

Do You Know your Miranda Rights? Common Misconceptions and their Relevance to Police Questioning

Richard Rogers, Ph.D., ABPP

Richard.Rogers@unt.edu

September 17, 2019

Osher Lifelong Learning Institute at UNT

NSF Disclaimer

If you don't like what I say ...

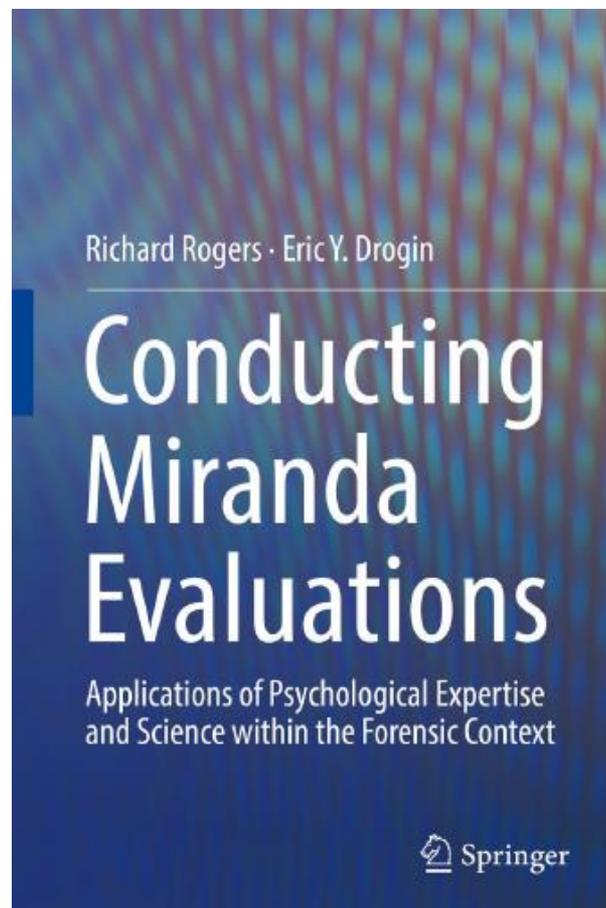
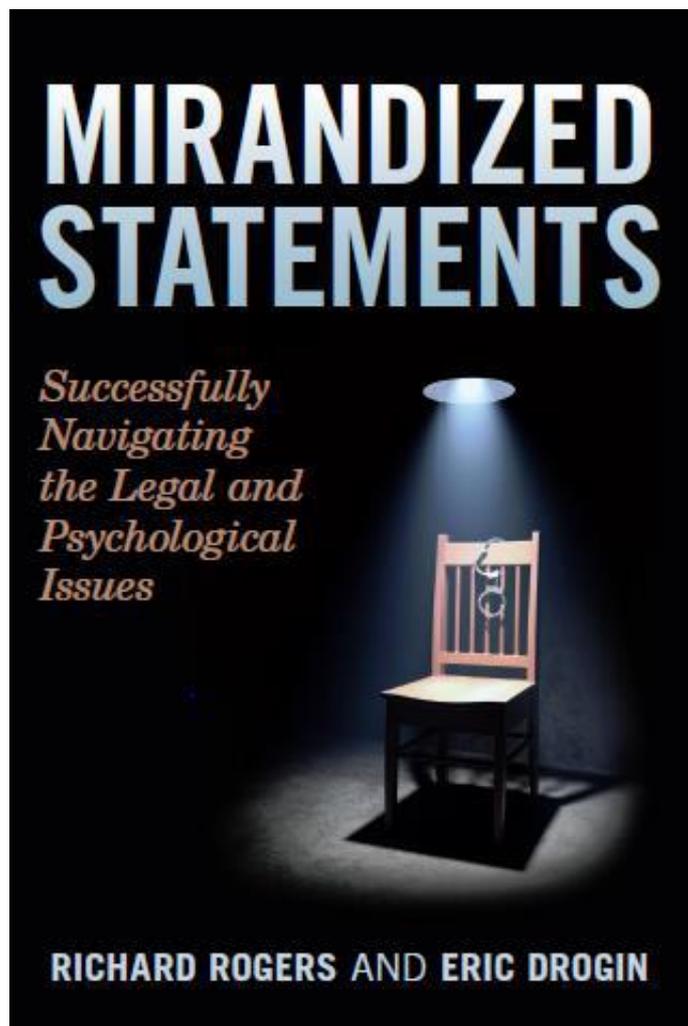
- “Any opinions, findings, and conclusions, or recommendations expressed in this material are those of the authors and do not necessarily reflect the views of the National Science Foundation.”

Financial disclosures

I do receive royalties for

- *SAMA* (Miranda measures)
- *Mirandized Statements* (ABA book, lawyers)
- *Conducting Miranda Evaluations* (practitioners)

Miranda books



Today's talk

- Few minutes of Ernesto Miranda
- How well do *you* know the Miranda warning?
- Myths and misconceptions about Miranda
- Professional roles and Miranda

What is wrong with Miranda?

- Jerry Townsend, a one-time carnival worker with an IQ of 50-60:
 - “Intelligently waived” his Miranda rights
 - Extensive coaching by investigators
 - A detailed confession over four days to multiple murders
 - After 22 years of incarceration, retired police detective found exonerating evidence including DNA

What is wrong with Miranda?

- Gorman Roberts, Jr.
 - A 17 year old adolescent with an IQ of 67
 - Video recorded confession for drowning of a five year-old boy.
 - His manslaughter conviction was overturned because of a “flawed” Miranda warning.
 - *Roberts v. Florida*, 874 So.2d 1225, 2004

The missing word

- His Miranda warning—could consult counsel
 - Included: **before** questioning
 - Omitted: **during** questioning
- Should the validity of Miranda warnings turn on a single word?*

*Subsequently addressed by the U.S. Supreme Court (*Florida v. Powell*, 2010)

Ernesto Miranda: The crime

- No evidence tied him to the kidnapping and sexual assault
- Used a 1953 Packard
- Days later followed her in the same 1953 Packard
- Identified part of the license plate
- Led to his questioning

Ernesto Miranda

- Survivor described Miranda:
 - Hispanic, early 20's with observable tattoos, and dark rimmed glasses
- Failed to identify him in a 4 person line-up

Miranda's interrogation

Officer's version after the line-up:

Miranda: "How did I do?"

Officer: "You flunked."

Miranda's version:

- "Going to throw the book at you"
- "Something wrong with me. . . . "get me medical help, if I need it"

Miranda 5-4 decision by Chief Justice Warren

“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.”
(pp. 478-479)

Components of Miranda

1. Right to silence (Constitutional protection against self-incrimination)
2. Perils of waiving the right to silence
3. Right to counsel
4. Free legal services to indigent suspects
5. Ongoing protections of Miranda rights

Do *you* know your Miranda warnings?

- Thousands of episodes of Law and Order must have pounded Miranda warnings into every human mind.
- Let's take a look at the next three slides.
- Test yourself on your knowledge of Miranda warnings.

Which is correct?

- 1.You may remain silent.
- 2.You have the right to remain silent.
- 3.I have been duly warned that I do not have to make any statement at all.
- 4.I have the right to remain silent and not make any statement at all, nor incriminate myself in any manner whatsoever.

Let's try harder. Which is correct?

1. You have the right to an attorney.
2. You have the right to the presence of a lawyer and to talk with a lawyer before and during any questioning.
3. You have the right to be represented by an attorney at all stages of the proceedings that will be held against you including this proceeding right now.

Final chance. Which is correct?

1. If you cannot afford a lawyer, one will be provided free.
2. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.
3. If you are poor and unable to afford counsel and if the charge for which you are appearing will carry jail as a penalty you may apply to the court for appointment of counsel at public expense.

How many had the following answers?

- You have the right to remain silent. (#2)
- You have the right to an attorney. (#1)
- If you cannot afford a lawyer, one will be provided free. (#1)

National survey of Miranda warnings

- Sampled 945 American jurisdictions
 - Rogers et al. (2008)
- General warnings (i.e., all ages)
- How many different ways can you word general Miranda warnings?
 - ___ 100?
 - ___ 300?
 - ___ 500?
 - ___ 888?

What went wrong?

Miranda

- Left the door open: “other fully effective means”

California v. Prysock (1981)

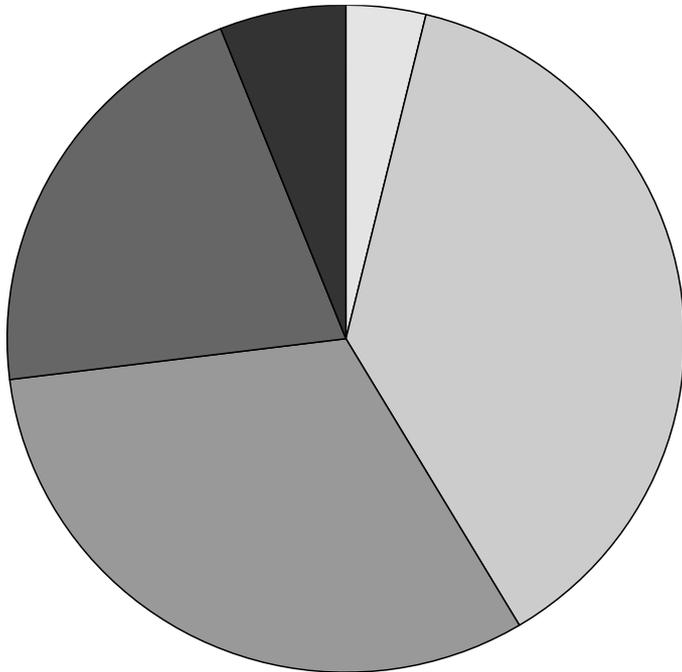
- The Supreme Court rejected the idea of exact language for Miranda.
- “No talismanic incantation was required to satisfy its strictures” (p. 359).
- It makes a lot of sense during an arrest.
- However, the decision opened the floodgates.

How long is the Miranda warning?

Warning + waiver:

- ___ 50 words?
- ___ 100 words?
- ___ 150 words?
- ___ 200 words?
- ___ 250 words?
- ___ 300 words?
- ___ 400 words?

You are all correct!



Lightest to darkest

- 75 or fewer words
- 76 to 124 words
- 125 to 174 words
- 175 to 224 words
- 225 or more words

Extraordinary range of word lengths

Miranda	average	range
1. Silence	9 words	4 to 43
2. Evidence against	15 words	8 to 39
3. Attorney	22 words	7 to 60
4. Free legal services	22 words	9 to 72
5. Continuing rights	27 words	7 to 69
6. Waiver	44 words	4 to 184
Total warning	96 words	28 to 408
Total Miranda	149 words	49 to 547

Reading levels and Miranda warnings

- Flesch-Kincaid:
 - Most widely used estimate
 - What is Flesch-Kincaid?
 - Answer: Grade level for understanding at least 75% of the material
- Flesch-Kincaid and Miranda:
 - Range: 2.8 to post-college
 - Miranda average grade level = 6.2

Averages don't tell the whole story!

Statement	Flesch-Kincaid
1. Silence	3.2
2. Evidence	5.0
3. Attorney	8.4
4. Free legal services	10.2
5. Continuing rights	9.4
6. Waiver	6.1

Does reading matter?

National Adult Literacy Survey

- 1000's of inmates from over 100 prisons
- 70% of inmates has limited literacy (\leq grade 6)
- Lower reading levels for African Americans and Hispanic Americans

What about oral warnings?

Failure rates (< 50% comprehension!) when tested soon after arrest

	Oral	Written
Easy	8.2%	2.8%
Moderate	25.5%	6.4%
Difficult	27.3%	10.0%

Rogers (2008)

Want it short and simple?

Maitland Police Department:

1. You have the right to remain silent.
2. Anything you say may be used against you in court.
3. You have the right to talk to a lawyer before and during questioning.
4. If you cannot afford a lawyer, one will be provided for you without charge.
5. (You may stop talking to us at any time.)

Summary: only 44 words and 4.7 grade reading

Want it long and incomprehensible?

Florida Highway Patrol (FHP) Version 2

1. You have the right to remain silent.
2. Anything you say can be used against you in court.
3. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
4. If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish.
5. If you decide to answer questions without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

___, has any promise or reward been offered to you as inducement for you to make a statement? Do you understand each of these rights I have explained to you? Have you previously requested any law enforcement officer to allow you to speak to an attorney? With this in mind, do you wish to talk to us now?

I have carefully listened to the above statement and understand my rights, I do not want an attorney at this time and I am willing to answer questions concerning this investigation.

Summary: 8.0 grade reading and 187 words

Other Miranda warnings

- Juvenile (youth only) warnings
- Spanish warnings

National trends

Do we treat juveniles better?

Compared to adults

- Are juvenile Miranda warnings--
 - ___ longer
 - ___ shorter
- Are juvenile Miranda warnings--
 - ___ easier to read
 - ___ more difficult to read

Longer warnings for juveniles

	General Juvenile	
Short (< 125 words)	49.6%	28.3%
Typical (125-175 words)	40.5%	34.2%
Long (> 175 words)	9.9%	37.5%*

*15.1% exceed 225 words.

New Hampshire? 726 words!

Before I am allowed to ask you any questions, you must understand that you have certain rights, or protections, that have been given to you by law. These rights make sure that you will be treated fairly. You will not be punished for deciding to use these rights. I will read your rights and explain them to you. You may ask questions as we go along so that you can fully understand what your rights are. Do you understand me so far? Yes --- No ---.

1. You have the right to remain silent. This means that you do not have to say or write anything. You do not have to talk to anyone or answer any questions we ask **307 you. You will not be *23 punished for deciding not to talk to us. Do you understand this right? Yes --- No ---.

2. Anything you say can and will be used against you in a court. This means that if you do say or write anything, what you say or write will be used in a court to prove that you may have broken the law. Do you understand this? Yes --- No ---.

3. You have the right to talk to a lawyer before any questioning. You have the right to have the lawyer with you while you are being questioned. The lawyer will help you decide what you should do or say. The things you say to the lawyer cannot be used in court to prove that you may have broken the law. If you decide you want a lawyer, we will not question you until you have been allowed to talk to the lawyer. Do you understand this right? Yes --- No ---.

4. If you want to talk to a lawyer and you cannot afford one, we will get you a lawyer at no cost to you before any questioning begins. This means that if you want a lawyer and you cannot pay for one, you still may have one. Do you understand this right? Yes --- No ---.

5. You can refuse to answer any or all questions at any time. You also can ask to have a lawyer with you at any time. This means that if you decide, at

any time during questioning, that you do not want to talk, you may tell us to stop and you cannot be asked any more questions. Also, if you decide you would like to talk to a lawyer at any time during questioning, you will not be asked any more questions until a lawyer is with you. Do you understand this right? Yes --- No ---.

6. (In felony cases only) There is a possibility that you may not be brought to juvenile court but instead will be treated as an adult in criminal court. There you could go to a county jail or the State prison. If you are treated as an adult you will have to go through the adult criminal system, just as if you were 18 years old. If that happens, you will not receive the protections of the juvenile justice system. Do you understand this? Yes ---No ---.

7. Do you have any questions so far? Yes --- No ---.

(This portion is now to be read by the child.)

I can read and understand English. Yes --- No ---.

I have been read and I have read my rights as listed above. I fully understand what my rights are. I do not want to answer any questions at this time and I would like to have a lawyer.

Signature of child _____ Date _____
Time _____

*24 Waiver of Rights

(This portion is to be read by the child.)

I can read and understand English. Yes --- No ---.

I have been read and I have read my rights as listed above. I fully understand what my rights are. I have been asked if I have any questions and I do not have any. I am willing to give up my right to silence and answer questions. I give up my right to have a lawyer present. I do not wish to speak to a lawyer before I answer any questions. No promises or threats or offers of deals have been made to me to make me give up my rights. I understand that I

Do we treat juveniles better?

- Juveniles: Shorter attention span?
 - Solution: increase length by 50%
 - From 95 words to 149 words
- Juveniles: Lower reading level?
 - Solution: increase the reading difficulty
 - From 7.02 to 8.30 grade level

Additional content?

- Good news?
 - Try to explain legal ideas.
 - Silence = “don’t have to talk”
- Bad news?
 - Questionable explanations
 - “A judge is like an umpire in a baseball game.”

Preteen offenders?

- 115,000 preteens are arrested each year
- Assume very optimistically
 - Reading 1 year **above** their grade level
 - Started school at age 5
- Conclusion
 - Still not able to understand the typical juvenile warning

National trends: Prefer Spanish?

- Missing Spanish Miranda components--
 - 9.2% omit 5th prong—continuing rights (included in the English version)
- Mistranslations?
 - 1.6%
- Awkward usage
 - 12.1%

MIRANDA WARNING IN SPANISH

- 1) Tienes el derecho de permanecer en silencio.
- 2) Cualquier cosa que digas puede y sera usada en contra tuya en la corte.
- 3) Tienes el derecho de hablar con un abogado y que este, este presente contigo cuando seas interrogado.
- 4) Si no tienes la disponibilidad economica para contratar a un abogado, uno se te sera asignado para que te represente antes de algun interrogatorio.
- 5) Tambien puedes dejar a un lado tu derecho de permanecer en silencio y tu derecho de solicitar un abogado y puede proceder a contestar cualquier pregunta o hacer cualquier comentario que desees. Si decides contestar las preguntas, puedes parar en el momento que desees, y reclamar tu derecho de solicitar un abogado.
- 6) Entiendes lo que te he dicho?

Spanish examples--

- Awkward usage
 - “afford an attorney” translated as “economically permit yourself a lawyer”
- Mistranslation
 - “Tiene el derecho de quedar en calado” or “You have the right to remain whitewashed.”

Spanish vs. English

- Substantive errors
 - English: "An attorney of your choice"
 - Spanish: "A licensed professional that you supply"
- Dissimilar content (free legal services)
 - English: "One will be provided free."
 - Spanish: "One will be assigned you before the questions begin."

Consulted in the Orlando area

- 15 Spanish translations
- Compared English and Spanish translations
- Back-translations were conducted independently by two bilingual psychologists

Reading level: Fernández-Huerta Index

Component	Average	Grade
1. Silence	71.49	7 th
2. Evidence against you	88.59	6 th
3. Attorney	57.38	10 th to 12 th
4. Free legal services	55.40	10 th to 12 th
5. Continuing rights	54.22	10 th to 12 th
Total warning	64.70	8 th to 9 th

Do we have a problem?

- How many Spanish-speaking defendants can read *Spanish* at a 10th to 12th grade level?
- When is the last time a public defender asked for a reading test?

Translation problems: Florida example

- Reading disparities: Orlando area

Agency	English	Spanish
Orange County Sheriff	8-9 th	10-12 th
Ocoee PD Windermere PD	7 th	10-12 th
UCF PD	8-9 th	10-12 th
Winter Garden (#2)	7 th	10-12 th

Translation problems

- Missing the 5th prong on the Spanish translation when it was on the original English?
 - Belle Isle PD
 - Orlando PD
 - Winter Park PD

Next, focus on Miranda reasoning

- Components
 - Misconceptions (false premises)
 - Reasoning
- First, a brief historical perspective

Grisso and juvenile offenders

Miranda Misconceptions

- Right to silence
 - Get punished?
 - 61.8%
 - Revocable by police?
 - 21.1%
 - Revocable by the judge?
 - 55.3%

Grisso: More unsettling results?

- Asserting rights in a felony-murder case
 - Only 38% considered access to counsel to be a good reason for exercising Miranda rights.
 - However, 24% believed that asserting rights would have a negative effect of the disposition of the case.

Rogers and adult offenders



- Rogers et al. (2010)
- Developed the Miranda Quiz
 - 25 items, true-false
 - Common misconceptions
 - Detainees
 - Others
- Scale
 - Reliability (ICC = .97)
 - Content validity (ICC = .96)

Miranda misconceptions

- Groups:
 - **Reality:** 149 detainees awaiting trial
 - **Bright, young and educated:** 119 college students
 - **Members of the public:** 420 persons called for jury duty

Right to silence

- Does that mean you
 1. Have the choice to keep quiet?
 2. Your silence can't be used against you?

- Got it wrong?
 - 31% of defendants
 - 36% of college students
 - 24% of jury duty

Waiver of silence: Permanent?

- Once you give it up, is it gone?
- Got it wrong:
 - 37% of defendants
 - 27% of college students
 - 18% of jury duty

Off the record?

- If you ask for something to “be off the record,” is it protected?
- Got it wrong?
 - 52% of defendants
 - 38% of college students
 - 34% of jury duty

Ask for a lawyer: Can you still be questioned?

- Can you be questioned **until** counsel gets there?
- Got it wrong?
 - 38% of defendants
 - 33% of college students
 - 28% of jury duty
- False premise:
 - Going to question me anyway, I might as well get started.

Can law enforcement use deception?

- Lie about an eyewitness? Got it wrong:
 - 39% of defendants
 - 24% of college students
 - 48% of jury duty
- Lie about the charges? Got it wrong:
 - 47% of defendants
 - 31% of college students
 - 57% of jury duty

Decisions and false premises

- False premise: Police have to tell the truth about the witnesses and charges.
 - Flawed reasoning: Might as well cooperate, if I am going to be found guilty anyway.

They didn't warn me, I'm protected.

- Do the police need to warn me if I am not in custody?
- Got it wrong:
 - 60% of defendants
 - 62% of college students
 - 73% of jury duty

Adding it all up

- What percent made false assumptions about 3 or more Miranda components?
 - 69% of defendants
 - 59% of college students

Do police get a bad rap?

- Bottom line:
 - Occasional cases of false confessions get a lot of bad press.
- Reality:
 - The majority of police chiefs don't see their jobs hampered by Miranda warnings.
 - 88% of police chiefs see criminals confessing anyway.

Do police get a bad rap?

- 2015 Rogers and Clark study
 - Anonymous survey of 209 officers
- Law enforcement strongly favored
 - Right to counsel (79% yes; 17% neutral)
 - Right to silence (60% yes; 23% neutral)
- More mixed on the active role of lawyers during police questioning
 - 36% yes; 32% neutral; 32% no

Beyond Miranda

- Law enforcement was proactive about fairness: They wanted
 - More safeguards for youth or disabled suspects: 72% yes; 19% neutral
 - Free assistance of interpreters: 61% yes; 25% neutral
 - Right for foreign nationals to contact embassies: 68% yes; 19% neutral

Professionals: Miranda Myth #1

#1 Lack of intelligence is the cause of Miranda misconceptions.

- Percentage correct on the MQ:
 - 72% for defendants with IQs \geq 90
 - 68% for defendants with IQs $<$ 90
- Conclusion: small effect but not the cause

Professionals: Miranda Myth #2

#2 Lack of education, literacy, and past experiences are the causes.

- Relevance? *Coyote v. U.S.* (1967)
 - Consider abilities (intelligence, etc.)
 - Consider experiences (police, etc.)
- Answer: No (“frequent flyers” with 20+ arrests similar errors)

Professionals: Miranda Myth #3

#3 Miranda warnings resolve misconceptions.

- Percentage correct on the MQ:
 - 70% for defendants before Miranda warning
 - 72% for defendants after Miranda warning

Professionals: Miranda Myth #4

#4 Psychological impairment is the cause.

- MQ total score:
 - 71% for defendants with $GAF > 60$
 - 68% for defendants with $GAF \leq 60$

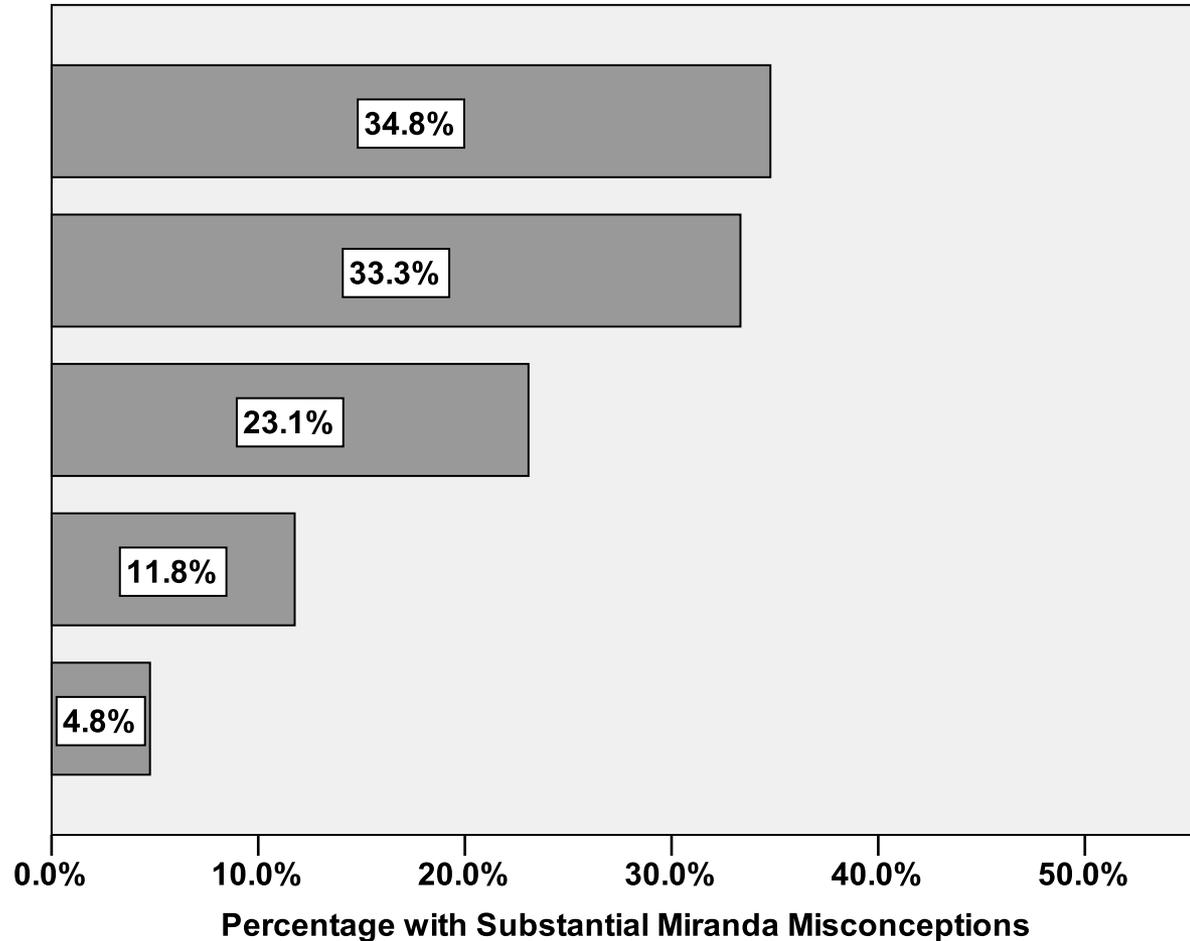
GAF = Global Assessment of Functioning

Key Miranda variables

- Verbal (not overall!) intelligence
 - VIQ < 85 vs. \geq 90
- Temporal discounting (i.e., focused only on immediate circumstances but not long-term consequences)
- Consideration of alternatives (i.e., identify advantages and disadvantages to Miranda waiver decisions)

What makes the difference?

VIQ	Discount	Consider
< 85	Problem	Problem
< 85	OK	Problem
< 85	OK	OK
≥ 90	OK	Problem
≥ 90	OK	OK



Professional neglect hypothesis

- Estimates of Miranda evaluations
 - Extrapolations from Ryba et al. (2007)
 - Only 4,905 Miranda-waiver evaluations annually
- The disconnect
 - > 600,000 Miranda-impaired cases*
 - < 5,000 evaluations

*Omits intellectual disabilities

Professional roles

- Consultants on public policy
 - Grass roots efforts in your community
 - Ultimately, change public policies
- ABA (2010) issued a call to simplify juvenile Miranda warnings
 - Relied heavily on Rogers et al. research
 - It used the Rogers et al. “model warning.”
 - 2016 (finally!) adopted as law in Illinois

Illinois 2016: Public Act 099-0882

- Model (Rogers/ABA) juvenile warning:
 - You have the right to remain silent. That means you do not have to say anything.
 - Anything you do say can be used against you in court.
 - You have the right to get help from a lawyer.
 - If you cannot pay for a lawyer, the court will get you one for free.
 - You can ask for a lawyer at any time. You have the right to stop this interview at any time.
- 64 words and grade 3 level

Illinois continued

- Interviewer must “wait for the minor's response to each question:”
- Waiver:
 - "Do you want to have a lawyer?"
 - "Do you want to talk to me?"
- Waiver: 14 words and Kindergarten reading level
- Potential effect
 - 9800 adolescents (15 < 18 years)
 - < 15 now cannot waive the right to counsel

Forensic practice

- Miranda as an emerging specialty
 - Must overcome the inertia of defense counsel
 - Outright suppression is rare.
 - The goal is often related to plea bargaining.
 - Must overcome the skepticism of prosecutors
 - Clearly legitimate cases do occur.
 - Compromised waivers are linked to false confessions (crucial issue for prosecutors)
 - SAMA measures can detect feigned Miranda abilities.

In closing . . .

“Real” Miranda warning from Travis County:

- You have a right to remain silent and you would be **really stupid to talk to us** no matter how nice we seem and no matter how much we tell you that we want to hear your side of the story.
- If you do talk to us, we will take everything you say and **hang you with it** in court.
- You have a right to an attorney and the first thing he/she is going to tell you is to **shut up**.

Thank you! Time for questions.