Chapter 1

Legal Landscape

Overview

This book is written for criminal attorneys and judges, whose professional lives are grounded in individual cases and often constrained by limited resources. Given the centrality of confessions and other inculpatory statements to criminal verdicts, the book provides a lucid, step-by-step examination of psychological and legal issues involving the Mirandized statements of custodial suspects. For criminal attorneys, the objectives are straightforward and best conceptualized as three interrelated questions: First, what do I need to know about Miranda-related issues to be effective? Second, how can I establish a successful working relationship with forensic psychologists or other experts? Third, how can I competently present my arguments and supporting evidence to challenge or preserve a Mirandized statement? Judges in criminal courts are likely to emphasize the first objective but they will also find value in understanding the strategies used by counsel in their courtrooms on Miranda-related motions.

The book strives to present a balanced analysis of Mirandized statements, critically examining the strengths and weaknesses of options for addressing defendants’ statements. While balanced, the analyses are structured explicitly by the objectives of the defense (motion to suppress) and the prosecution (admissibility). This structure allows attorneys on each side to fully understand and carefully prepare their individual cases. In doing so, their awareness of the strategies and methods used by opposing counsel strengthens their own case as well as increases their awareness of its potential vulnerabilities. In the context of the adversarial system, such insights can assist in a candid appraisal regarding how to proceed in individual cases. For instance, defense counsel may choose not to proceed in a particular case where the obvious weaknesses undeniably eclipse its merits.

Each chapter is organized into succinct, easily accessible sections for often time-challenged criminal attorneys. Subsections examine occasionally considered options that go the extra mile in full recognition that the required time and resources are not likely to be available for most criminal cases, but that an exceptional case may warrant this
additional effort. In addition, chapters often refer to specific appendixes; this organization provides easy access to key information that bridges chapters and may be needed as an immediate reference.

This first chapter is organized in three main sections. First, it provides an overview of Miranda warnings and waivers. Beginning with the *Miranda* decision, it presents a succinct summary of important developments in Miranda case law, which are buttressed by occasional references to legal and psychological literature. Second, the chapter builds on the work of Rogers, Shuman, and Drogin (2008) in their contribution to the ABA magazine *Criminal Justice*. It outlines and explores the complex and sometimes bewildering landscape of Miranda warnings and waiver decisions. Because of the book’s focus on practical implications, the third and final section introduces the fictional case study of Tracy Miller, who is utilized in chapters 6 and 7 to illustrate key issues in Miranda consultations and subsequent suppression hearings.

We begin with a brief summary of Miranda cases, starting with an overview of the original decision.

**Miranda Warnings and Waivers**

**The Miranda Decision**

Chief Justice Earl Warren delivered the majority opinion in *Miranda v. Arizona* (1966), which was strongly critical of police practices, including the use of third-degree methods. The majority opinion (p. 458) held that incommunicado interrogations were inherently intimidating: “It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation.” To protect the Fifth Amendment privilege from the “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” (p. 467), the Court ruled that custodial suspects must be effectively informed of their rights to silence and to counsel.

The Supreme Court of the United States held that all custodial suspects must be apprised of their rights via a warning or “other fully effective means” (p. 479). The key passage outlining its requirements states:

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. (p. 479)
Of the five core components, two address the right to silence in affirming its constitutional protection and cautioning about the perils of waiving this right. The next two address the right to counsel and the assurance that this protection is available to all custodial suspects irrespective of their financial means. The fifth component affirms the ongoing nature of these rights; suspects are provided with a “continuous opportunity to exercise” the right to silence (p. 444) and they may assert the right to counsel at “any stage of the process” (pp. 444–445).

The Supreme Court likely anticipated efforts to circumvent its procedural protections. It held that every suspect must be informed of these rights and that no amount of circumstantial evidence would suffice to preclude them (p. 471). It also held that all statements, whether inculpatory or not, were subjected to the same required warning (p. 477). The Court affirmed that when statements are made without the benefit of counsel, a “heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination” (p. 475).

The Language and Meaning of Miranda Warnings

The majority opinion in Miranda did not specify the language of the Miranda warnings or even that warnings were required for any subsequent statements to be admissible in court proceedings. On the contrary, the Court took pains not to produce a “constitutional straitjacket” (p. 467). Instead, it urged Congress and the states to search for “increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws” (p. 467). The Court’s original flexibility on how custodial suspects should be apprised of their rights is clearly reflected in its subsequent decisions.

The Miranda decision focuses on the meaning rather than the wording of the advisement. It plainly focuses on the accurate conveyance of information in “clear and unequivocal terms” (pp. 467–468). It held that awareness of rights constituted “the threshold requirement for an intelligent decision as to its exercise” (p. 468, emphasis added).

The Supreme Court has consistently ruled that Miranda warnings or other effective means should flexibly focus on the meaning of the advisement and should not be reduced to any rote parroting of the Miranda language. In California v. Prysock (1981), the Court declared unequivocally that it never required “precise formulation of the warnings given a criminal defendant” (p. 359). It cogently argued against such rigidity, which it disparaged as a “talismanic incantation” (p. 359).

In Duckworth v. Eagan (1989), the Supreme Court offered well-reasoned insights into why any precise formulation of Miranda language was impractical. Officers apprehending suspects may not always have access to printed Miranda warnings and thereby may deviate in language but not in the substance of their advisements. If asked for clarification, officers will elaborate on the warnings in seeking to communicate Miranda rights.
While intending to serve the interests of justice, such elaborations would not be contained in printed Miranda warnings.

The Supreme Court of the United States in Florida v. Powell (2010) introduced additional flexibility in meeting the constitutional minima for Miranda warnings. In Miranda (p. 471), the Court held that every custodial suspect “must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.” In Powell, the defendant was informed of his right to counsel only prior to questioning. After a statement about the availability of free legal services to indigent defendants, the defendant was further informed, “You have the right to use any of these rights at any time you want during this interview” (Powell, p. 54). In reversing the Florida Supreme Court, the Supreme Court of the United States acknowledged that the right-to-counsel advisement given to Powell was “not the clearest possible formulation” (p. 63; emphasis in the original). Nonetheless, it held that a defendant presented with the two described components of the Powell advisement could reasonably infer the right to have an attorney present during questioning.

The clear communication of Miranda advisements is further complicated by the potential inadequacy of translated Miranda warnings, which have been addressed in various appellate decisions but have not yet been considered by the Supreme Court. In general, existing decisions have held that awkward wordings and substandard grammar do not invalidate translated advisement, as long as the information itself is clearly conveyed (Rogers, Sewell, Drogin, & Fiduccia, 2012). However, faulty translations of key information can lead to an insufficient advisement. In United States v. Perez-Lopez (2003), the 9th Circuit Court of Appeals held that the words “solicit the Court for an attorney” (p. 842) did not adequately convey the constitutionally provided access to free legal services for indigent defendants. Beyond awkward wordings and mistranslations, cases have been reviewed where an essential component of the Miranda warning was entirely omitted (Rogers, Sewell, et al., 2012). Obviously, such omissions cannot clearly inform custodial suspects. This matter will be revisited later in the subsection titled “Myth #4: Spanish-Language Miranda Warnings Are Accurate and Complete Translations.”

In conclusion, the Supreme Court of the United States could never have envisioned that its well-reasoned flexibility in the language of the Miranda warning would lead to the remarkable proliferation of uniquely worded Miranda warnings, likely totaling in the thousands when general and juvenile advisements are considered together (Rogers, Sewell, et al., 2012). As subsequently discussed with the uniformity myth, professionals and the public alike often do not appreciate the extraordinary heterogeneity and other complexities of Miranda advisements.
Miranda Waivers

The Supreme Court of the United States in *Miranda* recognized that custodial suspects should be provided with an opportunity to both *exercise*, which preserves their constitutional rights, or *waive*, which temporarily relinquishes these protections. Waiver decisions, often sought by law enforcement, may involve statements and actions against suspects’ self-interests. As a result, the Court imposed a higher standard for waiving than exercising Miranda rights. It held (p. 444), “The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.” No such requirement is mandated for exercise decisions that may be based on whim or utter irrationality. Thus, very different standards are imposed on waiver decisions than on exercise decisions, which, as discussed in subsequent chapters, have direct implications on appraisals of Miranda reasoning by forensic psychologists and other consultants.

The Supreme Court’s requirement for the documentation of Miranda waivers, while still critical, has diminished somewhat over time. In the landmark *Miranda* decision, the Supreme Court of the United States indicated that the waiver of rights could not be inferred. The decision cited with approval *Carnley v. Cochran* that “presuming waiver from a silent record is impermissible” (1962, p. 516). The decision further specified that “a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.” In waiving constitutional rights, it held (p. 475) that “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel” (p. 475). When initially guided by the *Miranda* decision itself, law enforcement had a strong vested interest in documenting the basis for a valid Miranda waiver.

The Supreme Court of the United States has gradually clarified and apparently reduced the requisite evidentiary basis for demonstrating valid Miranda waivers.1 The once “high standards of proof for the waiver of constitutional rights” (*Miranda*, p. 475) have more recently been reformulated as simply a “preponderance of the evidence” (*Colorado v. Connelly*, 1986, p. 168). In addition, *Miranda* (p. 475) required that waivers be communicated via the record or other evidence, holding that, “Presuming waiver from a silent record is impermissible.”

In *North Carolina v. Butler* (1979), however, the Court ruled that an implied waiver would be sufficient. Legal professionals may differ on whether the Court’s related reasoning in *Berghuis v. Thompkins* (2010) is itself convincingly rational or potentially irrational:

---

1. In addition to changes in the burden of proof and expressed waivers, the Court has provided other exceptions to *Miranda*, for example, regarding matters of public safety (*New York v. Quarles*, 1984) and spontaneous statements made by the suspect after requesting counsel (*Rhode Island v. Innis*, 1980).
As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford. (p. 385, emphases added)

The premise of the deduction (i.e., “full understanding”) is controverted by consistent research evidence regarding both the completeness and accuracy of Miranda understanding (Rogers, 2011). The conclusion of the deduction (i.e., breaking silence constitutes a deliberate and rational choice) is likewise challenged by research. Even a brief pre-interrogation can markedly diminish Miranda recall and reasoning (Gillard, Rogers, Kelsey, Robinson, & Drogin, in press). Emotions and situational stressors often override—if not eclipse—reasoning in Miranda waiver decisions (Blackwood, 2013).

The Court certainly should not be faulted for its presumptions regarding implied waivers. As best as we can determine, minimal evidence was presented to the Court in the Thompkins appeal that addressed the defendant’s mental state after what has been characterized as a “one-sided, accusatory monologue by officers” (Weisselberg, 2010, p. 71) lasting 2 hours and 45 minutes before any admission was elicited. Case law has always presumed the competency of criminal defendants and the Thompkins decision about the validity of implied waivers is no exception. As noted by Rogers, Sewell, et al. (2012, p. 6), the “absence of any record to the contrary” (i.e., impaired reasoning related to the admission) obligated the Court to reach its determination.

The three requisite prongs of valid Miranda waivers—voluntarily, knowingly, intelligently—are extensively examined in later chapters, which address the application of these legal constructs to particular cases. The next paragraphs simply distill the core issues.

The voluntary prong of the Miranda waivers has always been framed within the interpersonal context of communications between law enforcement personnel and suspects. In Miranda, the Supreme Court of the United States held that a voluntary waiver requires that the accused was not “threatened, tricked, or cajoled” (p. 476), with an emphasis on uncoerced statements. The matter of whether internal compulsions alone would be sufficient was a matter of some debate (Rogers & Shuman, 2005) until the Court’s ruling (Colorado v. Connelly, 1986, p. 167) that deemed “coercive police activity is a necessary predicate” for an involuntary waiver. However, this decision does not entirely remove the suspect’s mental state entirely from the equation. Rather, the totality of circumstances must be considered in determining custodial suspects’ experience of and responses to perceived coercion. Important factors include the “defendant’s maturity, education, physical condition, and mental condition” (Smith v. Bowersox, 2002, p. 922).

The knowing prong of Miranda waivers was addressed by the Supreme Court of the United States as early as Adams v. United States ex rel. McCann (1942). The decision held that the accused must “know what he is doing” so that “his choice is made with eyes open”
The understanding of Miranda rights involves such rudiments as knowledge of Miranda-relevant words and their meaning within a particular Miranda advisement. A “knowing” waiver can be nullified when a suspect misconstrues the word “terminate” as kill or the term “waive” as a friendly gesture. Statements within the Miranda warning may be rendered incomprehensible by the use of legalese and other rarely used terminology (Rogers, Hazelwood, Sewell, Harrison, & Shuman, 2008). Problems with obscure language are often compounded by the use of complex sentences with multiple independent or dependent clauses. The following sentence—composed of 56 words and exceeding a college-level reading comprehension—is intended specifically for juvenile suspects:

Prior to and during the making of this statement have and do hereby knowingly, intelligently, and voluntarily waive the above explained rights and I do make the following voluntary statement of my own free will and without any promises or offers of leniency or favors, and without compulsion or persuasion by any person or persons whomsoever.

Expressed ignorance (e.g., “I don’t understand what you just read.”) in an adversarial context (e.g., incommunicado pre-interrogation) is likely to be deemed an ineffective strategy by most persons, including custodial suspects. In general, suspects are unwilling to “let down their guard” by admitting to law enforcement personnel that they are unaware of what is being verbalized. In addition, the more specific phenomenon of acquiescence (going along with those in authority) is a common and potentially self-destructive strategy, especially among persons with intellectual disabilities (Beail, 2002; Gudjonsson, 2003; Sigelman, Budd, Spanhel, & Schoenrock, 1981). As a brief aside, the new diagnostic standards (i.e., DSM-5, American Psychiatric Association, 2013) have replaced the traditional term “mental retardation” with “intellectual disability.”

Unlike ignorance per se, “meta-ignorance” occurs when defendants are unaware of their own lack of knowledge (Rogers, 2011). Knowing what you don’t know (i.e., insight into ignorance) is easily apparent for obviously unfamiliar material (e.g., some foreign languages) but is far less so for seemingly familiar material such as that found with Miranda warnings. Ongoing research provides initial evidence that meta-ignorance commonly occurs in a cross-section of the community (i.e., jury pools); many prospective jurors espousing a good knowledge (80 percent or better) of Miranda rights fail to understand key aspects of their Miranda rights (Rogers, Fiduccia, Drogin, Steadham, Clark, & Cramer, 2013).

2. The first error is common in both written and oral warnings, whereas the second occasionally occurs in oral advisements.
3. This version was supplied from an unpublished database on juvenile Miranda warnings used for the aggregate findings in Rogers, Blackwood, Fiduccia, Steadham, Drogin, and Rogstad (2012).
The Supreme Court of the United States in *Miranda* took pains not to equate accurate knowledge with a signed statement to that effect. Ernesto Miranda’s single-page confession was preceded by a boilerplate statement affirming “full knowledge of my legal rights.” The *Miranda* decision (1966) dismissed this affirmation:

The mere fact that he signed a statement which contained a typed-in clause stating that he had “full knowledge” of his “legal rights” does not approach the knowing and intelligent waiver required to relinquish constitutional rights. (p. 491)

The Court later adopted a different stance in *North Carolina v. Butler* (1979) when it determined that “an express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver.” Even so, it did acknowledge in this regard that an expressed waiver was “not inevitably either necessary or sufficient to establish waiver” (p. 373). This point was reemphasized in the course of Justice Sotomayor’s dissent some three decades later in *Berghuis v. Thompkins* (2010), in which she asserted that even *Butler* “made clear that the prosecution bears a substantial burden in establishing an implied waiver” (p. 397). In *Arizona v. Roberson* (1988), the Court had also relied on the earlier assertion in *Miranda* (1966, p. 475) that “a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.”

In conclusion, any explicit or implicit communications of knowledge must be closely examined in a balanced manner by forensic psychologists and other experts. We recommend that both strengths and weakness be clearly delineated as systematic comparisons. On this point, attorneys should be alert for potentially biased evaluations that document only suspects’ lack or presence of Miranda-relevant knowledge. Both explicit and inferential data are needed for evaluating the knowing prong within the totality of circumstances.

The intelligent prong was described in the *Miranda* decision as including an awareness of the adversarial process and the consequences of waiving the privileges of silence and counsel. Chief Justice Warren authored the majority opinion that explains the intelligent prong:

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. (p. 469)
The terms “knowing” and “intelligent” are often coupled in the same phrase and appear to be used interchangeably in some appellate decisions (Rogers, Sewell, et al., 2012). However, “knowing” relates to the “availability” of information, whereas “intelligent” involves the “application” of that information. As a clear example of this distinction, a small number of highly suggestible suspects may unintentionally internalize law enforcement’s version of their criminal involvement; becoming thoroughly convinced of their own guilt, they may waive rights and confess. These internalized false confessions (Kassin, 2008) may well be based on a knowing waiver of Miranda rights; however, the intelligent prong is brought into question because their reasoning is likely based on a fundamentally flawed premise (e.g., my guilt deserves punishment).

Intelligent waivers require a clear appreciation of the alternatives and a decision based on these alternatives. In Iowa v. Tovar (2004, p. 88), the Supreme Court of the United States addressed the issue of choices based on knowledge. It cited with approval Adams v. United States ex rel. McCann (1942, p. 279) in quoting the following: “We have described a waiver of counsel as intelligent when the defendant ‘knows what he is doing, and his choice is made with eyes open.’” As previously summarized, the Supreme Court of the United States in Thompkins (2010, p. 385) held that actions contrary to Miranda rights presumably signify “a deliberate choice to relinquish the protection those rights afford.” The Court reasoned that the defendant was fully aware of his alternatives: (1) he “could have said nothing in response” to the detective’s questions, or (2) “he could have unambiguously invoked his Miranda rights and ended the interrogation” (p. 386). From the Court’s perspective, the defendant exercised a deliberate choice among at least three alternatives: simply remain silent, implicitly waive the right to silence, or explicitly exercise the right to silence. As observed by Rogers, Sewell, et al. (2012), the Supreme Court was not provided with any data that addressed which alternatives—if any—the defendant considered at the time of his admission. As articulated by the Court (p. 385), “There is no basis in this case to conclude that he did not understand his rights; and on these facts it follows that he chose not to invoke or rely on those rights when he did speak.” Such data—regarding the defendants’ awareness of rights, and consequently, their decisional abilities—are critically important at both trial and appellate levels in ascertaining the intelligent waiver of the right to silence.

The paradox of breaking silence to assert silence deserves a brief comment. The critical issue is whether most persons (e.g., members of the public or custodial suspects) would engage in this inferential reasoning. In an initial study (Gillard et al., in press), undergraduates participated in a mock crime (stealing a watch, then being apprehended and Mirandized). Dramatic differences were found in the percentages exercising the right to silence with implied waivers (i.e., only 14 percent when questioning started immediately)

4. Clearly, another alternative would be to formally waive the right to silence without any prompting.
than with explicit waivers (i.e., 81 percent when formally asked). Among those answering some questions, the effects of implied waivers extended to confessions: 18 percent for implied versus only 4 percent for explicit. Clearly, more research is needed on whether this alternative is actually considered by suspects during pre-interrogations and interrogations.

Intelligent waivers of Miranda rights are not limited to the immediate circumstances of the detainment but also consider the broader legal ramifications. Short-term advantages of exercising rights may include a cessation of pre-interrogative questioning and a less pressured interrogation. Regarding the latter, the Court in *Miranda* (p. 740) declared, “With a lawyer present the likelihood that the police will practice coercion is reduced.” Short-term advantages of waiving Miranda rights may include better treatment by law enforcement because of cooperation and, for some suspects, feelings of importance and being in control (Rogers & Shuman, 2005).

In the long term, the primary advantage of exercising of Miranda rights may protect vulnerable suspects—including innocent persons—from making incriminating statements. In addition, defendants may benefit from the legal expertise provided by counsel, such as (1) no potentially incriminating communications to other detainees and (2) an ally to assist in decision making about the waiver decision. In contrast, the *Thompkins* (2010) Court’s decision articulated several long-term reasons for why defendants may wish to relinquish their Miranda rights. They include (p. 388) the following: “beginning steps towards relief or solace for the victims; and the beginning of the suspect’s own return to the law and the social order it seeks to protect.” Similar to short-term goals, each defendant’s long-term objectives must be closely evaluated.

In summary, several themes emerge from this brief summary of Miranda waivers. In its efforts to balance the individual rights of defendants against the government’s interest in justice, the Supreme Court of the United States appears to have moderated its position in diminishing certain protections of custodial suspects (e.g., expressed versus implied waivers) and providing greater opportunities to the prosecution. As previously noted, the Court has consistently taken the position that defendants are competent and rational decision makers. Any other presumption would likely threaten the integrity of the criminal justice system with the impossible task of proving competency for millions of suspects annually. As outlined in this book, the defense is obligated to provide solid, retrospective evidence regarding the suspect’s limited capacities to know (e.g., recall and understanding) and rationally apply this knowledge to the Miranda waiver decision. Contrastingly, the prosecution bears a very different responsibility in demonstrating the defendant’s capacity to make knowing and rational decisions (e.g., reasonable precautions in allegedly committing the offense) that also apply to the Miranda waiver.