is no fixed formulation of *Miranda* required, the generalizability of this early research was limited.\textsuperscript{30} Later research, however, took into account the wide variations of the *Miranda* warnings and replicated the initial research’s findings.\textsuperscript{31} For example, in 2007, a large-scale survey of *Miranda* warnings was conducted.\textsuperscript{32} Out of the 448 different American

\begin{itemize}
\item \textsuperscript{23} See, e.g., Leo, supra, note 3. See also Richard Rogers, Daniel W. Shuman, & Eric Y. Drogin, *Miranda Rights... and Wrongs; Myths, Methods, and Model Solutions*, 23 CRIM. JUST. 4 (2008).
\item \textsuperscript{24} *Miranda*, 384 U.S. at 471.
\item \textsuperscript{25} *Burbine*, 475 U.S. at 421.
\item \textsuperscript{26} Richard Rogers ET AL., *Development and Initial Validation of the Miranda Vocabulary Scale*, 33 LAW & HUM. BEHAV. 381, 381-382, 388 (2009).
\item \textsuperscript{27} Id. at 388 (“It is difficult to imagine any intuitive leaps of insight that would allow custodial suspects to successfully overcome inaccurate or irrelevant definitions of key *Miranda* terms”).
\item \textsuperscript{29} Rogers, supra note 26, at 382 (providing the six words: right, entitled, consult, attorney, interrogation, and appointment).
\item \textsuperscript{30} Rogers, supra note 28, at 125-126.
\item \textsuperscript{31} See, e.g., Rogers, supra note 26; Rogers, supra note 28.
\item \textsuperscript{32} Rogers, supra note 28 at 125.
\end{itemize}
jurisdictions that responded, 560 Miranda Warnings were submitted.\textsuperscript{33} Of those warnings, 95\% of them had their own, unique formulation—that is, there were 532 different phrasings of the Miranda warnings.\textsuperscript{34} The length of the warnings varied from 49 to 547 words.\textsuperscript{35} The reading comprehension level of the words also varied from grade 2.8 to post-graduate.\textsuperscript{36}

Overall, research into the vocabulary of the Miranda warnings has been consistent with the 2007 study.\textsuperscript{37} Considering that between 10-12\% of the prison population has an 8th grade education or less and that about 40\% did not complete high school or obtain a GED,\textsuperscript{38} the vocabulary level of Miranda warnings may be too high for a significant number of suspects to understand.\textsuperscript{39}

2. Reading Level and Comprehension

Along with Miranda vocabulary, forensic psychologists have studied the comprehension and reading level of the Miranda warnings.\textsuperscript{40} Reading comprehension is the ability to derive meaning from words.\textsuperscript{41} Reading level is defined as the school-grade level at which an individual can read and understand written material.\textsuperscript{42} The reading level at which a person can read while understanding 99\% of the vocabulary and comprehending at least 90\% of the material is his or her independent reading level.\textsuperscript{43} The reading level at which a person understands less than 90\% of the vocabulary and comprehends less than 50\% (i.e., does not understand the materials) is called his or her frustration level.\textsuperscript{44} Research has shown that generally two grade levels above a person’s independent reading level is a person’s frustration level.\textsuperscript{45}

Reading levels, and particularly a suspect’s frustration level, are important to Miranda comprehension because studies have shown that the reading level of the various formulations of the Miranda warnings varies greatly, from the fourth to the fourteenth grade level.\textsuperscript{46} Additionally, studies have shown that juvenile

\textsuperscript{33} Id. at 181.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} See, e.g., id. at 130-131.
\textsuperscript{39} See Rogers, supra note 26 at 388-389.
\textsuperscript{40} See, e.g., Rachel Kahn, Patricia A. Zapf & Virginia G. Cooper, Readability of Miranda Warnings and Waivers: Implications for Evaluating Miranda Comprehension, 30 LAW & PSYCHOL. REV. 119 (2006).
\textsuperscript{41} Id. at 126.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at 127.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Id. at 128-129. The variance in reading level is due to the numerous different formulations of the warnings. See section A infra.
warnings were overall more difficult to comprehend than adult warnings. Therefore, according to research, a defendant who has a sixth grade reading level will not be able to understand a *Miranda* warning written at an eight-grade level or above (the defendant’s frustration level).

Overall, research indicates that both reading level and word comprehension are important factors in an individual’s ability to understand the *Miranda* warnings, and that difficulties with either can impair an individual’s ability to intelligently and knowing waive those rights.

**B. Language Disorders and Miranda**

Somewhat related to the impact of a person’s reading level and word comprehension, and also likely to impact a person’s ability to understand the *Miranda* warnings, are language disorders. The American Speech-Language-Hearing Association describes language disorders as when “a person has trouble understanding others (receptive language), or sharing thoughts, ideas, and feelings completely (expressive language).” Language disorders can be caused by a variety of things, including certain medical conditions, developmental conditions, and other factors, such as deprivation of speech during formative years.

Language disorders can occur in children and adults. Due to the difficulties that those with language disorders have communicating with those around them, those with language disorders are at a highly increased risk of psychiatric, academic, cognitive, social, and behavioral problems. Language deficits can also have significant behavioral effects, which are called pragmatics. For example, it is common for children with language disorders to have difficulty

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47. *Id.* at 128-133 (The author of this study hypothesized that attempts to “dumb down” the warnings for juveniles resulted in the warnings becoming more difficult to comprehend and suggested different wording and composition. Also, street law programs appear to increase Miranda understanding among juveniles).

48. *Id.* at 128.

49. Language disorders are exceedingly complex and can affect many different individuals in a myriad of ways. This article provides only a cursory overview of this very interesting, and pervasive, set of conditions.


53. LaVigne, *supra* note 51, at 55.

54. *Id.* at 56.
answering questions, initiating and maintaining conversations, and keeping from making inappropriate or off-topic comments.\textsuperscript{55}

Individuals with language disorders also can lack the ability to self-regulate and may act impulsively, irresponsibly, and even aggressively.\textsuperscript{56} As such, it is not surprising that there is a high prevalence of language disorders among incarcerated individuals.\textsuperscript{57} For example, the Mendota Juvenile Detention Center (MJTC), a mental health facility for delinquent adolescent males who were too violent for the juvenile correction system, tests 25\% of their population for language disorders.\textsuperscript{58} Those tested “consistently fall within the bottom one percent of the population at large... The multidisciplinary staff at MJTC also believes that ‘many of the behavioral difficulties [the youths at MJTC] struggle with can often be attributed to communication barriers of some sort.”\textsuperscript{59}

Research suggests that a large number of adult offenders have language disorders as well.\textsuperscript{60}

Language disorders can directly impact a suspect’s ability to understand the \textit{Miranda} warnings. Research shows that “language is the key to cognitive functioning,” and a deficit in language can impair a person’s ability to understand written, verbal, and non-verbal communications.\textsuperscript{61} As such, a language disorder can seriously interfere with a suspect’s understanding of his or her \textit{Miranda} rights.\textsuperscript{62} To be able to make a knowing and intelligent waiver of one’s \textit{Miranda} rights, “defendants must have the ability to process the language of the warnings, knowledge of the vocabulary and concepts, and the ability to generalize or apply the information to their own situations.”\textsuperscript{63} A person with a language disorder may not be able to perform any or all of these tasks.\textsuperscript{64}

\textbf{C. Barriers to Understanding Miranda due to Mental Disorders}

1. Intellectual Disabilities

When considering barriers to understanding of any kind, the first thing likely to come to a one’s mind is an intellectual disability (“ID”). ID has been historically classified as having an intelligence quotient (“IQ”) of 70 or below

\textsuperscript{55} Id. at 56-58 (“As these children get older they will be unable to read social situations, body language, or conform to the rules of social engagement, and may appear ‘uncooperative at least, or more seriously, rude or insulting.””).

\textsuperscript{56} Id. at 61-62.

\textsuperscript{57} Id. at 42.

\textsuperscript{58} Id. at 41.

\textsuperscript{59} Id. at 41-42.

\textsuperscript{60} Id. at 91.

\textsuperscript{61} Id. at 59.

\textsuperscript{62} Id. at 74-75.

\textsuperscript{63} Id. at 74.

\textsuperscript{64} Id. at 74-75.
with an onset prior to the attainment of age 18.\textsuperscript{65} Current diagnostic standards, however, downplay the importance of the IQ test, noting that those with similar IQs may function very differently.\textsuperscript{66} Current diagnostic criteria state that ID is a disorder with an onset during the developmental period (before attainment of age 18) that includes both intellectual and adaptive functioning deficits.\textsuperscript{67} Intellectual deficits include deficits in reasoning, problem-solving, planning, abstract thinking, judgment, academic learning, learning from experience, and practical understanding (measured by intelligence tests and clinical interview).\textsuperscript{68} Deficits in adaptive functioning are those that result in a failure to meet standards for personal independence and social responsibility with limited functioning in one or more daily activities, such as communication and social participation, across multiple environments (i.e., home, school, and work).\textsuperscript{69} ID is a chronic condition; although it can be ameliorated somewhat through therapies and special education, there is no cure.

Several studies have been conducted over the years regarding the ability of individuals with ID to make knowing and intelligent \textit{Miranda} waivers.\textsuperscript{70} As a disorder that is characterized by a limited intelligence, it should not be surprising that these studies have shown that those with ID have an impaired ability to understand the \textit{Miranda} warnings as compared to those with average intelligence.\textsuperscript{71} What may be surprising, however, is that these studies found that those with even mild ID (IQ of 50-55 to around 70) exhibited significant difficulty understanding the \textit{Miranda} warnings.\textsuperscript{72} For example, in a study of 60 individuals with mild ID, 50\% of them failed to answer a single question correctly on a standardized \textit{Miranda} comprehension measure.\textsuperscript{73}

Beyond a subnormal IQ, individuals with ID generally have other characteristics that may impair their ability to knowingly and intelligently waive
their  *Miranda* rights. Specifically, individuals with ID may be more easily influenced by others, have a strong desire to please others, more likely to acquiesce, and less likely to decipher the motives of others. 74 Some researchers have found that these traits make individuals with ID more suggestible in the context of police interrogations and thus are more likely to waive their rights. 75

2. Other Mental Disorders

Intellectual Disorders are not the only disorders that affect intellectual functioning, however. For example, dementia, which is a name for a group of symptoms describing “a brain disorder that seriously affects a person’s ability to carry out daily activities” (e.g. Alzheimer’s), can dramatically impact a person’s intellectual and adaptive function. 76 Organic Brain Syndrome, which is decreased mental function due to a disease other than a psychiatric illness (e.g., a stroke), is another example. 77 Any impairment that can dramatically affect a person’s intellectual and adaptive function can affect a person’s ability to understand the  *Miranda* warnings.

Even mental impairments that are not defined by a decline in cognitive functioning, such as depression, anxiety, and schizophrenia, can limit a person’s ability to understand  *Miranda* warnings. For example, in a study of 75 psychiatric patients, 60% did not understand at least one  *Miranda* right. 78

D. Suggestibility and Stress

1. Stress

Depending on the circumstances, stress can be either “good” or “bad.” Stress can be “good” in some situations because it can cause one to narrow attention and focus. 79 Stress can be “bad,” however, because it can impair cognitive function. 80 For example, high levels of stress can negatively affect memory,
understanding, processing information, and performance.\textsuperscript{81} In 2012, Professors Scherr and Madon performed an experiment to determine whether stress negatively or positively affected a person’s ability to comprehend the \textit{Miranda} warnings.\textsuperscript{82} In this study, 30 college students were assigned to a partner.\textsuperscript{83} They were then asked to perform two tasks independently and one task jointly.\textsuperscript{84} The partners (to which each college-student participant was assigned) each asked the student for help in completing one of the individual tasks.\textsuperscript{85} The “stressor” was then imposed to half of the college students (the other half was the control group): they were accused of cheating.\textsuperscript{86} Afterwards, all of the college students underwent standardized \textit{Miranda} comprehension testing.\textsuperscript{87} The results showed that those who were accused of cheating scored significantly lower on \textit{Miranda} comprehension than those who were not accused of cheating, suggesting that stress detrimentally impacts \textit{Miranda} understanding.\textsuperscript{88}

2. Suggestibility

Suggestibility is the “\textit{e}motion\textit{a}l characteristic where ideas or attitudes of other person is accepted without criticism.”\textsuperscript{89} Some individuals are more suggestible than others. Specifically, individuals with intellectual disabilities, juveniles, and some mentally ill individuals will generally defer to authority figures more than non-impaired adults, even in the absence of coercion.\textsuperscript{90}

Two aspects of suggestibility are particularly problematic in an interrogation setting: (1) the tendency to give conforming responses to leading questions, and (2) the tendency to change one’s answers in response to feedback.\textsuperscript{91} These are problematic because during an interrogation, law enforcement officers can use techniques, such as leading questions and minimizing (discussed below), which can lead to involuntary \textit{Miranda} waivers and/or false confessions.\textsuperscript{92}

\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 276-278
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 278-280.
\textsuperscript{90} E.g., Patricia Devoy, The Trouble with Protecting the Vulnerable: Proposals to Prevent Developmentally Disabled Individuals from Giving Involuntary Waivers and False Confessions, 37 HAMLIN L. REV. 253, 257-258 (2014).
\textsuperscript{91} Michael J. O’Connell, William Garmoe & Naomi E. Sevin Goldstein, \textit{Miranda} Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility, 29 LAW & HUM. BEHAV. 359, 360 (2005).
Of all the factors that may limit the understanding of Miranda, suggestibility is one of the most controversial. It is controversial partially because most people falsely believe that an innocent person would not waive her rights and confess to a crime that she did not commit.93 In fact, the Innocence Project reports that of the first 325 DNA exonerations, 27% of the exonerees had waived their rights and pled guilty to crimes that they did not commit.94 Suggestibility in this context is important because if a person is highly suggestible, she may waive her rights without understanding them and confess to a crime she did not commit merely because she is giving the interrogator the answer she thinks the interrogator wants to hear.95

Suggestibility is also controversial because the testing for it has not been widely accepted by the courts96 and some of the psychological community has criticized it.97 G. H. Gudjonsson developed the Gudjonsson Suggestibility Scales (“GSS”) to test for suggestibility in the context of interrogations and confession between the 1980’s and 1990’s.98 Suggestibility, as measured by GSS, has been used to attack the “voluntary” requirement for Miranda waivers (i.e., if a person is highly suggestible, then he or she is incapable of voluntarily waiving); however, most attacks on waivers has come from research papers rather than court cases.99 Research regarding using the GSS to measure the “voluntariness” of Miranda waivers has largely focused on the intellectually disabled and

93. O’Connell, supra note 91, at 361.
95. See O’Connell, supra note 91, at 361.
96. Compare., People v. Shanklin, 2014 IL App (1st) 120084, ¶ 80, 6 N.E.3d 288, 304 appeal denied, 8 N.E.3d 1052 (Ill. 2014) (“On all this evidence, we cannot say the trial court erred in granting a Frye hearing on the admissibility of defendant’s GSS results, where the acceptance of the GSS in the field of forensic psychology was unsettled despite its almost 30-year existence and, thus, remained a novel scientific methodology.”), with Floyd v. Cain, 62 So.3d 57 (2011) (Mem) (GSS results used as part of rationale for new trial).
98. Id. at 66-67. Under this test, the examiner reads a lengthy paragraph to the subject and then asks the subject 20 standardized questions, 15 of which are leading (or rather, misleading) questions. The response to the misleading questions yields one score. Regardless of the subject’s performance, he or she is told that they have to go through the questions again and to “try to be more accurate.” If the subject changes answers, then a second score is produced. The first score, called a “Yield score” measures the likelihood of the individual to give conforming responses to leading questions. The second score, called the “Shift score,” measures the individual’s tendency to change one’s answers in response to feedback. The two scores are added together to provide a Total Suggestibility Score. E.g., Bruce Frumkin & Alfredo Garcia, Psychological Evaluations and the Competency to Waive Miranda Rights, 27 CHAMPION 12, 17 (2013).
99. Id. at 19 (Noting that voluntariness is measured at the time of the waiver); Rogers, supra note 97, at 67-68 (“[a] Westlaw search using “Gudjonsson Suggestibility Scaled” yielded only a handful of appellate cases […].] Several … have allowed GSS-based testimony without reviewing its scientific admissibility… [Others] are divided over the admissibility of the GSS….”). This author replicated this search. Westlaw produced 29 cases total (a low number considering the GSS is about 30 years old), many of which did not speak to its admissibility. Those that did speak to its scientific admissibility were split in opinion.
Studies have found that intellectually disabled individuals generally scored in the suggestible range, but results regarding juveniles and adult offenders generally have been mixed.  

One study looked at the suggestibility of nearly 400 pretrial defendants in order to determine whether suggestibility was related to Miranda comprehension. It found that “most highly suggestible defendants do not experience their choices as being influenced by external coercion” and that “high levels of suggestibility appear to play no direct role for diminished abilities in Miranda comprehension and reasoning.” Despite these findings, other forensic experts continue to hold that the GSS is a valid indicator of voluntariness. In sum, “[P]rominent forensic experts are divided on both its relevance and validity for these [Miranda waiver] determinations.”

E. The “Average” Suspect

The majority of research into a suspect’s ability to understand the Miranda warnings has focused on conditions that affect a suspect’s understanding; however, there is a good deal of research that indicates that indicates that a large percentage of suspects have a deficient understanding of their rights. Professor Richard Rogers framed the research question as this: “Primed with thousands of televised episodes of police shows such as Law & Order, most Americans instantly recognize the phrase ‘you have the right to remain silent,’ and can supply the next few lines from rote memory. Does this mean, however, that we are truly knowledgeable about our Miranda rights?”

The research so far answers, “Not necessarily.” For example, in a study published in 2010, 149 pre-trial criminal defendants and 119 college undergraduates were administered tests to measure Miranda understanding, intelligence, and academic achievement. The results were rather surprising. 31.1% of the defendants and 29.6% of the college students believed that if they remained silent, their silence could be used against them. 52% of the defendants and 29% of the college students believed that if they asked to say something “off the record,” then the police could not use that statement against them. 30.2% of the defendants and 41.5% of the college students believed that

100. Rogers, supra note 97, at 68-69.

101. Id.

102. Id. at 69-78.

103. Id. at 76-77.

104. See, e.g., Frumkin, supra note 98.

105. Rogers, supra note 97, at 69.


107. Id. at 5.

108. Rogers, supra note 3, at 305.

109. Id. at 307.

110. Id.
after asking for a lawyer, the police can continue to ask questions until the lawyer arrives.111 37.2% of defendants and 26.9% of college students believed that once the right to remain silent has been waived, the waiver is permanent.112 32% of defendants and 39.8% of college students believed that if the police lied to you, you could retract your statement without hurting your case.113 25.9% of defendants and 20.3% of college students believed that unless they signed a waiver, the police could not use what they said against them.114 These findings were fairly consistent with a 2008 study consisting solely of college students.115

F. Interrogations

In *Miranda*, the Supreme Court noted that law enforcement officials have used both physical and psychological coercion to undermine a subject’s will to resist interrogation.116 Yet, the Court did not outright ban the use of psychological coercion. Instead, it provided the *Miranda* warnings to balance the scale between the inherently coercive nature of custodial interrogations and a suspect’s ability to exercise his or her Fifth Amendment rights.117

The Supreme Court relied on interrogation manuals for insight into what happens during a custodial interrogation.118 Until fairly recently, most research relied upon these as well.119 Below is a review of research into how the police deliver the *Miranda* warnings and a study based on self-report by police officers.

1. *Miranda* Delivery Techniques

Studies have demonstrated that the police often use two techniques in the delivery of the *Miranda* warnings that may affect a suspect’s understanding: minimization of the rights and the speed of delivery.120

Minimization of the *Miranda* rights occurs when the police reduce the meaning of the warnings to a technicality, or otherwise minimize the importance of the warnings.121 The purpose of minimization techniques is to trivialize the legal significance of *Miranda* rights to be the “equivalent to other standardized bureaucratic forms that one signs without reading or giving much thought” and to

111. Id.
112. Id.
113. Id. at 308.
114. Id. at 307.
118. Id.
119. E.g., Leo, *supra* note 92, at 267.
121. E.g., Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators’ Strategies for Dealing with Obstacles Posed by Miranda*, 84 MINN. L. REV. 397, 433. See also Domanico, *supra* note 92, at 15-16 (describing minimizing techniques such as referring to the warnings as “just something we have to do” or “it’s part of the formality” in 45% of the cases).
“communicate that the interrogator expects the suspect ... to execute the waiver and respond to subsequent questioning.”\textsuperscript{122} Studies have shown that minimization of the *Miranda* warnings does lead to an increased number of suspects waiving their rights.\textsuperscript{123} For example, one study noted a 24% increased waiver rate between those who were told that their *Miranda* rights were important and those where *Miranda* was trivialized.\textsuperscript{124}

The speed of the delivery of *Miranda* warnings can also affect a suspect’s comprehension of the warnings.\textsuperscript{125} Generally, the faster a person speaks, the less the listener understands.\textsuperscript{126} If a police officer states the *Miranda* warnings quickly, then the suspect may not understand her rights and therefore may not be able to “intelligently and knowingly” waive them.\textsuperscript{127} One study looked at the rate of speed at which detective orally delivered the *Miranda* warnings to determine whether police delivered the warnings at a speed that would impair comprehension.\textsuperscript{128} In that study, the detectives spoke at a rate of 268 words per minute, a speed at which comprehension declines.\textsuperscript{129} Beyond limiting comprehension, speaking the warnings quickly can also minimize or trivialize the warnings and can enforce the perception that the warnings are a mere formality.\textsuperscript{130}

2. Police Self-Report

Social scientists have conducted studies through direct observation, reviewing recorded material, and clinical experiments to determine a suspect’s understanding of and the overall effectiveness of the *Miranda* warnings, but what do the police think about their own practices? A 2007 study, based on the self-report of 631 investigators from 16 police departments in 5 states, sought to obtain from the police themselves information about certain aspects of their work.\textsuperscript{131} Based on these responses, the study compared the self-report with other empirical research.\textsuperscript{132}

The survey sent to participants focused on, among other things, truth detection abilities and *Miranda* warnings and waivers.\textsuperscript{133} The results confirmed one aspect of what most television police dramas portray: that the police conduct

\textsuperscript{122} Leo, supra note 3, at 1019.
\textsuperscript{123} E.g., Domanico, supra note 92, at 15-17.
\textsuperscript{124} Kyle C. Scherr & Stephanie Madon, “*Go Ahead and Sign*”: *An Experimental Examination of Miranda Waivers and Comprehension*, 37 LAW HUM. BEHAV. 208, 213-214 (2013).
\textsuperscript{125} See, e.g., Domanico, supra note 92, at 17.
\textsuperscript{126} See id. at 17.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Leo, supra note 3, at 1018.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
interrogations in a small, private room, isolated from the suspect's friends and family. The study found, however, that the coercive measures that are common in police dramas, such as physically intimidating the suspect, do not occur very often. The police participants reported that suspects waived their Miranda rights 83% of the time, which is consistent with other research.

The participating police officers estimated that their own deception detection skills as being 77% accurate. This self-reported estimate is consistent with other studies that showed that police believed that they could detect whether the suspect was telling the truth with 85% accuracy. The ability to detect the truth is important because “[o]nce a specific suspect is targeted, police interviews and interrogations are thereafter guided by the presumption of guilt.” Once the police subject a suspect to interrogation, techniques such as minimization can induce an invalid waiver of Miranda rights. Therefore, a police officer’s false assumption that a suspect is guilty can lead to an invalid waiver. Disturbingly, studies of police investigators have found that they cannot reliably distinguish between truths and lies any better than other people. That is, a flip of a coin is just as good at distinguishing truth from fiction as police detectives.

As part of another study, 97 police chiefs and 320 college students responded to a survey regarding the Miranda warnings in order to gauge their attitudes about them. Among other things, this study found that the police chiefs generally thought that offenders already knew their rights, were more likely to agree that the Court should get rid of the warnings, and were more likely to agree that the warnings make it more difficult for them to do their jobs. These findings may not be surprising, but they are important to both point out how law enforcement’s perception of Miranda may directly conflict with reality (i.e., that many suspects do not understand their rights) and how law enforcement may perceive any proposed Miranda reform.

134. Id. at 388.
135. Id. at 388, 394 (reporting that 73% of those who responded said that they never use physical intimidation).
136. Id. at 389.
137. Id.
139. Id. at 13.
140. Id.
141. Id.
142. Id. at 14.
144. Id.
IV. PROPOSED REFORMS

When the Supreme Court first handed down the *Miranda* decision, many, including the police, thought that the warnings would severely hamper police investigations and would result in murderers and rapists going free. In the fifty years since the *Miranda* decision, studies have shown that the initial fears over *Miranda* were unjustified. Despite the *Miranda* warnings, most suspects waive their rights (78 – 96%). That is not to say that *Miranda* had no effect. As Professor Richard Leo noted, *Miranda* has had at least four long-term impacts:

First, *Miranda* has increased the professionalism of police detectives, removing the last entrenched vestiges of the third degree. Second, *Miranda* has transformed the culture of police detecting in America by fundamentally reframing how police talk and think about the process of custodial interrogation. Third, *Miranda* has increased public awareness of constitutional rights. And fourth, *Miranda* has inspired police to develop more specialized, more sophisticated, and seemingly more effective techniques with which to elicit inculpatory statements from custodial suspects.

Why then do so many suspects waive their rights? Social science studies, including those discussed herein, have shown that certain groups, particularly the mentally disordered, those with language impairments, and those with limited vocabulary and reading levels, may not understand the *Miranda* warnings. Further, those who do have the cognitive ability to understand the *Miranda* rights may not understand the importance of those rights due to police techniques such as minimization. To that end, one researcher has gone so far as to say that if “the goal of *Miranda* was to reduce the kinds of interrogation techniques and custodial pressures that create stationhouse compulsion and coercion, then it appears to have failed miserably.”

Researchers have proposed several potential reforms to *Miranda* with the intent to better protect the Fifth Amendment rights of suspects. On one end of the spectrum, some researchers have called for a total overhaul of police interrogation procedures. On the other end, researchers have suggested simply requiring the police to record all interrogations. This section will discuss the most prevalent of the recommendations: a complete overhaul, mandatory presence of an attorney or neutral third party, mandatory intelligence testing,
additional police training, prohibiting minimization techniques, re-writing Miranda, standardizing Miranda delivery, and mandatory electronic recording.

A. A Complete Overhaul

Those advocating for a complete overhaul of the American interrogation procedures argue that the Miranda warnings do not adequately protect suspects’ rights due to the reasons previously discussed. Without adequate protection of suspects’ rights, they argue that the guilt-presumptive, confrontational nature of current interrogation practices leads to an unacceptable amount of false confessions. Therefore, advocates of a complete overhaul of interrogation techniques argue that the United States should adopt and make mandatory an investigational interrogation process (instead of the current “confrontational” model). They cite studies that have shown that investigative interrogations lower the rate of false confessions without lowering the rate of true confessions. Advocates of a complete overhaul of interrogation techniques therefore argue that the United States should adopt and make mandatory investigational/inquisitorial interrogation process.

American police interrogations predominantly follow a confrontational, guilt-presumptive model that’s goal is to illicit a confession. The most used confrontational model employed in the United States is called the “Reid Technique.”

The Reid Technique of interrogation is presented as a nine-step process, but the various steps can usefully be reduced to three: isolation, confrontation, and minimization. The process begins by placing the suspect in a small, barely-furnished room, apart from friends, family, familiar surroundings, or any support system. This isolation increases the suspect’s anxiety and eagerness to extricate himself from the situation.

The interrogation itself typically begins with an accusation of the suspect, buttressed by the suggestion that the interrogators have irrefutable evidence, sometimes fabricated. Denials of guilt are aggressively cut off. The idea is to communicate to the suspect the futility of maintaining innocence. Subsequently, the interrogators seek to minimize the nature or consequences of the crime. Minimization

152. See, e.g., Kassin, supra note 10, at 27-28.
153. Leo, supra note 138, at 12 (reporting studies of exonerations found that 14% to 60% of wrongful convictions involved false confessions).
154. See, e.g., Kassin, supra note 10, at 27.
155. Id. at 27.
156. Id. at 27.
themes, which include (but are not limited to) accident, justification, provocation, mitigating circumstances, and secondary role, lead the suspect to infer that he will be treated leniently if only he confesses. Confrontation brings on despair; minimization supplies a lifeline. Together, they break down many suspects.  

The Reid Technique is only to be used when the investigator is reasonably certain of the suspect’s guilt.  

Reasonable certainty of guilt is obtained via evidence and non-confrontational interviews, during which the investigator observes the suspect’s verbal and non-verbal responses.  

The problem with the investigator determining guilt based on the subject’s responses is that, as noted previously, studies of police investigators have found that they cannot reliably distinguish between truths and lies any better than other people.  

The investigatory model, on the other hand, is an information-gathering approach that seeks to establish a working relationship with the suspect and prohibits deception.  

The interrogator tries to establish a rapport with the suspect, asks open-ended questions, and practices active listening.  

Several countries have adopted investigational interrogations as a matter of national policy.  

For example, starting the in the 1980’s after some high profile cases of false confessions, Britain moved away from the accusatorial interrogation model to an investigative model.  

Britain’s PEACE model (Planning & Preparation, Engage & Explain, Account, Closure, Evaluation) of interrogation, “is based upon rapport, respect, and prohibits the use of deception and psychological manipulation on the part of the operator … It is often referred to as a ‘fact-finding’ mission that does not presume guilt, but instead uses open-ended questions to discern the truth. It is associated with the operator actively listening to the subject and developing rapport. In contrast, the accusatorial method of interrogation presumes guilt, seeks to establish control, and uses psychologically manipulative techniques to confront the source. The main goal of this approach is to elicit a confession.”  

Studies have shown that this investigatory interrogation technique not only significantly reduced the use of psychologically manipulative tactics, but that they enabled investigators to inculpate offenders “by obtaining from them useful, evidence generating information about the crime.”

160. Id. at 807.
161. Id.
162. E.g., Leo supra note 138, at 14.
164. Id.
165. Kassin, supra note 10, at 28.
166. Id. at 27-28.
167. Kelly, supra note 163, at 166.
B. Presence of an Attorney

Another proposed Miranda reform is to require that an attorney or neutral third party be present during every interrogation, or adopting a per se rule prohibiting officers from interrogating suspects until the suspect has spoken with an attorney.169 The general idea is that by having an attorney or neutral third party present, that person can make sure that the suspect does understand his or her rights.170

The presence of an attorney or neutral third party is especially advocated to protect vulnerable populations, such as those with an intellectual disability.171 Proponents argue that mandating a neutral third party or an attorney be present during an interrogation of a person with a cognitive impairment will ensure that the individual understand the questions asked and the implications of the answers given.172 Proponents say that this would not only protect the suspect’s rights, but would be vital evidence if the validity of the Miranda waiver were ever challenged.173

C. Mandatory Intelligence Testing

In order to identify suspects with a cognitive impairment, some researchers have urged for the mandatory administration of an intelligence test prior to being Mirandized.174 By using an intelligence test, the police would be able to “distinguish those who are unable to understand their Miranda rights due to a developmental disability, and thus unable to knowingly waive them, from those who can understand them.”175 If the intelligence test indicates that a person can comprehend the Miranda warnings, then the police can administer the warnings and proceed with interrogation.176 If, however, intelligence testing indicated that a suspect is unable to understand the Miranda warnings, the police would then

171. E.g., Kassin, supra note 10, at 30.
172. E.g., id.
173. E.g., Ogletree, supra note 170, at 1842-1843.
175. Id. at 277.
176. Id. at 278.
have to take additional steps, such as a more detailed dialogue with the suspect, in order to help the suspect understand the *Miranda* rights.\(^\text{177}\)

**D. Police Training**

There are two separate proposed reforms to police training regarding *Miranda*: training regarding vulnerable populations\(^\text{178}\) and training regarding the psychology of interrogations.\(^\text{179}\) The proposed reform of additional police training regarding vulnerable populations is premised on the same notion as mandatory intelligence testing: identifying vulnerable suspects and modifying how *Miranda* is given to those suspects to protect their rights. As Patricia Devoy succinctly stated:

“The primary problem developmentally disabled individuals face during interrogations is that police officers do not know the individuals are developmentally disabled. As a result, police officers administer the *Miranda* warnings and use the same interrogation tactics used on individuals of ordinary intelligence, resulting in a high rate of involuntary waivers and false confessions by developmentally disabled individuals. Thus, steps need to be taken to ensure police officers recognize these individuals and verify their comprehension of the *Miranda* rights before the interrogation for the crime begins.”\(^\text{180}\)

To aid police officers in identifying individuals with developmental disabilities, Ms. Devoy suggests training both at the academy (“pre-service” training) and routine refresher trainings / seminars (“in-service” training).\(^\text{181}\)

Researchers who advocate for police training regarding the psychology of interrogations seek to inform police officers how their own perceptions and interrogation techniques can lead to invalid waivers and false confessions.\(^\text{182}\) For example, advocates wish to teach police officers how studies have shown that minimizing techniques increase the likelihood of invalid waivers and false confessions, particularly among vulnerable populations.\(^\text{183}\) Further, advocates for this reform seek to teach police officers that scientific studies show that their “lie detection” abilities or intuition regarding guilt or innocence cannot be trusted (see section II(E) supra), and that relying on those intuitions can lead to erroneous judgments.\(^\text{184}\)

\(^\text{177}\). *Id.*
\(^\text{179}\). *E.g.*, *id.*; Leo, *supra* note 138, at 26.
\(^\text{180}\). Devoy, *supra* note 70, at 273.
\(^\text{181}\). *Id.* at 273-275.
\(^\text{182}\). *E.g.*, Leo, *supra* note 138, at 26-27.
\(^\text{183}\). *Id.* at 29-30.
\(^\text{184}\). Leo, *supra* note 138, at 13-17, 26.
E. Banning Minimization

Some researchers argue that minimization techniques are so prone to bring about invalid waivers that they should be prohibited.\textsuperscript{185} As noted previously, one study demonstrated a significant increase in waivers and a decrease in \textit{Miranda} comprehension when minimization tactics were used.\textsuperscript{186} Advocates of banning the minimization of the \textit{Miranda} warnings argue that one cannot be fully aware of the importance of the rights or the consequences of abandoning them if the importance and consequences of the rights are trivialized.\textsuperscript{187}

F. Re-Writing and Standardizing \textit{Miranda}

As noted previously, one barrier to \textit{Miranda} comprehension is that its vocabulary, sentence structure, and overall comprehensibility are often above the level that a suspect possesses.\textsuperscript{188} Due to this, a large number of researchers have proposed that \textit{Miranda} should be re-written so that it is understandable to most suspects.\textsuperscript{189}

G. The Delivery of the \textit{Miranda} Warnings

Researchers have suggested two different reforms regarding the delivery of \textit{Miranda}: standardization and the use of delivery methods to ensure understanding.\textsuperscript{190} Researchers who advocate for the standardization of \textit{Miranda} delivery seek to combat the variables in \textit{Miranda} delivery that can affect understanding, such as the method and location of the delivery.\textsuperscript{191} Since not every variable can be controlled, other researchers suggest using a delivery method that ensures understanding.\textsuperscript{192} Although the exact formulations of this delivery method varies among researchers, this method generally calls for a conversational approach to \textit{Miranda}, where the police officer will ask the suspect to define key vocabulary words and to rephrase an important concept in his own words.\textsuperscript{193} If the suspect demonstrates confusion, misunderstanding, or misconceptions, then the police officer will provide clarification to ensure understanding.\textsuperscript{194}

\begin{small}
\textsuperscript{185} See Domanico, supra note 92, at 22; Leo, supra note 121, at 433-439.
\textsuperscript{186} See Sheer, supra note 124, at 213–214.
\textsuperscript{187} See Domanico, supra note, at 19.
\textsuperscript{188} See supra Part II.
\textsuperscript{189} E.g., LaVigne, supra note 51, at 113-115. See also Rogers, supra note 28, at135 (“Simple text revisions could greatly increase the comprehensibility of the \textit{Miranda} warnings.”).
\textsuperscript{190} E.g., Kahn, supra note 40, 134-135; Andrew Guthrie Ferguson, The Dialogue Approach to \textit{Miranda} Warnings and Waiver, 49 AM. CRIM. L. REV. 1437 (2012).
\textsuperscript{191} E.g., Kahn, supra note 40, 134-135.
\textsuperscript{192} E.g., Ferguson, supra note 190, at 1439.
\textsuperscript{193} E.g., Id. at 1474.
\textsuperscript{194} E.g., id.; Dominico, supra note 92, at 20-21.
\end{small}
H. Mandatory Electronic Recording

One problem common to all of these proposed reforms described above is that it would be difficult to insure compliance because the bulk of interrogations occur in isolation. Thus, most researchers include mandatory electronic recording (both video and audio) of all interrogations as part of their recommended reforms to Miranda.195

Advocates of mandatory electronic recording of all interrogations say that recording alone may go a long way towards protecting and honoring the Miranda rights of suspects. First, having a recording of the Miranda portion of the police interrogation can help a court determine whether a suspect voluntarily, intelligently, and knowingly waived his or her rights.196 As Professor Richard Leo stated, “The fundamental value of electronic recording is that it creates an objective, comprehensive, and reviewable record of the interrogation for all parties.”197 Secondly, electronic recording of interrogations may decrease the use of psychologically coercive tactics or, at the very least, can provide a suspect evidence for a motion to suppress if the police used such tactics.198 Lastly, electronic recording of interrogations would also allow scholars access to valuable empirical data, which would in turn lead to meaningful research and suggestions for improvement.199

V. THE BEST OF THE PROPOSED REFORMS

The research discussed herein indicates that the Miranda warnings are not an adequate procedural safeguard to protect the Fifth Amendment rights for all suspects. Further, the research is largely critical of police, specifically police interrogation tactics. In considering the Miranda research and proposed reforms, one should understand that the social scientists’ recommendations stem primarily from a different ‘view of the world’ than that of the police. Specifically, social scientists approach Miranda research with a focus on protecting a suspect’s rights. The police, on the other hand, are trying to do their jobs, which is to “catch the bad guy.”200 At its core, the call to reform Miranda brings these two important goals (i.e., protecting the rights of the accused and crime control) into conflict. The solution, then, must balance these goals.201 Some may argue that

195. E.g., Leo, supra note 3, at 1028-1029.
196. E.g., Dominico, supra note 92, at 19.
197. Leo, supra note 3, at 1028.
198. See Leo, supra note 138, at 27.
199. Id.
200. See, e.g., Herbert L. Packer, Two Models of the Criminal Process, 113 U. PA. L. REV. 1 (1964); see also Chris W. Eskridge, LIBERTY V. ORDER: THE ULTIMATE CONFRONTATION (1993). That is not to say that the police do not care about a suspect’s constitutional rights. The police merely have a different objective than social scientists, which must be considered to find an effective solution to Miranda’s shortcomings.
201. See, e.g., Hon. J. Harvey Wilkinson III, IN DEFENSE OF AMERICAN CRIMINAL JUSTICE, 67 Vand. L. Rev. 1099, 1108-1109 (2014) (“A tension between these two supreme values cannot be
the *Miranda* doctrine as it stands currently sufficiently balances these goals, but the sheer volume of *Miranda* scholarship calling for changes indicates otherwise. Indeed, there is scholarship calling for *Miranda* reform both due to *Miranda*'s ineffectiveness of protecting a suspect’s fifth amendment rights (rights based argument) and because *Miranda* leads to lost convictions (crime control argument).202

“How can we calibrate the balance struck by our system so as to avoid the concededly deplorable outcomes of conviction of an innocent man and exoneration of the guilty?”203 The ideal solution would be a system that successfully honored individual rights, including vulnerable populations, while convicting only the guilty.204 Ideally, the solution would be a collaborative effort between academics, bar associations, defense, prosecution, police, and judges’ organizations.205 Thus far, an ideal solution has not been found and there has not been sufficient collaboration thus far to believe that one is on the horizon anytime soon; however, in the interim, some proposed reforms may improve the current situation.

A. Discussion of Proposed Reforms

The idea of a new, improved interrogation method that will cure all of *Miranda*'s shortcomings is enticing; however, there are a few problems with this proposed reform. Although the studies coming out so far appear promising,206 it is not clear that an investigatory interrogation model will protect suspects any better than *Miranda* does. Equally as important, more research regarding this interrogation method’s efficacy of catching “the bad guy” is needed. If a new interrogation technique is proven to be as effective at solving crimes, it would be easier to convince law enforcement to embrace the new technique. Without such evidence- or worse, if the evidence indicates the new technique is less effective-changing techniques would be a very hard sale.

resolved other than through compromise, and the American criminal justice system has for the most part managed these essential tradeoffs well.


203. Wilkinson, supra note 201, at 1109.

204. This line of thinking admittedly assumes that right against self-incrimination and *Miranda*'s goal of counteracting the inherently coercive nature of custodial interrogations are worthy of protection; however, not all agree on this point. Compare, e.g., Charles Hobson, *The Minimalist Privilege*, 1 N.Y.U. J. L. & LIBERTY 712 (2005), and Donald A. Dripps, Against Police Interrogation -- And the Privilege Against Self-Incrimination, 78 J. CRIM. L. & CRIMINOLOGY 699 (1988), with Andrew E. Taslitz, Confessing in the Human Voice: A Defense of the Privilege Against Self-Incrimination 7 CARDOZO PUB. L. POL.’Y & ETHICS J. 121 (2008).

205. Britain’s PEACE model, for example, was the product of such a collaborative effort. Gisli H. Gudjonsson & John Pearse, Suspect Interviews and False Confessions, 20 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 33, 34 (2011).

206. See, e.g., Kassin, supra note 10, at 28.
The feasibility of the proposed reform must be considered as well. Such a reform would need to be enacted legislatively, which means it would be impossible to implement in one fail swoop. Additionally, it would probably take something dramatic to embolden lawmakers to implement such a change. Without something dramatic occurring to spark lawmakers into action, it would likely, as Professor Michael Cicchini stated regarding a different proposed Miranda reform, “[R]equire more substantive change than our entrenched and snail-paced system of justice can currently accommodate.”

Lastly, a total overhaul of American interrogation procedures would require a significant amount of time and resources to implement. For this reason, it is probably the least likely of the proposed Miranda reforms to gain support from lawmakers at this time.

Even if state legislatures enacted such a change, the Supreme Court would either have to overrule Miranda or find the new legislation to be equally as effective at preventing coerced confessions as Miranda, otherwise the new, sans-Miranda interrogation technique would be found unconstitutional.

Significant amount of time and resources required also stands as impediments to other proposed reforms, specifically requiring the presence of an attorney or neutral third party during interrogation and mandatory intelligence testing. For example, specifically requiring the presence of an attorney or neutral third party during an interrogation would likely require most police stations have a lawyer present at all times, which the Miranda opinion itself does not require. States would likely argue that this would be cost prohibitive, and they would have a valid point. For example, in Kentucky, the state police has sixteen regional posts scattered across the state. Assuming that one attorney per regional post would be sufficient to have an attorney present at each interrogation, and assuming the lowest possible salary for an attorney employed with the state, the cost for the attorneys’ salaries would be over $620,000 a year, not including benefits. This number just considers the state police.

207. The Supreme Court could theoretically implement such a sweeping change, if it determined that implementation would serve to give constitutional guidelines to law enforcement and to safeguard a fundamental right (the rationales it used in finding Miranda to be a constitutional case). Dickerson v. United States, 530 U.S. 428, 429 (2000). Although the ultimate make-up of the Court is unclear at this time, it is highly unlikely that the Court would do such a thing.


209. Dickerson v. United States, 530 U.S. 428, 429 (2000) (stating legislation must be at least as effective as the Miranda warnings at apprising the accused of her rights in order to be constitutional).

210. Miranda at 474.


213. $3,230.84 x 12 (months) x 16 (number of posts).
one considers the number of attorneys that would be needed to cover city, county, and other departments, the high cost quickly becomes apparent.

There are other problems with these proposed reforms as well. For example, if mandatory intelligence testing were required prior to being Mirandized, then issues regarding the validity of the testing, the effort of the test taker, and qualifications of the test administrator would arise in the form of pre-trial motions. If the presence of an attorney or neutral third party were required, then defense counsel would likely raise issue with the neutrality and/or effectiveness of the attorney or third party. The result of both proposed reforms, then, could actually result in more pre-trial proceedings and questions as to whether a suspect “knowingly and intelligently” waived his or her rights than they would resolve.

Reforming police training to include trainings on vulnerable populations and the psychology of interrogations would require additional time and resources, but those would likely be comparatively small as the trainings would be relatively short and could be implemented at times where law enforcement personnel are already undergoing training, such as at the academy and at regularly scheduled refresher trainings. The main “con” to additional training is that it is not a “fail safe” solution: its effectiveness would depend on the quality of training and the receptiveness of the student.

Banning minimization of the Miranda warnings may increase Miranda comprehension and reduce invalid waivers as researchers suggest; however, such a ban does not address other barriers to understanding the warnings, such as ID and language disorders. Additionally, such a ban would be hard to monitor and regulate. For example, most interrogations are not recorded. How is a court to know whether an interrogator used minimization techniques? Additionally, such a ban may increase pre-trial motions. For example, defense could raise a motion to exclude because the interrogator gave the warnings at X many words per minute and not the prescribed Y words per minute. In short, a ban on minimization tactics could ultimately lead to more problems than it would solve.

Re-writing and standardizing the Miranda warnings so that they are understandable to most suspects would be a cheap reform to implement; however, doing so is not as easy as it may seem. For example, some studies show that simplified Miranda warnings do not increase understanding and that attempts to simplify the warnings actually resulted in warnings that were less comprehensible. Additionally, simplified warnings might still be ineffective in increasing Miranda comprehension among suspects with an intellectual

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disability.\textsuperscript{215} Lastly, this proposed reform runs contrary to \textit{California v. Prysock}, in which the Supreme Court held that there was no rigid rule as to the content of the warnings.\textsuperscript{216} So to implement standardized, simplified warnings, the Supreme Court would either have to overrule \textit{Prysock}, or all legislative bodies would have to enact such a rule. Neither of which appear to be a possibility at this point.

Mandating a conversational delivery of the \textit{Miranda} warnings would have the benefit of increasing \textit{Miranda} comprehension and it would be effective among vulnerable populations. Although this proposed reform would require training of law enforcement, it is comparatively cost effective and would be easy to implement. The drawback to this proposed reform is that it will not likely be supported by law enforcement or those who lean towards the crime control model. That is, law enforcement and those concerned with crime control would likely think that this purposed reform would interfere with the investigative process and would result in increased lost confessions.\textsuperscript{217} Research into the conversational delivery of the \textit{Miranda} warnings and its effect on confessions may be worthwhile to address law enforcement concerns. If, however, we truly want suspects to be knowledgeable of their rights, then the conversational method of \textit{Miranda} delivery seems best fitted towards that end.\textsuperscript{218}

Simply electronically recording all interrogation procedures appears to be the most favored of all of the proposed reforms. This is not surprising because it would be relatively low-cost to implement\textsuperscript{219}, would likely reduce the number of pretrial motions\textsuperscript{220}, and would, when needed, aid courts in determining the validity of the waiver\textsuperscript{221}. Additionally, studies have not found a significant reduction in confessions with recording.\textsuperscript{222} Lastly, mandating electronic recording of interrogations is not a sweeping reform, but rather a modification of

\begin{thebibliography}{99}
\bibitem{217} These same concerns have been voiced regarding \textit{Miranda} ever since it was decided (and even in its dissent), so it seems reasonable to infer that they would be raised again if its delivery method was standardized. \textit{See, e.g.}, \textit{Miranda v. Arizona}, 384 U.S. 436,516 (Harlin, J., dissenting) (“What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it.”).
\bibitem{218} \textit{See note 204 supra. See also Andrew E. Taslitz, Bullshitting the People: The Criminal Procedure Implications of a Scatological Term, 39 \textit{Tex. L. Rev.} 1383 (2007).
\bibitem{219} \textit{E.g., Christopher Slobogin, Toward Taping, 1 \textit{Ohio St. J. Crim. L.} 309, 315 (2003).
\bibitem{221} \textit{E.g., Findley, supra note 220, at 161-162.
\end{thebibliography}
procedures already in place. As such, the police and lawmakers are more likely to accept this reform.

Despite its support and significant benefits, mandating electronic recordings can have some negative consequences. For example, although mandatory recording may discourage improper interrogation practices while on camera, it will do nothing to stop law enforcement officers from finding a “work-around,” such as pre-interrogation questioning or “missing” or incomplete recordings.223

Additionally, electronic recordings may not be as “objective” as they appear. For example, law enforcement officers may only tape the last part of the interrogation. According to research, this is problematic for two reasons, “First, the jury sees a final self-incriminating statement but not the circumstances that led up to it, thus perhaps increasing perceptions of voluntariness. Second, after recounting a story over and over again, a suspect is likely to show less emotion and appear unusually callous.”224

Beyond potentially projecting an inaccurate view of the defendant to the jury, mandatory electronic recording may not provide an objective record in another way. Studies have shown that people tend to think that a video interrogation with just the suspect in frame is less coercive than if the suspect and interrogator are both in the frame.225 This is a phenomenon called “camera perspective bias.”

Even if both the interrogator(s) and the suspect are in the frame of the camera, human psychology may influence how a jury may regard the “objective” recording. For example, research has found that people tend to think that a person acts a certain way because of some internal cause, even when external pressures can account for them.226 So, even if a recording shows police using coercive tactics, people will still tend to believe that the suspect confessed “because she wanted to” and not because of the coercive tactics.

The problems inherent to electronic recording can be ameliorated, if not nearly eliminated, if strict guidelines for electronic recording were imposed. Specifically, electronic recording should be mandatory every time law enforcement questions a suspect and for the entirety of the questioning. Such recording should require both the interrogator(s) and the suspect equally within the camera’s frame. Judges and advocates should also be aware of the psychological pitfalls of recordings and do their best to guard themselves, and the jury, against them.

Several states have already implemented mandatory electronic recording through either legislation or judicial ruling.227 With the current public interest in

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223. Slobogin, supra note 219, at 315.
225. E.g., id.
227. Id. at 769.
recording police conduct, the likelihood of implementing this reform in other states appears to be good and far more likely than the other proposed reforms.

B. The Best for Now... Maybe Later?

The absolutely best way to counter the inherently coercive nature of police interrogations would be to remove the coerciveness from the interrogation. The problem is it is not clear whether the investigative model of interrogation, or any other model for that matter, would effectively do that. It is also not clear how a less coercive interrogation would affect crime control efforts. More extensive research into the effectiveness of investigative models, such as Britain’s PEACE model, in comparison to our adversary model and other investigative models is desperately needed. There is a middle ground to be found, but more research and collaboration between all parties involved is needed to find it. In short, the “best” solution has not yet been definitively identified, but there is hope that one will be found one day. Until then, there are a couple of easily implemented, low cost short-term reforms that should be sought.

Of the short-term, low cost reforms, mandatory electronic recording is the most beneficial because of the potential evidentiary value of the recording. This reform, however, must be uniform and precise to be effective. Recordings should be used every time a suspect is questioned, for the entirety of the questioning, and should include the suspect and the interrogators in the camera’s view to avoid the biases and psychological affects that recordings can create.

Electronically recording interrogations may not go far enough to protect a suspect’s rights, particularly if the suspect is, for example, intellectually deficient. If we except Miranda’s principal that knowledge of the right helps protects suspects from the compelling psychological pressures of an interrogation, and / or if we believe that we want an informed people (specifically that suspects be informed of their rights)

228. See notes 204 and 218 supra.

Taken together, mandating electronic recording and a conversational delivery of the Miranda warnings would provide the suspect with better protection of his or her rights and would aid courts in determining the validity of the waiver. Equally as important, these recommended reforms are unlikely to thwart law enforcement’s goal of crime control. These proposed reforms would not drastically alter the current balance between protecting the suspect’s rights and crime control, but would only nudge the balance slightly closer to even by providing a bit more protection for particularly vulnerable suspects.

Ideally, however, mandating police trainings on both vulnerable populations and the psychology of interrogations would be included with these proposed
reforms. These trainings would not only educate law enforcement regarding vulnerable populations and the limitations of their perceptions, but may go a long way to helping law enforcement understand why *Miranda* reform is needed.

These three modest reforms, implemented in tandem, would be ideal; however, such a goal is likely unrealistic. Instead, advocates for reform should first push legislatures for the most popular proposed reform: electronic recording. Once that is obtained, advocates should push for additional police training because it is not as likely to meet opposition as the conversational delivery. A mandated, conversational delivery of *Miranda* is the “harder sale” of the three proposed reform. If, however, additional research or a brave district willing to try it can show its benefits, both as to how a suspect’s responses to a conversational delivery of *Miranda* can provide evidence of a valid waiver and how it can identify vulnerable suspects, then it would be much easier to convince law enforcement and law makers of its value.

VI. CONCLUSION

Even though the *Miranda* decision will celebrate its fiftieth birthday within a few months, questions regarding its effectiveness of protecting Fifth Amendment rights remain. The prevalence of these questions is based largely on a wide, ever growing body of research that shows not only that the *Miranda* warnings are not an adequate procedural safeguard to protect the Fifth amendment rights for all suspects, but that the warnings wholly fail in some contexts.

As the research discussed herein has shown, there are many barriers to understanding the *Miranda* warnings, particularly among suspects with cognitive, psychiatric, and language disorders. This is problematic since these vulnerable groups are overrepresented in the criminal justice system.229 Even among non-vulnerable groups, the majority of suspects waive their *Miranda* rights. There are many potential reasons for this, but police tactics such as minimization of the importance of the *Miranda* rights have been shown to significantly affect *Miranda* understanding and ultimately *Miranda* waivers. Despite the psychological effectiveness of these techniques at bypassing *Miranda*, they are currently permissible (i.e., not considered “coercive” by the courts).

Researchers have proposed several reforms to *Miranda* and interrogations to better safeguard suspects Fifth Amendment rights. Since the goal of *Miranda* was to counter the inherently coercive nature of custodial interrogations, it would seem logical that the best protection for Fifth Amendment rights would be to remove the coerciveness of custodial interrogations and replace it with an

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investigatory model such as Britain’s PEACE method. This may indeed be the best solution, but more research and collaboration is needed.

Until a large-scale solution is found, reforms that are cheaper and easier to implement and that enable courts to better determine whether a waiver was knowing, voluntary, and intelligent under current law should be pursued. Such modest reforms suggested by researchers include simplifying the language and reading level of the *Miranda* warnings, standardizing the warnings, providing police training regarding vulnerable populations and psychological evidence regarding interrogations, and electronically recording all interrogations. Of these proposed modest reforms, electronic recording of all interrogations appears to have the most support among social scientists and most beneficial because of the potential evidentiary value of the recordings.

Barring a total overhaul of interrogation procedures, implementation of a few proposed reforms is necessary in order to ensure a suspect understands the *Miranda* rights. Specifically, a conversational approach to *Miranda* that ensures understanding coupled with an electronic recording of the interrogation, including the *Miranda* conversation, would both ensure the suspect’s rights and provide law enforcement with evidence showing a valid waiver. Adding mandatory police training on vulnerable populations and the psychology of interrogations would have the benefit of having a more informed police force who, in turn, may be receptive or understanding of the need for *Miranda* reform.

Until reforms are implemented, legal professionals need to be aware of the many factors that can limit a defendant’s ability to understand the *Miranda* warnings. Researchers need to continue to explore and test alternatives to the accusatory interrogation model and other methods aimed at better protecting suspects’ rights. Researchers and those in the legal profession should also work with law enforcement and law makers on a more permanent solution.