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Attorney-Client Privilege and Zealous Representation: An Exploratory Study of People's Comprehension

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This study explores how well U.S. citizens understand what an attorney is supposed to do for their clients. Specifically, subjects were asked about their understanding of the duty of zealous representation and attorney-client privilege. These attributes are not only cornerstones of legal ethics, but they are also key reasons why the assistance of defense counsel can be very useful to the accused both in terms of assuring their rights are protected and in mitigating punishment. If citizens lack an understanding of these key attributes of a defense lawyer's role, people are neither capable of understanding the nature of their rights nor appreciating the consequences of waiving them. Under such circumstances, it is impossible to make a knowing and intelligent decision about whether to consult with an attorney prior to talking with the police. Although Miranda, the U.S. case most closely associated with in-custody interrogation, is ubiquitously referenced in American police dramas, a significant proportion of the subjects surveyed displayed a deficient understanding of key aspects of a lawyer's role such that their ability to validly waive their rights is in grave doubt. Voluntary, knowing and intelligent waiver of rights is constitutionally mandated and waivers made without sufficient understanding are constitutionally deficient and in need of both legal and policy redress.

Keywords: *miranda, waiver, attorney-client privilege, zealous representation.*

INTRODUCTION

People may know or at least think they know what *Miranda v Arizona*[1] is all about, thanks to the popularity of police dramas where a parade of suspects are informed of their rights on a weekly basis. Usually, actors playing detectives sternly inform their co-stars, playing the roles of suspects, that they have the right to remain silent and that if they choose to give up that right, anything they say can and will be used against them in a court of law. "Suspects" are then informed that they have the right to an attorney prior to answering any questions and that if they cannot afford an attorney, one will be provided for them free of charge. Neither suspects on television nor in real life are informed about what this attorney is supposed to do or how an attorney might be useful to them. For substantive information about the defense attorney's role, a suspect must rely solely on the knowledge they already possess.

Suspects on television nearly always dutifully waive their rights with nary a pause for reflection, and the interrogation proceeds without delay. The ubiquity of televised Mirandizing of suspects caused no lesser source than the U.S. Supreme Court to conclude that "the warnings have become part of our national culture".[2] Some scholars have questioned whether *Miranda* warnings are even necessary anymore given the public's familiarity with them through televised dramas.[3] Yet, if the public is learning about their *Miranda* rights from repetition on television, there is a danger they are learning that *Miranda* rights should be waived automatically and thoughtlessly, just like they do on television.

In any event, familiarity with the warnings as a piece of televised theater does not necessarily mean that people understand what *Miranda* warnings mean in practice. On the contrary, scholarly literature suggests that suspects often do not understand what the warnings mean.[4] Moreover, even if suspects understand the plain-language meaning of the vocabulary used, it

[1] *Miranda v Arizona* [1966] 384 US 436
[2] *Dickerson v United States* [2000] 530 US 428, 443
[3] Richard Rogers et al., 'General knowledge and misknowledge of Miranda rights: Are effective Miranda advisements still necessary?' (2013) 19(4) Psychology, Public Policy and Law 432-442 <https://doi.org/10.1037/a0033964> accessed 17 November 2023
[4] Richard Rogers, 'Getting it wrong about Miranda rights: false beliefs, impaired reasoning, and professional neglect' (2011) 68(8) American Psychologist 728-736 <https://doi.org/10.1037/a0024988> accessed 17 November 2023

does not necessarily follow that they know what attorneys do for their clients well enough to make a rational decision about whether such services might be beneficial in a particular context. This exploratory research attempts to begin filling this void by explicitly examining whether members of the public are aware of attorney-client privilege and the duty of zealous representation and whether they comprehend how these attributes affect the role of defense counsel well enough to make a knowing and intelligent decision about whether to waive their rights to counsel prior to being interrogated.

LEGAL FRAMEWORK

Similar to other countries with an Anglo jurisprudential history, U.S. law prohibits involuntary self-incrimination (5th Amendment of the U.S. Constitution), thus all confessions must be voluntary to be used against the accused at trial. Voluntariness was traditionally evaluated under a totality of the circumstances test.[5] Early cases recognized that physical abuse rendered a confession involuntary.[6] Subsequent cases found that psychological abuse, sleep deprivation and other tactics designed to overcome a suspect's will were similarly impermissible.[7]

While voluntariness is essential to a confession's admissibility, the *Miranda* Court found that the voluntariness test previously relied upon was insufficiently protective in the custodial interrogation context. Finding that custodial interrogations were inherently coercive, the *Miranda* Court noted the need for procedural safeguards to dispel this coercive atmosphere prior to questioning. Specifically, the Court stated that a suspect

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.[8]

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[5] Sharon Kelley et al., 'Review of Research and Recent Case Law on Understanding and Appreciation of Miranda Warnings' (2018) 3 Advances in Psychology and Law 77-117 <https://doi.org/10.1007/978-3-319-75859-6_3> accessed 17 November 2023

[6] *Brown v Mississippi* 297 U.S. 278 1936

[7] *Haynes v Washington* 373 [1963] US 503; *Ashcraft v Tennessee* [1944] 322 U S 143

[8] *Miranda v Arizona* 1966 p. 479

Because the *Miranda* decision, by its terms, was limited to custodial interrogations, it is not surprising that in the intervening years, the Court was called upon to define what they meant by custody and interrogation. The Court obliged, finding that a suspect is in custody for *Miranda* purposes if a reasonable person under those circumstances would not think they were free to leave.[9] The Court elaborated on the meaning of interrogation, finding that it goes beyond direct, guilt-seeking questioning and includes any words or actions that a reasonably well-trained police officer should know are likely to elicit an incriminating response.[10]

The Court also clarified what it takes for a suspect to successfully avail themselves of their rights and what the government must prove to establish a valid waiver of *Miranda* rights. While *Miranda* itself states that if suspects ***indicate in any manner*** that they wish to be silent they have successfully invoked, subsequent decisions make clear that a successful invocation is more difficult to achieve. In order to successfully invoke *Miranda* rights, a suspect must make an "unequivocal" and "unambiguous" assertion of rights.[11] Ambiguous and indirect comments indicating that a suspect "wants" or "needs" a lawyer are typically insufficient to act as an invocation. The Court's move to require a clear and specific assertion of rights is problematic because people tend to speak indirectly and ambiguously, rather than directly and forcefully, when in a situation like a police interrogation where power is not equally distributed.[12]

The Court has also given guidance on what constitutes a valid waiver of *Miranda* rights. In *Moran v Burbine* (1986), the Court noted that the waiver inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice, rather than intimidation, coercion, or deception. Second, the waiver must have been made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances

[9] *Oregon v Mathiason* [1977] 420 US 714
[10] *Rhode Island v Innes* [1980] 446 US 291
[11] *Davis v United States* [1994] 512 US 452
[12] Justin B. Petersen, 'Miranda invocations: An intentionalist approach' (2019) 58(2) University of Louisville Law Review 349–380

surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.[13]

This test is often summarized as knowing, voluntary, and intelligent.[14] The first prong referenced by the *Moran* Court is the test for voluntariness and prohibits the use of physical or psychological coercion or trickery by the police to obtain a waiver. The second prong articulates the test for knowing and intelligent and requires that suspects understand what their rights are and make intentional decisions to relinquish them (knowing) with full knowledge of the consequences (intelligent). A valid waiver must be all three, knowing, voluntary, and intelligent.[15]

The Supreme Court takes a jaundiced view of efforts to circumvent *Miranda* and has condemned efforts by law enforcement to compromise a person's ability to make a free and rational choice about whether to exercise their rights.[16] A free and rational choice is impossible absent adequate knowledge to rationally evaluate the available options. Moreover, permitting waivers to be made while the suspect is in custody, in the absence of counsel, seriously undermines *Miranda*'s prophylactic effect.[17]

The substantial number of cases dealing with what constitutes a valid/invalid waiver is commensurate with the significance of the consequences inhering in that decision. The police are skilled interrogators and once a valid waiver is obtained, the police are given quite a bit of latitude to use deception and other means to get a confession.[18] Unfortunately, a substantial

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[13] *Moran v Burbine* [1986] 475 US 412, 421

[14] Traditionally, once suspects invoked their Miranda rights, the police could not make further attempts to interrogate them until counsel was made available unless the suspects initiated the subsequent contact and indicated a current willingness to waive their rights - *Edwards v Arizona* [1981] 451 US 477; The Supreme Court later clarified the temporal reach of an invocation, finding that a two-week break in custody is sufficient to permit the police to re-approach suspects and re-Mirandize them in an attempt to obtain valid waivers - *Maryland v Shatzer* [2010] 559 US 98

[15] *Maryland v Shatzer* [2010] 559 US 98

[16] *Missouri v Seibert* [2004] 542 US 600

[17] Yale Kamisar, 'Closing keynote address: The Miranda case fifty years later' (2017) 97(3) Boston University Law Review 1293–1307 <https://www.bu.edu/bulawreview/files/2017/08/KAMISAR.pdf> accessed 17 November 2023

[18] Fred E. Inbau et al., *Criminal Interrogation And Confessions* (5th edn, Jones and Bartlett Publishers, Inc 2013); Richard A. Leo, 'The impact of Miranda revisited' (1996) Journal of Criminal Law and Criminology 86(3) 621-692 <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6874&context=jclc> accessed 17

number of these confessions will be false, made by factually innocent people.[19] False confessions are difficult to overcome and are a leading cause of wrongful conviction.[20] Innocent people may be particularly susceptible to both waiving their rights without any thought or reflection in the belief that their innocence will protect them, and subsequently succumbing to police pressure and falsely confessing.[21]

By contrast, successful invocation greatly reduces the chance that any incriminating evidence will be gathered from the accused, primarily because invocation should bring an immediate end to questioning.[22] At least admissions and confessions which are the. product of interrogation occurring after a successful invocation should be suppressed and not usable in evidence against the accused. There are, however, a number of judicially-approved uses of non-warned statements that might cause some police to continue an interrogation despite a valid invocation.[23] For example, some police officers may continue to question suspects in the hope of obtaining incriminating statements that can be used for impeachment should those suspects subsequently choose to take the stand in their own defense at trial.[24] In some circumstances, the police may even be able to use evidence derived from unwarned statements.[25]

November 2023; Richard A. Leo and Jerome H. Skolnick, 'The ethics of deceptive interrogation' (1992) 11(1) Criminal Justice Ethics 3-12 <https://doi.org/10.1080/0731129X.1992.9991906> accessed 17 November 2023

[19] Saul M Kassin, 'False confessions: How can psychology so basic be so counterintuitive?' 72(9) American Psychologist 951–964 <https://doi.org/10.1037/amp0000195> accessed 17 November 2023; Michael J. Zydney Mannheimer, 'Fraudulently induced confessions' (2020) 96(2) Notre Dame Law Review 799–858 <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4940&context=ndlr> accessed 17 November 2023

[20] Kyle C. Scherr., 'Cumulative disadvantage: A psychological framework for understanding how innocence can lead to confession, wrongful conviction, and beyond' (2020) 15(2) Perspectives on Psychological Science 353–383. https://doi.org/10.1177/1745691619896608> accessed 17 November 2023

[21] *Ibid*; Smalarz, L., Scherr, K. C., & Kassin, S. M. (2016). Miranda at 50: A psychological analysis. Current Directions in Psychological Science, 25(6), 455–460. https://doi.org/10.1177/0963721416665097> accessed 17 November 2023; Saul Kassin, 'On the psychology of confessions: Does innocence put innocents at risk?' (2005) 60(3) The American Psychologist 215-228 <https://doi.org/10.1037/0003-066X.60.3.215> accessed 17 November 2023

[22] *Miranda v Arizona* [1966] p. 473-74

[23] Richard A. Leo and Welsh S. White, 'Adapting to Miranda: Modern interrogators' strategies for dealing with the obstacles posed by Miranda' (1999) 84(2) Minnesota Law Review 397–472 <https://scholarship.law.umn.edu/mlr/2180/> accessed 17 November 2023

[24] *Harris v New York* [1971] 401 US 222 ; *Oregon v Hass* [1975] 420 US 714; While the Court has determined unwarned statements may be used for impeachment purposes, police interrogating outside of *Miranda* may incur civil liability under 42 U.S.C. § 1983 for violating a citizen's *Miranda* rights, even if their training manuals encourage such behavior - *California Attorneys for Criminal Justice v Butts* [9th Cir. 2000] 195 F.3d 1039

[25] *United States v Patane* [2004] 542 US 630

Even if police do not attempt to interrogate outside of *Miranda*, they almost certainly will not provide an attorney to consult with the suspect.[26] Police know that defense attorneys will act to protect their clients' interests and even the most inexperienced defense attorneys know better than to let their clients talk to the police. Defense attorneys will not only thwart any interrogation effort, they may also challenge the legality of the arrest, object to the fairness of a proposed lineup or otherwise oppose the police in their efforts to incriminate their client.

Police, in avoiding the involvement of defense attorneys for as long as possible, evince an understanding of the defense counsel's adversarial role that may be unknown to suspects. Defense attorneys are not there to help the police solve cases. To the contrary, defense attorneys have an ethical obligation to **zealously represent** their clients.[27] They are obligated to act in their clients' best interests, without regard to the public good or other considerations.[28] Unlike prosecutors, who at least in theory have an obligation to see that justice is done,[29] defense attorneys work only for their clients. Defense attorneys are obligated to pursue all applicable procedural and substantive defenses without regard to factual guilt or innocence, so long as they do not suborn perjury or perpetrate fraud upon the court.[30]

While the potentially deleterious effects of zealous representation on accurate adjudications have been noted,[31] the duty to zealously represent their clients within the bounds of the ethical

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[26] Albert W. Alschuler, 'Miranda's fourfold failure' (2017) 97(3) Boston University Law Review 849–892 <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2113&context=public_law_and_legal_theory> accessed 17 November 2023; Mark A. Godsey, 'Reformulating the Miranda warnings in light of contemporary law and understandings' (2005) 90(4) Minnesota Law Review 781–825 <https://scholarship.law.uc.edu/fac_pubs/90/> accessed 17 November 2023; David Rossman, 'RESURRECTING MIRANDA'S RIGHT TO COUNSEL' (2017) 97 Boston University Law Review 1129-1156 <https://www.bu.edu/bulawreview/files/2017/08/ROSSMAN.pdf> accessed 17 November 2023

[27] 'ABA Model Code of Professional Responsibility' (*Defend Youth Rights*) <https://www.defendyouthrights.org/wp-content/uploads/2014/05/ABA-Model-Code-of-Professional-Responsibility.pdf> accessed 17 November 2023

[28] Abbe Smith, 'Defending defending: The case for unmitigated zeal on behalf of people who do terrible things' (2000) 28 Hofstra Law Review 925-961 <https://scholarship.law.georgetown.edu/facpub/216/> accessed 17 November 2023

[29] *Brady v Maryland* [1963] 373 US 83

[30] Robin Walker Sterling, *Role of Juvenile Defense Counsel in Delinquency Court* (National Juvenile Defender Center, Washington DC 2009)

[31] Todd A. Berger, 'The Ethical limits of discrediting the truthful witness: How modern ethics rules fail to prevent truthful witnesses from being discredited through unethical means' (2015) 99(2) Marquette Law Review 283–362 <https://scholarship.law.marquette.edu/mulr/vol99/iss2/4/> accessed 17 November 2023

rules remains a cornerstone of legal ethics and is one of the key reasons defense attorneys are so valuable to the accused. The duty to zealously represent would be nearly impossible to fulfill if attorneys were not able to candidly gather information from their clients. Attorney-client privilege has long been regarded as essential to an attorney's function as an advocate and is embedded in the ethical rules.[32] Unless the client consents or waives the privilege, attorneys are prohibited from disclosing to third parties anything their clients tell them during the course of the representation, except in rare instances where such disclosure is necessary to *prevent* a crime or the occurrence of substantial bodily harm.[33]

Attorney-client privilege enables clients to fully disclose what happened so that their attorneys can properly prepare their defenses, without fear of their lawyers becoming witnesses against them or otherwise assisting the state in building its case. Defense counsel stripped of attorney-client privilege would be at best useless to the accused and at worst extremely detrimental, potentially providing the state with damning evidence from the defendant's own mouth which might otherwise have been unavailable. Suspects lacking an understanding of attorney-client privilege and the duty of zealous representation cannot reasonably be expected to make a knowing and intelligent decision about whether they should consult with an attorney.

PRIOR EMPIRICAL RESEARCH

A number of scholars have focused on the impact of *Miranda* on crime control. They argue that *Miranda* has handcuffed the police and made it harder for them to catch criminals, resulting in future victimizations at the hands of these uncaught criminals.[34] For example, after culling several studies for methodological reasons, Cassell's meta-analysis comparing before-and-after *Miranda* confession rates found that confessions fell by about 16% resulting in 28,000 fewer convictions for violent crime and 79,000 fewer convictions for property crimes after *Miranda*.[35]

[32] American Bar Association 1980
[33] American Bar Association 1980
[34] Paul Cassell and Richard Fowles, 'Still handcuffing the cops: Review of fifty years of empirical evidence of Miranda's harmful effects on law enforcement' (2017) 97(3) Boston University Law Review 685-848 <https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1033&context=scholarship> accessed 18 November 2023
[35] Paul G. Cassell, 'Miranda's social costs: An empirical reassessment' (1996) 90(2) Northwestern University Law Review 387-499 <https://www.ojp.gov/ncjrs/virtual-library/abstracts/mirandas-social-costs-empirical-reassessment> accessed 18 November 2023

Cassell's work is not without its critics, including Stephen Schulhofer who using a different mix of studies found far lower losses in confessions which he deemed to be "vanishingly small."[36] Subsequent scholarly work remains sharply divided. Some scholars argue that the police have learned to work within the strictures of *Miranda* and that the rules have little adverse impact on their ability to solve crimes.[37] Other scholars argue just as vociferously that "confession rates have remained depressed since *Miranda*."[38] Scholars even disagree about the meaning of the same statistic. For example, Leo in noting that about 80% of suspects waive their rights asserts that *Miranda* has "had only a marginal effect on the ability of the police to successfully elicit admissions and confessions" but raises concerns that police interrogations have become a confidence game in which the police manipulate suspects and betray their trust. Cassell and Fowles look at that same statistic and argue that 20% is a very large number and that *Miranda* has essentially given immunity from police questioning to 20% of criminal suspects.[39]

Most of the empirical work from social scientists focuses on whether people know what their *Miranda* rights are and/or can understand the meaning of the words used in the *Miranda* warnings. For example, using a random sample drawn from the Dallas County jury pool, Rogers and his colleagues found that a substantial proportion of subjects were not able to correctly recall their *Miranda* rights and that even among those who could accurately recite their content, *Miranda* misconceptions remained high.[40] About 20% of the sample thought continuing silence could be used against them and almost 30% thought interrogation could proceed until counsel was physically present.[41] Most pretrial detainees and close to 40% of college students thought

[36] Stephen J. Schulhofer, 'Miranda's practical effect: Substantial benefits and vanishingly small social costs' (1996) 90(2) Northwestern University Law Review 500-563
[37] Steven B. Duke, 'Does Miranda protect the innocent or the guilty?' (2007) 10(3) Chapman Law Review 551-578 <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/5233/Does_Miranda_Protect_the_Innocent_or_the_Guilty.pdf?sequence=2&isAllowed=y> accessed 18 November 2023; Tonja Jacobi, 'Miranda 2.0' (2016) 50(1) UC Davis Law Review 1–86 <https://lawreview.law.ucdavis.edu/archives/50/1/miranda-20> accessed 18 November 2023; George C. Thomas III and Richard A. Leo, 'The effects of *Miranda v. Arizona*: Embedded in our national culture' (2002) 29 Crime and Justice: A Review of Research 203-271 <https://www.journals.uchicago.edu/doi/abs/10.1086/652221#:~:text=Arizona%20required%20that%20police%20inform,admitted%20into%20evidence%20at%20trial> accessed 18 November 2023
[38] Cassell (n 34) 696
[39] *Ibid* 829-830
[40] Rogers (n 3)
[41] *Ibid* 437

comments they made "off the record" could not be used against them.[42] Another study involving pretrial detainees suggested even more stark miscomprehensions were common with nearly one-third of the subjects indicating they thought silence would be used to incriminate them at trial.[43] College students fared little better, demonstrating similar *Mirada* misunderstandings, including difficulty comprehending the right to appointed counsel.[44]

Further complicating analysis of people's understanding of their *Miranda* rights lies in their variability. Although there is widespread agreement on the essential components of the warnings, the Supreme Court has made clear that there is no required or "talismanic" language.[45] Consequently, there is significant jurisdictional variation in the warnings actually given.[46] Rogers and his colleagues found that *Miranda* warnings ranged from less than 75 words to more than 300 words and varied substantially in complexity. Many of these lengthier warnings require people to retain and process many more concepts than even an adult with excellent working memory would be capable of handling.[47] Significantly, all of the warnings studied either completely failed to explain the role of an attorney or described it in passive terms such as "being present." No mention was made in any of the warnings of the lawyer's advocacy role (zealous representation) or attorney-client privilege. Rogers and his colleagues also found that the waiver language used was skewed toward encouraging waiver and rarely mentioned the risks associated with it.[48] Very little work has directly examined whether people are aware of attorney-client privilege and the duty of zealous representation, although existing work suggests there is cause for concern. Grisso, for example, found that juveniles frequently thought

[42] Rogers (n 4)
[43] Richard Rogers et al., '"Everyone knows their Miranda rights": Implicit assumptions and countervailing evidence' (2010) 16(3) Psychology Public Policy and Law 300-318 <https://doi.org/10.1037/a0019316> accessed 20 November 2023
[44] Jeffrey L. Helms and Candace L. Holloway, 'Differences in the prongs of the Miranda warnings' (2006) 19(1) Criminal Justice Studies 77-84 <https://doi.org/10.1080/14786010600616007> accessed 20 November 2023; Roger (n 4)
[45] *California v Prysock* [1981] 453 US 355
[46] Helms (n 44); Rogers (3); Richard Roger et al., 'The language of Miranda in American jurisdictions' (2008) 32(2) Law & Human Behavior 124-136 <https://doi.org/10.1007/s10979-007-9091-y> accessed 20 November 2023
[47] Richard Rogers, 'Juvenile Miranda warnings: Perfunctory rituals or procedural safeguards?' (2012) 39(3) Criminal Justice and Behavior 229-249 <https://doi.org/10.1177/0093854811431934> accessed 20 November 2023
[48] *Ibid*

any incriminating information they told their attorney would be reported to the court.[49] Nearly 20% of adult pretrial detainees thought private access to an attorney was impossible.[50] Lack of private access would, of course, destroy attorney-client privilege rendering it meaningless. One of the few studies expressly examining the understanding of attorney-client privilege and the duty of zealous representation involved juveniles.[51] McGuire and her colleagues found that even juveniles who had been through the system before had difficulty understanding attorney-client privilege and zealous representation such that their ability to make a knowing and intelligent waiver was in serious doubt.[52]

The lack of research on what people understand about the advocacy role of an attorney and attorney-client privilege is unfortunate because, as discussed above, the duty of zealous representation and attorney-client privilege are key reasons why lawyers are able to act as effective advocates for their clients. It is hard to imagine a person lacking predicate knowledge of zealous representation and attorney-client privilege is able to rationally evaluate whether they want to consult with an attorney prior to being interrogated. Waivers under such circumstances can hardly be described as knowing and intelligent.

METHODS

The original intent was to survey people likely to encounter the police in an aversive capacity, namely people on the streets in urban, underclass areas. Concluding that we would be most successful in reaching this population and maintaining their privacy if the data was collected anonymously, the decision was made to craft a survey to fit within the parameters of exempt research, thereby relieving the team of the necessity of getting signed consent forms. Consequently, no data was gathered regarding the subject's criminal record.

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[49] T. Grisso, *Juveniles' waiver of rights: Legal and psychological competence* (Plenum Press 1981)
[50] Rogers (n 47)
[51] M Dyan Mcguire et al., 'Do juveniles understand what an attorney is supposed to do well enough to make knowing and intelligent decisions about waiving their right to counsel?: An exploratory study' (2015) 2 Journal of Applied Juvenile Justice Services 1-30 <https://www.researchgate.net/publication/274002788_Do_juveniles_understand_what_an_attorney_is_supposed_to_do_well_enough_to_make_knowing_and_intelligent_decisions_about_waiving_their_right_to_counsel_An_exploratory_study> accessed 20 November 2023
[52] *Ibid*

Some empirical data suggest that those who have had prior experience with the system are more likely to invoke their rights.[53] They are not, however, necessarily more likely to understand their *Miranda* rights.[54] Such seemingly inconsistent results make sense when one considers that while prior defense attorneys almost certainly told their clients not to talk to the police, they probably did not thoroughly explain the scope and implications of *Miranda* rights because that would not be relevant to the immediate issues surrounding the defense of the client. Thus, while being told to never talk to the police might cause invocations to be more frequent, it does not necessarily follow that the person so informed would have a greater understanding of *why* they should invoke their right to counsel. There is, therefore, reason to believe such data would not have been relevant to the specific inquiry under study here. In any event, in balancing the utility of prior record data against the necessity of getting signed consent, it was determined that the benefits of anonymous collection outweighed the potential benefit of gathering sensitive data about prior police contacts. Moreover, prior police contact, if it had any impact at all, would make someone more, not less, savvy about their rights, consequently, the choice not to control for prior records would not inflate our findings.

We originally targeted people at the bus and train station located downtown or hanging around on the streets in urban neighborhoods within the city of St. Louis. The team went to various areas where people are known to congregate including the Delmar Loop, an eclectic area of shops and restaurants, the Central West End, an upscale urban enclave and the neighborhood surrounding Crown Candy, a popular eatery located on the Northside. All of these sites are located within or adjacent to economically depressed areas. Despite efforts to make the survey brief (1 page, multiple choice questions) and dispensing with a signed consent form in favor of a recruitment statement, the team encountered substantial problems in finding willing participants. After several months of effort with only limited success, the decision was made to expand our search for subjects to include area colleges, suburban shopping malls and public

[53] Leo (n 18), Rossman (n 26)
[54] Sarah J. Chaulk et al., 'Measuring and Predicting Police Caution Comprehension in Adult Offenders' (2014) 56(3) Canadian Journal of Criminology and Criminal Justice 323–340 <https://www.mun.ca/psychology/media/production/memorial/academic/faculty-of-science/psychology/media-library/research/brl/Chaulk_et_al_2014.pdf> accessed 20 November 2023

libraries which resulted in getting more participants and a subject population potentially more reflective of a wider segment of the community.

After IRB approval but prior to gathering data for this study, a day was spent asking people encountered on the streets of the neighborhood surrounding Crown Candy to take our survey. They were asked if they understood all the questions or if anything was confusing or not worded clearly. Volunteers helped us assess comprehension and the clarity of wording. Data collected that day was used to slightly modify the survey and was then destroyed. Data collection occurred between September 2018 – December 2019 and yielded a non-probability sample of adults (N=649). Substantially incomplete surveys were discarded (<10).

Subjects were approached by a member of the research team and were told we were conducting research on the general public's familiarity with the role of attorneys. Subjects were asked if they wanted to participate and if they indicated assent they were given a Recruitment Statement approved by Saint Louis University's IRB (protocol # 29218, Exempt). The research team member went over the Recruitment Statement with the subject and asked them if they wanted to participate. If they indicated assent, they were given a one-page survey containing 19 objective questions. Team members offered to read the survey questions to subjects but few (<10) accepted this offer. It is possible that adults with difficulties reading simply declined to participate. Subjects filled out the survey while the members of the research team waited. Subjects turned the survey back in when they were done and were thanked for their time.

DEMOGRAPHIC MEASURES

Subjects were asked if they were male or female. Biological sex was coded 0 for females and 1 for males. Subjects were also asked if they primarily identified as White, Black, Hispanic, Asian or Indigenous. For purposes of subsequent analyses, race was collapsed into 3 dichotomous variables reflecting whether the respondent primarily self-identified as White (1) or something else (0) or Black (1) or something else (0) or Other Minority (Hispanic, Asian or Indigenous) (1) or something else (0). In addition, respondents were asked about their age and educational background. Age was coded in years. Educational attainments were coded as follows: GED or less (1), High School Graduate (2), Some College (3), College Graduate (4) and Graduate

Education (5).

ATTITUDINAL MEASURES

A couple of questions were asked to ascertain the subjects' general attitude toward police and attorneys, factors which could be relevant to assessing and contextualizing their responses. Subjects were asked if most police officers are trustworthy, responses were coded with 1 for True and 0 for False or Unsure. Subjects were also asked if their attitude toward lawyers was generally positive (coded with 1) or negative (coded with 0).

MIRANDA-RELATED MEASURES

Right to Silence

Subjects were asked three true/false questions related to the right to silence. The first asked if the police could put you in jail if you refused to answer their questions (the correct answer is false). The second asked if the police could use your refusal to answer their questions to prove you did something wrong (the correct answer is false). The third asked if you admit to the police that you did something wrong, they can use that to put you in jail (the correct answer is true). For all 3 questions, correct responses were coded with 1 while incorrect responses were coded with 0. The three variables related to silence were then added together to create a scale reflecting an understanding of the right to silence. Zero indicates that the subject answered all three questions regarding the right to silence incorrectly while 3 indicates that they answered all of those questions correctly.

Zealous Representation

Subjects were asked five questions concerning the duty of zealous representation. Specifically, they were asked:

If you hire a lawyer s/he has to do what you want him/her to do but if the government hires a lawyer for you s/he has to do what the government wants. ___True _X_ False __Unsure

If the government appoints a defense lawyer for someone accused of a crime, that lawyer primarily represents (pick **1** of the following): _____ the interests of justice, _X_ the person accused of the crime, _____the government.

If the government appoints a defense lawyer for someone accused of a crime, that lawyer should help the police and/or courts figure out whether their client is actually guilty. ____True __X__ False _____Unsure

It is the defense lawyer's job to make sure that only guilty people get punished. _____True __X__ False _____Unsure

Defense lawyers are supposed to do whatever they can, without breaking the law, to help their clients avoid punishment. __X__ True _____ False _____Unsure

The legally correct answer is marked with an X. The correct answer was coded with a 1 and the incorrect answers (the other 2 choices) were coded with a 0. Five subjects left the question about who appointed counsel represents blank, since they failed to answer the question correctly their non-answer was coded with a 0. A scale reflecting zealous representation was created. Zero indicates that the subject answered all five questions regarding the duty of zealous representation incorrectly while 5 indicates that they answered all of those questions correctly.

Attorney-Client Privilege

Subjects were also asked 5 survey questions pertaining to their understanding of attorney-client privilege. All subjects answered all of these questions. Specifically, they were asked:

Defense lawyers are allowed to tell the police what their clients told them without getting the client's permission. _____True __X__ False _____Unsure

Defense lawyers are allowed to tell judges what their clients told them without getting the client's permission. _____True __X__ False _____Unsure

Defense lawyers are allowed to tell their clients' family members what their clients told them without getting the client's permission. _____True or __X__ False _____Unsure

Defense lawyers are required to tell the police if they reasonably believe their clients are lying about their involvement in a suspected crime. _____True __X__ False _____Unsure

If a client tells his/her attorney that s/he murdered someone, the lawyer is supposed to tell the police. _____True __X__ False _____Unsure

With these questions, the legally correct answer was always False. The correct answer, False, was coded with a 1 and the incorrect answers (True and Unsure) were coded with a 0. A scale reflecting performance on the 5 attorney-client privilege questions was created. Zero indicates that the subject answered all 5 questions regarding attorney-client privilege incorrectly while 5 indicates that they answered all of those questions correctly.

Analytic Plan

Given the nature of the data and the research question, primary analyses were descriptive in nature. Of specific interest was discerning how well subjects understood zealous representation and attorney-client privilege. An examination of relevant bivariate associations was also undertaken to determine the correlates of zealous representation and attorney-client privilege. A series of bivariate correlation matrixes were constructed to determine which measures of demographic status correlated with measures related to understanding the right to silence, zealous representation and attorney-client privilege. Using the results of the correlation matrixes to inform variable selection, regression analyses were then performed.

Results

Descriptive Analyses

Most of the subjects surveyed were female (N=357) although about 45% were male (N=289). Three subjects declined to provide data about their biological sex. Females were somewhat over-represented vis-à-vis their presence in the population of metropolitan St. Louis (55% v. 52%)[55]. Respondents were also asked if they primarily identified as White, Black, Hispanic, Asian or Indigenous. Most of the sample reported that they primarily identified as White (N=462), the next largest group was Black (N=85), then Hispanics (N=35), Asians (N=58) and Indigenous (N=7). Two people declined to identify by race/ethnicity. The racial composition of the sample was close but not identical to the metro area. The sample was 71% White, 13% Black, 5% Hispanic, 9% Asian and 1% Indigenous. The demographic makeup of the St. Louis metro area, by contrast, is 73% White, 18% Black, 3% Hispanic, 3% Asian, and 0% Native.[56] As is clear from

[55] 'St. Louis, MP-IL Metro Area' (*Census Reporter*, 01 November 2021) <https://censusreporter.org/profiles/31000US41180-st-louis-mo-il-metro-area/> accessed 20 November 2023

[56] *Ibid*

the comparison, African Americans were most notably under-represented in the sample.

Age ranged from 18 to 87, with a mean age of 27.26. Most of the sample was college-age (18 to 22 years old, N= 416). The sample was disproportionately young with a median age of 21 compared with a regional median age of almost 40.[57] The sample was also relatively well-educated. Only 2% did not have a high school diploma, 17% were high school graduates, 62% had some college and 9% were college graduates and 9% had graduate education. Some college was, thus, not only the modal category, but it was also the median. Contrastingly, about 7% of the population of the Metro area did not graduate from high school, 26% are high school graduates, 31% have some college, 21% graduated from college and 15% had post-graduate education.[58]

Questions concerning the subjects' general attitude toward the police and attorneys indicate that most subjects (N=424) thought the police were trustworthy but a significant number disagreed (N=111) or were unsure (N=114). When it came to lawyers, the subjects' assessments were mostly positive. About 85% (N=551) indicated their general attitude was positive. These responses suggest that this subject pool was not particularly hostile toward police or lawyers.

Prior work suggests that the right to silence is more easily comprehended than the rights associated with counsel.[59] Results here were consistent with those prior findings. Almost a quarter of the subjects did not know that the police could not put them in jail simply for refusing to answer the police's questions (Table 1). Perhaps more disturbing, almost 26% thought that their silence ***could*** be used against them to prove they did something wrong (Table 1). While most understood that admissions they made to the police could be used against them (84%), slightly more than 16% did not even understand this critical risk (Table 1). Turning to the scale variable, Silence, we see slightly more than half of the subjects (N=336) answered all 3 questions pertaining to the right to silence correctly, suggesting substantial comprehension of the right (Table 2). Unfortunately, nearly half had some comprehension problems, ranging from apparent complete ignorance (2%) to varying degrees of miscomprehension (Table 2).

[57] *Ibid*
[58] *Ibid*
[59] Helms (n 44)

Table 1. Miranda Relevant Variables

	Correct		**Incorrect**	
Right to Silence	**N**	**%**	**N**	**%**
Jailed for Refusal to Answer	492	75.8	157	24.2
Silence used to incriminate	482	74.3	167	25.7
Admissions used as evidence	544	83.8	105	16.2
Duty of Zealous Representation	**N**	**%**	**N**	**%**
Appointed Lawyer Does What Government Wants	429	66.1	220	33.9
Appointed Lawyer Represents	427	65.8	222	34.2
Help Police/Courts Determine Guilt	422	65.0	227	35
Job to Make Sure Only Guilty Punished	400	61.6	249	38.4
Help Client Avoid Punishment w/o Breaking Law	522	80.4	127	19.6
Attorney-Client Privilege	**N**	**%**	**N**	**%**
May Tell the Police	558	86.0	91	14
May Tell the Judge	547	84.3	102	15.7
May Tell Family	539	83.1	110	16.9
Required to Tell police Client Lying	444	68.4	205	31.6

Supposed to tell Police about Murders	354	54.5	295	45.5

Table 2. Scales

Value	**Silence**		**Zealous Representation**		**Attorney-Client Privilege**	
	N	**%**	**N**	**%**	**N**	**%**
0	13	2%	13	2%	36	5.5%
1	90	13.9%	66	10.2%	31	4.8%
2	210	32.4%	92	14.2%	51	7.9%
3	336	51.8%	129	19.9%	101	15.6%
4	N/A		182	28%	144	22.2%
5	N/A		167	25.7%	286	44.1%
Total	649	100%	649	100%	649	100%

The subjects' comprehension of the duty of zealous representation was generally less robust than comprehension concerning the right to silence. More than one-third of the subjects answered most of the questions pertaining to zealous representation incorrectly (Table 1). For example, more than one-third of the subjects thought that because the government (not the client) was paying appointed counsel, appointed counsel was required to take direction from the government. Similarly, over one-third of the subjects thought that appointed counsel primarily represented the interests of justice (N=156, 24%) or the government (N=61 9.4%).

Perhaps even more alarming, 35% of subjects thought that it was incumbent upon defense counsel to help the police and/or courts figure out whether their client was actually guilty. Even more of the subjects thought it was the defense counsel's job to make sure only guilty people are punished (38.4%), again suggesting a fundamental misunderstanding of defense counsels' unique advocacy role among many of the people surveyed. The last question summarizes the duty of zealous representation, as most lawyers would understand the duty in layperson's terms: "Defense lawyers are supposed to do whatever they can, without breaking the law, to help their clients avoid punishment". Four out of five subjects correctly responded to this survey question. Turning to the scale variable, Zealous Representation, only about a quarter of the subjects answered all 5 questions correctly, suggesting that about 75% of the subjects had some difficulty understanding that a defense attorney, appointed or not, acts as an advocate for their client and the primary bulwark against overreaching by the police irrespective of their client's guilt or innocence (Table 2).

Most subjects (80%+) appeared to understand that defense counsel was generally not supposed to tell other people what the client told them without first getting the client's permission. However, this understanding broke down when they were asked about specific contexts. For example, almost one-third of respondents thought defense lawyers were required to tell the police if they thought their client was lying (31.6%). Nearly half (46%) believed lawyers were supposed to tell the police if their client admitted to them that they had committed murder.

Turning to the scale variable, attorney-client privilege, it is clear that subjects generally had a greater understanding of this ethical duty than they did of zealous representation. More than 40% of subjects were able to answer all 5 questions correctly. However, almost 6% were not able to answer any of the questions correctly. The remaining 50% or so fell somewhere along the continuum, getting between 1 and 4 of the questions correct (Table 2).

Bivariate Correlations

A correlation matrix using the demographic, attitudinal and scale variables was constructed (Table 3). As expected, there are high correlations between some of the race/ethnicity variables. None of the race variables (White, Black, Other) are significantly related to sex. Only other is significantly related to age, indicating that other minorities tended to be younger. White and Black (but not other) are significantly related to education and suggest that those who primarily identified as White were more highly educated than those who primarily identified as Black. Not surprisingly, age is also positively associated with education suggesting that older respondents were more highly educated than younger ones. Males in this sample also tended to be older and less well-educated than females.

Table 3. Correlation Matrix

	1	2	3	4	5	6	7	8	9	10	11
1. Sex	1	.037	.073	-.015	.190**	-.097*	.093*	-.123**	.012	.025	.019
2. White		1	-.61**	-.671**	0.040	0.124**	0.180**	0.064	0.153**	0.168**	0.094*
3. Black			1	-.166**	.041	-.173**	-.159**	-.142**	-.103**	-.06	-.043
4. Other Minority				1	-.085*	-.004	-.075	.061	-.102**	-.149**	-.079*
5. Age					1	.134**	.152**	-.162**	.035	.106**	.182**
6. Education						1	.049	-.012	.08*	.109**	.103**
7. Police Trust.							1	.154**	.038	.138**	.021
8. Lawyers Attitude								1	.050	.104**	-.065
9. Silence									1	.296**	.316**
10. Zealous Rep.										1	.430**
11. Atty. Client Priv.											1

** p<0.01 *p<0.05

Many of the demographic variables have statistically significant relationships with the attitudinal variables (Table 3). These results suggest older white males are the most likely to think the police were trustworthy whereas identifying as Black, being younger and being female all correlated with thinking the police were untrustworthy. When it came to attitude towards lawyers, younger women who identified as something other than Black were most likely to

regard lawyers positively. Attitudes towards the police and lawyers were positively associated suggesting that those who regarded the police as trustworthy were also more inclined to be positively disposed toward lawyers.

The correlation matrix also indicates some interesting associations between attitudinal and demographic characteristics and measures relating to understanding *Miranda* rights (Table 3). For example, respondents who thought police were trustworthy and positively regarded lawyers also rated higher on the zealous representation scale. Identifying as White was positively associated with having a greater understanding of the right to silence, the duty of zealous representation and attorney-client privilege. Identifying as Black was negatively associated with comprehension of the right to silence but was not significantly associated with zealous representation or attorney-client privilege. Identifying as another minority (Hispanic, Asian or Indigenous) was negatively associated with all 3 measures of comprehension of *Miranda* rights, suggesting this group is less familiar with their rights.

By contrast, increased education was positively associated with all 3 *Miranda* scales suggesting a greater understanding of the right to silence, the duty of zealous representation and attorney-client privilege among more educated people. Sex was not significantly associated with any of the *Miranda* scales. Being older is positively associated with a greater understanding of zealous representation and attorney-client privilege.

Regression

Given the lack of significant correlations between sex and any of the scales measuring the dependent variables of interest, sex was excluded from the regression equation. The remaining demographic variables (White, Black, Other Minority, Age and Education) and both attitudinal variables (police and lawyers) have at least some statistically significant relationships with at least some of the dependent scale variables. Consequently, these variables were all used in regressions equations to predict scores on the scales measuring comprehension of the right to silence, duty of zealous representation and attorney-client privilege. To avoid potential multicollinearity problems, the race variables were not combined in the same equation. Since the scale variables are ordinal in nature, OLS regression was used.

As is clear from Table 4, being White made a statistically significant contribution to a greater understanding of all 3 scales. Looking specifically at the right to silence, it is apparent that none of the other variables remain significant once "Whiteness" is accounted for. The model accounts for about 3% of the variance. By contrast, all of the variables, with the exception of education, remain significant in the equation predicting understanding zealous representation. Thus, subjects who were White, older, positively disposed towards lawyers and inclined to believe police are trustworthy were more likely to have a better grasp of what the duty of zealous representation means in practical terms. The Zealous Representation model has twice the explanatory power of the Silence model but it still only explains about 6% of the variance in the dependent variable (R^2=.061). Both race and age made statistically significant contributions to understanding attorney-client privilege with older, White people having a more robust understanding of this concept. Again, the model explains relatively little of the variance with an R^2 of only .046.

Table 4. Predicting Miranda's Comprehension (Silence)

	White			**Black**			**Other Minority**		
	B	*SE B*	*Beta*	*B*	*SE B*	*Beta*	*B*	*SE B*	*Beta*
Race	.246**	.069	.141**	-.201*	.095	-.086*	-.225**	.086	.103**
Age	.002	.002	.029	.002	.002	.036	.001	.002	.023
Education	.055	.037	.059	.056	.038	.060	.071*	.037	.076*
Police Trustworthy	-.004	.067	-.002	.015	.067	.009	.022	.067	.013
Lawyers Attitude	.104	.088	.047	.095	.089	.043	.131	.089	.060
Constant	1.864	.152		2.047	.157		1.995	.151	
R-squared	.029			.017			.021		

** p<0.01*p<0.05

The same regression analyses were conducted using Black as the primary independent variable of interest. As is clear from Table 5, being Black negatively affected comprehension of the right to silence but was not a statistically significant predictor of scores on either the zealous representation scale or the attorney-client privilege scale. Among Blacks, older, better-educated people who thought the police were trustworthy and were positively disposed toward lawyers were most likely to score well on the zealous representation scale. Only age was a statistically significant predictor of the score on the attorney-client privilege scale, suggesting older people were more likely to be more familiar with the ramifications of the privilege.

Table 5. Predicting Miranda Comprehension (Zealous Representation)

	White			**Black**			**Other Minority**		
	B	*SE B*	*Beta*	*B*	*SE B*	*Beta*	*B*	*SE B*	*Beta*
Race	.398**	.119	.131**	-.051	.163	-.013	-.543**	.146	-.143**
Age	0.009*	.004	.095*	.01*	.004	.096*	.009*	.004	.086*
Education	.122	.063	.075	.143*	.065	.087*	.148*	.063	.091*
Police Trustworthy	.226*	.115	.078*	.283**	.116	.098**	0.257*	0.114	0.089*
Lawyers Attitude	0.386**	0.151	0.101**	0.402**	.153	.105	.442**	.151	.115**
Constant	2.007	.260		2.178	.269		2.249	.257	
R-squared	.061			.044			.065		

** p<0.01 *p<0.05

Regression equations using Other Minorities (Asians, Hispanics and Indigenous) as the independent variable of interest suggest that belonging to one of these other minority groups predicted poorer performance on both the silence and zealous representation scales but not the attorney-client privilege scale. Being better educated positively impacts all three *Miranda* scales, suggesting better-educated people fared better in terms of understanding their *Miranda* rights. Age positively predicted performance on the zealous representation and attorney-client privilege but not the silence scales. The attitudinal variables were positively correlated with the zealous representation scale. R^2 was modest for all 3 models (.021-.065) (Table 6).

Separate equations were run using Asian (1) or not (0) and Hispanic (1) or not (0). Results suggest that being Asian negatively affected silence scores (Beta = -.102, p<.01**) and zealous

representation scores (Beta = -.096, p<.05*) but not attorney-client privilege scores. Being Hispanic was only a statically significant predictor of zealous representation scores (Beta = -.100, p<.01**).

Table 6. Predicting Miranda Comprehension (Attorney-Client Privilege)

	White			**Black**			**Other Minority**		
	B	*SE B*	*Beta*	*B*	*SE B*	*Beta*	*B*	*SE B*	*Beta*
Race	.258*	.128	.080*	-.156	.175	-.036	-.268	.158	-.066
Age	.018**	.004	.167**	.018**	0.004	0.17**	0.017**	0.004	0.163**
Education	0.117	0.068	0.067	0.122	.069	.07	.134*	.068	.077*
Police Trustworthy	-.065	.124	-.021	-.04	.124	-.013	-.04	.123	-.013
Lawyers Attitude	-.155	.163	-.038	-.158	.164	-.039	-.124	.163	-.03
Constant	2.919	.281		3.086	.289		3.062	.278	
R-squared	.046			.041			.044		

** p<0.01*p<0.05

Discussion

These results suggest that adults may not understand their *Miranda* rights as well as is often assumed. Caution in interpreting these results is, however, warranted. This was a non-probability sample of people in public places or classrooms willing to participate in the survey at times when the research team was there. This is not a random sample and the results are not generalizable but it should be noted efforts were made to go to a variety of locations on a variety of different days and times and to capture results from what is colloquially referred to as "the

man on the street". The sex and race compositions of this sample are not dramatically different from the population of the St. Louis Metro area and surveys were sought from everyone present. So, while there are significant limitations inherent in non-probability sampling, efforts were made to be as inclusive as possible, given the limitations of design, time and resources.

While these limitations are significant and further research is necessary, the results are nonetheless concerning. The requirement of a knowing and intelligent waiver is a constitutionally mandated floor and *any* deficits in understanding relevant to these inquiries among the populous are cause for concern. *Miranda* jurisprudence is predicated on the assumption that all people, or at least all "reasonable people" are able to understand the *Miranda* warnings and make knowing and intelligent decisions about whether to waive their rights and answer questions without the assistance of an attorney. Consistent with other research, these data suggest that a significant portion of the public does not understand the import of the relatively straightforward right to silence much less the complexities inherent in deciding whether an attorney should be consulted prior to being interrogated.

These results suggest that a substantial number of adults do not understand what a defense attorney is supposed to do well enough to evaluate whether such assistance might be beneficial. Lacking such knowledge, it is practically impossible for a person to engage in rational decision-making. Absent rational decision-making, no knowing and intelligent waiver of *Miranda* rights can occur. People who do not understand what a defense attorney is supposed to do lack full awareness of the nature of the right to counsel and cannot possibly understand the consequences of the decision to abandon it. Such understanding was mandated as a condition of a valid waiver by the Supreme Court in *Moran v Burbine* more than 35 years ago (1986).

Troublingly, deficits in understanding *Miranda* rights seem to be associated with race/ethnic status. Although the impact is small, there is a consistent pattern of "being White" improving outcomes across all 3 Miranda scales. These results suggest some form of "White privilege" is at work and that White people are in a better position to understand and assert their rights if confronted by the possibility of a custodial interrogation than are people of color. Successful assertion of rights protects against wrongful conviction and other adverse criminal justice outcomes and has significant benefits.

In addition to "White privilege", direct disadvantage inuring in minority status is also apparent, albeit less consistently than the advantage associated with being White. Being Black or being Asian adversely impacts understanding the right to silence. Being Asian or Hispanic adversely affects the understanding of zealous representation. People who do not understand the right to silence, do not understand the nature of their 5th Amendment rights. People who do not know about the duty of zealous representation cannot possibly appreciate the consequences of abandoning the right to counsel. Waivers by such people do not meet the standard articulated in *Burbine* and indications that these deficits in knowledge have a greater impact on citizens of color should concern everyone. Also of concern, education, arguably an indicator of higher socio-economic status and social capital, is a statistically significant predictor of understanding the duty of zealous representation among Blacks and other minorities. Among Hispanics and Asians higher education also contributes to a greater understanding of the right to silence and attorney-client privilege. These results hint at the intersectional disadvantage of being both a minority and a member of the lower class.

Cultural differences may also play a role. Hispanic cultural values like *respeto* which encourage deference to authority and a more hierarchical relationship orientation[60] may make it more difficult for Hispanics to understand the rights given to them against the authority of the state. Asian cultures also tend to be more hierarchical and value submission to authority and avoidance of shame. Such cultural milieus may make understanding and asserting *Miranda* rights more difficult.

These findings are consistent with and add to the growing body of evidence that people who are not of European descent face increased scrutiny and harsher treatment when dealing with the American criminal justice system.[61] Such race and class-based correlates affecting knowledge

[60] Beth Harry, 'An Ethnographic Study of Cross-Cultural Communication With Puerto Rican-American Families in the Special Education System' (1992) 29(3) American Educational Research Journal 471–494 <https://doi.org/10.3102/00028312029003471> accessed 22 November 2023; Armando Rodríguez-Pérez, 'Respect for community as a moral norm (El respeto a la comunidad como norma moral) ((El respeto a la comunidad como norma moral))' (2020) 35(3) Revista de Psicología Social 625–630 <https://www.tandfonline.com/doi/full/10.1080/02134748.2020.1783856> accessed 22 November 2023

[61] Janie L. Jeffers, 'Justice is not blind: Disproportionate incarceration rate of people of color' (2019) 34(1) Social Work in Public Health 113–121 <https://doi.org/10.1080/19371918.2018.1562404> accessed 22 November 2023

of the Constitutional rights protected by *Miranda* are concerning. There is reason to suspect this may be another area where minorities face adverse conditions within the criminal justice system. Such an interpretation is bolstered by attitudinal evidence showing that those who identify as Black are less likely to think the police are trustworthy or to be positively disposed toward lawyers. Only 46% of those who identified as Black considered the police trustworthy while nearly 71% of the people who identified as White thought they could trust the police. Attorneys fared better, 72% of those who identified as Black and 86% of those who identified as White were positively disposed towards attorneys in general. While these attitudinal differences are not directly relevant to the *Miranda* inquiry, they are, nonetheless, cause for concern because they suggest that non-whites perceive the system as less fair to them which may cause them to feel less confident in asserting their rights, even if those rights are understood.

CONCLUSION

A knowing and intelligent waiver of *Miranda* warnings is not possible unless suspects understand that lawyers are obligated to zealously represent them and to protect the information they share with them. Suspects who think their lawyers will simply function as another agent for the state trying to punish them cannot possibly make an informed choice about whether to invoke their right to counsel. These data suggest that a substantial portion of adults do not understand concepts related to zealous representation and attorney-client privilege. Current *Miranda* warnings make no effort to inform suspects about the substance of the rights they are being asked to waive. Such a state of affairs is arguably unconstitutional.

This knowledge deficit could be ameliorated through augmented *Miranda* warnings. For example, after informing suspects about their right to silence and their right to an attorney, as police currently do, the authorities could briefly explain the role of an attorney. For example, after conventional warnings are issued the police could say "If you choose to consult with a lawyer, that lawyer will be on your side and will do their best to protect your rights whether you committed a crime or not. Your lawyer will not tell the police or anyone else anything you tell them without your permission. Deciding to talk to a lawyer prior to answering our questions is not evidence of guilt and it will not hurt your case in any way." This additional explanatory material would take seconds to give and would go a long way toward assuring a level playing

field by making sure that all suspects, regardless of race or class, actually understand the constitutionally protected choice being offered to them prior to waiving their rights. Being given this information will facilitate rational decision-making and will allow suspects to make a knowing and intelligent waiver decision.