Richard Rogers · Eric Y. Drogin

Conducting Miranda Evaluations

Applications of Psychological Expertise and Science within the Forensic Context

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Preface

Largely overlooked until the last two decades, Miranda evaluations may eventually overshadow all other criminal forensic mental health issues combined. A conservative estimate (Rogers 2011) is that several hundred thousand adult defendants per year—persons with serious mental disorders and severely impaired Miranda abilities—waive their rights and confess without the benefit of counsel. Each year, comparable numbers are estimated for developmentally immature juvenile detainees facing custodial questioning. This book is timely in addressing this emerging crisis and in positioning psychologists and psychiatrists as the professionals best equipped to meet its challenges.

Conducting Miranda Evaluations provides practicing psychologists and psychiatrists with both the conceptual framework and clinical methods needed to respond to these forensic assessment opportunities. Readers are presented with balanced, empirically driven guidance on how to interact with counsel, conduct these assessments, and communicate their conclusions to the legal community. This book provides mental health professionals with the necessary legal and forensic background for carrying out sophisticated evaluations that cover both Miranda comprehension and reasoning. In addition, two chapters describe how to integrate findings and communicate them via forensic reports and expert testimony. The final chapter broadens the focus to other professional roles and responsibilities involving education, consultation, and research.

The professional audience for this book is likely to be both broad and diverse. In highly populated urban centers, readers will likely be composed predominantly of forensic psychologists and psychiatrists with similarly specialized training. However, more than 1000 rural and semirural counties in the United States depend mostly on seasoned generalists to evaluate routinely forensic assessments such as

Miranda consultations. This book will be respectful of both professional audiences and a smaller group of criminal attorneys seeking to educate themselves about the psychological advances in Miranda issues.

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Why Study These Decisions?

Forensic mental health services do not occur in a vacuum. Instead, they should be conceptualized as an often complex system that interfaces law, criminal justice, and specialties of forensic psychology and psychiatry.

When we conduct clinical evaluations or psychotherapy, be it in a hospital, in a school, or in the privacy of our own offices, we—in collaboration with our patients/clients—are the professionals running the show. Stated in simple terms, we find out what may be wrong, and we try to make it better. Yes, there are laws that shape what we do and how we should do it. Ethical codes (e.g., American Academy of Psychiatry and the Law 2005; American Psychological Association 2017) provide mandatory standards for professional comportment. Guild-driven guidelines set aspirational goals we wish we could always attain. As long as we keep it within the navigational beacons, how we succeed is left up to us.

Forensic mental health services are about solving other professionals' referral issues, generally on terms they devise, concerning issues they find important, consistent with their own behavioral assumptions. As mental health professionals who function in the legal arena, we still obey the law, adhere to our ethical codes, and pursue our guidelines. While it is true that we have been afforded considerable freedom in how we perform our forensic duties, if we fail to discern and deliver what the criminal justice system thinks it needs from us, we are literally wasting their time and ours.

Fortunately, figuring out the expectations of other professionals is a rational and intuitive process for which we are uniquely skilled, given our clinical expertise. Moreover, we do not have to look far to find our data set. As it turns out, the criminal justice system has found a way to share this information in a direct fashion information for centuries: the appellate decision. In these written opinions, senior judges

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settle interpretive disputes about all manner of legal issues. They take great pains to explain their reasoning, overtly communicating both their objectives and their assumptions so that trial judges—and we as forensic practitioners—may get it right in future cases.

The vast, intricate realm of Miranda jurisprudence burst into public consciousness with a high-profile and controversial appellate decision over half a century ago, drawing from several decades' worth of prior opinions and spawning a series of consequential new rulings that debut periodically to the present day. What has endured throughout all of these appellate decisions, essentially unscathed, is the fundamental notion that when law enforcement professionals take someone into custody, certain warnings must be provided if they want to use that person's statements as evidence. Is it really that simple? The Supreme Court of the United States (the "Court") has been telling us so for a long time now, but apparently legal and mental health professionals alike are still not getting it right.

The Miranda Decision: What Did It Actually Tell Us?

Similar to such other legally, forensically, and clinically fraught notions as reporting requirements under the "duty to warn" (Shah et al. 2013), notification requirements under the "Health Insurance Portability and Accountability Act" (HIPAA; Richards 2009), and confidentiality requirements under the doctrine of "informed consent" (Knapp et al. 2017), our grasp of the warning and waiver requirements of *Miranda v. Arizona* (1966) is best addressed by going directly to the source. Overlapping concerns of misinformation, superstition, and what can simply be described as sloppy practices are each potentiated by a failure to reconnect with what this decision lays out in some of the most compelling and concise language in all of American criminal law.

Ernesto Miranda—one of three defendants whose case was addressed in the Court's combined decision—was arrested in his home and transported to a local police station. An interrogation conducted by two police officers for approximately 2 h resulted in this "seriously disturbed individual" (p. 457) providing a signed confession. The officers "admitted at trial that Miranda was not advised that he had a right to have an attorney present" (p. 491). The trial court admitted Miranda's statement into evidence, despite his attorney's objections. Miranda was subsequently convicted of both kidnapping and rape and sentenced to two concurrent terms of 20–30 years.

The Supreme Court of the United States cogently stated (p. 439) that:

> The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

Providing an overview of seven decades of prior reasoning, the Court noted with approval its assertion in *Brown v. Walker* (1896) that, concerning the plight of the custodial suspect, "the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions" had inspired American colonists to make "a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment" (pp. 596–597).

In *Chambers v. Florida* (1940), the Court had described a situation in which incarcerated murder suspects, subjected to incessant questioning for days on end, "at no time during the week were permitted to see or confer with counsel or a single friend or relative" (p. 231), leading to a holding later described in *Blackburn v. Alabama* (1960) as establishing "that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition" (p. 206).

Miranda arrived in the wake of a decision rendered just 2 years earlier—*Escobedo v. Illinois* (1964)—that without *Miranda* would surely have been remembered as "the" custodial interrogation case. Escobedo was arrested for shooting his brother-in-law, and was eventually convicted of murder after making a "damaging statement" (p. 478) while his own lawyer, present in the same building, was not allowed to see him. The Court ruled in this case that when an investigation "has begun to focus on a particular suspect" who "has been taken into police custody" and who "has requested and been denied an opportunity to consult with his lawyer," and "the police have not warned him of his absolute constitutional right to remain silent," then "no statement elicited by the police during the interrogation may be used against him at a criminal trial" (pp. 490–491).

After reviewing, in considerable depth, the nature of then-current interrogation practices, the Court in *Miranda* asserted that Miranda had been "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures" and that "it is obvious that such an interrogation environment is created for no purpose other than to subject the individual to the will of his examiner" (p. 457). The Court further observed that "this atmosphere carries its own badge of intimidation … this is not physical intimidation, but it is equally destructive of human dignity," and maintained that "unless protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice" (pp. 457–458).

The Court stated (p. 467) that "unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it," specific "safeguards must be observed" (pp. 467–468):

> At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them

> aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning, and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

In this passage, the Court provides a rationale for the underlying notion of Miranda warning requirements that is as much socially as it is legally inclined. The filament running through this language—although the term itself does not surface—is one of fundamental fairness. There is also a clear acknowledgement of the purpose as well as the nature of custodial interrogations (Frantzen 2010).

The Court was not content with a mere notification of the "right to silence," mandating additionally (pp. 469) that:

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

Arguably decades before its time, this insight concerning the natural inclination of persons toward law enforcement implicitly acknowledges a perceptual sociocultural distinction when it comes to the citizenry's perception of law enforcement and its alignment with the interests of citizens as a whole (Intravia et al. 2018). What is anticipated here is that arrest and questioning will ensnare a broad cross-section of the population, not just in terms of cognitive capacity and related educational experience, but also in terms of exposure to the criminal justice system and alignment with its avowed purpose.

Beyond this warning, the Court further provided (pp. 469–70) that:

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end … thus, the need for counsel to protect the Fifth Amendment privilege

> comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

Conveyed here in no uncertain terms is the need for Miranda warnings to be not just delivered and comprehensible, but also effective (Rogers et al. 2013). A pro forma recitation, a ticking of the procedural box, a "tagging up" in terms of arrest protocol—clearly, none of these was an end in and of itself in the minds of this decision's drafters.

The Court also specified (p. 473) that:

> In order fully to apprise a person interrogated of the extent of his rights under this system, then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that, if he is indigent, a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation —the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

In this passage, the Court is digging, in deeply detailed fashion, into the notion that legal representation is comprised of more than just a binary advisement as to whether or not to avail oneself of the right to silence. Counsel's ongoing presence is a critical factor, as new information—factually accurate or otherwise—is proffered by questioners and new enticements are offered (Davies and Worden 2009; Rogers et al. 2007).

The Court explicitly stated that Miranda rights should not be construed as a one-time decision (p. 479): "Opportunity to exercise these rights must be afforded him throughout the interrogation." Regarding the ongoing right to silence, it held that the accused be apprised of "their right of silence and to assure a continuous opportunity to exercise it" (p. 444). Moreover, the right to counsel can be asserted at "any stage of the process" (pp. 444–445). If an effort to erase any doubt regarding this matter, the Court added the following clarification:

> The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

The five Miranda components are summarized in Table 1.1. They include four rights as well as cautionary advice about the risks of talking. Importantly, the warning must be provided before any questioning so as to convey the Miranda-relevant information prior to any opportunities for self incrimination.

Table 1.1 Requisite Miranda warning components

Component	Right or advice?	Guiding language from the Miranda decision
Right to remain silent	Right	"He must be warned prior to any questioning that he has the right to remain silent." (p. 479)
Risks of talking	Advice	"He must be warned prior to any questioning … that anything he says can be used against him in a court of law." (p. 479)
Right to an attorney	Right	"He must be warned prior to any questioning … that he has the right to the presence of an attorney." (p. 479)
Appointment of an attorney if indigent	Right	"He must be warned prior to any questioning … if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (p. 479)
Assertion of rights at any time	Right	"Opportunity to exercise these rights must be afforded him throughout the interrogation." (p. 479)

How well are these components communicated to detainees? Box 1.1 summarizes the key differences in clarity and completeness based on two national surveys (see Rogers et al. 2008). As detailed in subsequent chapters, forensic practitioners must evaluate both the information presented as well as what understanding was conveyed. For instance, many detainees may fully realize that defense attorneys will play an active role, irrespective of whether this is mentioned. More concerning for many arrestees involves the occasional use of legalese. If the word "waiver" is not clearly explained, how may detained individuals understand the meaning of this word that typically requires a college education (see Chap. 3, Table 3.4).

On occasion, Miranda warnings include potentially misleading statements. Rogers et al. (2008) found that about one-fourth of Miranda warnings contained the following statement: "remain silent *until* counsel is available." Many detainees may simply overlook the conditional word, "until." Alternatively, they may wrongly decide that talking is inevitable and choose now without counsel over later with legal representation. Again, forensic practitioners must ascertain the meaning of Miranda content for each detainee of included and omitted material. As an example of the latter, will I or my family be responsible for unaffordable legal services? Professionals are prudently cautioned never to extrapolate from their own understanding of Miranda content but rather inquire from each examinee.

Omissions of key information are likely based on well-intentioned assumptions that such material is either known or easily inferred. For instance, it appears easy to infer that evidence in a criminal matter would be used for the purposes of prosecution (Component #2, Box 1.1). In contrast, the earlier cited example remains obviously ambiguous. Persons may be appointed, such as the conservator of a will, without being reimbursed by the court.

Box 1.1
Miranda Components and Key Differences in Content

1. Right to silence
    a. Most do not unexplained what this means
    b. The rest mention there is no obligation to talk
2. Evidence against you
    a. Most specify in court or at trial
    b. The rest do not specify
3. Right to an attorney
    a. About half designate physically to be present
    b. About half mention duties: "advise" or "consult"
4. Access to appointed counsel
    a. Most do not mention who pays for legal services
    b. The rest clarify the services are free to detainees
5. Assertion of rights
    a. Most use simple language (e.g., "stop at any time")
    b. The rest use legalese (e.g., "withdraw your waiver")

Beyond Miranda content, the Court addressed (pp. 473–474) how this content would be implemented on a practical basis:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

The Court's observation here that "any manner" of assertion of the right to silence will lead to the cessation of questioning eventually led—as described later in this chapter, in considerable detail—to additional appellate decisions that seem to

draw a critical distinction between *being* silent and wishing to *remain* silent (Gillard et al. 2014). Overall, what is and has remained clear is that further interrogation is seen as an undue burden for those whose right to silence appears to imply that theirs is not the only silence that matters.

Finally, the Court described how, "unless other fully effective means are adopted," the "following measures are required" (p. 479):

> He must be warned prior to any questioning that he 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 the presence of an attorney, and that, if 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. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. 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.

The foregoing "fully effective means" provision presages a string of appellate cases, subsequently examined in this chapter in depth, that grapple with an unintended interpretive legacy of this decision—a wrongheaded assumption on the part of some courts that the language employed in Miranda constitutes the actual words that must be present in each and every advisement. Rather than precise verbiage, Miranda was intended to provide general descriptions for each components.

Representative of the dissenting opinions of four Justices in *Miranda* is the following passage (p. 500):

> Now the Court fashions a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, counsel will be furnished him. When, at any point during an interrogation, the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed. The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof. Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient.

The "patient" remains alive, although opinions continue to differ as to how well. The 5–4 split in the *Miranda* case presaged the specifically delineated camps that skirmish over the interpretation of its legacy through to the present day. The following sections of Chap. 1 address how subsequent appellate cases have addressed various aspects of "unfinished business" in ensuring Constitutional protections. It does lead to speculation about whether the original drafters have seen it this way.

Miranda Language—Why Aren't They Using the Right Words?

It's not as if the *Miranda* decision itself is hard to find. On Google, the simple query "*Miranda v. Arizona*" pulls up over 13,000,000 results. Free legal search engines like Justia (2018), Oyez (2018), and Cornell Law School's Legal Information Institute (2018) offer links to the full text of the Court's decision. Moreover, some sites also include such additional resources, such as filing documents and audio recordings of the actual oral arguments. The website of the United States Courts (2018) helpfully provides a slew of "activity resources" for attorneys and members of the public alike, including an educational podcast and a video on the "Voices of *Miranda v. Arizona*" that bring various aspects of the case to life.

So, why is it so hard to get the words right? Admittedly, it would be asking a lot for law enforcement officers to carry a copy of the entire *Miranda* decision around with them—in its originally published form, it weighed in at some 69 pages—but how about something as simple as a card inscribed with the precise, legally sanctioned warning?

As a matter of fact, many police departments issue such cards, but strangely the language seems to vary from jurisdiction to jurisdiction (much more about this phenomenon in Chap. 2). From a strictly legal standpoint, how can this be?

After *Miranda* had been the law of the land for a decade and a half, with lawyers around the country challenging these variations at every turn, the Court agreed to take up this issue in *Prysock v. California* (1981). The case involved Randall, a juvenile arrested for murder. He was taken into custody and brought to the local sheriff's department. Once initially being advised of his Miranda rights, Randall refused to speak with law enforcement officers. His parents were then summoned; after Randall spoke with them, he agreed to answer a police sergeant's questions after all. At this juncture, Randall was led through his "legal rights" a second time, and the following conversation ensued (pp. 356–357):

Sgt. Byrd: Mr. Randall James Prysock, earlier today I advised you of your legal rights, and at that time you advised me you did not wish to talk to me, is that correct?

Randall P.: Yeh.

Sgt. Byrd: And, uh, during, at the first interview, your folks were not present, they are now present. I want to go through your legal rights again with you and after each legal right I would like for you to answer whether you understand it or not … Your legal rights, Mr. Prysock, is [*sic*] follows: Number one, you have the right to remain silent. This means you don't have to talk to me at all unless you so desire. Do you understand this?

Randall P.: Yeh.

Sgt. Byrd: If you give up your right to remain silent, anything you say can and will be used as evidence against you in a court of law. Do you understand this?

Randall P.: Yes.

Sgt. Byrd: You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?
Randall P.: Yes.
Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?
Randall P.: Yes.
Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this?
Randall P.: Yes.
Sgt. Byrd: You all, uh,—if,—you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?
Randall P.: Yes.
Sgt. Byrd: Now, having all these legal rights in mind, do you wish to talk to me at this time?
Randall P.: Yes.

At trial, Randall was convicted of first-degree murder, with aggravating circumstances of torture and robbery. When the California Court of Appeal reviewed his case, however, it reversed the trial court's decision and granted Randall a new trial, ruling that his "recorded incriminating statements, given with his parents present, had to be excluded from consideration by the jury" because he "was not properly advised of his right to the services of a free attorney before and during interrogation" (p. 358).

Although the California Court of Appeal acknowledged that Randall had been told that he could "talk to a lawyer" before being questioned, could have that lawyer present "while you are being questioned, and all during the questioning," and could have this lawyer "appointed to represent you at no cost to yourself," it concluded that "these warnings were inadequate" because Prysock "was not explicitly informed of his right to have an attorney appointed *before further questioning*" (pp. 358–359; emphasis supplied).

The Court of Appeal buttressed this perspective by noting that one of the "virtues" of *Miranda* was that "its precise requirements that are so easily met," and quoted *Harryman v. Estelle* (1980), a then-recent Federal appellate decision, to the effect that "the rigidity of the *Miranda* rules and the way in which they are to be applied was conceived of and continues to be recognized as the decision's greatest strength" (p. 359).

When this case was eventually appealed all the way to the Supreme Court of the United States, the Court rejected this notion of "rigidity," and in so doing undercut the notion of how "easily met" Miranda requirements were going to be—at least as other courts would struggle with them in the future. Instead it maintained that "this Court and others *have* stressed as one virtue of *Miranda* the fact that the giving of the warnings obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions of the accused," and that "nothing in these observations

suggests any desirable rigidity in the form of the required warnings," with the further observation that "quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures" (p. 359).

The Court specified that, in the present case, "nothing in the warnings given respondent suggested any limitation on the right to the presence of appointed counsel" (p. 360), concluding that:

> It is clear that the police in this case fully conveyed to respondent his rights as required by Miranda. He was told of this right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed at no cost if he could not afford one. These warnings conveyed to respondent his right to have a lawyer appointed if he could not afford one prior to and during interrogation. The Court of Appeal erred in holding that the warnings were inadequate simply because of the order in which they were given. (p. 361)

Although three Justices dissented in *Prysock*, they did not dispute "the Court's demonstration that the Constitution does not require that the precise language of *Miranda* be recited to an accused" (p. 364). The dissenters did maintain, however, that with respect to the Court of Appeal's reasoning "this Court is not at all fair to those judges when it construes their conscientious appraisal of a somewhat ambiguous record as requiring 'a virtual incantation of the precise language contained in the *Miranda* opinion'" (pp. 365–366). Such sentiments did not, however, deter the Court from ruling some 8 years later in *Duckworth v. Eagan* (1989) that judges "need not examine *Miranda* warnings as if construing a will or defining the terms of an easement" (p. 203).

In other words, hundreds of different words have been used in delivering Miranda warnings (Rogers et al. 2008), but this observation alone does not explain away why varied language does not get the job done. As noted in *Miranda* (1966, p. 476), "the warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant" (*Miranda* 1966, p. 476; emphasis supplied).

As all of us in the mental health professions are aware, "effective" is a term with practical applications as well as legal implications. Even words that cleave specifically to a judicially preapproved checklist don't necessarily enable the sort of decision-making process clearly envisioned by the Court in *Miranda*. The Court didn't require law enforcement officers to say these things in order to tidy up the record at trial. The goal was—and is—to make sure that useful information is accurately conveyed. The modern appellate battleground is littered with decisions that grapple with this central notion of Miranda jurisprudence.

One of the more recent of these conflicts—and as effective a harbinger as any for where the Court appears to be heading in such matters—is reflected in *Florida v. Powell* (2010). When the police entered the apartment of Powell's girlfriend with the intent of arresting him for his potential role in an alleged robbery, they found him, along with a loaded handgun located underneath a bed in the room from which

he was exiting. Powell was read a Miranda warning that contained the following language (p. 54):

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview.

Powell signed the form at the local police station after acknowledging that he had been "informed of his rights," that he "understood them," and that he was "willing to talk" with the officers. He then confessed to being the owner of the handgun, and was ultimately convicted—in light of his status as a convicted felon—of "possession of a weapon by a prohibited possessor" (pp. 54–55). On appeal, the Florida Supreme Court overturned Powell's conviction on the basis that "the advice Powell received was misleading because it suggested that Powell could only consult with an attorney before questioning and did not convey Powell's entitlement to counsel's present throughout the interrogation" (p. 55).

When Powell's case was ultimately appealed to the Supreme Court of the United States, this argument failed to find traction. The Court pointed out, with respect to the Miranda warning Powell had signed, that "the first statement communicated that Powell could consult with a lawyer before answering any particular question," and that "the second statement confirmed that he could exercise that right while the interrogation was underway," such that "in combination, the two warnings reasonably conveyed Powell's right to have an attorney present, not only at the outset of interrogation, but at all times" (p. 62). The Court then went on to describe, in unusually practical terms (pp. 63–64), what would be necessary in order for its own reasoning to fail to pass muster:

> To reach the opposite conclusion, *i.e.,* that the attorney would not be present throughout the interrogation, the suspect would have to imagine an unlikely scenario: To consult counsel, he would be obliged to exit and reenter the interrogation room between each query. A reasonable suspect in a custodial setting who has just been read his rights, we believe, would not come to the counterintuitive conclusion that he is obligated, or allowed, to hop in and out of the holding area to seek his attorney's advice. Instead, the suspect would likely assume that he must stay put in the interrogation room and that his lawyer would be there with him the entire time.

The Court concluded in *Powell* that "although the warnings were not the *clearest possible* formulation of *Miranda's* right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a commonsense reading" (p. 63). Two dissenters on the Court doggedly continued to maintain that "the warning at issue in this case did not reasonably convey to Powell his right to have a lawyer with during the interrogation," that it was "clear that the form is imperfect," and that "reasonable judges may well differ over the question the deficiency is serious enough to violate the Federal Constitution" (p. 76).

Miranda and the Target of Questioning—Were They Talking to Me*?*

Ideally—given the assumption shared by both authors of this book that all parties involved truly cherish the rule of law and want to find out who actually committed the offense in question—Miranda warnings would be administered under circumstances free of any physical or psychological trappings of coercion. Moreover, they would be delivered by law enforcement officers who are fully informed of the suspect's linguistic abilities, cognitive limitations, behavioral inclinations, and mental health status. In addition, the custodial setting would be a physically safe one for all involved. Every aspect of advisement and waiver would be preserved in audio and visual formats that independently confirm the coherence of all written and verbal transactions, conducted in a language and dialectic with which every participant is comfortable and familiar.

For better or for worse, arrests and questioning are conducted in the real world and less than ideal conditions. Statements may occur in any number of physical settings, prompted by any number of stimuli that might not necessarily be directed—intentionally or otherwise—toward custodial suspects themselves.

In *Rhode Island v. Innis* (1980), the police responded to a taxi driver's complaint that he had just been robbed by a man using a sawed-off shotgun. Just 1 day earlier, the body of another local taxi driver was discovered "in a shallow grave," with the cause of death determined as "a shotgun blast aimed at the back of his head" (p. 293). Less than 4 h after the current complaint, a uniformed police officer "spotted the respondent standing in the street facing him," and when the officer "stopped his patrol car, the respondent walked towards it" (p. 294). No legally relevant conversation occurred between Innis and the patrolman before a police sergeant and a police captain appeared separately, each reading Innis his Miranda rights upon arriving. Innis "stated that he understood those rights and wanted to speak to a lawyer," at which point he was transported to the police station, undisputedly "in custody" (p. 298) by three officers. Of interest, they were instructed by their captain "not to question the respondent or intimidate or coerce him in any way" (p. 294).

On the ride to the station, one officer remarked to another that "there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves." A second officer later recalled replying to the first officer that "I more or less concurred with him that it was a safety factor, and that we should, you know, continue to search for the weapon and try to find it." In following the discussion, a third officer later remembered that the second officer also "said it would be too bad if the little—I believe he said a girl—would pick up the gun, maybe kill herself" (pp. 294–295). Innis then "interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located" (p. 295).

At trial, the presiding judge determined that Innis had been "repeatedly and completely advised of his *Miranda* rights," that it was "entirely understandable" why the

officers would "voice their concern" to one another concerning safety issues. In conclusion, the judge ruled that Innis's statement constituted "a waiver, clearly, and on the basis of the evidence that I have heard, [an] intelligent waiver, of his right to remain silent" (p. 296). On the basis of Innis having been charged with "kidnaping, robbery, and murder," the jury ultimately "returned a verdict of guilty on all counts" (pp. 295–296).

On appeal, the Rhode Island Supreme Court ruled that the officers' conversation about the shotgun was "contrary to Miranda's mandate that, in the absence of counsel, all custodial interrogation then cease," reasoning that "even though the police officers may have been genuinely concerned about the public safety, and even though the respondent had not been addressed personally by the police officers," Innis had nonetheless been "subjected to 'subtle coercion' that was the equivalent of 'interrogation' within the meaning of the *Miranda* opinion," such that a new trial was warranted (pp. 296–297). The Supreme Court of the United States agreed to review the case "to address for the first time the meaning of 'interrogation' under *Miranda v. Arizona*" (p. 297).

The Court in *Innis* consulted its prior reasoning in *Miranda*, recalling that in that case it had explained that "by custodial interrogation, we mean 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" (Miranda 1996, p. 44). In *Innis*, the Court freely acknowledged that "this passage and other references throughout the opinion to 'questioning' might suggest that the Miranda rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody" (p. 298), but maintained that "we do not, however, construe the *Miranda* opinion so narrowly."

Instead, the Court opined in *Innis* (pp. 300–302; original emphasis) that:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

In other words, the *Innis* Court had one basic point in making its ruling. Things said in the presence of suspects are potentially as coercive as things addressed to

suspects directly—and if they're said in a way an officer knows is reasonably likely to lead to a harmful statement, then that statement may wind up being excluded from evidence.

"Ambiguous" and "Equivocal" Miranda Waivers: Do I Have to Talk in Order to Remain Silent?

In *Berghuis v. Thompkins* (2010), Van Chester Thompkins was arrested by police approximately 1 year after a shooting at a shopping mall left one person dead and another wounded. At the beginning of what ultimately became an approximately 3 h interrogation, Thompkins was presented with and signed a Miranda warning with the following wording (pp. 374–375):

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.

First, Thompkins was asked to read the fifth Miranda components out loud, which he did, in an exercise that Detective Helgert later testified was intended "to ensure that Thompkins could read." The other four components were then read to Thompkins, after which "the record contains conflicting evidence about whether Thompkins then verbally confirmed that he understood the rights listed on the form" (p. 375). However, his appellate lawyers ultimately voiced no disagreement with the facts conveyed in the following accounting (pp. 375–376):

> Officers began an interrogation. At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. Thompkins was "largely" silent during the interrogation, which lasted about 3 h. He did give a few limited verbal responses, however, such as "yeah," "no," or "I don't know." And on occasion he communicated by nodding his head. Thompkins also said that he "didn't want a peppermint" that was offered to him by the police and that the chair he was "sitting in was hard."
>
> About 2 h and 45 min into the interrogation, Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "welled up with tears." Helgert asked, "Do you pray to God?" Thompkins said "Yes." Helgert asked, "Do you pray to God to forgive you for shooting that